



REVIEW ARTICLE

AFFIRMATIVE ACTION AND RESERVATION POLICIES UNDER THE FEDERAL SYSTEMS OF ETHIOPIA AND INDIA: DESCRIPTIVE CONSTITUTIONAL PERSPECTIVES

*²Mohammed Usman Darasa and ¹Prakasa Rao, D. S.

¹College of law, Andhra University

²Research scholar in Andhra University, India

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ABSTRACT

Generally speaking, India and Ethiopia are known to have reservation and affirmative action policies under their respective constitutions. The Indian Constitution recognizes the three major categories of beneficiaries of reservation policies such as scheduled castes (SCs) and scheduled tribes (STs) and other backward classes (OBC) who have historically been excluded and marginalized from Indian society. Similarly, the principle of affirmative action is one of the innovative features of the constitution of Federal Democratic Republic of Ethiopia. For instance article 54(3) provides that out of the maximum number of 550 seats in the House of People's Representatives, a minimum of 20 seats are reserved for 'minority nationalities and peoples of the country'. In conclusion this work has tried to assess and describe available constitutional safeguards to historically, marginalized and disadvantaged sections of societies in India and Ethiopia. It has been indicated that both the constitution of India and the Constitution of Federal Democratic Republic of Ethiopia, make some key especial provisions regarding affirmative rights and protections to disadvantaged sections of societies based on their respective national context. Inter alia, Both countries have adapted Federal system of government which is believed to be the most suitable instrument for the realization of this end. In this regard, constitution of India is far more inclusive and comprehensive. Because, it attaches special and detailed clauses which obliged state take specific and measurable remedial steps. so that they can ride of marginalization and wrongs that had been done against them. From a comparative perspective, at the level of constitutional protection, the two countries are similar in that both have constitutionally guaranteed or endorsed measures of affirmative action or reservation policies in response to historical injustices. The constitutional recognition of affirmative action of the two countries differs in two crucial aspects: there are three categories of beneficiaries in case of India- such as scheduled castes and scheduled tribes and other backward communities. While in case of Ethiopia, affirmative action is provided as wider and general constitutional solution or direction without specifying the exact beneficiaries except women. It simply says affirmative for all historically marginalized and disadvantaged sections of an Ethiopian society in general. In conclusion, constitutional commitment is fairly clear both in case of India and Ethiopia but still much have to be done to put these noble constitutional principles into practice through further enforcing legislations. And particularly in Ethiopia implementation has to be backed by strong enforcing legislations as well as institutional frameworks. Unlike the Ethiopia, India has enacted plenty of an advanced and strong legislative protections and institutional framework to monitor proper implementation reservations in general.

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INTRODUCTION

The meaning of affirmative action has not always been clear as it appears at first. The use of terms in connection with Affirmative action has not been consistent. Complete understanding of Affirmative action requires clarity of terms used.

***Corresponding author: Mohammed Usman Darasa,**
Research scholar in Andhra University, India.

In the international sphere, it was widely used by the Commission on Human Rights, whose sub-commission appointed a Special Rapporteur for the "task of preparing a study on the concept and practice of affirmative action. Term "affirmative action" after noting the existence of terms like "positive discrimination", "positive action", "preferential policies", "reservations", "compensatory or distributive justice", "preferential treatment."¹

¹ Erna Appelt, Affirmative Action: a Cross-National Debate in Erna Appelt and Monika

This study was conducted to assess laws and practices of Affirmative action throughout the world; it is possible to assume that these terms fairly reflected what was in the laws and policies world-wide. Moreover, the practice of using either of these terms world-wide is generally acknowledged by UN human rights committees. In spite of the debate on the concept, affirmative action is the process by which governmental bodies or Agencies give special rights to some legally identified section (s) of society to compensate them for past discriminations or marginalization. The concept has been the subject of debate, with opponents claiming that it produces reverse discrimination. The A common principle is that whether for political reservations, special admissions in education or employment, affirmative action programs such as targeted recruitment and goals are encouraged to remedy the past negative effects of discrimination. For instance, affirmative action in American employment law has evolved through a series of governmental proclamations, court decrees, and voluntary programs instigated by employers even in the private sectors. Private employers who receive no public funding are not required to adopt affirmative action policies.

Affirmative action policies are enforced by the entities adopting them if they are voluntary, while affirmative action policies required by government mandates can be enforced through the legal system. Multinational states like the Ethiopia and India, characterized by the forces of diversity and unity need to have constitutionally guaranteed system of accommodation. Like the most African states, Ethiopia is ethnically diverse. The Ethiopian population is characterized by considerable diversity in religion (the Ethiopian Orthodox Church, Protestants, Moslems, traditional belief systems), language (there are dozens of different languages), culture, socio-economic activities (pastoralism sedentary agriculture) and traditional governance structures. But unlike other African states, this diversity is not the result of colonial imperialist designs; instead it resulted from the late 19th century territorial expansion of the empire of Abyssinia. The creation of the Ethiopian state by a process of internal expansion did not, however, give rise to an alternative nation building strategy. Just like the leaders of the postcolonial African states, the Ethiopian power Switzerland, Canada, India, Croatia and Ethiopia can be cited as exemplary states which have adopted the system of accommodation of diversity to maintain the national unity.² For instance, if we look at the people of the constitution of Federal Democratic Republic of Ethiopia, it recognises the injustices of the past and sets out the need to establish a society based on equality, dignity and freedom.³ It also aspires to heal the divisions of the past and to establish a society based on democratic values, social justice,

rule of law and fundamental human rights.⁴ The founding constitutional values of the country are stated to be human dignity, the achievement of equality and the advancement of human rights and freedoms⁵. The constitution of Federal Democratic Republic of Ethiopia provides for equality as a right and adopts both a formal, as well as a substantive approach to equality, by outlawing unfair discrimination by providing for affirmative action.⁶ The historical legacy of inequality and discrimination suffered by majority Nations and Nationality of Ethiopia in general and Ethiopian women in has Ethiopia taken into account. The purpose of such measures shall be to provide special attention to disadvantaged and historically marginalized section of societies so as to enable them to compete and participate on the basis of equality in political, social and economic life as well as in public and private institutions.

Affirmative action in Ethiopian Federal system

Before knowing the origin of affirmative action in politics in Ethiopia it would be necessary to have some general insight into the historical structure of the Ethiopian political society. Despite the historical maxim "Nation building" through the means of assimilation or integration of diversities, the issue of finding political, economic, cultural and social spaces for diversities to run the government has become a necessary choice in multiethnic States. Experience has also proved that around ninety percent OF states in the world are created from multi-ethnic/national societies whereby assimilation and accommodation of these diversities has been competing political policies.⁷

⁴"We the Nations, Nationalities and People of Ethiopia:

Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing, a democratic order, and advancing our economic and social development

..... Fully cognizant that our common destiny can best be served by rectifying historically unjust relationships and by and the prospect of a democratic order which our struggles and sacrifices have brought about"

Have therefore adopted, on 8 December 1994 this Constitution through representatives we have duly elected for this purpose as an instrument that bind us in a mutual commitment to fulfil the objectives and the principles set forth above.

⁵Op cited note 4. P 2

⁶FDRE Constitution, Article 25 reads, "[a]ll persons are equal before the law and are Entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status." SubArticles 1, 2, 7, and 8 of Article 35 provide for equality of women in general, equality of women in marriage, equality of women in property relations, and women's equality in employment, respectively. FDRE Constitution, Article 35 (3)165

Jarosch (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe* (2000), p.8

² *Ibid*

³ published in the *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia*, 1st Year No. 1, dated 21 August 1995. The Constitution was adopted on 8 December 1994 and promulgated by the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 which entered into force on 21 August 1995.

⁷Walker Conner, *Nation Building or Nation Destroying ?*, World Politics, Vol.24, No.3(1972), Johns Hopkins University Press, <http://www.jstor.org/stable/2009753>, accessed on 07/2008 06:53, pp. 319-20

As experience has indicated ethnic minorities do not let national identity to be equated to the identity of one or few ethnic groups since they believe unity of the state peacefully proceeds ahead and perpetuated only when the identity, culture, language, autonomy, and religion of every ethnic group are granted equal constitutional respect and recognition⁸. Owing to this, the need to devise political policies to accommodate ethnic diversities granting political space for different diverse groups keeping intact the national unity came in to picture. For a closer in fact most of the time minority rights are undermined under the shade of nation-building subordinating to the identity, culture, language and religion of one or very few ethnic groups had been the cause for the passing a way of life and distraction of property, which in turn is an obstacle to economic growth. Different ethnic groups have been fighting one another for the preservation of their identity, to have political space and self-determination in which yesterday's oppressor becomes today's oppressed due to the military strength of the other.⁹ Most of the states in Africa are characterized by considerable diversities in socio-economic, ethnicity and religion which is attributed to the colonial imperialist policies and designs. However, in the case of Ethiopia, the cause of ethnic diversity is not attributed to the Impact of colonizers as Ethiopia was colonized by foreign colonizers. Rather, it is attributed to the 19th century expansion of Abyssinia had been motivated by unification through assimilation after bloody wars during their expansion. Emperor Menilik was mentioned first among the modern leaders whose dream was to create Ethiopia under one identity by force. With the aim of building Ethiopia wherein diversities are denied or erased under the dominance of the culture of Amhara.8 Nonetheless, because of the imposition of the identity of one ethnic group on all ethnic groups by conquest, it created a sort of dissatisfaction to many ethnic groups. Irrespective of brutal resistance from different ethnic groups, successors of Emperor Menilik, specifically Emperor Haile Sellasie, managed to achieve the goals of the former, nation building under the monarchical system¹¹. To facilitate nation building objectives, a great number of Amhara political and religious missionaries moved to the Eastern, Southern and Western parts of the country. Particularly, significant number of Amhara moved to Oromia partly because of the establishment of capital city, Finfine (Addis Ababa) and partly in pursuit of better economic resources.¹² Systematic assimilation in the guise of nation-building by equating national identity to the identity of

one nation was strongly challenged by the then university students from different ethnic groups. Even students who belong to the dominant ethnic group had bitterly reacted against denial of the diverse identity and cultures of the Ethiopian people by recognizing only one nation's identity, culture and language as the sole identity and culture of Ethiopia. This University Students' dissatisfaction to the Haile Sellasie's absolute assimilation policy was upgraded to several national fronts on the basis of ethnic groups such as Eritrean Liberation Front, Tigray People's Liberation Front and Oromo Liberation Front with the objective of secession. In the meantime, the military junta, Dergue, assumed power overthrowing the Emperor in 1974 though still the issue of ethnic diversity was not considered as a big issue as usual. The Dergue regime, which was challenged both internally and externally, without due regard to accommodation of ethnic diversity except mere declaration of equality of nations, the national literacy campaign by local vernaculars and de jure decentralizations of power at the eve of its down fall. The ethnic based liberation front – EPRDF could successfully penetrated in to the central part of the country. They succeeded in overthrowing the Dergue declaring the sovereignty of Nations Nationalities and peoples of Ethiopia, under the 1991 Charter of Transitional Government. The framers of the Charter came up with a noble ideas as compared to the predecessors which had been strictly adhering to nation building by undermining ethnic diversity. The 1995 Constitution of Federal Democratic Republic of Ethiopia came up with federal arrangement the units of which are Nations, Nationalities and Peoples of Ethiopia guarantying the right to Self- determination. According to this new conception, the construction of an Ethiopian national identity was based on the recognition of the ethnic diversity of the population. In other words, unity depended on the recognition of and the respect for diversity. This attention to unity in diversity was legally expressed in the granting of a right to self-determination to all the *Nations, Nationalities and Peoples*¹³.

This right was first incorporated. The right to self-determination as conceived by the Ethiopian constitution is very large and includes language rights, cultural rights and rights of self-administration. It even includes the right of nations, nationalities and peoples to secede from the Ethiopian federation. Thus all ethnic groups have the right to speak and develop their own language, to express and promote their own culture and history; they have the right to self-administration within a particular territory and the right to their own representation at the regional and federal levels of government. As such, the right to self-determination includes both the objectives of unity and that of diversity. The federal parliament, as is customary in almost all federal composed of two chambers: the House of People's Representatives and the House of the Federation.¹⁴ The representatives of the former are representatives of the Ethiopian people as a whole. They are elected by means of general and direct elections under the *first-past-the-post* electoral system¹⁵. In practice, this means that the one seat in each electoral district is won by the

⁸ ibid

⁹ David A.Lake and Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, International Security, volume.21, No.2(Autumn,1996), p. 41

¹⁰ Ibid

¹¹ 11 Mohamed Hassen, *The Oromo of Ethiopia : A History of 11570-1860,1990*, p.200 and Bahiru Zewude, a *History of Modern Ethiopia 1885-1974*, (1991), p.16

¹² Ibid¹² 11 Mohamed Hassen, *The Oromo of Ethiopia : A History of 11570-1860,1990*, p.200 and Bahiru Zewude, a *History of Modern Ethiopia 1885-1974*, (1991), p.16

¹² Ibid

¹³ **1 Article 39 of the Federal Democratic Republic of Ethiopia.**

¹⁴ Article 47 (1) federal constitution.

¹⁵ 4 Article 54 federal constitution.

candidate who gets the most votes in the district. In a state organised on an ethnic basis, the use of such an electoral system runs the risk that the one seat in each electoral district will be won by the candidate who represents the interests of the largest ethnic group in the district. This is particularly problematic for those ethnic groups that are a minority in every electoral district. There is a real risk that those ethnic groups will not have a single representative in the House of People's Representatives. To reduce this risk and to guarantee the representation of all ethnic groups in the first chamber of parliament, the federal constitution provides for a guaranteed representation of '*minority nationalities and peoples*'. Article 54(3) of the federal constitution stipulates that out of the maximum number of 550 seats in the House of People's Representatives, a minimum of 20 seats is reserved for '*minority nationalities and peoples*'. As such, a representation of a large number of ethnic groups in the House of People's Representatives is guaranteed. Nevertheless, the chosen electoral system leads to the fact that the larger ethnic groups are more strongly represented in the first chamber of the parliament than the smaller ones. This is a common situation in Federal states. As indicated before, most parliaments in federal states are bicameral.

The first chamber is the representative institution of the federation as a whole, its members being elected pro rata of the population. In Ethiopia, the federal constitution stipulates that the members of the first chamber, the House of People's Representatives, are the representatives of the *Ethiopian People as a whole*. This conception of the first chamber and the resultant electoral system lead to a predominance of the larger federated entities in the first chamber. For example, in the United States the large (highly populated) regional states have a larger representation in the House of Representatives than the smaller states. We have the same picture in Ethiopia, where the large ethnic groups are much more strongly represented in the House of People's Representatives than the small ethnic groups. To stay with the example of the United States, there, the preponderance of the large regional states in the House of Representatives is compensated for by an equal representation of all states in the second chamber, the senate (all regional states of the US federation having two senators). This brings us to the second Chamber of the federal parliament in Ethiopia: the *House of the Federation*. The House of the Federation is the representative organ of the diverse Ethiopian ethnic groups or of the diversity in the federation. The composition of the House of Federation is stated under article 61 of the FDRE constitution as follows;

(1) *The House of Federation composed of representatives of nations, nationalities and peoples.*

(2) *Each nation, nationality and people is represented in the federal council by at least one member. Each nation and nationality shall be represented by one additional Representative for each one million of its population''.*

Proc. No. 7/1992 and Proc.No.11/1992 define minority nationality as "Nationality or people which cannot establish its own Woreda Self-Government" owing to smaller size of their

population.¹⁶ From the reading of Art.54 (3) and Proc. No. 111/1995 one can understand that it is nations, nationalities and peoples the population size of which is insignificant (may be below 100,000 inhabitants) that are entitled to be considered minority nationality Proc.No.532/2007. As per Art.20 (1(a)) the electoral districts are going to be rearranged in accordance with census results by taking the Woreda as a basis. Article 20(1(d)) of this proclamation states minority nationalities believed to require special representation shall be determined by the House of Federation. Therefore, identifying which nationalities are entitled to special representation cannot be identified until the house of Federation determines.

But, it is clear that minority nationalities reside either within the Nation, Nationality or People that has already established their own Regional state or local administration or they come together to form one local government.¹⁷ It is also clear that once a group qualifies the definition of nations, nationalities and peoples, they are automatically entitled to exercise the rights available for nations/nationalities regardless of the number of their members except the right to territorial self-government which was provided in Art.2 (7) of Proc.No.7/1992 and Art.2(5) of Proc.No.11/ 1992. To sum up, in Ethiopia, all Nations and Nationalities and peoples have a right to be represented in the House of the Federation, at least by one representative in the house of Fedration. In addition Article 61 (2) of the federal constitution stipulates that the ethnic groups, for each one million of their population, are entitled to an additional representative in the House of the Federation. Currently large ethnic groups such as the Oromo and Amhara have 20 and 14 representatives respectively whereas smaller ethnic groups such as the Harari and the Silte have just one representative each in the House.⁹ Consequently, the House of the Federation offers an insufficient counterweight to the preponderance of the larger ethnic groups in the first chamber of the parliament. The Ethiopian constitution of 1995 contains no provisions that guarantee representation for different ethnic groups in the federal executive.

Reservation policies in indian federalism

Indeed, India is known to have one of the most aggressive affirmative action policies. The Indian Constitution recognises the three major categories such as scheduled castes (SCs) and scheduled tribes (STs) and other backward classes (OBC) who have historically been excluded from Indian society. In order to correct for past discrimination, these groups now have a reserved share of seats in the state legislative assemblies. Specifically, each state must set aside a share of the number of seats equal to the population share of Scheduled castes and Scheduled tribes. The founding fathers of the Indian constitution desired to secure Justice, Social Economic, and political for all citizens.¹⁸ They realized that inequitable forces

¹⁶ Art 2(7) of proclamation No.7/1992, A proclamation to provide for the Establishment of the national /Regional Self-Governments, Negarit Gazeta, 51st year, No.2, 4th January 1992 and Art.2(5) of proclamation No.11/1992, A proclamation to provide for the Establishment of the National, Regional, and Woreda Councils Members Election Commission, Negarit Gazeta, 51st year, No.6, 8th February 1992.

¹⁷ Ibid

¹⁸ <http://www.sabrang.com/cc/archive/2010/apr10/chapter2.pdf>

embedded in the socio-economic system and also political organizations, hard resulted in deprivation and disadvantages for the poor and weaker sections of the scheduled castes and scheduled tribes due to tradition and a combination of numerous circumstances, were the most deprived, weak and vulnerable among the various sections of the society. The various safeguards and protective measures sought to ensure for them the all rounded development and freedom from the exploitation and social injustice and that they could form part of the mainstream of the society. The preamble of the constitution of India provides for securing to all circumstances, social, economic and political justice and equality of status and opportunity. In Indian Constitution social and economic justice finds its mention in the preamble, runs like a golden thread through Chapter III of fundamental rights and is more explicit laid down in Chapter IV of Directive Principles of State Policy. Commissions for SC and ST, women and children, Labour, Human Right are some of the agencies which can protect the weaker sections, and provide social, economic and political justice for all round development of weaker sections. Special provisions have also been made for the Scheduled Castes and Scheduled Tribes and other backward classes in the Constitution. The Constitution provides for protection and promotion of their social, economic, educational, cultural and political interests to remove the disparities and to bring them on par with other sections of the society. Article 164(1) provides that in the specific States there shall be a Minister in charge of tribal welfare who may, in addition be in charge of welfare of Scheduled Castes, Backward Classes or any other work. Article 330 provides for reservation of seats for Scheduled Castes and the Scheduled Tribes in Lok Sabha. Under Article 243(D), reservation of seats in Village Panchayats, Zilla Parishads has been made for Scheduled Castes and the Scheduled Tribes in proportion to their population at Respective level in direct election.

It has also been provided that the reserved seats for Scheduled Castes and the Scheduled Tribes shall be allotted by rotation to different constituencies in Panchayat at each level. Under Article 243-T, reservation of seats for Scheduled Castes and the Scheduled Tribes in proportion to their population has been made in municipal bodies at each level. Out of these reserved seats Scheduled Castes and the Scheduled Tribes, at least 1/3rd has been reserved for SC/ST women. Article 30 granted the right of minorities to establish and administer educational institutions. It provides that "all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". Clause (1A) of Article 30, which was inserted by the Constitution (44th Amendment) Act 1978, provides that "in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause". Article 30 further provides that "the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on or language". It would be

worthwhile to note that minority educational institutions referred to in clause (1) of article 30 have been kept out of the purview of Article 15(4) of the Constitution which empowers the state to make provisions by law for the advancement of any socially and educationally backward classes of citizens or scheduled castes/scheduled tribes in regard to their admission to educational institutions (including private educational institutions), whether aided or unaided. Articles 29 and 30 have been grouped together under a common head, namely "Cultural and Educational Rights". Together they confer four distinct rights on minorities. These include the right of:

- (a) any section of citizens to conserve its own language, script or culture;
- (b) all religious and linguistic minorities to establish and administer educational institutions of their choice;
- (c) an educational institution against discrimination by state in the matter of state aid (on the ground that it is under the management of a religious or linguistic minority); and
- (d) the citizen against denial of admission to any state maintained or state-aided educational institution.

Article 29, especially clause (1) thereof, is more generally worded whereas Article 30 is focused on the right of Minorities to (i) establish and (ii) administer educational institutions. Notwithstanding the fact that the right of the minority to establish and administer educational institutions would be protected by Article 19(1)(g), the framers of the Constitution incorporated Article 30 in the Constitution with the obvious intention of instilling confidence among minorities against any legislative or executive encroachment on their right to establish and administer educational institutions. In the absence of such an explicit provision, it might have been possible for the state to control or regulate educational institutions, established by religious or linguistic minorities, by law enacted under 19 (6) of the constitution of India. Article 16, which provides equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and prohibits any discrimination on grounds of religion, race, caste, sex, descent, place of birth, residence or any or all of them, has made a very special provision which permits Parliament to make any provision for 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. It is through this provision that reservations in appointments and promotions for Scheduled Castes and the Scheduled Tribes and for OBCs in the matter of recruitment have been made. Article 16(4)(a), this benefits of reservation in the matter of promotion has been extended to Scheduled Castes and the Scheduled Tribes to overrule the judgment of the Supreme Court. Article 16(4)(b) has further made provisions to permit backlog vacancies as a separate category in any year for determining the ceiling of 50% reservation on total number of vacancies that year. In addition, many articles in Parts III, IV, IX, IX-A, Fifth and Sixth Schedule of the Constitution reinforce these arrangements. It is an accepted fact that there is a large proportion of population which lacks land resources and suffers from deprivation of different kinds including unemployment, illiteracy and ill-health. The deprivation is more pronounced in the case of weaker sections such as women, scheduled castes, scheduled tribes, and backward

communities. Constitutional Provisions for Protection of Weaker Sections Constitutional makers provided the different safeguard in the Constitution of India to these depressed classes. Article 38 State to secure a social order for the promotion of welfare of the people: The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and Opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 39 Certain principles of policy to be followed Article by the State the State shall, in particular, direct its policy towards securing- that the citizen, men and women equally, have the right to an adequate means of livelihood; that the ownership and control of the material resource of the community are so distributed as best to sub-serve the common good that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment that there is equal pay for equal work for both men and women.¹⁹ Article 46 under the Directive Principles of State Policy provides that “The State shall promote with special care, the educational and economic interest of weaker sections of the People and particular of Scheduled Castes and Scheduled Tribes and shall protect them Social injustice and all forms of exploitation”.

Article 366(24) defines Scheduled Castes and Article 34 identifies the process through which such groups will be identified. Similar provisions have been made for Scheduled Tribes in Article 366(25) and Article 342 respectively. Social safeguards are contained in Article 17, 23, 24 and 25(2)(b) of the constitution. As per Article 17 of the Constitution of India, Untouchability is abolished and its practice in any form is forbidden. The Protection of Civil Rights Act, 1955 has been enacted with the objective of providing punishment for preaching and practice of untouchability, in the enforcement of any disability arising there from and for matters connected therewith. The provisions of the constitution of India like 23, 24 and 46 from part of economic safeguards for Scheduled Castes and the Scheduled Tribes. Article 46 provides that State shall promote with special Care the educational and economic interests of weaker sections of the people and, in Particular, Scheduled Castes/Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. It is in pursuance of this Article that special programmes for extending educational opportunities to Scheduled Cates and Scheduled Tribes have been taken up. Article 15(4) empowers the State to make special provisions for advancement of any socially and economically backward classes or citizens and for Scheduled Castes and the Scheduled Tribes. This provision has enabled the State to reserve seats for Scheduled Castes and the Scheduled Tribes in educational institutions including

technical, engineering and medical colleges. Article 29(1) provides that “Any section of the citizens residing in the territory of India or any part thereof, having a distinct language, script or culture of its own shall have the right to conserve the same”. Article 350(a) provides for adequate facilities for instructions in the mother tongue at the primary stage of education for children belonging to linguistic minority groups. The above Article has relevance for Scheduled Tribes as some of them have a distinct language/dialect. Article 335 provides that the reservation provisions shall be made taking into consideration efficiency of administration. Article 14(4) enables the State to make special arrangements for the advancement of any socially, and educationally backward class of citizens or for the scheduled castes and scheduled tribes. Similarly, while Article 16(1) stipulates equality of opportunity in matters of public employment, Article 16(4j) enables the State to provide for reservation of appointments of posts in favour of any backward class of citizens, which in its opinion is not adequately represented in the services under the State. To ensure the representation of the backward classes in the central and state legislatures, Article 330 and 332 provide for reservations of seats for the scheduled castes and the scheduled tribes in the House of the People and the State Legislative assemblies respectively. In recognition of the fact that tribes constitute a distinct political and socio-cultural category with a long history of independence and autonomy in their respective territories, Article 244 provides for special arrangements for the administration of the tribal areas in the form of the Fifth and the Sixth Schedule. The Fifth Schedule applies to the administration and control of tribal areas in any state other than the state of Assam, Meghalaya, Mizoram and Tripura and the Sixth Schedule covers the administration of tribal areas in these four north eastern states. The idea underlying this arrangement is that tribal communities should be kept out of the application of general laws, as their simple world view, egalitarian ethos and communitarian lifestyles would be adversely affected when exposed to the more advanced, socially differentiated and hierarchically stratified caste based societies. To ensure that tribes have an effective role in their own administration, the Fifth Schedule provides for the establishment of Tribes Advisory Council (TAC) at the state level, three fourths of which should comprise tribal representatives in the state Legislative Assembly.

The purpose behind this stipulation is that the Council would act as a watchdog and ensure that tribal rights are not infringed by the administration. To realize this objective the Governor on whom the power of administration rests is required to consult the TAC on all the important legislation he promulgates, or whenever he seeks to introduce administrative changes in the area. The Sixth Schedule goes further and provides for the establishment of Autonomous District Councils (ADC) and Regional Councils. Among other things, the District Councils are entrusted with legislative and judicial powers in respect of, the allotment and use of land, management of forests, appointment of chiefs and headmen, village and town administration, and matters pertaining to customary laws and practices. In India, Articles 15 and 16 of the Constitution prohibit the state from making any discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them either generally i.e. every kind

¹⁹ Abhinav
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of state action in relation to citizens (Article 15) or in matters relating to employment or appointment to any office under the state (Article 16). Article 15 permits the state to make “any special provisions” for women, children, “any socially and educationally backward class of citizens” and scheduled castes and scheduled tribes. Article 15 has recently been amended by the Constitution (93rd Amendment) Act 2005 to empower the state to make special provisions, by law, for admission of socially and educationally backward classes of citizens or scheduled castes/tribes to educational institutions, including private educational institutions, whether aided or unaided by the state, other than minority educational institutions. However, the provisions of these two articles do take adequate cognisance of the fact that there had been a wide disparity in the social and educational status of different sections of a largely caste-based, tradition bound society with large-scale poverty and illiteracy. There can be equality only among equals. Equality means relative equality and not absolute equality. Therefore, the Constitution permits positive discrimination in favour of the weak, the disadvantaged and the backward. It admits discrimination with reasons but prohibits discrimination without reason. Discrimination with reasons entails rational classification having nexus with constitutionally permissible objects. Article 16 too has an enabling provision that permits the state for making provisions for the reservation in appointments of 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”. Notably, while Article 15 speaks of “any socially and educationally backward class of citizens” and the scheduled castes and scheduled tribes without qualifying backwardness with social and educational attributes and without a special reference to scheduled castes/scheduled tribes, Article 16 speaks of “any backward class of citizens”. The words ‘class’ and ‘caste’ are not synonymous expressions and do not carry the same meaning. While Articles 15 and 16 empower the state to make special provisions for backward “classes”, they prohibit discrimination only on the ground of ‘caste’ or ‘religion’. In other words, positive discrimination on the ground of caste or religion coupled with other grounds such as social and educational backwardness is constitutionally permissible and therefore, under a given circumstance, it may be possible to treat a caste or religious group as a “class”. Therefore, even though Article 15 does not mention minorities in specific terms, minorities

who are socially and educationally backward are clearly within the ambit of the term “any socially and educationally backward classes” in Article 15 and “any backward class” in Article 16. Indeed the central government and state governments have included sections of religious minorities in the list of Backward Classes and have provided for reservation for them. The Supreme Court, in *Indira Sawhney & Ors vs Union of India*, has held that an entire community can be treated as a ‘class’ based on its social and educational backwardness. The court noted that the government of Karnataka, based on an extensive survey conducted by them, had identified the entire Muslim community inhabiting that state as a backward class and have provided for reservations for them. The expression ‘backward classes’ is religion neutral and not linked with caste and may well include any caste or religious community which as a class suffered from social and educational backwardness. Though economic backwardness is one of the most importantly – or perhaps the single most important – reasons responsible for social and educational backwardness. Article 340 of the Constitution empowered the president to appoint a commission “to investigate the conditions of socially and educationally backward classes. Articles, 29 and 30 deal with cultural and educational rights of minorities. Article 29 provides that: (1) any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own Shall have the right to conserve the same; and (2) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them. Unlike Article 30, the text of Article 29 does not specifically refer to minorities though it is quite obvious that the article is intended to protect and preserve the cultural and linguistic identity of the minorities, however, its scope is not necessarily confined to minorities. The protection of Article 29 is available to “any section of the citizens residing in the territory of India” and this may as well include the majority. However, India is a colourful conglomeration of numerous races, religions, sects, languages, scripts, culture and traditions. The minorities, whether based on religion or Language, are quite understandably keen on preserving and propagating their religious, cultural and linguistic identity and heritage.
