CHAPTER - 4

CONSTITUTIONAL AND LEGAL PROTECTIONS TO CIVIL SERVANTS
CHAPTER IV

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“The history of liberty has largely been the history of procedural safeguards.”

“Procedural fairness and regularity are of the indispensable essence of liberty.”

-MR. JUSTICE FRANK FURTHER

-MR. JUSTICE JACKSON

In the earlier chapter discussed about the power of the King in United Kingdom and the power of the President or the Governor of the State in India to dismiss or remove the civil servants from service. In the present chapter discussed about the Constitutional protections provided to the civil servants under the Constitution and under the various laws to discharge their duties towards the satisfaction of the public without any fear or favour.

The Civil Servants are considered as the back bone of the administration. In order to secure the progress of the nation it is essential to strengthen the administration by protecting the Civil Servants from political and personal influence. Before the advent of the Constitution the civil servants did not have any of the specific safeguards as such under the Constitution but they had the protection of the ordinary law of master and servant. The civil servants were appointed as covenanted civil servants and had the protection of the terms of contract under which they were appointed. Thus it was the
law of contract which sought to protect the civil servants in their service matters.

With an object of protecting the interest of Civil Servants, the Constitutional law has guaranteed certain protections to the Civil Servants in respect of service matters. Apart from the Constitutional law, certain protections are also provided under the Code of Criminal Procedure, 1973, Code of Civil Procedure 1908 and Prevention of Corruption, Act 1888 in relation to prosecution of Civil Servants and in matters of civil suit against the Civil Servants. These protections are provided upon the Civil Servants with the object of discharging their duties and responsibilities without any kind of political and personal influence.

4.1 CONSTITUTIONAL AND LEGAL PROTECTIONS.

(a) EQUALITY IN MATTERS RELATING TO EMPLOYMENT

Right to Equality is one of the basic fundamental rights that the constitution guarantees to all the citizens of the country. These rights can be broadly classified from Articles 14 to 18. Article 16 deals with the equality of opportunity in matters of public employment. Equal opportunity is a term which has differing definitions and there is no consensus as to the precise meaning. The constitution of India has given a wide interpretation to this Article.

The Constitutional Law of India guarantees certain protections to Civil Servants which determines or ascertain the privileges of the Civil Servants. Article 14, 15 and 16 of the Indian Constitution guarantees the equality of
treatment in relation to employment under Union of India or the State. Equality of treatment in relation to the employment and conditions of services of the Civil Servants is the basic requirement of the Indian Constitution. The preamble\textsuperscript{195} to the Constitution emphasises upon the principle of equality as basic to the Indian Constitution. Among the Constitutional provisions. Article 14 is the genes while Article 15 and 16 are the species.

Article 14\textsuperscript{196} of the Indian Constitution consists of two concepts, ‘equality before the law’ and ‘equal protection of law’. The equality before the law ensures that there, is no special privilege in favour of any one, that all are equally subject to the ordinary law of the land and that no person whatever may be his rank is above law. The concept equal protection of law ensures that the law should be applied to all persons who are similarly situated. It means that among equals the law should be equal and equally administered.

The equality under Article 14 of the Indian Constitution postulates that equality in matters relating to employment under the state. The Article 14 permits classification but forbids class legislation. The classification must be reasonable, however not to be arbitrary. The State is empowered to make legitimate and reasonable classification for its services and prescribe rules of

\textsuperscript{195} WE, THE PEOPLES OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; And to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation;

\textsuperscript{196} Equality; The state shall not deny to any person equality before the law or the equal protection of the law within the territory of India.
recruitment and conditions of services. In the process of classification the differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved. The State is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in its services and also to achieve the ends of social justice.

It is in Article 15(1) of the Indian Constitution prohibits discrimination on the ground of religion, race, caste, sex or place of birth, but at the same time the state is not prevented from making any special provisions for women and children or for the advancement of any socially and educationally backward class of citizens or of the scheduled caste and scheduled tribe. The intention of providing the special protections to the women, children and Scheduled Caste, Scheduled Tribes and backward classes is to achieve equality among all the people of India.

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197 State of Rajasthan V. Kunji Raman 1997(2)SLR 201 (SC)
198 State of Mysore and another V. P. Narasingh Rao. AIR 1967 SC 349

199 Prohibition of discrimination on the ground of religion, race, caste, sex or place of birth-
(1) The State shall not discriminate against any citizen on ground of only religion, race, caste, sex or place of birth or any of them

200 Article 15(3); nothing in this Article shall prevent the State from making any special provision for women and children.

(4);Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of the socially and educationally backward classes of the citizen or for Scheduled Caste or Scheduled Tribes., and

(5)Nothing in this article or in sub clause of (g) of clause (1) of the article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of the citizens or for Scheduled Caste or Scheduled Tribes in so far as the special provisions relates to their admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than minority educational institutions referred in clause (1) of article 30
Article 16 of the Indian Constitution ensures the equality of opportunity in matter of employment under the Union of India as well as the State. It provides that equality of opportunity to all citizens in matter relating to employment or appointment to any office under the state. It ensures that all citizens of India in relation to public employment cannot be discriminated on the ground of religion, race, caste, sex, descent, and place of birth residence or any of them.

Equality before the law and equality of opportunity in matter relating to employment or appointment guaranteed under Article 14 and 16 of the

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Article 16: Equality of opportunity in matters of public employment

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

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or 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, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or 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.

(4A) Nothing in this article shall prevent the state from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Caste and the Scheduled Tribe which in the opinion of the State, are not adequately represented in the Services under the State.

(4B) Nothing in this article shall prevent the state from considering any unfilled vacancies of a year which are reserved for being filled for in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

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201 Article 16: Equality of opportunity in matters of public employment

202 Article 16(2)
Indian Constitution are wide enough to include all matters relating to employment. The equality of opportunity as guaranteed under Article 16(1) means equality as between the members of the same class of the employees and not equality between members of independent classes. Therefore the term equality signifies that the persons in like situations, under like circumstances, are entitled to be treated alike.

The Hon’ble Supreme Court of India in *Western UP Power Supply Co Ltd V. State of Uttar Pradesh*[^203] observed that ‘Article 14 of the Indian Constitution ensures that equality among equals, its aim is to protect the persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between the persons similarly circumstanced, some were treated to their prejudice and the differentials treatment had no reasonable relations to the object sought to be achieved’. The above said observation made by the Supreme Court of India has been reiterated in *R.K.Garg V. Union of India*[^204] and in *State of Uttar Pradesh V. Kamala Palace*.[^205]

**(b) EQUALITY RELATING TO APPOINTMENT**

Appointment or recruitment means an actual act of posting a person to a particular office. Recruitment is an initial process that may leads to appointment in the service of the State. The power of the State as an

[^203]: AIR 1970 SC 21
[^204]: AIR 1981 SC 2138
[^205]: AIR 2000 SC 633
employer is more limited than that of a private employer in as much as it is subject to Constitutional limitation and cannot be exercised arbitrarily.

The import of equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities and opportunity of excellence in each cadre\textsuperscript{206}

Article 16(1) of the Indian Constitution guaranteed to all citizens of India, Equality of opportunity in matters relating to employment or appointment. This does not mean that every citizen can claim to be appointed to any post of his choice irrespective of his qualification and suitability or to insist that the state should adopt a particular method of recruitment.\textsuperscript{207} The State has got absolute power to prescribe the method of recruitment, conditions of services of servants, subject to Article 16(1) of the Constitution. The Hon’ble Supreme Court of India in \textit{Rangaswamy} \textit{j V. Governor of Andhra Pradesh}\textsuperscript{208} held that it is competent for the appropriate authority to prescribe relevant qualification for appointment to a post, provided the they are not unconstitutional.

Further in \textit{J.K.Public Service Commission V. Dr Narindra Mohan}\textsuperscript{209} The Supreme Court of India observed that in matters relating to the recruitment to services under a state, all citizens are guaranteed equal opportunity as guaranteed under Article 16(1) of the constitution, but it is open to the State

\textsuperscript{206} \textit{Jagadish Lal v State of Harayana} \textit{ AIR 1997 SC 538}.

\textsuperscript{207} Justice M. Rama Jois “Service Under the State” ILI Publication, revised and updated by faculty of ILI, 2007 \textit{p 35}.

\textsuperscript{208} \textit{AIR 1990 SC 535}

\textsuperscript{209} \textit{AIR 1994 SC1808}
to prescribe suitable qualification for the post, eligibility and necessary experience in the particular area. Therefore, a scheme of recruitment prescribes that persons who are already in part-time employment of the state and who had good record of service should be recruited and therefore is not discriminatory.

In *Panduranga Rao V. A.P Public Service Commission*\(^{210}\) the petitioner who was an Advocate practicing in trial court in a district place and was a applicant for the post of District Munsif under the State Judicial Service. The rules of recruitment to the subordinate judicial services of Andhra Pradesh provided that only Advocates of Andhra Pradesh High Court were eligible for recruitment to subordinate judicial service was held to be irrational inasmuch as there was no nexus between the basis of the said classification and the object intended to be achieved. Therefore the conditions of eligibility prescribed for recruitment must not bring about an arbitrary classification from among persons possessing similar qualifications.

Equal opportunity as guaranteed under Article 16(1) of the Indian Constitution requires that it is the obligation of the State to provide opportunity to all the citizens seeking appointments fulfils the conditions of eligibility for selection. The Hon`ble High Court in *Maharashtra State Electricity Board Engineers Association V. Maharashtra Electricity Board*\(^{211}\) held that publicity of proposed recruitment is essential in order to ensure equality of opportunity to all persons concerned. Therefore, any

\(^{210}\)AIR 1963 SC 268.
\(^{211}\)SLR 1968 Bom 273.
subsequent relaxation of the advertised qualification and other terms and conditions would be violation of Article 16(1) of the Constitution of India. This would result in denial of opportunity to persons who possess the relaxed qualification and who did not submit their applications in response to the advertisement. The similar observation has been made by the Hon’ble Supreme Court of India in Madan Mohan Sharma V. State of Rajasthan\textsuperscript{212} the petitioner challenged the eligibility criteria changed by the authority, during the selection process as violative of Article 16 of the Indian Constitution. An advertisement was issued by the authority for the purpose of appointment of the post of teacher Grade III of secondary examinations. The selection criterion was changed during the selection process. The Supreme Court of India held that once an advertisement has been issued the selection process should continue as per the advertisement. In the advertisement issued by the authority, the eligibility criterion for selection to the post of teacher Grade III was secondary examination. The eligibility criterion was changed during the process of selection to the post of teacher Grade III. This change cannot be made and the amendment cannot be made retrospectively.

\textbf{(c) EQUALITY RELATING TO PROMOTION}

The term ‘Promotion’ means in the literal sense ‘advance to higher position, grade or honour’. So also ‘promotion’ means advancement or preferment in honour, dignity, rank or grade’. Promotion thus not only covers advancement to higher position or a rank but also implies advancement to a higher

\textsuperscript{212}AIR 2008 SC 1657.
grade.\textsuperscript{213} A mere discharge of duties of a post with higher pay does not mean promotion.\textsuperscript{214} Promotion is a positive act of elevation in status conveyed by the employer by a written order issued in favour of the person promoted and communicated to him.

Equality of opportunity in matters relating to employment guaranteed under Article 16(1) extends to promotion also. But this does not obviously mean that a Civil Servant can claim promotion as of right. Where the provision is made for filling up the specified number of posts in the higher cadre by promotion, the extent of right of equality guaranteed under Article 16(1), in relation to promotion is, that a Civil Servant holding the lower post from which promotion is provided, is entitled to have his case considered according to his turn in the seniority\textsuperscript{215}.

The equality of opportunity in matter relating to promotion means that all employees holding posts in the same grade shall be equally eligible for being considered for promotion.\textsuperscript{216} Inequality of treatment for promotion as between the citizens holding different posts in the same grade may be an infringement of right to equality as guaranteed under Article 16(1) and 14 of the Constitution of India to every Government servant and that this consideration for promotion cannot be postponed except on reasonable grounds\textsuperscript{217}.

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\textsuperscript{213} M.R. Mallick. 'Service Law in India' Eastern Law House New Delhi, 2000 p 430.
\textsuperscript{214} Ram Shankar Bhattacharjee V. Gauhati High Court (2005) ATJ 161.
\textsuperscript{215} Justice M. Rama Jois “Service Under the State” ILI Publication, revised and updated by faculty of ILI, 2007, p 63.
\textsuperscript{216} High Court of Calcutta V. Amal Kumar Ray, AIR 1962 SC 1704.
\textsuperscript{217} C.O.Armugam V. State of Tamil Nadu 1991 Supp (1) SCC 199
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Further, The Hon’ble Supreme Court of India in *Union of India v. S.L. Dutta*\(^{218}\) held that ‘No employee has a right to promotion but the right to be considered for promotion is guaranteed under the Constitution. The only restriction on the power of the state to regulate the conditions of services of the Civil Servants is that the state should not violate the right of equality of opportunity as guaranteed under Article 16 of the Indian Constitution.

**(d) EQUALITY RELATING TO PAY SCALE**

Pay or pay scales applicable to a Civil Servants serving under the Union or the State is an important matter relating to employment under the State. The question of fixing the pay or pay scale applicable to a post is the power of the State to prescribe, having regard to the duties, responsibilities and the qualifications required, it is for the State to fix the pay scale of the posts created by it and such a fixation cannot be called in question on its merits. But the power of the State to fix the pay scale cannot be exercised in violation of Article 14 or 16(1) as the power to regulate the conditions of service under Article 309 is subject to the provisions of the Constitution.\(^{219}\)

The Hon’ble Supreme Court of India in *M.P. Singh V. Union of India*\(^{220}\) held that, the officers in the cadres of Sub-Inspectors and Deputy Superintendent of Police in the Central Bureau of Investigation were being given special pay. But the special pay for deputationists and non- deputationists were different and at different rates. The different rates of pay was challenged on the ground that, it amounts to discrimination. The Supreme Court has struck

\(^{218}\) AIR 1991 SC 363  
\(^{219}\) Supra note 215 at p 95.  
\(^{220}\) 1987(1) SLR 345 (SC)
down the said different special pay of the deputationists and non-deputationists on the ground that the classification of officers into two groups, namely deputationists and non-deputationists for paying different rates of special pay does not test the classification permissible under Article 14 and 16 of the Constitution since it does not bear any relation to the object of classification. It is pointed that the higher special pay for the deputationists on the ground of their rich experience or on the ground of their displacement from their parent departments in various states have nothing to do with the grant of special pay which leads to arduous nature of work that is being performed by them. Therefore it is held that the higher special pay for deputationists is discriminatory.

Further Telecommunication Research Centre Scientific Officers (Class-I) Association V. Union of India. The Supreme Court of India held that when the officers transferred to the Telecommunication Research Centre were paid special pay whereas the special pay was denied to the direct recruits appointed to the Research Centre. The Supreme Court observed that no reasons as to why such discrimination is made in the matter of special pay for direct recruits and transferred employees when both the categories of employees were doing the same nature of jobs. Therefore the Court directed the Union of India to pay special pay to the direct recruits till the transferred employees are getting the benefit of special pay.

221 1987 (1) SLR 489
Similarly in *State of Haryana V. Rajpal Sharma*\(^{222}\) the Supreme Court held that the teachers employed in privately managed aided schools in the State of Haryana are entitled to the same salary and dearness allowance as is paid to the teachers employed in the Government schools.

The 'principle of equality in matters relating to pay' has no mechanical application in every case of similar work. There can be two scales of pay in same cadre of persons performing the similar work or duties. The functions of two posts may appear to be the same or similar but there may be the difference in degree in the performance. The Supreme Court of India in *F.A.I.C, and C.E.S. V. Union of India*\(^{223}\) held that different pay scale fixed for stenographer grade-I of central Secretariat and those attached to the head of the subordinate officers on the basis of the recommendations of the third pay Commission was not violative of Articles 14 and 16 of the Constitution of India. The duties and responsibilities of the stenographers grade-I were much higher nature than those attached to the head of the subordinate officers.

Article 16(2) would invalidate a law or a rule, an order if it authorises discrimination in the matter of appointment under the State on any of the ground specified in sub clause (2) of Article 16 of the Constitution. It is to be noted that the two additional grounds ‘descent’ and ‘residence’ not included in Article 15 of the Constitution have been added to Article 16(2) of the

\(^{222}\) AIR 1997 SC 449
\(^{223}\) (1988) 3 SCC 91.
Indian Constitution. This is just to assure that parochialism and nepotism is eliminated in the matters of appointment in the Government Services.

4.1.2 - RESERVATION OF POSTS

Experiences of the past show that arbitrary treatment have been made for the certain set of peoples which are beyond the control of individuals and groups and such group of peoples have been exploited for the purpose of ensuring the dominance of certain groups of peoples. Justice requires equitable and just distribution of social goods and resources and benefits but that has not been implemented in the past. A group of people have been discriminated in one or other form in the entire world, blacks in United States of America, apartheid system of South Africa, or the plight of low caste people of India, all have suffered the same fate, i.e. exploited and deprived for the reasons beyond their control. Therefore the affirmative action programme are the tools to remove the present and continuing effects of past discrimination, to lift the limitations in access to equal opportunities which has been impeding the access of the classes of people to public offices and administration. Such measures as protective discrimination or reservations are adopted to remedy the continuing ill effects of prior inequalities stemming from discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness.

The founding fathers of Indian Constitution accepted and adored equality as one of the basic principles of Indian Constitution when it was brought into
force in 1950. With the object of achieving equality among all the people the constitutional Law guaranteed certain protection to backward class of people in relation to employment and appointment.

The equality of opportunity in matters relating to employment under the State guaranteed under Article 16 (1) of the Constitution and the prohibition against discrimination on the ground of only of religion, race, caste, sex, descent, place of birth, residence or any of them,\textsuperscript{224} covers the entire field relating to appointments under the state. Article 16(4) of the Constitution makes an exception and enables the State to make the special provisions for the reservation of appointments or posts in favour of any backward classes of citizens which in the opinion of the State is not adequately represented in the Services under the State.\textsuperscript{225} The other Constitutional provisions relating to reservation are Articles 335\textsuperscript{226} of the Constitution provides for the claims of Scheduled Caste and Scheduled Tribes to services and posts and under Article 338 and 338-A of the Constitution provides for the establishment of National Commission for Scheduled Caste and Scheduled tribes for the purpose of investigation and monitor all matters relating to the safeguards provided for the Scheduled Caste and Scheduled tribes under the

\textsuperscript{224} Article 16(2) of the Constitution of India

\textsuperscript{225} Supra note 215 at p 120.

\textsuperscript{226}Article 335. Claims of Scheduled Caste and Scheduled Tribes to services and posts- The claims of the members of the scheduled caste and scheduled tribe shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to service and posts in connections with the affairs of the Union or of a State.

[Provided that nothing in this article shall prevent in making of any provision in favour of the members of the scheduled caste and the scheduled tribe for relaxation in qualification marks in any examination or lowering the slandered of evaluation, for reservation in matter of promotion to any class or classes of the service or posts in connections with the affairs of the Union or of a State. (Ins, by the Constitution Eighty Second Amendment Act 2000) ].
Constitution or under any other law for the time being in force and to evaluate the working of such safeguards etc.,

The main object of reservation is to achieve the objective of equality as enshrined under Articles 14 and 16 of the Constitution. If a reservation is validly made in exercise of power conferred under Article 16(4) of the Constitution, cannot be called in question as it violates the fundamental rights guaranteed under Article 16(1) of the Constitution. The equality guaranteed under Article 14 and 16(1) of the Constitution does not aim at absolute equality of treatment to all persons in utter disregard of every conceivable circumstances and differences such as age, sex, education etc., as may be found among the people in general.

Article 16(4), of the Constitution of India imposes an obligation upon the State Government to decide, that the backward class for which the reservation is made is not adequately represented in the State services. While doing so, the State Government may take the total population of a particular backward class and the representation in the State services. The State Government after doing the necessary exercise of identifying the inadequacy of representation in public employment and the total population of backward class, make the reservation and provides the extent of the percentage of reservation of posts to be reserved for the backward class.

**BACKWARD CLASSES:** the term backward class has not been defined under the Constitutional law nor it is defined under the any enactments. According to dictionary meaning the term backward class meant “members
of a caste or a community who are recommended for special help in education and employment". The Central Government of India classifies some of its citizens based on their social and economic condition as Scheduled Caste, Scheduled Tribe, and Other Backward Class.

Therefore the term backward classes means in whose favour the State is authorized to make special provision under Article 15(4) and 16(4) of the Constitution of India in relation to education and employment under the State is termed as backward class. The Scheduled Caste and Scheduled Tribes which have been defined were known to be backward and the Constitution of India provided special protections for their advancement.

Article 341 provides for the issue of notification by the president of India specifying the caste, race or tribe shall be deemed to be Scheduled Castes either in the State or the Union territory. Similarly, Article 342 provides for the issue of notification by the president of India in respect of Scheduled

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227 Oxford dictionary
228 Article 341. Scheduled Castes(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification

229 Article 342. Scheduled Tribes(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification
Tribe either in the State or the Union territory. The notification issued by the
President of India under Article 341 and 342 of the Indian Constitution
specifying the list of castes as Scheduled Caste and Scheduled Tribe is final
subject to the power of Parliament. The Hon’ble Supreme Court of India in
*Nityanand Sharma V. State of Bihar*\(^{230}\) held that the Constitutional
provisions clarify that the contents of the Presidential notifications specifying
the castes as Scheduled Caste and Scheduled Tribe cannot be varied by any
authority except the Parliament of India.

The Supreme Court of India in *Action Committee V. Union of India*\(^{231}\) held
that, a person belong to Scheduled Caste or Scheduled Tribe in relation to
his original State, of which he is a permanent resident cannot be deemed to
Scheduled Caste or Scheduled in relation to any other State on his migration
to that State for the purpose of the employment, education etc.

Further the Supreme Court of India has been pleased to made it clear in
*Devadasan V. Union of India*,\(^{232}\) that though Article 16(4) of the
Constitution only states that reservation of posts can be made in favour of
the backward classes, the word “backward classes” obviously includes
Scheduled Caste or Scheduled Tribes.

**(a) - CLASSIFICATION OF BACKWARD CLASSES:** According to Article 16(4)
of the Constitution of India, State is empowered to make provision for the
reservation in appointments in favour of backward class of citizens. It is
open for the State to classify and declare as to the classes of citizens belongs

\(^{230}\) AIR 1996 SC 2306
\(^{231}\) (1994) 5 SCC 244.
\(^{232}\) AIR 1964 SC 179.
to the ‘backward class.’ While classifying the citizens, the state has to consider social and educational status of the citizens. Therefore, in determining whether a class of citizens is a backward class or not, caste also is relevant criteria for determination of backward class, but caste cannot be a sole criteria for determining the backwardness of class for the purpose of Article 16(1) of the Constitution. It is very difficult to determine the backward class, since the problem of determining backwardness is very complex. The sociological and economic considerations are playing an important role for determination of backward class.

A backward class classification made by the State Government on the basis of the recommendations made by the high powered commission appointed by the State and collected the relevant materials and submitted its report cannot be held to be invalid on the ground that some of the castes are declared as backward castes.

The Supreme Court in *Chitrlekha V. State of Mysore*\(^{233}\) held that, classification of backward class made by the State Government on the basis of the occupation and income cannot be held invalid.

Further the Supreme Court of India considered the question for determination of backward class under Article 15(4) and 16(4) of the constitution in *K.C. Vasantha Kumar V. State of Karnataka*\(^{234}\) the Court observed as follows;

\(^{233}\)AIR 1964 SC 1823.
\(^{234}\)AIR 1985 SC 1495.
The Supreme Court of India Speaking through Chief Justice Chandrachud had made the following propositions on the issue of reservation may serve as a guideline to the Commission which the Government proposes to appoint, for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and other Backward Classes which problem is a burning issue to-day.

1. The reservation in favour of scheduled castes and scheduled tribes must continue at present, that is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.

2. The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.

3. In so far as the Other Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.
4. The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (i) to the State to rectify distortions arising out of particular facts of the reservation policy and (ii) to the people, both backward and, non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations.

Justice Desai, observed as follows;

The Constitution promised an egalitarian society; it was a caste ridden stratified hierarchical society. Therefore, in the early stages of the functioning of the Constitution it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally For a period of three and half decades, the unending search for identifying socially and educationally backward classes of citizens has defined the policy makers, the interpreters of the policy as reflected in statutes or executive administrative orders and has added a spurt in the reverse direction, namely, those who attempted to move upward (Pratilom) in the social hierarchy have put the movement in reverse gear so as to move downwards (Anulom) in order to be identified as a group or class of citizens socially and educationally backward class of citizens for the purpose of Article 15(4) refers to 'class' and not caste. Preferential treatment which cannot be struck down as discriminatory was to be accorded a class, shown to be socially and educationally backward and not to the members of a case who may be presumed to be socially and educationally backward.

It is clear from the decisions of the Supreme Court that same vacillation on the part of the judiciary on the question whether the caste should be the basis for recognising the backwardness. Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities. The expression 'backward classes' is not defined. Courts therefore have more or less in the absence of well-defined criteria not based on caste
label has veered round to the view that in order to be socially and educationally backward classes, the group must have the same indicia as Scheduled Castes and Scheduled Tribes.

The following observations are made by Justice Venkataramiah,

1. Equality of opportunity revolves around two dominant principles- (i) the traditional value of equality of opportunity; and (ii) the newly appreciated-not newly conceived-idea of equality of results. The Society which cherishes the ideal of equality has to define the meaning and consent of the concept of equality and the choices open to it to bring about an egalitarian society would always be political. But the Courts have been forced to scrutinise a variety of choices, while society for which they have to answer has been issuing a proliferation of demands. Many inequalities in the past seemed almost to have been part of the order of nature. The Courts, however deal with the problems that society presents. 'Levels of awareness and corresponding senses of grievance have arisen at different times for particular historical reasons often tending to differentiate among the categories of equality rather than unifying them. Inequalities of class, race, religion and sex have presented themselves at different periods as primary grievances'. The Courts must remind themselves that for those who are suffering from deprivation of inalienable rights, gradualism can never be a sufficient remedy. Ours is a 'struggle for status, a struggle to take democracy off parchment and give it life.' 'Social injustice always balances its books with red ink'. Neither the caprice of personal taste nor the protection of vested interests can stand as reasons for restricting opportunities of any appropriately qualified person. These are the considerations which sometimes may be conflicting that should weigh with the courts while dealing with cases arising out of the doctrine of equality. It should, however, be remembered that the courts by themselves are not in a position to bring the concept of equality into fruitful action. They should be supported by the will of the people of the Government and of the legislators. These should be an emergence of united action on the part of
all segments of human society. This is not all. Mere will to bring about equality under the existing economic level might worsen the situation. There should be at the same time a united action to increase the national resources so that the operation of equality will be less burdensome and every member of the society is carried to a higher social and economic level leaving nobody below a minimum which guarantees all the basic human needs to every member of the society. If there is no united action the pronouncements by courts would become empty words as many of the high principles adumbrated in the chapter on the Directive Principles of State Policy in the Constitution have turned out to be owing to several factors.

2. The need for social action is necessitated by the environmental factors and living conditions of the individuals concerned. The application of the principle of individual merit, unmitigated by other considerations may quite often lead to inhuman results.

3. An examination of the question of the background of the Indian Social conditions-caste ridden atmosphere shows that the expression "backward classes" used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward. This is so because a caste is based on various factors, sometimes it may be a class, a race or a racial unit and the caste of a person is governed by his birth in the family.

While Speaking through Justice A.P. Sen, the Supreme Court had made the following observation

1. Conceptually, the making of special provisions for the advancement of backward classes of citizens under Art. 15(4) and the system of reservation of appointments or posts as envisaged by Art. 16(4) as guaranteed in the Constitution, is a national commitment and a historical need to eradicate age-old social disparities in our country. But unfortunately the policy of reservation higher to formulated by the Government for the upliftment of such socially and educationally backward classes of citizens is caste-oriented while the policy
should be based on economic criteria. Then alone the element of caste in making such special provisions or reservations under Arts, 15(4) and 16(4) can be removed.

2. It is true that mere economic backwardness would not satisfy the rest of educational and social backwardness under Article 15(4), and is only one of several tests to be adopted. The predominant and the only factor for making special provisions under Article 15(4) or for reservations of posts and appointments under Art, 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes or Scheduled Tribes, till such members of backward classes attain a state of enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life.

3. The adequacy or otherwise of representation of the backward classes in the services has to be determined with reference to the percentage of that class in the population and the total strength of the service as a whole. The representation does not have to exactly correspond to the percentage of that class in the population; it just has to be adequate. Moreover, in the case of services the extent of representation has to be considered by taking into account the number of members of that class in the service, whether they are holding reserved or unreserved posts.

4. The State should give due importance and effect to the dual constitutional mandates of maintenance of efficiency and the equality of opportunity for all persons. The nature and extent of reservations must be rational and reasonable. The state of backwardness of any class of citizens is a fact situation which needs investigation and determination by a fact finding body which has the expertise and the machinery for collecting relevant data.
5. The Preamble to our Constitution shows the nation's resolve to secure to all its citizens: Justice-Social, economic and political. The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but surely tear apart the fabric of society. It is primarily the duty and function of the state to inject moderation into the decisions taken under Arts. 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fueled by unwise State action, will destroy, not advance, social justice. If the State contravenes the constitutional mandates of Art 16(1) and Art 335, the Supreme Court will of course, have to perform its duty.

6. The extent of reservation under Art.15 (4) and Art.16 (4) must necessarily vary from State to State and from region to region within a State, depending upon the conditions prevailing in a particular State or region, of the Backward Classes. Since the problems pertaining in reservation can never be resolved through litigation in the Courts, the Central Government should consider the feasibility of appointing a permanent National Commission for Backward Classes which must constantly carry out sociological and economic study from State to State and from region to region within a State. The framers of the Constitution by enacting Art 340 clearly envisaged the setting up of such a high-powered National Commission for Backward Classes at the Centre.

7. The doctrine of protective discrimination embodied in Arts. 15(4) and 16(4) and the mandate of Art 29(2) cannot be stretched beyond a particular limit. The State exists to serve its people. There are some services where expertise and skill are of the essence. Medical services directly affect and deal with the health and life of the peoples. Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, there can be no room for
reservation of posts; merit alone must be the sole and decisive consideration for appointments.

Justice Chinnappa Reddy had made the following observation;

1. The paradox of the system of reservation that may be made under Articles 15(4), 16(4) read with 29(2) of the Constitution is that it has engendered a spirit of self-denigration among the people. Nowhere else in the world do castes, classes or communities queue up for the sake of gaining the backward status. Nowhere else in the world is there competition to assert backwardness and to claim 'we are more backward than you'. This is an unhappy and disquieting situation, but it is stark reality.

2. The Scheduled Castes, the Scheduled Tribes and other socially and educationally backward classes, all of whom have been compendiously described as 'the weaker sections of the people', have long journeys to make unsociety. They need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity, and not charity. They claim their constitutional right to equality of status and of opportunity and economic and social justice. Several bridges have to be erected, so that they may cross the Rubicon. Professional education and employment under the State are thought to be two such bridges. Hence the special provision for advancement and for reservation under Articles 15(4) and 16(4) of the Constitution.

3. Courts are not necessarily the most competent to identify the backward classes or to lay down guidelines for their identification except in a broad and very general way. Courts are not equipped for that; Courts have no legal barometers to measure social backwardness and are truly removed from the people, particularly those of the backward classes, by layer upon layer of gradation and degradation. And, India is such a vast country that conditions vary from State to
State, region to region, ‘district to district and from one a ethnic religious, linguistic or caste group to another. A test to identify back ward classes which may appear appropriate when applied to one group of people may be wholly inappropriate and unreasonable if applied to another group of people. There can be no universal test; there can be no exclusive test; In fact, it may be futile to apply and rigid tests. One may to look at the generality and the totality of the situation.

4. Before attempting to lay down any guideline for the purpose of determining the methods to be adopted for identifying the socially and educationally backward classes one should guard against the pitfalls of the traditional approach to the question, which has generally been superior, elitist and, therefore, ambivalent. The result is that the claim of the Scheduled Castes and Scheduled Tribes and other backward classes to equality as a matter of human and constitutional right is forgotten and their rights are submerged in what is described as the "Preferential principle" or "protective or compensatory discrimination". Unless these superior, patronising and paternalist attitudes are got rid off. It is difficult to truly appreciate the problems involved in the claim of the Scheduled Castes, Scheduled Tribes and other backward classes for their legitimate share of the benefits arising out of their belonging to humanity and to a country whose constitution preaches justice, social, economic and political and equality of status and opportunity for all.

5. There is neither statistical basis nor expert evidence to support the assumption that efficiency will necessarily be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts. The word ‘efficiency’ is neither sacrosanct nor is the sanctorum has to be fiercely guarded. ‘Efficiency’ is not a Mantra which is whispered by the Guru in the Sishya’s ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand
with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. This does not mean that efficiency in civil service is unnecessary or that it is a myth. However, one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and for admission to such courses. The rules may provide for an appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different courses of study having regard to the requirements of the posts and the courses of study. But, efficiency cannot be permitted to be used as a camouflage to let the upper classes monopolise the services, particularly the higher posts and the professional institutions. In view of Articles 15(4) and 16(4), the so called controversy between the moratorium and compensatory principles is not of any significance.

6. The three dimensions of social inequality are class, status and power. Every one of these three dimensions are intimately and inextricably connected with economic position. Viewed from any of these three dimensions it is clear that the economic factor is at the bottom of backwardness and poverty is the culprit cause and the dominant characteristic. The economic power has firm links with the castes system, land and learning, two of the primary sources of economic power in India have been the monopoly of the superior castes. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable
with reference to a person’s caste. Shared situation in the economic hierarchy, caste gradation, occupation, habitation, style of consumption, standard of literacy and a variety of such other factors appear to go to make towards social and educational backwardness.

7. "The backward classes of citizens" referred to in Article 16(4), despite the short description, and the same as ‘the socially and educationally backward classes of citizens and the scheduled castes and the scheduled tribes’ so fully described in Article 15(4). Again the ‘special provision for advancement’ is a wide expression any may include many more things besides ‘mere reservation of seats in colleges It may be by way of financial assistance, free medical, educational and hostel facilities, scholarships, free transport, concessional or free housing, exemption from requirements insisted upon in the case of other classes and so on. Under Article 16(4), reservation is to be made to benefit those backward classes, who in the opinion of the Government are not adequately represented, in the services. Reservation must, therefore, be aimed at securing adequate representation. It must follow that the extent of reservation must match the inadequacy of representation. There is no reason why this guideline furnished by the Constitution itself should not also be adopted for the purposes of Article 15(4) too. The reservation of seats in professional colleges may conveniently be determined with reference to the inadequacy of representation in the various professions. Similarly, the extent of reservation in other colleges may be determined with reference to the inadequacy in the number of graduates, etc. Naturally, if the lost ground is to be gained, the extent of reservation may even have to be slightly higher than the percentage of population of the backward classes.

The only point on which the unanimity of views with regard to determination of Backward class under Article 15(4) and 16(4) of the Constitution of India are; caste cannot be the sole determinant of backwardness, but it is not an
irrelevant test and can be taken into account along with certain other factors. The Hon’ble Judges have expressed separate opinion in the matter relating to reservation, but a clear guideline is discernible from their opinion is as follows;

(a) The reservation in favour of Scheduled Caste and Scheduled Tribe must be continued at present, without the application of means test, for a further period of fifteen years.

(b) The means test i.e., the test of economic backwardness ought to be applicable even to the Scheduled Caste and Scheduled Tribe after fifteen years.

(c) So far as other backward class is concerned should be comparable to the Scheduled Caste and Scheduled Tribe in the matter of their backwardness and should satisfy the means test.

(d) The policy of reservation in employment, education, and legislative institutions should be revived for every five years.

Further the scope of reservation under Article 16(4) of the Constitution has been examined by the Hon’ble Supreme Court of India in Indira Sawhney V. Union of India,\(^{235}\) (Mandal Commission Case) the observation of the Supreme Court is summarized as follows;- 

(a) Backward class of citizen in Article 16(4) of the Constitution can be identified on the basis of caste and not only on economic basis.

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\(^{235}\)AIR 1993 SC 477
The majority of the Judges held that a 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) of the Constitution. The identification of backward class can certainly be made with reference to the castes among and along with other occupation groups, classes and sections of the peoples.

(b) The majority held that the backward class of citizens contemplated in Article 16(4) of the Constitution is not the same as the socially and educationally backward classes as referred to in Article 15(4) of the Constitution. Backward class under Article 16(4) is much wider and does not contain the qualifying words ‘socially and educationally’ as Article 15(4). The ‘backward class of citizens’ under Article 16(4) means SC’s, ST’s and all other backward classes of citizens including socially educationally backward classes.

(c) The majority held that while identifying the backward classes the socially advanced persons known as “creamy layer” among them should be excluded. The Hon’ble Supreme Court directed the Government of India to set up a commission within four months from the decision specifying the basis and socio economic criteria to exclude socially and advanced persons among backward classes.

(d) Further the Supreme Court held that backward class of citizens cannot be identified exclusively with reference to economic criteria. It would defeat the very object of the Article 16(4) of the Constitution to give adequate representation to backward classes in the services.
Article 16(4) not only aimed at economic upliftment of poverty. It is specifically designed to give due share in the state power to those who have remained out of states employment on account of their social, economic and educational backwardness.

(e) The majority held that the maximum limit of reservation for backward class cannot exceed fifty percent. Further in extraordinary situations it may be relaxed in favour of people living in far flung and remote areas of country who because of their peculiar conditions and characteristics need a different treatment.

(f) The majority held that the reservation under Article 16(4) cannot be made applicable in promotion and the reservation is confined to initial appointments.

The Supreme Court of India has delivered the very thoughtful, creative and exhaustive opinion dealing with various complex aspects of the reservation problem in India with the object of attaining the equality.

After the decision of the Supreme Court of India in Indira Sawhney\textsuperscript{236} for the future socio-economic development of the nation, as a whole, is progressively lessening, not increasing reservation, so that ultimately meritocracy may have some chance to prevail over mediocrity.\textsuperscript{237} The Supreme Court in Indira Sawhney's case had held that the reservation to backward class in Government jobs could be given only after excluding the "creamy layer". But the Government of Kerala, instead of implementing the

\textsuperscript{236} AIR 1993 SC 477
\textsuperscript{237} Justice M. Rama Jois "Service Under the State" ILI Publication, revised and updated by faculty of ILI, 2007 p 157
directions of the Hon’ble Supreme Court, enacted an Act known as *The Kerala State Backward classes (Reservation of Appointments or Posts in Services) Act 1995.*, which declared that having regard to the ‘Known facts’ in existence in the State of Kerala there are no socially advanced category in any backward classes and they would continue to be entitled to reservation under Article 16(4) of the Constitution. The Constitutional validity of the said Act was challenged in *Indira Sawhney V. Union of India (II),*\(^{238}\) the Hon’ble Court held that *The Kerala State Backward classes (Reservation of Appointments or Posts in Services) Act 1995,* is discriminatory and violative of Articles 14, 16(1) and 16(4) of the Constitution and therefore, unconstitutional and invalid. The creamy layer in the backward classes is to be treated “on par” with the forward classes and are not entitled to the benefit of reservation.

**In E.V.Chinnaiah V. State of Andhra Pradesh\(^{239}\)** The Supreme Court invalidated the Andhra Pradesh legislation dividing Scheduled Caste citizens into four classes for the purpose of Article 16(4) of the Constitution, for the reason that it tinkered with the list of SC’s made by the President, which could be changed only by parliament and also such division could not be justified under Article 14 of the Constitution of India. In the instant case the State of Andhra Pradesh by an Ordinance the A.P.S.C. (Rationalisation of Reservation) Ordinance, 2000 which became an Act subsequently, divided the 57 castes listed in Presidential list into four groups based on their inter-se backwardness and fixed the separate quota in reservation for each of

\(^{238}\)AIR 2000 SC 498.
\(^{239}\) (2005) 1 SCC 394
these groups. The Hon’ble Supreme Court of India held that such sub-classification is violative of Article 14 of the Constitution and liable to be struck down.

In *Ashok Kumar Thakur V. State of Bihar*[^240^][^241^] held that the concept of Creamy layer as laid down in Mandal Commissions Case[^241^], does not apply to Scheduled Caste and Scheduled Tribes. The Supreme Court has quashed the economic criteria laid down by Bihar and Uttar Pradesh Government for identifying the affluent sections of the backward class i.e., creamy layer and exclude them for the purpose of job reservation, and held that the criteria for identification of “creamy layer” is violative of 16(4) and Article 15(4) of the Constitution.

Therefore, as per the various decisions of the Supreme Court of India, Article 16(4) of the Constitution is not an exception to Article 16(1) of the Constitution, but rather is a facet of equality of opportunity in matter of employment with an object of achieving the equality as enshrined under the Constitutional law of India.

**(b) THE CONSTITUTIONAL 77TH AMENDMENT ACT, 1995:**

The 77th Amendment has added a new clause (4-A) to the Article 16 of the Constitution of India which provides that;

> “Nothing in this article shall prevent the state from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of

[^240^] (1995) 5 SCC 403  
[^241^] Supra note 235
the Scheduled Caste and the Scheduled Tribe which in the opinion of the State, are not adequately represented in the Services under the State."

The 77th Amendment guarantees the reservation in promotion in Government jobs will be continued in favour of Scheduled Caste and Scheduled Tribes. Though the providing for reservation in promotion was abolished by the Supreme Court, but just with an intent to nullify the decision of the Hon’ble Supreme Court in Mandal Commission case the seventy seventh Constitutional amendment was passed for political consideration.

The Supreme Court of India after the 77th Amendment to the Constitution of India in Union of India V. Virpal Singh\textsuperscript{242} in this case the legality of the extent of reservation to promotions in Railway Service which provides the specified group of employees a reservation in employment as well as promotion on the basis of their caste. The Supreme Court tries to mitigate to some extent the inequity that the reservation in general has to represent by holding that caste criteria for promotion is violative of Article 16(4) of the Constitution and held that seniority between the reserved category candidates and general category candidates shall continue to be governed by their panel position prepared at the time of selection.

\textbf{(c) THE CONSTITUTIONAL 81st AMENDMENT ACT, 2000:}

The 81st Constitutional Amendment has added new clause (4-B) after clause (4-A) of Article 16(4) of the Constitution. Article 16(4-B) reads as follows.

\textsuperscript{242} (1995) 6 SCC 684
“Nothing in this Article shall prevent the state from considering any unfilled vacancies of a year which are reserved for being filled for in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.”

Article 16(4-B) seeks to end the fifty per cent ceiling on reservation for Scheduled Caste, Scheduled Tribes and backward classes in backlog vacancies which could not be filled up in the previous year due to the non-availability of the eligible candidates of the SC’s/ST’s and backward class categories will be considered as a separate class and be filled up 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 fifty per cent reservation on total number of vacancies of that year. This means that the unfilled reserved vacancies are to be carry forward from year to year without any limit, and are to be filled separately.

Therefore the eighty first amendment sought to modify the proposition laid down by the Supreme Court in Mandal Commission case. This amendment increases the employment opportunities for Scheduled Caste, Scheduled Tribe and Backward class candidates.

(d) THE CONSTITUTIONAL 85th AMENDMENT ACT, 2001

The 85th Amendment has substituted, in clause 4-A of Article 16 of the Constitution for the words “in matter of promotion to any class” the words
“in matters of promotion, with consequential seniority, to any class”. This amendment aims at extending the benefit of reservation in favour of Scheduled Caste and Scheduled Tribe in matter of promotion with consequential seniority.

The Constitutional of validity, interpretation and implementation of 77th amendment Act 1995, 81st amendment Act 2000, 82nd amendment Act 2000 and 85th amendment Act 2001 was challenged in *M. Nagaraj V. Union of India*243. The Supreme Court held that, these Constitutional amendments, by which Article 16(4A) and 16(4B) have been inserted flow from Article 16(4) of the Constitution. These amendments are enabling provisions and do not alter the structure of Article 16(4) of the Constitution. They retain the controlling factors namely, backwardness and inadequacy of representation which enable the State to provide for reservation keeping in mind the overall efficacy of the State administration under Article 335 of the Constitution of India. These amendments are confined only to Scheduled Caste and Scheduled Tribe, and amendments do not obliterate any of the Constitutional requirements of ceiling limits of fifty per cent, the concept of creamy layer, the sub-classification of OBC on one hand and SCs/STs on the other hand and the concept of post based roster with inbuilt concept of replacement. The Hon’ble Court reiterated that the ceiling limit of 50 per cent, the concept of creamy layer and compelling reasons such as backwardness, inadequacy of representation and efficacy of administration

243 AIR 2007 SC 71
are all Constitutional requirement without which the structure of equality of opportunity as guaranteed under the Constitution would collapse.

Therefore the Supreme Court held that subject to the above limitations, the State can make reservation but the State has to show in each case the existence of compelling reasons such as backwardness, inadequacy of representation and efficacy of administration before making provision for reservation. Article 16(4A) and (4B) are enabling provisions. The State is not bound to make reservation. However, if the State wishes to exercise their discretion for making such provision they have to collect quantifiable data showing the grounds namely backwardness and inadequacy of representation of that class in the Government Services. Thus the Supreme Court upheld the Constitutional validity of 77th, 81st, 82nd and 85th amendments.

The three conditions laid down in M.Nagarj’s case rise a number of concerns. It must be remembered that Article 16(4A) permits reservation in promotion only for the Scheduled Caste and Scheduled Tribes and not for other backward classes. As per the law laid down in the M.Nagaraj’s case, requiring the State to demonstrate backwardness of the persons seeking benefits, inadequacy of representation and maintenance of efficiency are the essential requirement for reservation in promotion.

The issue of implementation of the reservation in promotion through existing statutory enactment by the State Legislature and the subsequent rules framed by the authorities of the State or concerned corporation of the State
of Uttar Pradesh known as Uttar Pradesh Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 and Rule 8A of the 1991 Rules, as brought into force in 2007, was challenged in **Uttar Pradesh Power Corporation Ltd V. Rajesh Kumar** the Supreme Court strike down the reservation in promotion for not meeting the required criteria as laid down by the Supreme Court in M Nagaraj case.

Subsequent to the decision of the Hon’ble Supreme Court India the response of the Government as reflected in 117th Constitution Amendment Bill introduced in the Rajya Sabha. The proposed law sought to remove the criteria laid down in M. Nagaraj case, on the issue of backwardness of SCs/STs, its approach to the ‘adequacy of representation’ and maintenance of efficiency. The proposed Article 16(4A), which seek to substitute the existing Article 16(4A), has done away with concerns of efficiency by stating that nothing Article 335 can be an impediment, and with reference to ‘adequacy of representation’ has been sought to be deleted.

Thus the protections provided under the constitutional law of India, increases the confidence upon the civil servants, the sense of security of employment to discharge their duties and responsibilities without any threat or fear of dismissal or removal of services.

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244CIVIL APPEAL No. 2608 OF 2011 dated 27th April 2012
4.2- PROTECTIONS WITH REFERENCE TO DISMISSAL, REMOVAL AND REDUCTION IN RANK

Though the Civil Servants in India holds the post at the pleasure of the executive head following the English doctrine of pleasure, there are Constitutional protections provided to the Civil Servants against arbitrary dismissal, removal and reduction of rank.

The members of the public expect that Government Servants should discharge the duties and responsibilities enshrined to them honestly, sincerely, impartially and without fear or favour. In order to assure them that, in the event of their discharging their duties honestly and sincerely, they will not be put to any capricious action by persons who are capable of wielding power or influence on the authorities who have the power to take action against the Civil Servants. Hence these Constitutional guarantees which undoubtedly confer rights and the benefits on Civil Servants are mainly designed to achieve public good. The Supreme Court of India has also dwelt at length on the necessity to impart a sense of security to Civil Servants. Article 311 is enshrined in the Constitution of India with the object of ensuring security of tenure to all Civil Servants by affording them adequate protection against the capricious action. These immunities or the protections are utmost importance in a democratic state to ensure efficiency and incorruptibility of public administration.245

Constitution of India in its Article 311 provides protection to Civil Servants against any arbitrary dismissal or removal from their post:

245 Motiram Deka V. General Manager, NEFR, AIR 1964 SC 600.
Article 311 gives duel guarantee to the Civil Servants against the action of removal or dismissal.

Article 311 (1) reads as follows: -

_No person who is the member of a Civil Service of the Union or an All India service or civil service of the state or holds a civil post under the union or a state shall be dismissed or removed by an authority subordinate to that by which he was appointed_.

(i) **NO DISMISSAL OR REMOVAL BY AN AUTHORITY SUBORDINATE TO APPOINTING AUTHORITY**

The significance of the protection under Article 311(1) of the Constitution is that the Government Servants are entitled to the judgement of the authority by which they were appointed or some authority superior to such authority and that they shall not be dismissed or removed by a lesser authority.

Article 311 provides that a member of civil service of a state cannot be dismissed by an authority subordinate to that by which he was appointed.

A close examination of the words of Article 311(1) of the Indian Constitution makes it explicit that it prohibits only the subordinate authority from dismissing or removing a Civil Servant. Then the question arises whether the authority superior to the appointing authority can also exercise power of dismissal or removal. This question was came up for consideration before the High Court in _Karamdeo V. State of Bihar_ the contention of the

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246 Art.311(1) of the Constitution of India  
247 AIR 1956 Patna 228.
petitioner in the instant case was he could not be dismissed by an officer superior to the officer who had appointed him in view of Article 311(1) of the Constitution. The contention of the petitioner was negatived by the Hon’ble High Court and held that Article 311 did not have any application in the present case because the order of dismissal has not been passed by an authority subordinate to that which appointed the petitioner. The Article 311(1) did not preclude the authority which was superior to that which had made the appointment.

The decision of the Patna High Court has been confirmed by the Supreme Court of India in *Sampuran Singh V. State of Punjab*\(^\text{248}\) it was held that, the removing authority cannot be subordinate in rank to the appointing authority. By necessary implication the removing authority may be higher in rank to that by which he was appointed.

Further the Hon’ble Supreme Court of India in *State of Assam Vs M.K.Dass*\(^\text{249}\) held that the protection provided under Article 311 (1) does not mean that the authority who appointed the civil servant has the power to dismiss or remove a civil servant, there is nothing in Article 311 (1) which debars the Government conferring powers on officer other than the appointing authority to dismiss the Government servant provided the authority on whom such power is conferred is not subordinate in rank to the appointing authority.

\(^{248}\)AIR 1982 SC 1407.
\(^{249}\) AIR 1970 SC 1255
SUBORDINATE AUTHORITY: It indicates that an order of superior authority appointing a civil servant cannot be nullified by one subordinate to him. The Hon’ble Supreme Court of India in *State of M.P Vs Sardul Singh* 250 held that in a situation where a post of an appointing authority had ceased to exists and an officer lowering rank than the appointing authority exercise the power of dismissal, it cannot be contented that in view if fact that the post of appointing authority has ceased to exist, there is no existing subordination and hence the dismissal order is good. Merely because the appointing authority has ceased to exist the constitutional guarantee given under 311(1) cannot be taken away. In such circumstances an order will have to be passed by an officer of superior rank.

In *Transport Commissioner V Radhakrishnamoorthy* 251 the Hon’ble Supreme Court held that disciplinary proceedings cannot be initiated by an authority lower in rank than the appointing authority. Article 309 of the Indian constitution provides that Governor of the State to frame the rules regulating the conditions of the service of the government servants includes powers to frame rules regulating disciplinary proceedings. It is competent for the Governor to authorize lower in Rank than the appointing authority to initiate disciplinary proceedings and to impose minor penalties and in cases where the imposition of punishment of dismissal or removal is called for, to forward the record to the authority competent to impose the punishment. Therefore such rules does not contravene Article 311 (1) of the Constitution.

250 AIR 1970 SC 101
251 1995(1)SCC 332
In effect, therefore Article 311 (1) implies that subject to rules made in this behalf a punishment other than that of dismissal or removal from service may be imposed by an authority subordinate to appointing authority. The Supreme Court of India in *State of Bihar V. Abdul Majid*\(^{252}\) held that an order of dismissal or removal is made by an officer subordinate to appointing authority, the order is null and void ab initio, and it is not possible to validate for the competent authority retrospectively. Such an order is inoperative even if it is confirmed on appeal by the competent authority.\(^{253}\)

Therefore it is now well settled position is that the power of dismissal or removal of Civil Servants may be exercised by the appointing authority itself or by the authority superior in rank than the appointing authority. The only criteria which are to be taken into consideration is that the removing authority may be of the same rank or grade, but must not be subordinate to one to that of the appointing authority.

**(ii) REASONABLE OPPURTUNITY TO DEFEND**

The expression reasonable is not susceptible of a clear and precise definition. Reasonable does not mean the best; it means the most suitable in a given set of circumstance.

One of the most important aspect of civil service or services under the State is permanence in office. Continuity of Civil Servants in office is of great importance. If there is constant change in the services, it will not only be costly in money but more costly ineffectiveness. Civil Servants must be given

\(^{252}\) *(1954)*SCR 786  
\(^{253}\) *NMF Province Vs Suraj Narayan* AIR 1949 PC 112
such security of tenure as will give them confidence to deal forth rightly with their masters.\textsuperscript{254} Realizing the importance of protections to Civil Servants Constitution of India lays down the second safeguard with a view to provide adequate security of tenure to the Civil Servants, under Article 311(2) of the Constitution of India. According to Article 311 (2) of the Constitution of India:-

\begin{quote}
No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given an reasonable opportunity or being heard in respects of those charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.

Provided further that this clause shall not apply-
\end{quote}

\begin{itemize}
\item[(a)] Where a person is dismissed or removed or reduced his rank on the ground of conduct which has led to his conviction on a criminal charge; or
\item[(b)] Where the authority empowered to dismiss or remove a person or to reduce him rank is satisfied that for some reason, to be recorded by that authority in writing, it not reasonably practicable to hold such enquiry; or
\item[(c)] Where the President or the Governor as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.
\end{itemize}

The term reasonable opportunity to the Government servant as provided in the Constitution was interpreted by the Supreme Court of India in *Khemchand V. Union of India*\(^{255}\) as follows:-

(i) An opportunity to deny his guilt and to establish his innocence.

(ii) An opportunity to defend himself by cross examining the witnesses produced against him and by examining himself or any other witnesses in support of his defense.

(iii) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him.

Thus every departmental enquiry under Article 311 (2) has two stages, the first stage, the enquiry in to allegations and the findings there on and the second stage, the opportunity to the Government servant to contest the findings recorded as against him as well as their propriety of the proposed punishment.

Further the Supreme Court in *K.Rajendran V. State of Tamilnadu*,\(^{256}\) held that an analysis of Article 311(2) shows that it guarantees to a person, the right to defend himself in any proceedings against his dismissal, removal or reduction in rank. It requires that in such a case any inquiry should precede any such action, and at that inquiry he should be informed the charges against him and given a reasonable opportunity of being heard in respect of the charges. Where it is proposed after such inquiry to impose upon him any such penalty, such penalty may be imposed on the basis of

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\(^{255}\) AIR 1958 SC 300  
\(^{256}\) AIR 1982 SC 1107.
the evidence adduced during such inquiry and it shall be necessary to give a person any opportunity of making representation on the penalty proposed.

Therefore it is clear from the decision of the Hon’ble Supreme Court that under Article 311(2) of the Constitution following requirement has to comply before imposing the penalty of dismissal, removal or reduction of rank, they are:

(i) Inquiry;
(ii) Information of charges;
(iii) Reasonable of being heard
(iv) Decision to be based on evidence adduced during such inquiry.

These requirements are mandatory and any order which does not comply with these requirements is null and void. To conduct an enquiry according to the rules of natural justice is the primary constitutional duty of the disciplinary authority while affording a reasonable opportunity of being heard is the second obligation to hold an enquiry as per the requirement of Article 311(2) of the constitution of India.

There should be an enquiry into the charges made against government servant before imposing the punishment of dismissal, removal and reduction of rank. There must be some material before the authority imposing the penalty that justify is the imposition of such penalty.

**FIFTEENTH AMENDMENT ACT, 1963**

Article 311 (2) was amended\(^{257}\) and clause (2) of Article 311 after the amendment reads as follows:-

“No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against is and given reasonable opportunity of being heard in respect of these charges and where it is proposed, after such enquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of evidence adduced during such enquiry”

The amendment thus retained the second opportunity with the restrictions that the employee has to make representation on the penalty proposed, but only on the basis of evidence adduced during the enquiry. All that fifteenth amendment accomplished was to clarify and give effect to the judicial decisions interpreting the un-amended Articles. The Supreme Court of India *Bhagabanchandradas V. State of Assam*\(^{258}\) held that the provision of Article 311 (2) prior to and after the amendment in effect remains one and the same.

**a. FOURTY SECOND AMENDMENT ACT, 1976**

Clause (2) of Article 311 after the amendment reads as follows:-

“No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges”.

*Provided that where it is proposed after such enquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of evidence adduced during such enquiry and it shall not be necessary to*
give such person any opportunity of making any representation on the penalty proposed,

By this amendment the requirement to give second opportunity was removed. It provides expressly that it is not necessarily to give a delinquent Government servant any opportunity of making representation on the proposed penalty. The position now is that where it is proposed, after enquiry to impose upon a Government servant the punishment of dismissal, removal or reduction in rank, it may be imposed on the basis of evidence adduced at the enquiry without giving an opportunity of making representation regarding the penalty proposed.

The judicial interpretation of Article 311 (2) providing two opportunity stood now reversed by the constitutional 42nd Amendment, which the giving of opportunity after findings are recorded in the enquiry was deleted, further the supreme court of India in *Union of India Vs Tulasiram Patel*²⁵⁹ held that the second proviso to Article 311 which dispense with the enquiry in three types of cases rules out the requirement of giving second opportunity and in such cases rule of natural justice is also stands excluded.

However the protections guaranteed under Article 311 (2) shall not apply to:-

- a. Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on criminal charge or
- b. Where authority is empowered to dismiss or remove a person or reduce him in the rank is satisfied that for some reason to be recorded by that authority in writing, is not reasonably not practicable to hold such enquiry or

²⁵⁹ AIR 1985 SC 1416
c. Where the President or the Governor as the case may be, is satisfied that in the interest of security of the state is not expedient to hold such enquiry.

Thus the Government servant’s holds office during pleasure of the president but the security of tenure is specifically assured. The 42nd Amendment to the Article 311 (2) as restricted the protection earlier provided to a Government servant and purports to widen the doctrine of pleasure. The rulings laid down in Tulisirams Patel’s case created insecurity of their jobs and has left the Government servants on the mercy of the president or the Governor.

4.3 - STATUTORY PROTECTIONS

Apart from the protections provided under the Constitutional law of India there are certain protections are also provide to the Civil Servants under the code of Civil Procedure 1908, Code of Criminal Procedure 1973 and the Prevention of Corruption Act, 1988 in order to discharge their duties effectively, impartially and without any favour or fear.

a. PROTECTIONS REGARDING PROSECUTION OF CIVIL SERVANTS

The fundamental requirement to initiate prosecution against the Civil Servant is the previous sanction from the government. The previous sanction is intended to offer a reasonable protection to government servants while discharging his official duties strictly and impartially according to the wisdom of the legislation. While discharging the duties strictly according to law may offend persons and create enemies, from frivolous, malicious or vexatious prosecution and to save the government servants from
unnecessary harassment or undue hardship previous sanction from the government to initiate prosecution is necessary.

The prosecution of government servant for an offence challenging his honesty and integrity has also a bearing on the morale of public services. The appropriate government consisting of expert knowledge in particular field is alone is empowered to asses and weigh the accusation against the public servant. A public servant who is alleged to have committed an offence should be allowed to proceeded against in a court of law, unless on the basis of facts material evidence placed before the sanctioning authority for initiating prosecution against public servant.

The sanction for initiating prosecution against public servant would be necessary only if the act complained of is directly concerned with his official duties.

**b. AUTHORITY COMPETENT TO SANCTION PROSECUTION OF CIVIL SERVANTS**-

The sanctioning authority has an absolute discretion to grant or withhold sanction after satisfying itself whether the material placed before it discloses a prima facie case against delinquent government servant. The competent authority is the sole deciding authority to decide either to grant or withhold sanction on the basis of material placed before the competent authority.

**c. AUTHORITY COMPETENT TO SANCTION PROSECUTION UNDER THE CODE OF CRIMINAL PROCEDURE:**
Under section 197(1) of criminal procedure code 1973 provides that it is necessary for the prosecuting authority to have previous sanction of the administrative authority for initiating prosecution against a public servant

Section 197(1) reads as follows:-

(1). When any person who is or was the judge or magistrate or a public servant not removal from his office save by or with the sanction of the government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance as such offence except with the previous sanction ---

(a). in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the union, of the central government

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the state, of the state government.

Provided that where the alleged offences were committed by a person referred to in Clause (b), during the period while proclamation issued under clause (1) of Article 356 of the constitution was in force, in a state, clause (b) will apply as if for the expression state government occurring there in the expression central government was substituted.

**d. AUTHORITY COMPETENT TO SANCTION PROSECUTION UNDER PREVENTION OF CORRUPTION ACT:** Under Section 19(1)\(^{260}\) of the

\(^{260}\) Section 19(1): No court shall take cognizance of an offence punishable under section 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction-
prevention of corruption Act, 1988 the competent authority to sanction prosecution will normally be-

Central government,\(^\text{261}\) in the cases of Central government servants who is employed in connection with the affairs of the union or State Government, in the cases of state government servants who is employed in connection with the affairs of the state or Authority competent to remove from his office, in case of any other public servants.

The word employed is used under section 19(1) and removable clause (a) and (b) and competent to remove him from his office , used in clause (c) are clearly shows that the authority contemplated in section 19 of the Act is the one competent to remove the public servant holding the office.

The Section 19(2)\(^\text{262}\) of Prevention of Corruption Act provides in case any doubt arises as to whose previous sanction should be obtained to initiate prosecution against the government servant in such case, the authority competent to remove the public servant is necessary.

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\(^{261}\) Central government means the president as provided under section 3(8) of general clauses Act.1897.

\(^{262}\) Section 19(2); Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub section (1) should be given by central government or state government or any other authority such sanction shall be given by that government or authority which have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.
It is generally, the sanction should be accorded by the competent authority. However in case sanction may be accorded by the authority higher than the competent authority, such sanction will not be invalid. The Hon’ble High Court of Bombay in \textit{State of Maharashtra V. Govindpurshottam}^{263}\textsuperscript{263} held that disciplinary authority having power to remove a civil servant is the appointing authority, the state government is also being the higher authority, the authority competent remove the civil servant. Hence in such cases it is competent for government to give sanction for prosecution, though the sanctions have been refused by the disciplinary authority.

It is further the Supreme Court of India \textit{Sampurna Singh V. state of Punjab}^{264}\textsuperscript{264} held that Section 6 (1) (c) stipulates the removing authority will be the sanctioning authority. In view of Article 311 (1) of the Indian Constitution the removing authority cannot be subordinate in rank to the appointing authority. By necessary implication the removing authority may be higher in authority to the appointing authority. In the instant case the prosecution of sectional officer in Punjab public works Department whose appointing authority was chief engineer, sanction to initiate prosecution accorded by the chief minister. The Hon’ble supreme court of India was held that sanction granted was not invalid.

\textbf{e. FORM OF SANCTION:}

There is no particular form or type has been prescribed under the code of Cr.P.C 1973 or prevention of Corruption Act 1988. However the courts

\footnotesize{\textsuperscript{263} SLR 1973 (1) Bom 617 \textsuperscript{264} AIR 1982 SC 1407}
expects that a sanction for which no particular form has been prescribed by law should ex facie indicates that the sanction authority had, before according the sanction to initiate prosecution against the alleged public servants, all the relevant facts on the basis of which prosecution was proposed to be initiated. The Hon’ble Supreme Court of India in *shivraj singh V. Delhi Administration*\(^{265}\) held that the order of giving sanction should be based on application of mind to the facts of the case. In the instant case the prosecution of police officer for an offence under section 161 of I.P.C for which order of sanction to initiate proceedings issued by DIG after fully and carefully examining the material before him in regard to the allegation made against the police officer, the Hon’ble court ordered on the face of it showing the facts constituting offence charged. Hence order of sanction held full filled the requirement of section 6 of P.C.Act

Further The Hon’ble Supreme Court in *state of Punjab V. M.L Puri*\(^{266}\) held that in the absence of previous sanction of a competent authority as prescribed under section 6(1) of prevention of corruption Act 1947, the entire proceedings are invalid and conviction is liable to be set aside. The ratio laid down in the above case shows sanction under prevention Act or Criminal Procedure Code is mandatory.

In *State of Orissa V. Ganesh Chandra jew*\(^{267}\) The Hon’ble Supreme Court held that the expression that no court shall take cognizance of such offence except with previous sanction used in section 197(1) of Code of Criminal

\(^{265}\) AIR 1968 SC 1419  
\(^{266}\) AIR 1975 SC1633  
\(^{267}\) 2004 Cri LJ 2011 SC
Procedure make protection afforded to a public servant is mandatory. Further the use of word ‘No and Shall’ bars the very cognizance of complaint by any court without obtaining previous sanction of the central or State Government as the case may be.

_In Mansukhlal. Vittal Das Chauhan V. State of Gujarat_\(^{268}\) The Hon’ble Supreme Court held that independent application of mind to the facts of the case is also material and evidence collected during the investigation by the authority competent to grant sanction is essential. Wherefore in the instant case sanction issued by an authority on the direction of the High court, held, was invalid because there was no independent application of mind by the sanctioning authority. High Court direction had taken away the discretion of the authority not to grant sanction and it was left with no choice but to mechanically accord sanction in obedience of the mandamus issued by the High Court, further Court held that the Central or State Government or any other authority (depending upon category of public servants) has the right to consider the facts of each case and to decide whether the public servant is to be prosecuted or not. It is in Section 6 of Prevention of Corruption Act, prohibits the Courts from taking cognizance of the offence specified therein, it envisages that the Central or the State Government or other authority, has not only the right to consider the question of grant of sanction, it also has the discretion to grant or not to grant the sanction. The sanction is not intended to be, nor it is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness.

\(^{268}\) (1997) 7 SCC 622
It is one of the guiding principles for sanctioning authority is to keep in mind the public interest and therefore, the protection available under section 6 of the Act to a public servant cannot be said to be absolute. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protections to Government servant against frivolous prosecution. The Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for the innocent but not shield for the guilty.

f. SANCTION IS NECESSARY TO INITIATE A PROSECUTION ON A PERSON CEASES TO BE A GOVERNMENT SERVANT?

It is under section 6 of the prevention of corruption Act 1947, sanction is not necessary if a person has ceases to be a Government servant. The Supreme Court of India in *S.A Venkataraman V. State* \(^{269}\) observed that “when an offence is alleged to have been committed, the accused was a public servant but by the time the court is called upon to take cognizance of the offence committed by him as a public servant, he has ceased to be a public servant no sanction would be necessary for taking cognizance of the offence against him.” This approach is in accordance with the policy underlying under section 6 of the Act in that a public servant is not to be exposed to harassment of a frivolous or speculating prosecutions.

g. SAFEGUARD REGARDING INVESTIGATION: In case of investigation against a Government servant relating to an offence punishable under the provisions of prevention of corruption Act, 1947 protection is provided

\(^{269}\) AIR 1958 SC P 107
under section 5A of the Act. Section 5A states that, except with the previous permission of Magistrate no investigation can be initiated against the Government by an officer below the rank of Deputy Superintendent of Police. The Hon’ble Supreme Court of India in *State of M.P. v. Mubarak Ali*\(^{270}\) held that permission of a Magistrate for investigation is statutory safeguard to a civil servant and must be strictly complied with in the public interest and constitutes a guarantee against frivolous and vexatious prosecutions.

It is now under section 17 of Prevention of corruption Act 1988, provides that; Notwithstanding anything contained in the code of criminal procedure code, 1973 no police officer below the rank;

(a) in case of the Delhi Special Police Establishment, of an Inspector of police;

(b) In the metropolitan area of Bombay, Calcutta, Madras and Ahmadabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the code of criminal procedure, 1973, of the Assistant Commissioner of police.

(c) Elsewhere, of a Deputy Superintendent of police or a police officer of equivalent rank, shall investigate any offence punishable under the Act without the order of Metropolitan Magistrate or a Magistrate of first class, as the case may be, or make any arrest therefore without a warrant;

Provided that if a police officer not below the rank of an Inspector of police is authorized by the state government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan

\(^{270}\) AIR 1957 SC 707
Magistrate or Magistrate of first class, as the case may be, or make arrest therefore without warrant;

Provided further that an offence referred to in clause (e) of section 13 shall not be investigated without the order of police officer not below the rank of a superintendent of police.

**h. PROCEDURE FOR OBTAINING SANCTION**

Upon receipt of complaint and, as soon as decision has been taken to investigate the allegations, it will be necessary to decide whether allegations should be enquired into departmentally or whether police investigation is necessary. Generally investigation of certain kinds of allegations should be entrusted to CBI or Anti-Corruption Branch in union territories.

In cases investigated by CBI against any public servant who is not removable from his office, except with the sanction of the central government, they will forward the final report of their investigation to the Central Vigilance Commission and will simultaneously endorse a copy of the report to the concerned Administrative department. The CBI recommends prosecutions of persons only in those cases in which they find sufficient justification for

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271Section 13 (1)(e); if or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

272(i) allegations involving offences punishable under law which Delhi Special police Establishment are authorized to investigate, such as offences involving bribery, corruption, forgery, cheating, criminal breach of trust, falsification of records, possession of assets disproportionate to known source of income, etc.

(ii) Cases in which the allegations are such that their truth cannot be ascertain without making enquiries from non-official persons, or those involving examination of non-government records, books of accounts etc and

(iii) Other cases of a complicated nature requiring expert police investigation.
prosecution as a result of investigation conducted by them. The central Bureau of investigation ensures that a recommendation to prosecute is taken only after a careful examination of all facts and circumstances of the case.

After considering the report of central Bureau of investigation and the comments if any, received from the administrative, Ministry or Department and any other relevant documents the Central Vigilance Commission will advise the Ministry or Department concerned who would consider the advice of CVC and take decision as to whether or not the prosecution should be sanctioned. If the CVC advises for grant of sanction for prosecution but the department concerned proposes not to accept such advice, the case should be referred to the Department.

The Supreme Court of India in Dr. Subramanian Swamy V. Dr. Manmohan Singh and Ors\textsuperscript{273} held that Section 19 of the Prevention of Corruption Act which bars the Courts from taking cognizance of a cases of a corruption against a public servant unless the Central or the State Government has accorded the sanction, virtually imposes fetters on private citizens and also on prosecutors from approaching the Court against a corrupt public servant. These protections are not available to other citizens. Public servants are treated as special class of persons enjoying the said protections so that they can perform their duties without any fear or favour and without threat of malicious prosecution. \textit{However the said protection against a malicious prosecution which was extended to public servant cannot}

\textsuperscript{273} AIR 2012 SC 1185
become a shield to protect corrupt officials. Therefore the Court held that in
every case where an application is made to an appropriate authority for
grant of sanction for prosecution in connection with the offence under
Prevention of Corruption Act, it is the burden duty of such authority to apply
its mind urgently to the situation and decide the issue without being
influenced by extraneous consideration.

Therefore the requirement of sanction to initiate prosecution against a public
servant under prevention of corruption Act or under code of criminal
procedure is to save the public servant from harassment and un wanted
official pressure and malicious prosecution which may be caused to him, if
each and the persons who are not concerned or the other person is allowed
to institute criminal complaint against the public servants. The protection or
safeguards granted under Cr PC or under prevention of corruption Act does
not mean not to prosecute a corrupt public servant but to protect honest
and impartial public servants whose services are indispensible for the
public. Further it is concluded that it is the state and central government to
follow the principles laid down in Mansukhlal Vithal Das Chauhan Vs State of
Gujarat\textsuperscript{274} that independent ‘application of mind’ to the facts of the case is
also material and evidence collected during the investigation by the authority
competent to grant sanction is essential.

\textsuperscript{274} (1997) 7 SCC 622
4.4 PROTECTIONS UNDER CODE OF CIVIL PROCEDURE.

In case a suit is to be filed by any party against a public officer in respect of any act purporting to be done by such public officer in his official capacity a legal notice under Section 80\textsuperscript{275} of the Code of Civil Procedure, 1908 is required to be served upon him, and after the provided period of notice only such suit will be entertained by a Civil Court. The requirement of notice under Section under Section 80 of the Code of Civil Procedure is applicable to the Government or a public officer. The main object of the notice is to give

\textsuperscript{275} Section 80 (1) Save as otherwise provided under in sub section (2), no suit shall be instituted against the Government (including the state of Jammu and Kashmir) or against public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered, to or left at the office of-

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and, in the case of a public officer, delivered to him or left at this office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu & Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit: Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice-

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(b) The cause of action and the relief claimed by the plaintiff had been substantially indicated.]
to the Secretary of the State or the officer concerned to reconsider the claims of the applicants so that the agony of facing the legal proceedings would be avoided.

Further Section 81\textsuperscript{276} of the Code of Civil Procedure provides the protection of exemption from arrest and personal appearance in respect of any act purporting to be done by the servant in his official capacity. Section 82\textsuperscript{277} of the Code of Civil Procedure provides the protection in execution of decree.

Therefore the intention of the provisions of the Code of the Civil Procedure is to provide certain protections to servants to discharge their duties without any kind of fear of victimising in the course of performing the public duties in the interest of general public.

\textsuperscript{276}Section 81: Exemption from arrest and personal appearance: In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity
(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and
(b) Where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

\textsuperscript{277}Section 82: Execution of decree (1) Where, in a suit by or against the Government or by or against a public officer in respect of any act purporting to be done him in his official capacity, a decree is passed against the Union of India or a State or, as the case may be, the public officer, such decree shall not be executed except in accordance with the provisions of sub-section (2).
(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decree.
(3) The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award:
(a) is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority; and
(b) is capable of being executed under the provisions of this code or of any other law for the time being in force as if it were a decree.
4.5 PROCEDURAL PROTECTIONS

Apart from the Constitutional protections provided under the Constitutional law of India, protections provided under the certain statutes, certain procedural protections are also provided in the form of holding of departmental enquiry is a condition precedent into the charges framed against the Civil servant.

The nature of Departmental enquiry has succinctly remarked in Mukesh Kumar V. State of Madhya Pradesh\textsuperscript{278} that the departmental enquiry is not a matter of empty formality. It is serious proceedings intended to give the servant concerned a chance to meet the charges and prove his innocence. It has to be conducted according to the relevant statutory rules and in compliance of principles of natural justice.

The aims and objectives of the procedural protections are to prevent miscarriage of justice. In case if there is a violation of principles of natural justice the entire proceedings are suffers from injustice and is liable to be set aside. Therefore the minimum requirement observation of principles of natural justice is mandatory before imposing the major or minor penalty.

Therefore the main objectives of providing the Constitutional, Statutory and Procedural protections to the Civil Servant, to discharge their duties and responsibilities without any fear of insecurity of their jobs. The Civil Servants are expected to discharge their duties with utmost satisfactions of the public. The Civil Servants are expected to share and uphold commitment to

\textsuperscript{278}1986 (3) SLR 42 MP.
the rule of law, honesty and integrity, accountability for decisions and actions, political neutrality, impartiality in the execution of public functions and dedication, professionalism and diligence in serving the community. These expectations can be achieved only if the sufficient protections are provided to the Civil Servants in discharging their duties in accordance with rule of law. The political intervention in discharging the duties of the Civil Servant hampers the public confidence and co-operation. Therefore the framers of the Indian Constitution emphasised the providing the protections to Civil Servants for 'an efficient, disciplined and contended service.'

Equality in employment enriches the confidence among the Civil Servants to discharge the public duties according to the rule of law. The Constitutional law guarantees under Articles 14, 15 and 16 to attain the objectives of equality as enshrined in the preamble of the Constitution of India. Article 16 of the Constitution ensures the equality of opportunity in matters relating to employment under the state. It states that the citizens of India cannot be discriminated only on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them in relation to employment under the state. With an object of attaining equality among the citizens of India clause (4) of Article 16 of the Constitution makes an exception and enables the state to make special provisions for the reservation in appointments or posts in favour of any backward classes of citizens which in the opinion of the state are not adequately represented in the services under the state.

Further Article 311 of the Constitution of India increases the confidence of the Civil Servants to work in a healthy environment and without any fear of
unnecessary harassment of the superior authority or the political superiors. Article 311(1) leads to the conclusion that the appointing authority has the power to remove or dismiss the Civil Servants. Not only the appointing authority but also an authority equal in rank or superior to the appointing authority may dismiss or remove the Civil Servant.

The most important aspects in the public employment are permanence in office. The security of Services of Civil Servants in office is of great importance. If there is a constant change in the services, which leads to loss of confidence among the Civil Servants to work for the benefit of the public or the society. Realizing this the Constitutional law of India, with a view to provide adequate security of tenure to the Civil Servants guarantees certain protections in its Article 311(2) that no Civil Servant shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Therefore sub clauses (1) and (2) of Article 311 of the Constitution of India guarantees the security of employment to the Civil Servants to discharge their duties and responsibilities without any fear of dismissal, removal or reduction of rank at the whims and fancies of the superior authorities or the political superiors.

One of the biggest threats that, the honest, impartial and unbiased Civil Servants are facing today is the false and frivolous complaints with intent to discourage the honest Civil Servants to work in accordance with law. Therefore with the object of overcoming the difficulty of false and frivolous complaints against the honest Civil Servants the Code of Criminal Procedure
1973 and Prevention of Corruption Act 1988 confers certain protections. Section 197 of the Code of Criminal Procedure confers that before initiating the criminal prosecution against the Civil Servants prior sanction is necessary and Section 19 of the Prevention of Corruption Act also confers the protection of prior sanction, prior to initiating the criminal proceedings against the Civil Servants. Further the Code of Civil Procedure, 1908 in its Sections 80, 81 and 82 confers certain protections to Civil Servants in relation to institution of civil suits against Civil Servants, Exemption from arrest and personal appearance and execution of decree wherein it provides that execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decree.