Empowerment is the process of increasing the capacity of individuals or groups to make choices and to transform these choices into desired actions and outcomes. It is multidimensional and refers to the expansion of freedom of choice and action in all spheres i.e., political, economic and social to shape one's life. It also implies total control over resources and decisions.

Eventhough empowerment has many facets, economic empowerment is most important among them, which leads to other facets of empowerment. It is a universal fact that power is often associated with economic resources. Same is the case of women. Employment coupled with control and autonomy over income makes women empowered to a great extent.

The right of every person to earn his or her livelihood is the economic expression of man's freedom. Primary cause of inequality of women is that they get less opportunities to earn their livelihood. For this culture, environment and law are responsible. Unlike other eighteenth century constitutions, the Constitution of India does not merely deal with division of power between the Centre and the States and the limitation upon the States for the protection of basic civil rights. It also envisages an interventionist State which has to actively use its power for bringing about a just social order based on social, political and economic justice. Gender

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justice and gender equality was an important item in the agenda of social engineering envisaged by the Constitution. The reason is that women's physical structure and performance of maternal functions place her to a disadvantageous position in the struggle for subsistence and her physical well being becomes an object of public interest and care in order to preserve the strength and vigour of the race.

Special Provision for Women under the Constitution of India

Article 14 of the Constitution of India has put an obligation on the State that it shall not deny to any person equality before law and equal protection of the law. To make the equality clause more pragmatic, the framers of the Constitution provided in Article 15(1) that State shall not discriminate on grounds of religion, race, caste, sex or place of birth. Similarly the equality of opportunity in matters relating to employment or appointment to any office under the State is assured to all including women under Article 16.

These provisions make it amply clear that men and women will be treated equally. But the farmers, on the other hand, were also conscious of the pitiable condition of women and therefore they made some special provisions for them and empowered the State to make further special provisions for the protection and promotion of the welfare and rights of women under Article 15(3). Thus special care has been taken to provide a socio-economic framework of justice and equality with regard to women.

Basu has raised the question whether Article 15(3) authorizes special provisions for women even where there is no reasonable basis for the classification, having regard to the object of the legislation. Article 15 (3) is not qualified by any condition. Since this is a special provision, it has to prevail, if there is any conflict between it and general provision in Article 14.

It would accordingly follow that any provision for women cannot be challenged on the ground that there is no reasonable classification having regard to the object of the legislation. In other words, any legislation coming under Article 15(3) is shielded from the attack on the ground of contravention of Article (14). If that was not so, there would have been no meaning to insert Article 15(3)⁴.

Article 15(3) enables the State to make special provisions favouring women. It cannot be interpreted in a manner to deny the rights granted to them under Article 15(1). Under Article 15(1) discrimination against women will be unconstitutional. Article 15(1) has to be read as supplementary to Article 14 of the Constitution. Hence it cannot deviate from the principal guarantee⁵.

The phraseology of Articles 15(1) and 15(3) makes it clear that, while there can be no discrimination against women on the basis of sex in view of Article 15(1), special legislation in favour of women is permissible under Article 15(3). Article 15(3) has been interpreted as permitting discrimination in favour of women, but not against women. This kind of discrimination alone is permissible presumably as a means of strengthening the position of women in the social, legal, economic and political spheres to attain equal status with men. Article 15(3) has to be looked at not as an exception to equality, but as a promoter of equality. In this sense Article 15(3) can be considered as a charter for affirmative action in favour of women⁶.

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(3) must be relatable to some feature or disability which is peculiar to women so as to differentiate them from men as a class. It is not possible to exhaust these special features of women.


Thus Articles 15(1) aims to combat discrimination against women, while Article 15(3) facilitates the giving of preferential treatment to women in employment.

A combined reading of Article 14 and Article 15(3) reveals that a classification based on sex, where this is a relevant criterion can be made by law which is in favour of women, thus permitting affirmative action in favour of women.

Article 15(3) cannot be interpreted to authorise discrimination against women because of two reasons:

(1) Article 15(3) does not use the expression discrimination against, but use a different expression ‘special provision for women’ (2) The word ‘for’ means ‘in favour’. Thus, the intention is to protect the interests of women and children, which according to the framers of the Constitution requires protection.

**Preferential Treatment for Women in Employment under Article 15(3)**

To give effect to the above explained constitutional provisions, several legislations have been passed and some of them are yet to be implemented in their true spirit. The aspect of employment also was influenced by the constitutional mandate of special provision for women. Various provisions were made by the State giving special treatment to women employees. It took the form of reserving posts for women, giving special benefits to women, providing preferential treatment in promotions etc.

Preferential treatment policies according to Marc Galanter, entail systemic departure from norms of formal equality such as merit, even-handedness and indifference which are justified in various ways:

(1) Preferential treatment may be viewed as needed assurance of personal fairness, a guarantee against the persistence of discrimination in subtle and indirect forms. (2) Such policies are justified in terms of beneficial
results that they will presumably promote such as integration, use of neglected talent, more equitable distribution of wealth etc. With these two—the anti-discrimination and general welfare theme—are entwined a notion of historical restitution or reparation to offset the systematic and cumulative deprivations suffered by the group in the past⁷.

Preferential treatment in public employment means the giving of special treatment to certain persons or classes of persons over other persons or classes of persons in employing them in public services. This treatment is not only desirable, but essential in the interest of the society as a whole because the society cannot march forward in a proper manner and at the desired speed, if a section of its people are so weak and handicapped because of various reasons that they are unable to move with it⁸. This can be given in various forms and from the very initial process of entering into employment and also later.

Many of these provisions were challenged and thus, the judiciary has also come forward to play an active role in giving a concrete content to this aspect of socio-economic justice to women workforce.

Judicial Attitude – A Critical Analysis

The judicial attitude regarding special treatment given to working women is of utmost importance. The success and efficiency of even the most favourable provision depends upon the judicial interpretation. Through interpretation judges can give life and content even to a deal law. By giving restrictive interpretation they can inhibit the growth of favourable provisions.

The real efficiency of the constitutional provisions lie in its life and dynamic interpretation in accordance with the facts and circumstances of

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individual cases and precedents. So an analysis of judicial attitude as to this aspect is the subject matter of appraisal.

In the beginning the attitude of the judiciary was not favourable to women as evident from *Flora Hilda Wilson v. State of Kerala*. In this case the petitioner, who was a lecturer in philosophy in the women’s college, Trivandrum, was appointed by the State Government as acting junior professor but was later on reverted to her former post and a male lecturer was appointed in her place. It was contended that the appointment of the male lecturer is discriminatory and is hit by Article 14 of the Constitution. It was argued that when Travancore University was making appointments it appointed only women in the teaching staff of women’s college, but when the petitioner’s chance arose, a male was appointed.

The Court while rejecting this argument observed that the practice of appointing women in women’s college was only for a time when the University was making appointments. But when the State Government took over the power of appointment it ruled that men should not be so discriminated against in this manner. But at the same time, the Court also directed the Government to reconsider the matter.

Thus in this case what the Court did is endorsal of its approval to the supersession of a women candidate by a senior male and merely directed reconsideration of the matter by the Government. The Court in fact took a retroactive approach in this case.

This decision was overruled in *State of Kerala v. K. Kunhipacky and Another*. In this case Shri. Kunhipacky challenged the order of the Government to appoint Smt. Saradamma, who was junior to him as Professor by adopting the practice of reserving vacancies in the Women’s college. It was argued that Government had already abandoned the old...
practice of reserving the vacancies in the Women’s college. The
Government contended that the convention of appointing women only in
Women’s college unless a qualified woman was not available, was
followed for some time and admitted that it has been abandoned\(^\text{12}\). The
Court observed that the convention of preferring women to men as
Lecturers in Government Women’s College is not unreasonable and the
decision in \textit{Flora Hilda Wilson v. State of Kerala}\(^\text{13}\) is not an accepted
precedent. But finally the Court discharged the order under appeal and
directed the Government to consider the representations of Shri.
Kunhipacky, after giving an opportunity to Smt. Saradamma also to
present her case and decide afresh either in confirmation or modification
of the earlier order.

In this case it can be seen that no reference has been made to Article
15(3). The Court could have upheld the order by relying on Article 15(3).
But the Court relied on technical niceties and passed such an order. The
order in fact left the matter to be decided afresh. In both the above
mentioned cases, if the Court had resorted to Article 15(3), the provisions
could have been upheld.

In \textit{Shamsher Singh v. State of Punjab and Others}\(^\text{14}\) the validity of
a special allowance for women in a wing of educational service was
challenged on the ground that their male counterparts were not given

\(^{12}\) \textit{Id.} at p. 109. The single Judge had held that “the promotion of the 2\textsuperscript{nd}
respondent (Smt. Saradamma) should not be disturbed” and declared Shri.
Kunhipacky “to be holding the post of Second Grade Professor in History
as and from 4.4.1961, the date on which he filed the writ petition in this
Court” and directed payment to him of salary and other emoluments of a
Professor, with increments from the aforesaid date. But the Appellate Court
held that the above order cannot be sustained as he has not been appointed
as Professor by the Government.

\(^{13}\) \textit{Supra} n. 9.

\(^{14}\) A.I.R. 1970 P. & H. 372 (R.S. Sarkaria, J., for himself and S.C. Mittal, J., R.S.
Narula, J., dissenting).
that benefit although both performed identical duties and were part of the same service\textsuperscript{15}.

The respondents were of the view that women members of the service were granted more pay on administrative grounds and such a grant did not amount to discrimination only on the ground of sex within the contemplation of Article 16(2). Even if it did, such a special provision could be justifiable in view of Article 15(3). The question that arose for determination before the Full Bench was:

(i) Whether the provisions of Article 15(3) could be invoked for construing and determining the scope of Article 16(2). (ii) And if so, to what extent and in what classes of cases\textsuperscript{16}.

The question was answered in the affirmative by Sarkaria, J., who spoke for the majority\textsuperscript{17}.

\textsuperscript{15} Id. at 373. Brief facts are as follows: Prior to 12\textsuperscript{th} May 1963 in the United State of Punjab there were two branches of Punjab Educational Service Non Gazetted (Class II) School Cadre. One was exclusively manned by men and the other by women. The members of both branches were either employed on teaching work or on inspection work. In 1961, the Government granted special pay equivalent to 25% of basic pay, but not exceeding Rs. 50 per month to the women's branch who were posted as Assistant District Inspectresses of Schools. After 12\textsuperscript{th} May 1963, the educational department in the field of school cum inspection was re-organised. The Assistant District Inspectors and Assistant District Inspectresses were designated as Block Educational Officers and had to perform identical duties. Their scales and responsibilities were same and the posts were interchangeable between male and female. The petitioner who has a male Block Educational Officer approached the High Court by Article 226 petition alleging that this amounted to discrimination solely on the ground of sex and as such, was violative of Article 16(2).


\textsuperscript{17} \textit{Supra} n. 14 at p. 375. The Court quoted the following observation by Chagla C.J., in \textit{Dattatreya v. State of Bombay}, \textit{ibid}, with approval.

\textit{(f.n. contd. on next page)}
It was observed that:\supc{18}: “If Articles 15(1) and 15(2) cover the entire field of State discrimination, including the field of public employment, specifically dealt with in Article 15, then it will not be wrong to say that, in a way, it overlaps and supplements what is said in Article 16. It follows as a necessary corollary therefrom that the scope and the content of the exception in Article 15(3) will extend to the entire field of state discrimination, including that of public employment. Thus, construed, clause (3) of Article 15 is to be deemed as a special provision in the nature of proviso qualifying the general guarantees contained in Articles 14, 15(1), 15(2), 16(1) and 16(2) \ldots When in clause (3) of Article 15, which covers the entire field of discrimination, Article 15(3) is obviously a proviso to Article 15(1) and proper effect must be given to proviso. It is true that in construing a proviso, one must not nullify the section itself. A proviso merely carves out something from the section itself, but it does not and cannot destroy the whole section. The proper way to construe Article 15(3) is that whereas under Article 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Article 15(3), discrimination in of favour of women is permissible and when the State does discriminate in favour of women it does not offend Article 15(1). Therefore, as a result of Article 15(1) and 15(3), the State may discriminate in favour of women against men but it may not discriminate in favour of men against women.

\supc{18} Supra n. 14 at p. 376. The Court relied upon the rule of harmonious construction for such an interpretation. A Constitution is an organic whole and has to be read as a whole. It does not mean one thing at one time and another subsequently. It is therefore not only proper, but imperative to construct one provision in the light of other provisions. The Court cited from Maxwell’s Interpretation of Statutes that the author must be supposed to be consistent with himself and if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place unless it appears that he has changed it. It cannot be assumed that Parliament has given with one hand what it has taken away with the other. Similarly in Moss. v. Elphick (1910) 1 KB 465 at 468 it was laid down that if there are two sections dealing with the same subject matter, one section being unqualified and the other containing a qualification, effect must be given to section containing qualification.
the framers of the Constitution clearly stated that special provisions may be made in favour of women (even if they amount to discrimination in their favour against men) it would have been needless tautology to repeat the same clause in Article 16, which is only an instance of the same right which has been guaranteed in general and wider terms by Article 15(1)19”.

It was observed that only such special provisions could be made in favour of women which were reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2). The Court in this case made clear that what is true with regard to Articles 15(4) and 16(4) is equally true in regard to Article 15(3)20.

R.S. Narula, J., gave a dissenting note21. According to the learned Judge22, Article 15(3) could not be invoked for restricting the scope of Article 16(2). If it was the intention of the framers, then a clause similar to Article 15(3) should have been repeated in Article 16 also. The learned Judge stressed that the words “nothing in this Article” in Article 15(3) were clear and unambiguous and delimit the scope of that clause to anything said in that Article only. It could not be twisted or strained to mean “nothing in this Constitution” and straining the express language in Article 15(3) could not be justified. The learned Judge relied on Golaknath v. State of Punjab23, in which the majority had held that the doctrine of necessary implication could not have been invoked, if there was an express provision or unless but for such implication, the Article will become otiose or

19. Ibid. The Court made clear the meaning of the word “for” in Article 15(3) relying on various dictionaries.
20. Ibid.
21. Id. at pp. 377 – 379.
22. Id. at p. 377.
nugatory. According to Narula, J., the only exceptions to absolute guarantee in Article 16(2) are the provisions in Articles 16(3), (4) and (5) and no other.24

The majority opinion appears to be right in the matter that Article 15(3) can be invoked for construing and determining the scope and extent of Article 16(2). Article 15 is wider than Article 16 and the subject matter of public employment in Article 16 is only one of the instances covered by Article 15. The phraseology in Article 15(3) is ‘special provision’ which includes various aspects and preferential treatment in employment also come within its purview. The majority in this case adopted a formal approach to equality and a correctionist approach as to gender. Pertaining to the nature of Article 15(3) it took the exception approach.25

It is relevant to note that the view Article 15(3) is an exception or proviso to Article 15(1) has changed with the decision in N.M. Thomas v. State of Kerala26 and the present view is that it is only an explanation.

25. Brenda Cossman and Ratna Kapur, “On Women, Equality and the Constitution: Through The Looking Glass of Feminism” in Nivedita Menon (Ed.) Gender and Politics in India, pp. 197-198. See also, K.C. Dwivedi, Right to Equality and Supreme Court (1990), p. 11. In cases dealing with equality aspect Courts can either take a formal approach or substantive approach. The understanding of equality that has dominated western thought since the time of Aristotle has been one of formal equality. Equality has been interpreted as ‘treating likes alike’, its constitutional expression in American and subsequently Indian equal protection doctrine, as the requirement that those who are similarly situated must be treated similarly. Here, sameness is the entitling criteria for equality. Corrective approach is one of three approaches of the Indian Judiciary as to gender, the other two being protectionist and sameness approaches. According to corrective approach women are seen to require special treatment as a result of past discrimination. Exception approach and holistic approach are the two approaches with regard to the relationship of Article 15(1) and (2) with clauses (3) and (4). In the ‘exception approach’ Articles 15(3) and 15(4) are interpreted as exceptions to the general equality guarantees.
In the following analysis it becomes clear that the principle laid down in this case has been followed by the judges in subsequent cases dealing with the same subject matter. In fact, it can be seen that the whole edifice of judicial attitude on preferential treatment to women workforce is built upon this landmark judgment.

In *Walter Alfred Baid v. Union of India and Others* the question which came up before the single judge of Delhi High Court was that whether the provisions in the recruitment rules for the post of Senior Nursing Tutor in the School of Nursing, Irwin Hospital, New Delhi which make the post a female reserve are constitutionally valid. The respondents contended that the School of Nursing was a predominantly female institution and having regard to the duties of a senior tutor, a female sister tutor would be more suitable for the post of a Senior Tutor and the rule regarding eligibility was not based on sex alone, but on the suitability of a female candidate and the corresponding unsuitability of a male candidate for the post.

The Court while striking down the rule as violative of Article 16(2) incorporated a concept of absolute equality between sexes in the matter of employment which is underscored by the absence of any saving in the

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28. *Id.* at p. 303. The petitioner was ‘A’ grade male nurse appointed as ‘sister tutor’ in the School of Nursing, Irwin Hospital, New Delhi. Annexure B sets out the duties and responsibilities of that post. The duties include “periodical visits to student rooms to make sure that they practice personal hygiene”. Later when the post of ‘Senior Tutor’ was sanctioned, due to certain contingencies, petitioner had to carry out the work of senior tutor for two years. The petitioner’s plea for promotion to the post of senior tutor was turned down on the ground that in terms of the recruitment rules for the above post, male sister tutors were ineligible for the post. According to the Recruitment Rules for the post, the post is designated as “Senior Tutor (female)”. The petitioners challenged the ineligibility of male candidates as being unconstitutional on the ground that being based on sex alone, it militates against constitutional prohibition contained in Article 16(2).
29. *Id.* at p. 306.
other clauses of the Article in relation to sex. Therefore, the considerations which have their genesis in sex and arise out of it would not save discrimination. What could save such a discrimination is any ground or reason independently of the sex, such as socio-economic conditions, marital status and other disqualifying conditions such as age, background, health, academic accomplishments etc. If every man was ineligible for a particular post in an exclusively female educational institution, it would be a clear case of discrimination on the ground of sex alone, however justified socially, administratively or otherwise such a requirement may be. Such a discrimination having its genesis in sex would be hit by Article 16(2).

The Court, thereby adopted a formal approach to equality according to which women and men are to be treated the same for the purpose of employment. It is relevant to note that this approach does not allow any difference in treatment on the basis of sex, including a difference in treatment which may be of advantage to women. With regard to the relevance of gender difference, the Court further stated:

"Although there are patent physical disparities between the two sexes such differences could not justify differential treatment without violating Article 16(2).... It is too late therefore, for anyone to suggest that there is an area of human activity for which women as a class are ineligible or any work for which all women are unfit".

While recognizing certain physical differences as natural, the Court adopted a sameness approach to gender difference, that is for the purpose of the law, any such gender difference should be irrelevant.

30. Supra n. 25.
31. Supra n. 27 at p. 306.
32. Brenda Cossman and Ratna Kapur, supra n. 25 at p. 217. According to sameness approach, women are construed as same as men and hence they should be treated alike in law. According to this approach, it is sufficient that men and women are treated formally equal. This view corresponds to the view of classical liberal feminists. According to them, law should be (f.n. contd. on next page)
In concluding that the classification in question was based on sex, the Court rejected the distinction “between sex and what it implied.” This rejection of the narrow interpretation of ‘only on the ground of sex’ opened the possibility of recognizing the extent to which gender differences were socially constructed and bringing these social dimensions of difference within the folds of the equality guarantees of the Constitution. In the context of a substantive model of equality this approach would allow the courts gender blind and there should be no special restrictions or special assistance on the basis of sex. In this approach, any recognition of gender difference in the past has simply been a justification for discriminating against women. According to them, special treatment has historically been a double-edged sword for women, that is under the guise of protection, it has been used to discriminate against women.

33. Supra n. 27 at p. 308. According to the Court it was difficult to accept the position that a discrimination based on sex was nevertheless not a discrimination based on “sex alone” because it was based on “other considerations” even though these other considerations have their genesis in the sex itself. Sex and what it implies cannot be severed. Considerations which have their genesis in sex and arise out of it would not be saved by such a discrimination on any ground or reason independently of sex such as socio-economic conditions such as age, background, health, academic accomplishments etc. The Court made a reference to Raghubans Saudagar Singh v. State of Punjab A.I.R. 1972 P. & H. 117 but did not agree with the decision or reasons by the High Court.

34. Brenda Cossman and Ratna Kapur, supra n. 25 at p. 198. Substantive model of equality begins with the recognition that equality sometimes requires that individuals be treated differently. The focus of substantive equality approach is not simply on equal treatment under the law, but rather on the actual impact of the law. It takes into account inequalities of social, economic and educational background of the people and seeks the elimination of existing inequalities by positive measures. The focus of the analysis is not with sameness or difference, but with actual disadvantage. Substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, cultural and political participation in the society. See also Kathy Lahey, “Feminist Theories of (In) Equality” in K. Mohoney and S. Martin (Eds.), Equality and Judicial Neutrality (1967), p. 71. It is (f.n. contd. on next page)
to address the broad range of socially constructed inequalities that women suffer from economic dependency to educational disadvantage. But in the instant case, this understanding of gender difference was coupled with a sameness approach, whereby any difference, whether natural or otherwise, ought to be irrelevant for the purpose of the law. As a result of the formal approach to equality and sameness approach to gender difference, the Court found that gender specific recruitment rule violated Article 16(2). The effect of this approach was to preclude any analysis for the purpose of the differential treatment, and thus, any consideration of whether the differential treatment was intended for the advantage or disadvantage of women. Further the examples used by the Court to distinguish between those factors implied by sex and those factors which were not, are also problematic. Socio-economic conditions, marital status, health and education are all factors that may be relevant to sex, if measured in terms of the substantive equality of women, and in respect of which a corrective approach to gender may thus be required. The decision is rooted firmly within a formal model of equality and the result of the case was to strike down a recruitment rule that had been advantageous for women. The Court seems to have taken the view that exception proves the rule, but cannot be said to abolish it.

In *Savitri v. K.K. Bose*, the Allahabad High Court had already made it clear that what Article 15(3) contemplated was that the making of special provision must be for benefiting generally women as a class. It was not possible to read the word “provision” as including a decision argued by the author that courts must adopt an approach which considers the effect of the rule or practice being challenged, to determine whether it contributes to the actual inequality of women and whether changing the rule will actually produce an improvement in the material conditions of the women affected.

given in a particular case or matter as it can lead to arbitrary and anomalous results. According to the Court the word “provision” included within its meaning a legislative enactment, a rule, a regulation and a general order and it was in this sense it has been used in Article 15(3)³⁸.

In B.R. Acharya v. State of Gujarat³⁹ a single Judge of the Gujarat High Court considered scope of the provision making only lady officers in common cadre entitled to promotion to higher post of lady superintendents of institutes for destitute women, unmarried mothers etc. and declined to set aside or quash the same on the allegation of discrimination on the ground of sex. The provision was held to be constitutional. Without referring to various judgements of the Apex Court and High Courts, it was held:

“...The institutions which are headed by Lady Superintendents are exclusively for women and it is for the Government to decide, as a matter of policy, whether or not such institutions should be headed only by lady officers. Merely at some stage there is a common cadre in which the officers of both sexes are appointed, does not mean that all posts in the higher cadre must also be filled in by persons belonging to both the sexes. Having regard to the nature of duties to be performed, it is open to the State Government to decide that certain posts are exclusively meant for lady officers. The Government cannot be compelled to appoint male officers to those posts, if it does not consider advisable to do so. If a special provision is made for women, the petitioners cannot make grievance that they have been discriminated against. In view of Article 15(3) the probation officers in the common cadre cannot contend that they should be considered to be eligible for promotion to the posts of lady superintendent⁴⁰.
This approach of the Court corresponds to substantive equality⁴¹. The fact which sought the attention of the Court was the actual beneficial impact of the impugned provision. It has taken up the rational view that a post can be reserved for women, depending upon the duties and responsibilities attached to that post. The Court has in fact pointed out that whenever the Government make a post women-reserve, it should be able to give a reason which has a rational nexus with the object sought to be achieved by such reservation⁴².

In Toguru Sudhakara Reddy v. Govt. of A.P.⁴³, the proviso to Section 31(1)(a)⁴⁴ of the Andhra Pradesh Co-operative Societies Act, 1964 which provided for nomination of two women members to certain class of societies by the Registrar was challenged as violative of Article 14, Rule 22(C) and 22-A(3)(a) which provided for the same were also challenged on similar grounds. It was also contended before the High Court and the Supreme Court that by nominating two women members to the committee of societies under the newly added proviso, the total reservation would go beyond 50% which is not permitted in view of the law laid down in Balaji v. State of Mysore⁴⁵.

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⁴¹ Supra n. p. 34.
⁴² M.C. Sharma v. The Punjab University, A.I.R. 1997 P. & H. 87, 105. The Court observed that in B.R. Acharya's case the scope of Article 15 of the Constitution was considered in isolation and without reference to the settled proposition of law and hence this decision cannot be held to be a good law.
⁴³ A.I.R. 1994 S.C. 544. (Kuldip Singh and N.M. Kasliwal, JJ.)
⁴⁴ Proviso to Sec 31(1) (a) is as follows:
“Provided also that women members shall be nominated by the Registrar to the Committee of such class of societies and in such manner as may be prescribed from among the women members of the general body of such societies. Such nominated members, shall, notwithstanding anything contained in this Act have the right to vote and otherwise to take part in the proceedings of the meetings of the Committee”.
The High Court and later the Supreme Court rejected the main contention of the petitioners – appellants on the reasoning that Article 15(3) permitted the making of special provisions for women. The Court went into the scheme of the Act in detail and came to the conclusion that impugned provisions were not arbitrary. It was held that the ratio in Balaji's case was only confined to the reservations under Articles 15(4) and 16(4) of the Constitution.

The Court in this case adopted a substantive approach to equality and resorted to beneficial interpretation of the impugned provisions. It also adopted a corrective approach to gender. The attitude of both the High Court and the Supreme Court in this case is, in fact, very apt. The decision gave life to the letters in Article 15(3). If the provision had not been upheld then it would have amounted to making the provision in Article 15(3) nugatory.

In Government of Andhra Pradesh v. P.B. Vijayakumar and Another, Rule 22-A(2) in the Andhra Pradesh State and Subordinate Service Rules which provided for reservation for women was challenged...

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46. Supra n. 43 at 545 According to the State Government even though there were women members in the societies, they were not coming forward to contest elections to the societies which invariably involve serious campaigning on the basis of factional and political consideration. Appointment of the women to the managing committee was considered as necessary to give proper representation to women to ensure that the benefit which accrue to the members of the co-operative societies were not confined to the male members to the exclusion of women members.

47. Supra n. 45.


49. Id. at p. 1650. As women are not getting due share of public employment, the Government of Andhra Pradesh introduced Rule 22(A) in Andhra Pradesh State and Subordinate Service Rules. Rule 22-A reads as follows:

"Notwithstanding anything contained in these rules or special or Ad-hoc rules-

(f.n. contd. on next page)
as unconstitutional as it was violative of Articles 14, 16(2) and 16(4)\(^{50}\) and had seriously affected all male unemployed persons in the State of Andhra Pradesh.

The Court upheld the validity of the impugned rule after an elaborate discussion and interpretation of Articles 14, 15 and 16. The Court adopted a reasoning similar to that in *Shamsher Singh v. State of Punjab*\(^ {51}\).

The Court observed:

"Articles 14, 15 and 16 are interrelated. Article 15 deals with every kind of State action in relation to the citizens... Every sphere of

\begin{enumerate}
\item[a.] In the matter of direct recruitment to the posts for which women are better suited than men, preference shall be given to women, (G.O. Ms. No. 472. G.A. dated 11.10.1985):

Provided that such absolute preference to women shall not result in total exclusion of men in any category of posts;

\item[b.] In the matter of direct recruitment to posts for which women and men are equally suited, other things being equal, preference shall be given to women and they shall be selected to an extent of atleast 30% of the posts in each category of O.C., B.C., & S.C., and S.T. quota:

\item[c.] In the matter of direct recruitment to posts which are reserved exclusively for being filled up by women, they shall be filled up by women only”.

A single Judge of Andhra Pradesh High Court upheld Rule 22, but the division bench struck down the last portion of Rule 22-A (2) which reads as “and they shall be selected to an extent of 30% of the posts in each category of O.C., B.C., S.C., & S.T quota”. So the State filed appeal before the Supreme Court.

\(^{50}\) *Id.* at p. 1651. According to the respondents when Article 16(2) was read with Article 16(4) it was clear that reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State were not adequately represented in the services under the State was expressly permitted. But there was no such express provision in relation to reservation of appointments or posts in favour of women in Article 16. So reservation in favour of women in relation to appointments or posts under the State would amount to discrimination on the ground of sex in public employment or appointment to posts under the State and would violate Article 16(2).

\(^{51}\) *Supra* n. 14.
activity of the State is controlled by Article 15(1). There is, therefore, no reason to exclude from the ambit of Art. 15(1) employment under the State. At the same time Article 15(3) permits special provisions for women. Both Articles 15(1) and (3) go together... in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 the former being a more general provision and the latter a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State.52

The Court also briefly narrated the reason for the insertion of Article 15(3) as follows:

"The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16."53

52. Supra n. 48 at p. 1651.
53. Ibid.
The Court also analysed the phraseology ‘special provision’ in both Articles 15(3) and 15(4) as follows to bring reservation for women under the purview of Article 15(3).

“This “special provision” which the State may make to improve women’s participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4). Under Article 15(4) reservations are permissible for the advancement of any backward class or of scheduled castes or scheduled tribes.... Since Article 15(3) contains an identical special provision for women, it would also include the power to make reservations for women”54.

The Court relied on Indra Sawhney v. Union of India55 and observed that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4) covering within it several kinds of positive actions and programmes in addition to reservation. The Court added a word of caution by reiterating M.R. Balaji v. State of Mysore56 to the effect that a special provision contemplated in Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits and should not exceed 50 percentage. It was observed that the same applied to Article 15(3) which is worded similarly. The Court concluded that equality is one of the major corner stones of Indian democracy and as it has not been achieved, it becomes necessary that Article 15(3) be read harmoniously with Article 16. According to the

54. Id. at pp. 1651 – 1652.
56. Supra n. 45.
Court, it was necessary to achieve the purpose for which these Articles have been framed.57

It is submitted that in the light of the provisions of the Constitution, if Rule 22-A(2) is viewed, it is apparent that the rule makes certain special provisions for women as contemplated under Article 15(3). Rule 22-A(2) provides for giving preference to women to the extent of 30 percentage of the posts, other things being equal. This is a rule, for a very limited affirmative action. It operates, first of all, in respect of direct posts for which men and women are equally suited. Secondly, it operates only when both men and women candidates are equally meritorious. Rule 22-A(2) prescribes a minimum preference of 30 percentage clearly contemplating that for the remaining posts also, if women candidates are available and can be selected on the basis of other criteria of selection among equals which are applied to the remaining candidates, they can also be selected. The 30 percent rule is not inflexible and in a situation where sufficient number of women are not available, preference that may be given to them could be less than 30 percent.

The Court taking an activist approach concluded that Rule 22-A(2) was within the ambit of Article 15(3) and not violative of Articles 16(2) or 16(4) which has to be read harmoniously with Articles 15(1) and 15(3). Both reservation and affirmative action in connection with employment or posts under the State were permissible under Article 15(3). Both Articles 15 and 16 were designed for the purpose of creating an egalitarian society.

It is submitted that the version that under Article 15(3) job opportunities for women cannot be created, would be to cut at the very root of the underlying inspiration behind this Article. From the discussion of the Court it is crystal clear that making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This decision appears to be based on a sound legal reasoning.

57. Supra n. 48 at p. 1652.
In this case Court adopted substantive approach to equality, and corrective approach to gender which is in fact the most apt. It can be also deciphered that regarding interpretation of Article 15(3) it took a holistic approach. If these approaches had not been adopted, the effect would have been to strike down a provision which is beneficial for women.

In *M.C. Sharma v. The Punjab University* the constitutional validity of Regulation 5 of Chapter VII (ii) of the Punjab University Calendar Volume II which provides for appointment of only lady Principal in Women's College was challenged as violative of Articles 14, 15 and 16. The majority held that the rule was unconstitutional and violative of Articles 14, 15 and 16 where as the minority upheld the constitutional validity of the same. The majority after a detailed analysis of various case laws observed as follows:

"The State has the power to make a provision for women and children under Article 15(3) of the Constitution which is to be read as a proviso to Article 15(1) of the Constitution. Discrimination on the grounds of sex is permissible if it is found that women were not equal with men and are lagging behind the men in the field where the reservation is sought to be made. For the purposes of providing

58. *Supra* n. 34.
59. Brenda Cossman and Ratna Kapur, *supra* n. 25 at p. 205. In the holistic approach Article 15 is seen as a whole and therefore Articles 15(3) and (4) are used to interpret the equality provisions more generally.
60. A.I.R. 1997 P. & H. 87. (Majority judgement was given by R.P. Sethi, Act C.J., N.K. Sodhi and K.S. Kumaran, JJ., while minority judgement was given by G.S. Singh and J.H.B. Chalapathi, JJ.).
61. *Ibid*. The regulation is as follows:

The Principal of women's college shall be a lady who shall possess at least Master's degree in 1st or 2nd class or an equivalent degree with experience of teaching in a college. The rule shall not apply to women's college whose men or women Principals have already been approved, provided that on their retirement a qualified lady principal shall be appointed.
62. *Id.* at pp. 97-100.
avenues in the matters of appointment in service such a discrimination cannot be held to be between two equals but is a discrimination between unequals which is not hit even by Articles 14 and 15(1) of the Constitution. What is prohibited under the Constitution is that discrimination cannot be made among equals and that equals are required to be treated equally. The special provision contemplated by Article 15(3) is aimed to protect the interest of women and children which according to the framers of the Constitution were required to be protected. However, as and when any reservation is made in favour of a woman the same is to be tested on the ground of reasonableness. Such reasonableness, once determined by the executive, cannot be substituted by the Court. The State is, however, required to prima facie justify the grounds for making reservation and the extent to which such reservation is sought to be made. Reservations under Article 15(3) is the basis which is related to biological grounds of sex.”

The majority after analyzing the functions of the Principal came to the conclusion that none of the functions enumerated justified the exclusion

63. Id. at pp. 100 – 101.

64. Id. at p. 105. Chapter XIX of Punjab University Calendar enumerates powers and functions of the Principal as follows:

“The Principal shall have full powers and discretion, consistent with the rules frames by the University in all matters pertaining to the internal administration of the college viz.,

i. Distribution of work amongst the staff;

ii. Admission, promotion and detention of students;

iii. Grant of concessions and award of stipend to deserving students;

iv. Imposition of fines and remission thereof;

v. Disciplinary action and imposition of penalties;

vi. Expenditure out of amalgamated fund;

vii. Appointment and dismissal of peons, laboratory assistants, bearers etc.

(f.n. contd. on next page)
of a male for consideration to be appointed as Principal. None of the functions postulate its performance by a female Principal only as would be in the case of a warden of a hostel or a doctor in a college dealing with women. Keeping in view the nature of the duties which are required to be performed by the Principal in relation to the girl students, it could not be deduced that such students could be subjected to any sort of exploitation. For dealing with the students, the Head of the Department has equal and similar powers as are conferred upon the Principal, which if misused might result in disastrous consequences. Most of the powers and functions exercisable by the Principal related to the staff and administration of the institution. It was not even suggested that a member of the staff could be subjected to sexual lust or exploitation if male was appointed as Principal in a Women's college ... If the petitioner could be appointed and allowed to continue as a teacher and later as Head of the Department in a college for girls, he could not be deprived of his right to promotion as Principal merely on the ground of sex particularly when such a discrimination has not been justified. The offending provision, in so far as it provide that Principal of a Women's College should be a lady is ultra vires of the provisions of the Constitution as guaranteed by Articles 14, 15 and 16. The respondents have not been in a position to justify the discrimination made in favour of a woman on the ground of sex alone65.

The minority upheld the constitutionality of the rule. The learned Judges were of the opinion that law laid down by full bench in Shamsher Singh v. State of Punjab66 and the observation made by the Division

viii. Grant of leave to the staff;
ix. Organisation of extramural activities;
x. To meet an emergency, temporary appointment of a member of the teaching staff and other staff upto a period of six months against a sanctioned post.
xi. Writing off a loss of at least three library books per thousand at the time of annual taking."

65. Id. at p. 106.
Bench in *Mrs. Raghubans Saudagar Singh's Case* unequivocally recognized the same principle which has been laid down by Bombay High Court in *Dattatraya Motiram More v. State of Bombay* and which has been followed by a full bench of Supreme Court that Article 15(3) is wide enough to cover the field of employment as well. So the impugned rule is not violative of Articles 14, 15 and 16. Formal approach as to equality and sameness approach as to gender can be traced from this retroactive judgment of the Court.

Later this matter came up before Supreme Court as appeal in *Vijay Lakshmi v. Punjab University*. The Supreme Court upheld the minority view. The Court referred to the established propositions of law interpreting Articles 14 to 16 and observed as follows:

"Article 14 does not bar rational classification; Reasonable discrimination between female and male for an object sought to be achieved is permissible. Question of unequal treatment does not arise if there are different sets of circumstances. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reasons and prohibits discrimination without reasons. Discrimination with reasons means rational classification for differential treatment having nexus with constitutionally permissible objects. It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. The equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according

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67. Supra n. 33.
68. A.I.R. 1953 Bom. 311.
69. Supra n. 60 at p. 114.
70. A.I.R. 2003 S.C. 3331. (M.B. Shah, J., for himself and Dr. A.R. Lakshmanan, J.)
to their inequality is not permitted but required, as stated in *St. Stephen’s College v. University of Delhi*. Sex is a sound basis for classification. Article 15(3) categorically empowers the State to make special provision for women and children. Articles 14, 15 and 16 are to be read conjointly’’.

The Court further observed that in the light of the aforesaid principles, on the concept of equality enshrined in the Constitution, it could be stated that there could be classification between male and female for certain posts. Such classification could not be said to be arbitrary or unjustified. If separate colleges or schools for girls are justifiable, rules providing appointment of lady Principal or teacher would also be justified. The object sought to be achieved was a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the students to be taught. One might believe in absolute freedom, one might not believe in such freedom, but in such case when a policy decision is taken by the State and rules are framed accordingly, it could not be termed to be arbitrary or unjustified. Hence, it would be difficult to hold that rules empowering the authority to were appoint only a lady doctor or a woman Superintendent violative of Articles 14 or 16 of the Constitution.

The Court resorted to the concept of policy decision and held that it was not for the Court to sit in appeal against the policy decision taken by the State Government. The Court referring to *State of Jammu and Kashmir v. Triloki Nath Khosa* took the view that classification

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72. Supra n. 70 at p. 3333.

73. Ibid.


(f.n. contd. on next page)
was primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service and if from the stand point of the authority making it, classification appears to rest on a reasonable basis, it has to be upheld.\(^7\)

The Court finally upheld the impugned rule as the classification was reasonable and had a reasonable nexus with the object sought to be achieved. The State Government was empowered to make such special provisions under Article 15(3) of the Constitution and this power was not restricted by Article 16.

Thus, in this case also the Court relied on the reasoning that Article 15(3) is wide enough to cover the entire range of State activity including employment under the State. The Court also viewed the reservation as permissive classification not violating the principle of equality under Article 14. The reasoning of the Court is indeed very logical and is not a castle without a proper foundation. The Court was right in reversing the decision of the High Court which otherwise would have been a precedent to strike down legal provisions giving preferential treatment to women. In short, substantive approach to equality, a combined correctionist and protectionist approach to gender and holistic approach as to the nature of Art. 15(3) adopted by the Court contributed in this case to meet the ends of justice.

In *Union of India v. K.P. Prabhakaran*\(^7\) the issue before the Supreme Court was the constitutional validity of the Railway Administration

\[\text{"But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment. Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially within the same class".}\]

\(^7\) Supra n. 70 at p. 3334.

\(^7\) (1997) 11 S.C.C. 638. The case came up before Agarwal and Faizan Uddin, JJ., as appeal from the Madras High Court decision that such reservation (f.n. contd. on next page)
circular reserving the posts of Enquiry-cum Reservation clerks in Reservation offices in the specified metropolitan cities exclusively for women and that said officers should constitute a seniority cadre separate from the rest of the Enquiry Reservation Cadre in Railways.

The Court relying on Govt. of A.P. v. P.B. Vijayakumar upheld the validity of the impugned provisions reversing the judgement of High Court. It was held:

"Article 15 deals with every kind of State action in relation to the citizens of this country and that every sphere of activity of the State is controlled by Article 15(1) and therefore, there was no reason to exclude from the ambit of Article 15(1) employment under the State. Since Articles 15(1) and (3) go together, the protection of Article 15(3) would be applicable to employment under the State falling under Articles 16(1) and (2) of the Constitution"

In this case, the Court upheld a circular which is of utmost importance to woman. Railway is one of the most potential employer for women in India in the public sector. This rule will naturally provide

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was violative of Article 14 and 16(1) and (2) and were not protected by Article 15(3) of the Constitution. The High Court had held that Article 15(3) cannot be read as a proviso or an exception qualifying or restricting the guarantee under Articles 16(1) and (2) of the Constitution.

77. Id. at p. 639. In 1978, The Railway Administration took a decision that both the upper and lower class reservation counters in the Reservation Offices in Madras, Bombay, Calcutta and Delhi would have to be manned only by women. Later it was decided that the Reservation Officers in the said metropolitan cities should constitute seniority unit separate from the rest of the Enquiry and Reservation cadre in the Railways. By the impugned judgement, the Madras High Court had quashed the said circular on the view that it was violative of Articles 14, and 16(1) and (2) of the Constitution.

78. Supra n. 48.

79. Supra n. 76 at p. 639.
employment for many women. The decision provides an apt example for the combination of substantive equality, correctionist approach and also holistic approach.

In *Gayathri Devi Pansari v. State of Orissa* the Court took an activist approach and held that reservation and preference are substantially different concepts. In this case, allotment of day and night medical store in a hospital to a lady was challenged. But the allotment was sought to be justified on the basis of certain orders directing reservation of 30 parentage of such stores in favour of ladies. But the notification required identification and specification of such shops to be so allotted and the concerned medical shop was not so identified and specified. The Supreme Court reversing the order of the Orissa High Court held that the policy cannot be pedantically construed as disentitling the Government from giving preference to otherwise eligible women candidates on mere basis that the shop in question was not identified and reserved for women candidates. It was held that the policy of the State Government which provided for allotment of 30% of the 24 hours medical stores within a district in favour of ladies itself provided sufficient and valid legal basis for extending preference in favour of a lady applicant, as long as the ceiling limit is not violated. The order was held to be not violative of Articles 14 and 16.

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80. A.I.R. 2000 S.C. 1531. In this case the appeal from the decision on *Sailendra Kumar Meher v. State of Orissa* A.I.R. 1999 Ori. 7 decided by A. Pasayat and A.C. Dutta, JJ., came up before S. Saghir Ahmed and Doraiswamy Raj, JJ., of the Supreme Court.

81. *Id.* at p. 1532. It was contended that the question of reservation envisaged under the Government order would arise only after the medical store for the purpose of reservation as contemplated in the Government order is identified and specified. The medical store in question was not so identified and specified.

82. *Sailendra Kumar Meher v. State of Orissa, supra* n. 80. In the opinion of Orissa High Court the selection was vitiated and the Court directed the authorities to consider the matter afresh.
The Supreme Court thus took an activist step and reversed the order of the High Court which held that as the medical store in question was not identified or specified for the purpose of reservation in favour of a lady, the allotment was vitiated. The Supreme Court resorted to a beneficial interpretation of the order and thus upheld the validity of allotment which in fact gave effect to the intention of the State. The Court tactfully, by pointing out the fact that as applications were limited from members of both sexes, made it clear that this was not a case of reservation, but of preference. The Court resorted to correctionist approach as to gender difference, substantive approach as to equality and a holistic approach as to the provision for giving special preference to women.

Conclusion

Government in India is regarded not as just another employer, but as one that affords a degree of security, prestige and authority not obtainable elsewhere. Government employment is regarded not just as a matter of private ambition, but of group advancement. Employment in the upper reaches of Government service is often used as a measure of advancement and security. Moreover, it is regarded as a source of prestige for both individual and group. As such, preferential treatment for women in public employment is of utmost importance.

Several cases involved challenges to employment rules, regulations and practices that treat women preferentially, on the basis that such preferential treatments discriminate against men. The results of these cases have been mixed. In those cases where the employment rules have been

83. Supra n. 80 at p. 1534.
84. Marc Galanter, Competing Equalities (1984), pp. 84-85. substantive approach which recognizes that equality may require preferential treatment. It is mostly coupled with a corrective approach to gender as evident from the reasoning in the above analysed cases.
upheld, the Court has adopted a more substantive approach which recognises that equality may require referential treatment. It is mostly coupled with a corrective approach to gender as evident from the reasoning in the above analysed cases.

In cases where employment rules have been struck down, courts have adopted a formal approach to equality and a sameness approach to the gender difference. The effect of this approach was to preclude any analysis for the purpose of the differential in treatment, and thus, any consideration of whether the differential in treatment was intended to advantage or disadvantage women.

From the above discussion, the settled position of law is very clear. Articles 14, 15 and 16 belong to one family. Article 14 can be called the genus and Articles 15 and 16 its species. Article 15 is more general than Article 15 as its field of operation includes the entire field of State discrimination including that of public employment. As Article 16(4) is not an exception or proviso to clauses 16(1) and (2), but only one of the modes of implementing the provisions of clause (1), there can be other modes of preferential treatment which is not confined to Article 16(4) only. So, preferential treatment for women in employment can be given under Article 15(3) and it is more wider in scope as the phraseology used is ‘special provision’ and not ‘reservation in appointment’ as used in Article 16(4). So it includes not only reservation in appointment, but all instances and benefits pertaining to employment. It can be seen that as to the relationship of Article 15(3) to Article 15(1) even though the Courts initially adopted an exception approach, with the passage of time shifted mostly to the holistic approach.

It is evident from the above discussion that with the passage of time, the courts have taken mainly a pro-women approach. It may be due to the campaigns for women’s rights in both national and international levels. The developments which took around naturally influenced the judiciary.
Thus, it can be seen that this aspect is an area where there has been vibrant judicial activism. It is the courts which gave life to Article 15(3) and made it meaningful for women workforce. It is true that there have been instances of judicial restraint rather retro-activeness, but the instances of activism outweighs them. The whole edifice of preferential treatment to women workforce can find justification in the following words of Mr. Justice Brewer of US Supreme Court:

"The women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is specially true when the burdens of motherhood are upon her ..... Differentiated by these matters from the other sex, she is properly placed in a class by herself., and the legislation designed for her protection may be sustained, even while like legislation is not necessary for men and could not be sustained"85.

85. Supra n. 2.