

a 319. Reservation should be avoided except in extreme cases of acute backwardness resulting from prior discrimination as in the case of the Scheduled Castes and the Scheduled Tribes and other classes of persons in comparable positions. In all other cases, preferential treatment short of reservation can be adopted. Any such action, though in some respects discriminatory, is permissible on the basis of a legitimate classification rationally related to the attainment of equality in all its aspects.

b 320. Any attempt to view affirmative action as merely retributive or to unduly over-emphasise its compensatory aspect and widen the scope of reservation beyond minority of posts or seats is to practice excessive and invidious reverse discrimination. To project particular castes as legitimate claimants for such compensatory discrimination, without due regard to the nature and degree of their backwardness, is to invite the public wrath of stigmatising prejudice against them, thereby promoting caste hatred and separatism. Any such stereotyped and stigmatised approach to this soul searching sociological problem is to distort the fairness of the political and constitutional process of adjustment and readjustment amongst classes of people in our country.

c 321. Affirmative action is not merely compensatory justice, which it is, but it is also distributive justice seeking to ensure that community resources are more equitably and justly shared among all classes of citizens. Furthermore, from the point of view of social utility, affirmative action promotes maximum well-being for the society as a whole and strengthens forces of national integration and general economic prosperity.

d 322. Any benign affirmative action with a view to equality amongst classes of citizens is a constitutionally permitted programme, but the weapon of reservation must be carefully and sparingly used in order that, while the victims of past discrimination are appropriately compensated, the generality of persons striving to progress on their own merits do not become victims of excessive, unfair and invidious reverse discrimination. e Affirmative action must find justification in the removal of disadvantages and not in their imposition. See Tribe, *American Constitutional Law*, 2nd edn. (1988); pp. 1521-1554; Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, Harvard Law Review, Vol. 100, p. 78 (1986-87); Marc Galanter, *Competing Equalities*, (1984); Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, Harvard Civil Rights Civil Liberties Law Review, Vol. 17, 1982, p. 503; *The Rights of Peoples*, Edited by James Crawford, Oxford (1988).

323. Summary

i (1) It is open to the State to adopt valid classification and make special provisions for the protection of classes of citizens whose com-

parative backwardness the State has a mandate to redress by affirmative action programmes. Any such programme must be strictly tailored to the constitutional requirement that no citizen shall be excluded from being considered on the basis of merits for any public employment except to the extent that a valid reservation has been made in favour of backward classes of citizens. a

(2) The Constitution prohibits discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Any discrimination solely on any one or more of these prohibited grounds will result in invidious reverse discrimination which is impermissible. None of these grounds is the sole or the dominant or the indispensable criterion to identify backwardness which qualifies for reservation. But each of them is, in conjunction with factors such as poverty, illiteracy, demeaning occupation, malnutrition, physical and intellectual deformity and like disadvantages, a relevant criterion to identify socially and educationally backward classes of citizens for whom reservation is intended. b c

(3) Reservation contemplated under Article 16 is meant exclusively for backward classes of citizens who are not adequately represented in the services under the State. d

(4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as backward classes. To be accepted as backward classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied. In the case of the other backward classes of citizens qualified for reservation, the burden is on the State to show that these classes have been subjected to such discrimination in the past that they are reduced to a state of helplessness, poverty and the consequential social and educational backwardness as in the case of the Scheduled Castes and the Scheduled Tribes. In other words, reservation is meant exclusively for the Harijans, the Girijans, the Adivasis, the Dalits or other like "depressed" classes or races or tribes most unfortunately referred to in the past as the "untouchables" or the "outcastes" by reason of their being born in what was wrongly regarded e f g h i

a as low castes and associated with what was equally wrongly treated as
b demeaning occupations, or any other class of citizens afflicted by like
c degree of poverty and degradation caused by prior and continuing dis-
crimination and exploitation, whatever be their professed faith, religion
or caste. These classes of citizens, segregated in slums and ghettos and
afflicted by grinding poverty, disease, ignorance, ill health and back-
wardness, and haunted by fear and anxiety, are the constitutionally
intended beneficiaries of reservation, not because of their castes or
occupations, which are merely incidental facts of history, but because of
their backwardness and disabilities stemming from identified past or con-
tinuing inequities and discrimination.

c (5) Members of the Scheduled Castes or the Scheduled Tribes do
not lose the benefits of reservation and other affirmative action
programmes intended for backward classes merely by reason of their
conversion from the Hindu or the Sikh or the Buddhist religion to any
other religion, and all such persons shall continue to be accorded all such
benefits until such time as they cease to be backward.

d (6) Identification of backward classes for the purpose of reservation
with reference to historical discrimination and its continuing ill effects is,
however, subject to the overriding condition that no person whose means
exceeded a predetermined economic level should be entitled to the
protection of reservation, however backward he may be socially and edu-
cationally. He may, however, be considered for the benefits of other
affirmative action programmes, but in doing so his comparative affluence
in relation to other backward class candidates may be a relevant consid-
eration to exclude him.

f (7) Once a class of citizens is identified on correct principles as
backward for the purpose of reservation, the "means test" must be
strictly and uniformly applied to exclude all those persons in that class
reaching above the predetermined economic level.

g (8) Reservation in all cases must be confined to a minority of
available posts or seats so as not to unduly sacrifice merits. The number
of seats or posts reserved under Article 15 or Article 16 must at all times
remain well below 50% of the total number of seats or posts.

h (9) Reservation has no application to promotion. It is confined to
initial appointment, whichever be the level or grade at which such
appointment is made in the administrative hierarchy, and whether or not
the post in question is borne on the cadre of the service.

i (10) Once reservation is strictly confined to the constitutionally
intended beneficiaries, as aforesaid, there will probably be no need to
disappoint any deserving candidate legitimately seeking the benefit of

reservation, for there will then be sufficient room well within the 50% limit for all candidates belonging to the backward classes as properly determined on correct principles. In that event, questions such as caste or religion will become merely academic and the competing maddening rush for "backward" label will vanish.

(11) A periodic administrative review of all affirmative action programmes, including reservation of seats or posts, must be conducted by a specially constituted Permanent Authority with a view to adjustment and readjustment of such programmes in proportion to the nature, degree and extent of backwardness. All such programmes must stand the test of judicial review whenever challenged. Reservation being exclusionary in character must necessarily stand the test of heightened administrative and judicial solicitude so as to be confined to the strict bounds of constitutional principles.

(12) Whenever and wherever poverty and backwardness are identified, it is the constitutional responsibility of the State to initiate economic and other measures to ameliorate the conditions of the people residing in those regions. But economic backwardness without more does not justify reservation.

(13) Poverty demands affirmative action. Its eradication is a constitutional mandate. The immediate target to which every affirmative action programme contemplated by Article 15 or Article 16 is addressed is poverty causing backwardness. But it is only such poverty which is the continuing ill-effect of identified prior discrimination, resulting in backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, that justifies reservation.

(14) While reservation is a remedy for historical discrimination and its continuing ill effects, other affirmative action programmes are intended to redress discrimination of all kinds, whether current or historical.

(15) Any legitimate affirmative action must be supported by a valid classification based on an intelligible differentia distinguishing classes of citizens chosen for the protective measures from the generality of citizens excluded from such measures, and such differentia must bear a reasonable nexus with the object sought to be achieved, namely, the amelioration of the backwardness of the chosen classes of citizens, which implies a reasonable proportion between the aim of the action and the means employed for its accomplishment, and its discontinuance upon the accomplishment of the object.

(16) In the final analysis, poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness

- a has to be eradicated not merely by reservation as aforesaid, but by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self-employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of the law-enforcing machinery, industrialisation, construction of roads, bridges, culverts, canals, markets, introduction of transport, free supply of water, electricity and other ameliorative measures particularly in areas densely populated by backward classes of citizens.

324. *Conclusions:*

- c A. The validity of the impugned Government Orders providing for reservation of posts depends on convincing proof of proper identification of backward classes of citizens by recourse to relevant criteria, such as poverty, illiteracy, disease, unhygienic living conditions, low caste and consequential isolation, and in accordance with correct principles, i.e., with reference to the continuing ill effects of historical discrimination resulting in social and educational backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, and inadequate representation of such classes of citizens in the services under the State, but subject to the overriding condition that all those persons whose means have exceeded a predetermined economic level shall be denied reservation. Amongst the aforementioned backward classes of citizens correctly identified to be qualified for reservation, preference may be legitimately extended to the comparatively poorer or more disadvantaged sections.
- f B. Reservation of seats or posts solely on the basis of economic backwardness, i.e., without regard to evidence of historical discrimination, as aforesaid, finds no justification in the Constitution.
- g C. Reservation of seats or posts for backward classes of citizens, including those for the Scheduled Castes and the Scheduled Tribes, must remain well below 50% of the total seats or posts.
- D. Reservation is confined to initial appointment to a post and has no application to promotion.
- h E. It is open to the State to adopt any valid affirmative action programme, otherwise than by reservation, for amelioration of the disabilities of all disadvantaged persons, including backward classes of citizens.

i 325. Neither the impugned orders of the Government of India [O.M. No. 36012/31/90-Estt(SCT) dated August 13, 1990 and O.M. No.

36012/31/90-Estt(SCT) dated September 25, 1991] nor the material relied upon by it nor the affidavits filed in support of the said orders disclose proper application of mind by the concerned authorities to the principles stated above for valid identification of the backward classes of citizens qualified for reservation in terms of Article 16 of the Constitution of India. The impugned orders are, therefore, unsustainable. The respondent-Government is accordingly directed to reconsider the question of reservation contemplated by Article 16(4) in the light of the aforesaid principles and pass appropriate orders. a
b

ORDER^{ss}

326. We have delivered our separate judgments. In the light of the reasons stated by us, the impugned orders (O.M. No. 36012/31/90-Estt(SCT) dated August 13, 1990 and O.M. No. 36012/31/90-Estt(SCT) dated September 25, 1991) issued by the Government of India are declared unenforceable for want of valid identification of backward classes of citizens qualified for reservation under Article 16 of the Constitution of India. In the circumstances, we direct the Union of India to re-examine the question of identification of the backward classes of citizens in accordance with the principles and directives contained in our respective judgments and pass appropriate orders providing for reservation under Article 16(4). c
d

327. The above cases are disposed of accordingly. There shall be no order as to costs. e

ANNEXURE

DR AMBEDKAR'S SPEECH IN THE CONSTITUENT ASSEMBLY

ON 30-11-1948

Now, Sir, to come to the other question which has been agitating the members of this House, viz., the use of the word "backward" in clause (3) of Article 10, I should like to begin by making some general observations so that Members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If Members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine f
g
h

^{ss} Ed.: Signed by the minority Judges, namely, T.K. Thommen, Kuldip Singh and R.M. Sahai, JJ. i

a whether he is fit for the post or not and that there ought to be no limita-
tions, there ought to be no hindrance in the operation of this principle of
equality of opportunity. Another view mostly shared by a section of the
House is that, if this principle is to be operative — and it ought to be
operative in their judgment to its fullest extent — there ought to be no
b reservations of any sort for any class or community at all, that all citizens,
if they are qualified, should be placed on the same footing of equality so
far as the public services are concerned. That is the second point of view
we have. Then we have quite a massive opinion which insists that,
although theoretically it is good to have the principle that there shall be
equality of opportunity, there must at the same time be a provision made
c for the entry of certain communities which have so far been outside the
administration. As I said, the Drafting Committee had to produce a
formula which would reconcile these three points of view, firstly, that
there shall be equality of opportunity, secondly that there shall be reser-
vations in favour of certain communities which have not so far had a
d 'proper look-in' so to say into the administration. If Honourable
Members will bear these facts in mind — the three principles, we had to
reconcile, — they will see that no better formula could be produced than
the one that is embodied in sub-clause (3) of Article 10 of the Con-
stitution; they will find that the view of those who believe and hold that
there shall be equality of opportunity, has been embodied in sub-clause
e (1) of Article 10. It is a generic principle. At the same time, as I said, we
had to reconcile this formula with the demand made by certain com-
munities that the administration which has now — for historical reasons
— been controlled by one community or a few communities, that
f situation should disappear and that the others also must have an
opportunity of getting into the public services. Supposing, for instance,
we were to concede in full the demand of those communities who have
not been so far employed in the public services to the fullest extent, what
would really happen is, we shall be completely destroying the first
g proposition upon which we are all agreed, namely, that there shall be an
equality of opportunity. Let me give an illustration. Supposing, for
instance, reservations were made for a community or a collection of com-
munities, the total of which came to something like 70 per cent of the
total posts under the State and only 30 per cent are retained as the
h unreserved. Could anybody say that the reservation of 30 per cent as
open to general competition would be satisfactory from the point of view
of giving effect to the first principle, namely, that there shall be equality
of opportunity? It cannot be in my judgment. Therefore the seats to be
reserved, if the reservation is to be consistent with sub-clause (1) of
i Article 10, must be confined to a minority of seats. It is then only that the

first principle could find its place in the Constitution and effective in operation. If Honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think Honourable Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word "backward" has been used.

With regard to the minorities, there is a special reference to that in Article 296, where it has been laid down that some provision will be made with regard to the minorities. Of course, we did not lay down any proportion. That is quite clear from the section itself, but we have not altogether omitted the minorities from consideration. Somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My Honourable Friend Mr T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. Mr Krishnamachari asked: "Who is a reasonable man and who is a prudent man? These are matters of litigation". Of course, they are matters of litigation, but my Honourable Friend, Mr Krishnamachari will understand that the words "reasonable persons and prudent persons" have been used in very many laws and if he will refer only to the Transfer of Property Act, he

a will find that in very many cases the words "a reasonable person and a prudent person" have very well been defined and the court will not find any difficulty in defining it. I hope, therefore that the amendments which I have accepted, will be accepted by the House. [*Constituent Assembly Debates*, Vol. 7 (1948-49), pp. 701-02]

b KULDIP SINGH, J (*dissenting*).— The Government action on the Mandal Report evoked spontaneous reaction all over the country. The controversy brought to the fore important constitutional issues for the determination of this Court. Nine-Judge Bench, specially constituted, has had a marathon hearing on various aspects of Article 16 of the Constitution of India. There are five judgments, from Brother Judges on Mandal Bench, in circulation. I have the pleasure of carefully reading c these erudite expositions on various facets of Article 16 of the Constitution of India. I very much wanted to refrain from writing a separate judgment but keeping in view the importance of the issues involved and also not being able to persuade myself to agree fully with any of the judgments I have ventured to express myself separately. I may, however, say d that on some of the vital issues I am in complete agreement with R.M. Sahai, J. The historical background and the factual-matrix have been succinctly narrated by Brother Judges and as such it is not necessary for me to cover the same.

e 329. I propose to deal with the following issues in seriatim:

- A. Whether "class" in Article 16(4) of the Constitution means "caste"? Can caste be adopted as a collectivity to identify the backward classes for the purposes of Article 16(4)?
- f B. Whether the expression "any backward class of citizens" in Article 16(4) means "socially and educationally backward classes" as it is in Article 15(4)?
- C. What is meant by the expression "any backward class of citizens ... not adequately represented in the services under the State" in Article 16(4)?
- g D. Whether Article 16(4) permits reservation of appointments or posts at the stage of initial entry into government services or even in the process of promotion?
- E. Whether Article 16(4) is exhaustive of the State power to provide job reservations?
- h F. If Article 16(1) does not permit job reservations, can protective discrimination as a compensatory measure permissible, in any other form under Article 16(1)?
- i G. To what extent reservations are permissible under Article 16(4)? Below 50% or to any extent?

- H. When a "backward class" has been identified, can a means-test be applied to skim-off the affluent section of the "backward class"?
- I. Can poverty be the sole criterion for identifying the "backward class" under Article 16(4).
- J. Is it mandatory to provide reservations by a legislative Act or it can be done by the State in exercise of its executive power?
- K. Whether the identification of 3743 castes as a "backward class" by Mandal Commission is constitutionally valid?

A

330. Mr Ram Jethmalani appearing for the State of Bihar has advanced an extreme argument that the 'class' under Article 16(4) means 'caste'. Mr P.P. Rao on the other hand vehemently argued that the Constitution of India, with secularism and equality of opportunity as its basic features, does not brook an argument of the type advanced by Mr Jethmalani. According to him caste is a closed door. It is not a path — even if it is — it is a prohibited path under the Constitution.

331. We may pause and have a fresh look at the socio-political history of India prior to the independence of the country.

332. Caste system in this country is sui generis to Hindu religion. The Hindu orthodoxy believes that an early hymn in the *Rig Veda* (the Purusasukta: 10.90) and the much later *Manava Dharm Sastra* (law of Manu), are the sources of the caste system. Manu, the law-giver cites the Purusasukta as the source and justification for the caste division of his own time. Among the Aryans the priestly caste was called the Brahmins, the warriors were called the Kshatriyas, the common people divided to agriculture, pastoral pursuits, trade and industry were called the Vaishyas and the Dasas or non-Aryans and people of mix-blood were assigned the status of Shudras. The Chaturvarna system has been gradually distorted in shape and meaning and has been replaced by the prevalent caste system in Hindu society. The caste system kept a large section of people in this country outside the fold of the society who were called the untouchables. Manu required that the dwellings of the untouchables shall be outside the village — their dress, the garments of the dead — their food given to them in a broken dish. We are proud of the fact that the Framers of the Constitution have given a special place to the erstwhile untouchables under the Constitution. The so-called untouchable castes have been named as Scheduled Castes and Scheduled Tribes and for them reservations and other benefits have been provided under the Constitution. Even now if a Hindu caste stakes its claim as

high as that of Scheduled Castes it can be included in that category by following the procedure under the Constitution.

a 333. The caste system as projected by Manu and accepted by the Hindu society has proved to be the biggest curse for this country. The Chaturvarna system under the Aryans was more of an occupational order projecting the division of labour. Thereafter, in the words of Professor b Harold A. Gould in his book *The Hindu Caste System*, the Brahmins "sacralized the occupational order, and occupationalised the sacred order". With the passage of time the caste system became the cancer-cell of the Hindu society.

c 334. Before the invasions of the Turks and establishment of Muslim rule the caste system had brought havoc to the social order. The Kshatriyas being the only fighters, three-fourth of the Hindu society was a mute witness to the plunder of the country by the foreigners. Mahmud Ghazni raided and looted India for seventeen times during 1000 AD to 1027 AD. In 1025 AD Mahmud Ghazni raided the famous temple of d Somnath. How he plundered the shrine is a matter of history. Thereafter between 1175 AD and 1195 AD Muhammad Ghori invaded India several times. According to the historians one of the causes of the defeat of the Indians at the hands of Turks was the prevalent social conditions especially the caste system of Hindus.

e 335. Mr L.P. Sharma in his book *Ancient History of India* writes that the prevalent social conditions, practice of untouchability and division of society by the caste system among others were the causes of defeat of Rajputs at the hands of Turks. Mr Sharma quotes various other historians in the following words:

f "Dr K.A. Nizami, has also pointed out that the caste system weakened the Rajputs militarily because the responsibility of fighting was left to a particular section of the society i.e. the Kshatriyas. He writes, 'The real cause of the defeat of the Indians lay in their social system and their invidious caste distinctions, which g rendered the whole military organisation rickety and weak. Caste taboos and discriminations killed all sense of unity — social or political.' Dr K.S. Lal also writes that, 'It was very much easy for the Muslims to get traitors from a society which was so unjustly divided. This was one of the reasons why all important cities of north India h were lost to the invader (Muhammad of Ghur) within fifteen years.' Dr R.C. Majumdar writes, 'No public upheaval greets the foreigners, nor are any organised efforts made to stop their progress. Like a paralysed body, the Indian people helplessly look on, while the conquerors march on their corpse.'"

i 336. The Hindus did not learn lesson from the invasions of the Turks and continued to perpetuate the caste system. In the middle of the

15th century major part of north India including Delhi came to be occupied by the Afghans of Lodi. Ultimately Babar established the Mughal rule in India in 1526. After the Moghuls the Britishers came and ruled this country till 1947. a

337. This country remained under shackles of slavery for over one thousand years. The reason for our inability to fight the foreign rule was the social degeneration of India because of the caste system. To rule this country it was not necessary to divide the people, the caste system conveyed the message "Divided we are — come and rule us". b

338. It was only in the later part of the 19th century that the national movement took birth in this country. With the advent of the 20th century Mahatma Gandhi, Jawaharlal Nehru along with other leaders infused national and secular spirit amongst the people of India. For the first time in the history of India caste, creed and religion were forgotten and people came together under one banner to fight the British rule. The caste system was thrown to the winds and people from all walks of life marched together under the slogan of 'Quit India'. It was not the Kshatriyas alone who were the freedom-fighters — whole of the country fought for freedom. It was the unity and the integrity of the people of India which brought freedom to them after thousand years of slavery. The Constitution of India was drafted in the background of the freedom struggle. c d e

339. Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. The Constitution has completely obliterated the caste system and has assured equality before law. Reference to caste under Articles 15(2) and 16(2) is only to obliterate it. The prohibition on the ground of caste is total, the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism — from feudalism to freedom. f

340. The caste system which has been put in the grave by the framers of the Constitution is trying to raise its ugly head in various forms. Caste poses a serious threat to the secularism and as a consequence to the integrity of the country. Those who do not learn from the events of history are doomed to suffer again. It is, therefore, of utmost importance for the people of India to adhere in letter and spirit to the Constitution which has moulded this country into a sovereign, socialist, secular democratic republic and has promised to secure to all its citizens justice, social, economic and political, equality of status and of opportunity. g h

341. Caste and class are different etymologically. When you talk of caste you never mean class or the vice versa. Caste is an iron-frame into i

a which people keep on falling by birth. M. Weber in his book *The Religion of India* has described India as the land of 'the most inviolable organisation by birth'. Except the aura of caste there may not be any common thread among the caste-fellows to give them the characteristic of a class. On the other hand a class is a homogeneous group which must have some live and visible common traits and attributes.

b 342. Professor Andre Beteille, Department of Sociology, University of Delhi in his book *The Backward Classes in Contemporary India* has succinctly brought out the distinction between 'caste' and 'class' in the following words:

c "Whichever way we look at it, a class is an aggregate of individuals (or, at best, of households), and, as such, quite different from a caste which is an enduring group. This distinction between an aggregate of individuals and an enduring group is of fundamental significance to the sociologist, and, I suspect, to the jurist as well. A class derives the character it has by virtue of the characteristics of its individual members. In the case of caste, on the other hand, it is the group that stamps the individual with its own characteristics. There are some affiliations which an individual may change, including that of his class; he cannot change his caste. At least in principle a caste remains the same caste even when a majority of its individual members change their occupation, or their income, or even their relation to the means of production; it would be absurd from the sociological point of view to think of a class in this way. A caste is a grouping sui generis, very different from a class, particularly when we define class in terms of income or occupation."

f 343. Article 16(2) of the Constitution of India in clear terms states that "no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State". In juxtaposition Article 16(4) states that "nothing in this Article shall prevent the State from making any provisions for the reservations 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". On a bare reading of the two sub-clauses of Article 16 it is obvious that the Constitution forbids classification on the ground of caste. No backward class can, therefore, be identified on the basis of caste.

h 344. We may refer to some of the judgments of this Court on the subject.

i 345. In *R. Chitralkha v. State of Mysore*⁷ this Court observed as under: (SCR p. 388)

7 (1964) 6 SCR 368: AIR 1964 SC 1823

"The important factor to be noticed in Article 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression 'classes' is used in clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution from using the expression 'backward classes or castes'. The juxtaposition of the expression 'backward classes' and 'Scheduled Castes' in Article 15(4) also leads to a reasonable inference that the expression 'classes' is not synonymous with castes This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles.... If we interpret the expression 'classes' as 'castes', the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution.... But what we intend to emphasize is that under no circumstances a 'class' can be equated to a 'caste', though the caste of an individual or a group of individual may be considered alongwith other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests."

346. In *Triloki Nath v. State of J & K (II)*⁸ this Court observed as under: (SCR p. 105)

"Article 16 in the first instance by clause (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression 'backward class' is not used as synonymous with 'backward caste' or 'backward community'.... In its ordinary connotation the expression 'class' means a homogeneous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, com-

⁸ (1969) 1 SCR 103; AIR 1969 SC 1; (1970) 1 LLJ 629

community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution."

347. In *State of U.P. v. Pradip Tandon*⁶ the following observations of this Court are relevant: (SCC p. 247, para 17)

"The expression 'classes of citizens' indicates a homogeneous section of the people who are grouped together because of certain likeliness and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens."

348. Finally in *K.S. Jayasree v. State of Kerala*¹⁷ this Court held as under: (SCC p. 736)

"It is necessary to remember that special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification is based solely on caste of the citizen, it may not be logical. Social backwardness is the result of poverty to a very large extent. Caste and poverty are both relevant for determining the backwardness."

349. It is, thus, obvious that this Court has firmly held that 'class' under Article 16(4) cannot mean 'caste'. *Chitrlekha case*⁷ is an authority on the point that caste can be totally excluded while identifying a 'backward class'. This Court in *Pradip Tandon case*⁶ has held that caste cannot be the uniform element of common attributes to make it a class.

350. Secular feature of the Constitution is its basic structure. Hinduism, from which the caste system flows, is not the only religion in India. Caste is an anathema to Muslims, Christians, Sikhs, Buddhists and Jains. Even Arya Smajis, Brahmo Smajis, Lingayats and various other denominations in this country do not believe in caste system. If all these religions have to co-exist in India — can 'class' under Article 16(4) mean 'caste'? Can a caste be given a gloss of a 'class'? Can even the process of identifying a 'class' begin and end with 'caste'? One may interpret the Constitution from any angle the answer to these questions has to be in the negative. To say that in practice caste system is being followed by Muslims, Christians, Sikhs and Buddhists in this country, is to be oblivious to the basic tenets of these religions. The prophets of these

⁶ (1975) 1 SCC 267: (1975) 2 SCR 761

¹⁷ (1976) 3 SCC 730: (1977) 1 SCR 194

⁷ *R. Chitrlekha v. State of Mysore*, (1964) 6 SCR 368: AIR 1964 SC 1823

religions fought against casteism and founded these religions. Imputing caste system in any form to these religions is impious and sacrilegious. This Court in *M.R. Balaji v. State of Mysore*¹² held as under: (SCR p. 460) a

"Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups" b

351. I, therefore, hold that 'class' under Article 16(4) cannot be read as 'caste'. I further hold that castes cannot be adopted as collectivities for the purpose of identifying the "backward class" under Article 16(4). I entirely agree with the reasoning and conclusions reached by R.M. Sahai, J@@ to the effect that occupation (plus income or otherwise) or any other secular collectivity can be the basis for the identification of "backward classes". Caste-collectivity is unconstitutional and as such not permitted. c

B

352. The expression "any backward class of citizens" in Article 16(4) of the Constitution as understood till date means 'socially and educationally backward class'. In *Janki Prasad Parimoo v. State of J & K*⁶¹ Palekar, J observed as under: (SCC pp. 432-33) d

"Article 15(4) speaks about 'socially and educationally backward classes of citizens' while Article 16(4) speaks only of 'any backward class of citizens'. However, it is now settled that the expression 'backward class of citizens' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4)." e

Mr N.A. Palkhivala contended that the above-quoted assumption by Palekar, J was without any basis and wholly unjustified. According to him it was not settled by any judgment of this Court that the two expressions in Articles 15(4) and 16(4) mean the same thing. Far from being- "settled", no judgment of this Court had even suggested prior to 1973 that the expressions in the two Articles meant the same thing. He further contended that unfortunately, in subsequent cases it was not pointed out to this Court that the assumption of Palekar, J was not correct and the wrong assumption of the learned Judge passed as correct. According to him an erroneous assumption, even by a Judge of this Court, cannot and f

@@ Ed.: Infra paras 605-608

¹² 1963 Supp 1 SCR 439: AIR 1963 SC 649

⁶¹ (1973) 1 SCC 420: 1973 SCC (L&S) 217: (1973) 3 SCR 236

does not make the law. This Court in *M.R. Balaji v. State of Mysore*¹² speaking through Gajendragadkar, J observed as under: (SCR p. 474)

a "Therefore, what is true in regard to Article 15(4) is equally
b true in regard to Article 16(4). There can be no doubt that the
Constitution-makers assumed, as they were entitled to, that while
making adequate reservation under Article 16(4), care would be
c taken not to provide for unreasonable, excessive or extravagant
reservation, for that would, by eliminating general competition in a
large field and by creating widespread dissatisfaction amongst the
employees, materially affect efficiency. Therefore, like the special
provision improperly made under Article 15(4), reservation made
under Article 16(4) beyond the permissible and legitimate limits
would be liable to be challenged as a fraud on the Constitution. In
this connection it is necessary to emphasise that Article 15(4) is an
enabling provision; it does not impose an obligation, but merely
leaves it to the discretion of the appropriate government to take
suitable action, if necessary."

d Although in *Balaji case*¹² this Court observed "what is true in regard to
Article 15(4) is equally true in regard to Article 16(4)" but this was
entirely in different context. In the said case reservations made in the
educational institutions under Article 15(4) were challenged on the
ground that the same were void being violative of Articles 15(1) and
e 29(2) of the Constitution. In the above-quoted observations this Court
indicated that the reservations made under Article 16(4) can also be
challenged on the same or similar grounds as the reservations under
Article 15(4) of the Constitution of India. This Court did not examine
the question as to whether the expression "backward class of citizens" in
f Article 16(4) means the same thing as the expression "any socially and
educationally backward classes of citizens" under Article 15(4).

353. Articles 340 and 16(4) were in the original Constitution. Article
15(4) was inserted a year later by the Constitution (First Amendment)
Act, 1951. Article 340 refers to "socially and educationally backward
g classes". The Framers of the Constitution did not, however, use the
expression "socially and educationally backward" in Article 16(4). The
definition of 'backward classes' as socially and educationally backward in
Article 340, may have given rise to the assumption that it was necessary
to re-define the expression 'backward class' in Article 16(4). Be that as it
h may the fact remains that there is no reasoned judgment of this Court
holding that the two expressions mean the same thing.

354. The same Constituent Assembly, which drafted the original
Constitution, drafted Article 15(4) and brought it into the Constitution

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¹² 1963 Supp 1 SCR 439: AIR 1963 SC 649

by way of Constitution First Amendment Act, 1951. Article 340 defining 'backward classes' was already in the original Constitution but in spite of that the Constituent Assembly defined the 'backward classes' for the purposes of Article 15(4) as "socially and educationally backward". It was, therefore, not the intention of the Framers of the Constitution to follow the definition given in Article 340, wherever the expression 'backward class' occurs in the Constitution. On the other hand it is plausible to assume that wherever the Framers of the Constitution wanted the 'backward classes' to be defined as "socially and educationally backward", they did so, leaving Article 16(4) to be interpreted in its context.

355. Articles 340 and 15(4) are part of the same constitutional scheme. Socially and educationally backward classes may be identified by a commission appointed under Article 340 and the said commission — after investigation — may make recommendations, including the sanctioning of grants, for the uplift of the backward classes. Article 15(4) makes it possible to implement the recommendations of the commission and for that purpose permits protective discrimination by the State. Since there is identity of purpose between the two Articles the 'backward class' in the context of these Articles has been defined identically. But that is not true of Articles 15(4) and 16(4). When these two Articles of Constitution in juxtaposition — enacted in consecutive years — use markedly different phraseology, well-established canons of interpretation dictate that such meanings should be assigned to the words as are indicated by the difference in phraseology. Article 16(4) has different purpose than Article 15(4). The subject-matter of Article 16(4) is the service under the State. It is a special provision enabling the State to make any provision for the reservation of appointments or posts in favour of the backward section of any class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The expression "backward" in the context of Article 16(4) is entirely different than the expression "socially and educationally backward class" in Article 15(4). Under Article 16(4) the backward class has to be culled out from amongst the classes which are not adequately represented in the State services. Any species of backwardness is relevant in the context of Article 16(4). By contrast, any special provisions to be made under Article 15(4) — e.g. grants out of the public exchequer — can only be made for "socially and educationally backward classes". What is to be identified under Article 16(4) is not the "backward class" but a "class of citizens" which is inadequately represented in the State services. On the other hand it is the "backward class" which is to be identified under Article 15(4). When

the two classes to be identified in the two articles are different the question of giving them the same meaning does not arise.

a 356. Constituent Assembly Debates Volume 7 (1948-1949) pages 684 to 702 contains the speeches of stalwarts like R.M. Nalavade, Dr Dharma Prakash, Chandrika Ram, V.I. Muniswamy Pillai, T. Channiah, Santanu Kumar Das, H.J. Khandakar, Mohd. Ismail Sahib, Hukum Singh, K.M. Munshi, T.T. Krishnamachari, H.V. Kamath and Dr B.R. Ambedkar on the draft Article 10(3) [corresponding to Article 16(4)]. In a nutshell the discussion projected the following viewpoints:

- (1) The original draft Article 10(3) did not contain the word 'backward'. The original Article only contained the expression "any class of citizens". The word "backward" was inserted by the Drafting Committee at a later stage.
- d (2) The opinion of the members of the Constituent Assembly was that the word "backward" is vague, has not been defined and is liable to different interpretations. It was even suggested that ultimately the Supreme Court would interpret the same. Mr T.T. Krishnamachari even stated in lighter tone that the loose drafting of the chapter on fundamental rights would be a paradise for the lawyers.
- e (3) Not a single member including Dr Ambedkar gave even a suggestion that "backward class" in the said Article meant "socially and educationally backward".
- f (4) The purpose of Article 10(3) according to Dr Ambedkar was that "there must at the same time be a provision made for the entry of certain communities which have so far been outside the Administration ... that there shall be reservations in favour of certain communities which have not so far had a proper "look-in" so to say into the Administration.
- g (5) According to Dr Ambedkar the said Article was enacted to safeguard two things namely the principle of equality of opportunity and to make provision for the entry of certain communities which have so far been outside the Administration. Dr Ambedkar further stated:

h "Unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental rights in the way in which it was passed by this Assembly."

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357. The reading of the Constituent Assembly Debates makes it clear that the only object of enacting Article 16(4) was to give representation to the classes of citizens who are inadequately represented in the services of the State. The word "backward" was inserted later on only to reduce the number of such classes who are inadequately represented in the services of the State. The intention of the Framers of the Constitution, gathered from the Constituent Assembly Debates, leaves no manner of doubt that the two "classes" to be identified in the two articles are different and as such the expressions used in the two articles cannot mean the same. Article 16(4) enables the State to make reservations for any backward section of a class which is inadequately represented in the services of the State. Almost every member who spoke on the draft Article 10(3) in the Constituent Assembly complained that the word "backward" in the said Article was vague and required to be defined but in spite of that, Dr Ambedkar in his final reply did not say that the word "backward" meant "socially and educationally backward", rather he gave the explanation, quoted above which supports the reasoning that the word "backward" was inserted in Article 16(4) to identify the backward section of any class of citizens which is not adequately represented in the State services and for no other purpose.

358. I, therefore, hold that the expression "backward class of citizens" under Article 16(4) does not mean the same thing as the expression "any socially and educationally backward classes of citizens" in Article 15(4). The judgments of this Court wherein it is assumed that the two expressions in Articles 15(4) and 16(4) mean the same thing do not lay down correct law and are overruled to such extent.

C

359. Over a period of four decades this Court under a mistaken view read the expression "any backward class of citizens" in Article 16(4) to mean the same as "backward classes of citizens" in Article 15(4). Having held that the two Articles operate in different fields, the crucial question which falls for consideration is what is meant by the expression "Any backward class of citizens ... not adequately represented in the services under the State" in Article 16(4).

360. A layman's look at Article 16(4) gathers the impression that the reservation under the said Article is permissible for the *backward classes* of citizens who are not adequately represented in the services under the State. But on closer scrutiny and examination it is clear that the reservations under Article 16(4) are provided for *classes of citizens* which are not

adequately represented in the State services. The original draft Article 10(3) [corresponding to Article 16(4)] was as under:

a "10. (3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any class of citizens who, in the opinion of the State, are not adequately represented in the services under the State."

b 361. Reading the original draft Article 10(3) leaves no manner of doubt that the manifest intention of the Framers of the Constitution was to provide reservation for those classes of citizens who are not adequately represented in the State services. It is common knowledge that during the British regime the State services were packed from amongst the persons who were on the right side of the regime. Mass of the Indian people who were active in the freedom struggle were kept out of State services. Article 16(4) was enacted with the sole purpose of giving representation to the classes of citizens who are not adequately represented therein. The sine qua non for providing reservation is the inadequate representation of the class concerned in the State services.

c 362. The word "backward" was inserted in the draft Article 10(3) by the Drafting Committee before the draft was finalised. The insertion of the word "backward" at a later stage did not change the intention with which the original draft Article 10(3) was brought into existence. d
e Fortunately, for the people of this country, there are lengthy deliberations in the Constituent Assembly Debates which show the purpose and the object of adding the word "backward" in the draft Article 10(3). Dr Ambedkar in his speech before the Constituent Assembly gave the object and purpose of enacting original draft Article 10(3) and also gave elaborate reasons for inserting the word "backward" in the said Article. f
The said speech is reproduced hereunder:

g "Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If Honourable Members will bear these facts in mind — the three principles, we had to reconcile, — they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall h i

be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now — for historical reasons — been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If Honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly." (*Constituent Assembly Debates*, Vol. 7, pages 701-702).

363. Dr Ambedkar stated in clear terms that draft Article 10(3) now Article 16(4) was brought in by the Framers of the Constitution to provide "reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration". He nowhere stated that the reservations were meant for backward classes. According to him, the article was enacted with the object of providing reservation to those classes of citizens who are not adequately represented in the State services. Dr Ambedkar further elaborated the point when he stated "the

a administration which has now — for historical reasons — been controlled
by one community or a few communities, that situation should disappear
and that the others also must have an opportunity of getting into the
public services". Dr Ambedkar was not referring to backward or non-
backward communities, he was only referring to the communities which
were dominating the public services and those which were not permitted
b to enter the said services. While making it clear that the reservations are
meant for those classes of citizens who are inadequately represented in
the State services. Dr Ambedkar visualised that conceding in full the
demand of such communities, reserving majority of the seats for them
and leaving minority of the seats unreserved, would render the guarantee
c under Article 16(1) nugatory. He illustrated the point by giving figures
and stated that a safeguard was to be provided so that majority of the
appointments/posts in the State services are not consumed in the process
of reservation. It was for that purpose, according to Dr Ambedkar, the
expression "backward" was inserted in the draft Article 10(3). The object
d of adding the word "backward" was only to reduce the number of
claimants for the reserve posts. Instead of the whole class having
inadequate representation in the State services only the backward
section of that class is made eligible for the reserve posts. In a nutshell,
the reservation under Article 16(4) is not meant for backward classes but
e for backward sections of the classes which are not adequately
represented in the State services. There may be a class which is
inadequately represented in the State services and it may be backward as
a whole, like the Scheduled Castes and the Scheduled Tribes. Such a
class as a whole is eligible for the reserve posts.

f 364. "Not adequately represented in the services under the State" is
the only test for the identification of a class under Article 16(4). There-
after the 'backward class' has to be culled out from out of the classes
which satisfy the test of inadequacy.

g 365. Under the Constitution the "backward class" which has been
identified for preferential treatment is the "socially and educationally
backward" class. The constitutional scheme is explicit. Articles 340 and
15(4) make it clear that wherever the Constitution intended to provide
special compensatory treatment for the "backward classes" they have
been defined as 'socially and educationally backward'. Article 16(4) is not
h in line with Articles 340 and 15(4). Article 16(4) does not provide job
reservations for the backward classes. That is why the expression "so-
cially and educationally backward" has not been used therein. The
classes of citizens to be identified under Article 16(4) are those who are
i not adequately represented in the services under the State.

366. Examine it from another angle. If the job reservations under Article 16(4) are meant for "any backward class" then the expression "not adequately represented" has to be read in relation to the said class. Can it be done? Is it possible to classify the backward classes into those who are adequately represented in the State services and those who are not? Can a class which is adequately represented in the State services be considered backward? Negative is the answer to all these questions. A class which is adequately represented in the State services cannot be considered a backward class. A class may not be backward even if it has inadequate representation in the State services but once it secures adequate representation in the State services it no longer remains backward. It is not possible to read the expression "not adequately represented" in Article 16(4) in relation to "any backward class". If you do so then the said expression is rendered redundant. To make every word of Article 16(4) meaningful and workable the said expression can only be read in relation to "class of citizens".

367. Yet another way to examine. Scheduled Castes and Scheduled Tribes are a 'class' by themselves and the Constitution permits protective discrimination to compensate them. Reservation of seats in the House of the People and the Legislative Assemblies have been provided for them. Article 335 is special provision for taking into consideration their claims in the appointments to State services. Had there been an intention to provide job reservations in favour of weaker sections of society or for the 'socially and educationally backward classes' then Scheduled Castes and Scheduled Tribes would have been the first to be provided for by specific mention in Article 16(4). It is idle to say that the expression 'backward class of citizens' would include them. Article 15(4) uses the expression "... any special provision for advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes". Similarly Article 46 provides "The State shall promote ... weaker section of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes ...". Thus wherever in the Constitution special protection has been provided for socially and educationally backward classes the Scheduled Castes and Scheduled Tribes have been specifically mentioned alongwith. Article 16(4) does not give protection to either of the two, it only provides for those who are inadequately represented in the State services. If the 'Scheduled Caste and Scheduled Tribes' and "socially and educationally backward classes" qualify the test of inadequacy they are eligible for the reserved seats under Article 16(4). The Scheduled Castes and Scheduled Tribes being the weakest of the weak per se satisfy the test.

a 368. The condition precedent for a class to get benefit under Article
16(4) is not its backwardness but its inadequacy in State services. Once
inadequacy is established and the classes on that test are identified then
the backward sections of those classes become eligible to the benefit of
reservation. Classes, which are inadequately represented, can be
identified by occupation, economic criterion, family income or from
political sufferers, border areas, backward areas, communities kept out of
State services by the British or by any other method which the State may
adopt. Once a class which is inadequately represented, is identified it is
only the backward section of that class which is eligible for job reser-
vations. Backward section can be culled out by adopting a means-test, or on
the basis of social, educational or economic backwardness. Once the
classes are identified there can be no difficulty for the State to find out
the backward parts of those classes.

d 369. Mandal has identified 52% population of this country as
backward. Of these 22% have already been identified as Scheduled
Castes and Scheduled Tribes. In a country with a population of 850
million people — 74% of which is backward — job reservation can hardly
be the source of reducing social and economic disparities in the society.
Even the Mandal Report has characterised the job reservations as
“Palliatives”. The Framers of the Constitution — with secularism,
egalitarianism, integrity and unity as their avowed objects — could not
have permitted horizontal division of the country into backward and non-
backward for the sake of job reservations.

f 370. I, therefore, hold that Article 16(4) permits reservation of
appointments/posts in favour of classes of citizens which in the opinion
of the State are not adequately represented in the services under the
State. Once such classes are identified then the reserve posts are offered
to the backward sections of those classes.

g 371. Before parting with the subject I may say that the successive
governments, whether in the States or at the Centre, have been remiss in
the discharge of their obligations, under the Constitution, towards the
poor and backward people of the country. Job reservations as a dole, has
been the vote-catching platter. Neither the job reservations nor the
reservation of seats in the educational institutions are of material help.
Unless illiteracy and poverty are removed, the backward classes cannot
be benefited by the reservations alone. Affirmative-Action Programme
on war footing is needed to uplift the backwards. Liberal grants and sub-
sidised schemes under Article 340 read with Articles 15(4) and 46 are
needed to remove illiteracy and poverty. Housing, sanitation and other
necessities of life are to be provided. Illiteracy is the root cause of back-

wardness. "Free and compulsory education" is nowhere within reach even 45 years after the independence. The legislations enabling free education are only on paper. A poor father, whose child is earning and contributing towards the family income, may not send the child to school even if the education is free. The State may consider compensating the father for the loss in income due to child's stopping work for going to school. It is not for this Court to suggest what the Government should do, we only say that the State has not done what it is required to do under the Constitution. Job reservation is not the answer to the problem. Prof. Andre Beteille in his book *'The Backward Classes in Contemporary India'* has summed up the issue in the following words:

"What has gone wrong with our thinking on the backward classes is that we have allowed the problem to be reduced largely to that of job reservation. The problems of the backward classes are too varied, too large and too acute to be solved by job reservation alone. The point is not that job reservation has contributed so little to the solution of these problems but, rather, that it has diverted attention from the masses of Harijans and Adivasis who are too poor and too lowly even to be candidates for the jobs that are reserved in their names. Job reservation can attend only to the problems of middle class Harijans and Adivasis: the overwhelming majority of Adivasis and Harijans, like the majority of the Indian people, are outside this class and will remain outside it for the next several generations. Today, job reservation is less a way of solving age-old problems than one of buying peace for the moment. It would be foolish to blame only the government for wanting to buy peace in a country in which everyone wants to buy peace. It would be foolish also to recommend an intransigent attitude to a government which has neither the will to impose its power nor the imagination to think of alternatives. But unless it is able to offer something better to the backward classes than it has done so far, reservation will continue to bedevil it.... In assessing any scheme of reservations today, we have to keep in mind the distinction between those schemes that are directed towards advancing social and economic equality, and those that are directed towards maintaining a balance of power. Reservations for the Scheduled Castes and Scheduled Tribes are, for all their limitations, directed basically towards the goal of greater equality overall. Reservations for the Other Backward Classes and for religious minorities, whatever advantages they may have, are directed basically towards a balance of power. The former are in tune with the spirit of the Constitution; the latter must lead sooner or later to what Justice Gajendragadkar has called a 'fraud on the Constitution'."

D

a 372. The next question for consideration is whether Article 16(4)
 provides reservation of appointments or posts at the stage of initial entry
 to Government services or even in the process of promotion. As at
 present the question is not res integra. A Constitution Bench of this
 Court, in *General Manager, S. Rly. v. Rangachari*²⁶ by a majority of three
 b to two, has held that promotion to a selection post is covered by Article
 16(4) of the Constitution of India. *Rangachari case*²⁶ has been followed
 by this Court in *State of Punjab v. Hiralal*²⁹ and *Alkil Bharatitya Soshit*
*Karamchhari Sangh (Railway) v. Union of India*¹¹. This Court has also
 c referred to *Rangachari case*²⁶ in various other judgments. The reasoning
 of the majority in *Rangachari case*²⁶ has, however, been followed in the
 subsequent judgments of this Court without adding any further reason.
 Mr Venugopal and Ms Shyamla Pappu, learned counsel for the
 petitioners have contended that majority judgment in *Rangachari case*²⁶
 does not lay down correct law.

d 373. The point in dispute in *Rangachari case*²⁶ was "is promotion to a
 selection post which is included in Article 16(1) and (2) covered by
 Article 16(4) or is it not?" The majority in *Rangachari case*²⁶ interpreted
 Articles 16(1), 16(2) and 16(4) as under:

- e (1) The matters relating to employment must include all matters in
 relation to employment both prior and subsequent to the
 appointment which are incidental to the employment and form
 part of the terms and conditions of such employment. Thus
 promotion to selection posts is included both under Article
 16(1) and (2).
- f (2) Article 16(4) does not cover the entire field covered by Article
 16(1) and (2). Some of the matters relating to employment in
 respect of which equality of opportunity has been guaranteed
 by Article 16(1) and (2) do not fall within the mischief of
 Article 16(4). For instance the conditions of service relating to
 g employment such as salary, increment, gratuity, pension and the
 age of superannuation are matters relating to employment and
 as such they do not form the subject-matter of Article 16(4).
- h (3) Both "appointments" and "posts" to which the operative part
 of Article 16(4) refers to and in respect of which the power to
 make reservation has been conferred on the State must neces-
 sarily be appointments and posts in the service. The word
 "posts" in Article 16(4) cannot mean ex-cadre posts in the
 context.

i 26 (1962) 2 SCR 586 : AIR 1962 SC 36

29 (1970) 3 SCC 567: (1971) 3 SCR 267

11 (1981) 1 SCC 246: 1981 SCC (L&S) 50: (1981) 2 SCR 185

(4) The condition precedent for the exercise of the powers conferred by Article 16(4) is the inadequate representation of any backward class in the State services. The inadequacy may be numerical or qualitative. In the context the expression "adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the State may well take the view that a certain percentage of selection posts should also be reserved.

(5) The word "posts" under Article 16(4) includes selection posts and as such reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may be filled by promotion thereafter.

374. The first three findings of the majority in *Rangachari case*²⁶ reproduced above are unexceptionable, however, findings 4 and 5, with utmost respect, do not flow from the plain language of Article 16(4) of the Constitution of India.

375. There is no doubt that the backward classes should not only have adequate representation in the lowest cadres of services but they should also aspire to secure adequate representation in the higher services as well. Article 16(4) permits reservation for backward classes by way of direct recruitment to any of the cadres in the State services. Reservation can be made in direct recruitment to any cadre or service from Class IV to Class I of the State services. The majority in *Rangachari case*²⁶ has read in Article 16(4), what is not there, to support the element of qualitative representation.

376. The reservation permissible under Article 16(4) can only be "in favour of any backward class of citizens" and not for individuals. Article 16(1) guarantees a right to an individual citizen whereas Article 16(4) permits protective discrimination in favour of a class. It is, therefore, mandatory that the opportunity to compete for the reserve posts has to be given to a class and not to the individuals. When direct recruitment to a service is made the 'backward class' as a whole is given an opportunity to be considered for the reserve posts. Every member of the said class has a right to compete. But that is not true of the process of promotion. The backward class as a collectivity is nowhere in the picture; only the individuals, who have already entered the service against reserve posts,

²⁶ *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

a are considered. In the higher echelons of State services — cadre strength being small — there may be very few or even a single 'backward class' candidate to be considered for promotion to the reserve post. An individual citizen's right guaranteed under Article 16(1) can only be curtailed by providing reservations for a 'backward class' and not for backward individuals. The promotional posts are not offered to the backward class. Only the individuals are benefited. The object, context and the plain language of Article 16(4) make it clear that the job reservation can be done only in the direct recruitment and not when the higher posts are filled by way of promotion.

c 377. Examine from another angle. Article 16(4) provides for reservation of appointments or posts. Promotion is an incident of service which comes after appointment. 'Appointment' simpliciter means initial appointment to a service. Even the majority in *Rangachari case*²⁶ did not dispute this proposition of law. But interpreting the word "posts" to include selection posts it has been held that reservation can be made in the initial appointments as well as in regard to selection posts to be filled thereafter. With respect, it is not possible to construe the word "posts" in the manner the majority judgment in *Rangachari case*²⁶ has done. The expression "reservation of ... posts in favour of any backward class of citizens" only means that the posts in any cadre or service can be reserved by the State Government. It is not possible to read in these lines the permissibility of reservation even in the process of promotion. This is the only interpretation which can be given in the context and also in conformity with the service jurisprudence.

f 378. It has been rightly held in *Rangachari case*²⁶ that Article 16(4) does not cover the entire field covered by Article 16(1) and (2). The conditions of service which are matters relating to employment are protected by the doctrine of equality of opportunity and do not form the subject-matter of Article 16(4). It is settled proposition of law that right to promotion is a condition of service. Once a person is appointed he is governed by the conditions of service applicable thereto. Appointment and conditions of service are two separate incidents of service. Conditions of service exclusively come within the expression "matters relating to employment" and are covered by Article 16(1) and not by Article 16(4). When all other conditions of service fall outside the purview of Article 16(4) and are exclusively covered by Article 16(1) then where is the justification to bring promotion within Article 16(4) by giving strained meaning to the expression 'posts'. The only conclusion by reading Articles 16(1), 16(2) and 16(4) which can be drawn is that all conditions of service including promotion are protected under Articles 16(1) and

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26 *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

(2). Article 16(4) makes a departure only to the extent that it permits the State Government to make any provision for the reservation of appointments or posts at the initial stage of appointment and not in the process of promotion. a

379. Constitution of India aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. If members of backward classes can maintain minimum necessary requirement of administrative efficiency not only representation but also preference in the shape of reservation may be given to them to achieve the goal of equality enshrined under the Constitution. Article 16(4) is a special provision for reservation of appointments and posts for them in government services to secure their adequate representation. The entry of backward class candidates to the State services through an easier ladder is, therefore, within the concept of equality. When two persons one belonging to the backward class and another to the general category enter the same service through their respective channels then they are brought at par in the cadre of the service. A backward class entrant cannot be given less privileges because he has entered through easier ladder and similarly a general class candidate cannot claim better rights because he has come through a tougher ladder. After entering the service through their respective sources they are placed on equal footing and thereafter there cannot be any discrimination in the matter of promotion. Both must be treated equally in the matters of employment after they have been recruited to the service. Any further reservation for the backward class candidate in the process of promotion is not protected by Article 16(4) and would be violative of Article 16(1). b
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380. Although there is no factual material before us but it would not be hypothetical to assume that the reservation in promotion — based on roster points — can lead to various anomalies such as the person getting the benefit of the reservation may jump over the heads of several of his seniors not only in his basic cadre but even in the higher cadres to which he is promoted out of turn. Even otherwise when once a member of the backward class has entered service via reserve post it would not be fair to keep on providing him easier ladders to climb higher rungs of the State services in preference to the general category. Instead of reserving the higher posts for in-service members of the backward class the same should be filled by direct recruitment so that those members of backward class who are not in the State services may get an opportunity to enter the same. f
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a 381. For the reasons indicated above I hold that the interpretation given by the majority in *Rangachari case*²⁶ to Article 16(4), to the effect that it permits reservations in the process of promotion, is not permissible and as such cannot be sustained. *Rangachari case*²⁶ to that extent is overruled. I hold that Article 16(4) permits reservation of appointments or posts in favour of any backward class of citizens only at the initial stage of entry into the State services. Article 16(4) does not permit reservation either to the selection posts or in any other manner in the process of promotion.

E & F

c 382. Article 16(1) provides equality of opportunity for all citizens in matters relating to State services. Equals have to be treated equally whereas the unequals ought not to be treated equally. For effective implementation of the right guaranteed under Article 16(1) classification is permissible. Such classification has to be reasonable having regard to the object of the right. Article 16(4) is another facet of Article 16(1). It d exclusively provides for reservation which is one of the forms of classification. Article 16(4) being a special provision regarding reservation it completely takes away such classification from the purview of Article 16(1). Thus the State power to provide job reservations is wholly exhausted under Article 16(4). No reservation of any kind is permissible e under Article 16(1). Article 16(4) completely overrides Article 16(1) in the matter of job reservations.

f 383. Article 16(4) thus exclusively deals with reservation and it cannot be invoked for any other form of classification. Article 16(1), however, permits protective discrimination, short of reservation, in the matters relating to employment in the State services. On these issues I entirely agree and adopt the reasoning and the conclusions reached by R.M. Sahai, J and hold as under:

- g 1. Article 16(1) and Article 16(4) operate in the same field.
2. Article 16(4) is exhaustive of the State power to provide reservations in State services.
3. Protective discrimination, short of reservations, which satisfy the tests of reasonableness, is permitted under Article 16(1).

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h 384. I have carefully read the reasoning and the conclusions reached by R.M. Sahai, J on this issue. Agreeing with him I hold:

- i (i) that the reservations under Article 16(4) must remain below 50% and under no circumstance be permitted to go beyond 50%. Any reservation beyond 50% is constitutionally invalid.

²⁶ *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

- (ii) It is for the State to adopt the methodology of providing reservations below 50%. The State may provide the said reservation in respect of the substantive vacancies arising in a year or in the cadre or service. It would be permissible to carry forward the reserve vacancies of one year to the next year. It is reiterated that the vacancies reserved in a year including those which are carried forward shall not exceed 50%. a
- (iii) No reservation of any kind can be made for any class or category whether backward or non-backward under Article 16(1). b

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385. The protective discrimination in the shape of job reservations has to be programmed in such a manner that the most deserving section of the backward class is benefited. Means-test ensures such a result. The process of identifying backward class cannot be perfected to the extent that every member of the said class is equally backward. There are bound to be disparities in the class itself. Some of the members of the class may have individually crossed the barriers of backwardness but while identifying the class they may have come within the collectivity. It is often seen that comparatively rich persons in the backward class — though they may not have acquired any higher level of education — are able to move in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practised on them by the superior class is in turn practised by the affluent members of the backward class on the poorer members of the said class. The benefits of special privileges like job reservations are mostly chewed up by the richer or more affluent sections of the backward classes and the poorer and the really backward sections among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniformed. The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the State services. It is, therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservations is necessary to benefit the needy sections of the class. I, therefore, hold that means-test is imperative to skim-off the affluent sections of the backward classes. c
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386. Whether a group of citizens living below poverty line or under poverty conditions can be considered a backward class under Article i

16(4)? In other words can a class of citizens be identified as backward solely on the basis of economic criterion? Emphatic yes, is my answer.

a 387. Poverty is the culprit — cause of all kinds of backwardness. A poor man has no money. He lacks ordinary means of subsistence. Indigence keeps him away from education. Poverty breeds backwardness all around the class into which it strikes. It invariably results in social, economic and educational backwardness. It is difficult to perceive on what reasoning one can say that a class of citizens living under poverty conditions is not a backward class under Article 16(4). The main reason advanced in this respect is that social backwardness being the mandatory criterion for the identification of backward class under Article 16(4) poverty alone cannot be the basis for backwardness in relation to Article 16(4). The other reason advanced is that in this country except for a small percentage of the population, the people are generally poor. The argument is that reservation for all is reservation for none. It is necessary to examine the two reasons on the anvil of logic.

d 388. This Court, over a period of four decades, has been interpreting the expression "backward class" in Article 16(4) to mean "socially and educationally backward" on the mistaken assumption that the expression "any backward class of citizens" in Article 16(4) means the same thing as "socially and educationally backward classes" in Article 15(4).

e 389. Based on elaborate reasoning I have held in Part B of this judgment that the expression "any backward class of citizens" in Article 16(4) cannot be confined to "socially and educationally backward classes". The concept of "any backward class of citizens" in Article 16(4) is much wider than the "backward classes" defined under Article 15(4). It is not correct to say that social backwardness is an essential characteristic of the 'backward class' under Article 16(4). The object of Article 16(4), as held by me in Part C of this judgment, is to provide job reservations for the backward sections of those classes of citizens which are not adequately represented in the State services. In the context of Article 16(4) the economic criterion is essentially relevant. On the interpretation of Article 16(4) as given by me in Parts B and C of this judgment, social backwardness is not the sine qua non for being a "backward class" under Article 16(4).

h 390. Even if it is assumed that a backward class under Article 16(4) means socially backward, any class of citizens living below poverty line would amply qualify to be a 'backward class'. Poverty has a direct nexus to social backwardness. It is an essential and dominant characteristic of poverty. A rich belonging to backward caste — depending upon his disposition — may be or may not be socially backward, but a poor Brahmin

struggling for his livelihood invariably suffers from social backwardness. The reality of present-day life is that the economic standards confer social status on individuals. A poor person, howsoever honest, has no social status around him whereas a rich smuggler moves in a high society. No statistics can hide the fact that there are millions of people, who belong to the so-called elite castes, are as poor and often a great deal poorer than a very large proportion of the backward classes. It is a fallacy to think that a person, though earning thousands of rupees or holding higher posts is still backward simply because he happens to belong to a particular caste or community whereas millions of people living below poverty line are forward because they were born in some other caste, or communities. Poverty never discriminates, it chooses its victims from all religions, castes and creeds. The pavement-dwellers and the slum-dwellers, belonging to different castes and religions, have a common thread of poverty around them. Are they not the backward classes envisaged under Article 16(4)? Poverty binds them together as a class. Classes of citizens living in chronic-cramping poverty are per se socially backward. Poverty runs into generations. It may be a result of the social or economic, inequality of the past. During the British regime several communities who fought the Britishers and those who actively participated in the freedom struggle, were deliberately kept below the poverty line. There are vast areas in India, like Kalahandi in Orissa, which are perennially poverty-stricken. By and large poverty in this country is a historical factor. Looked from any angle it is not possible to hold that the citizens of India who are living under poverty conditions or below poverty line are not socially backward. It would be doing violence to the object, purpose and the language of Article 16(4) to say that the poor of the country are not eligible for job reservations under the said article.

391. Simply because the bulk of the population of this country is poor and there may be a large number of claimants for the reserved jobs that is no ground to deny the poor their right under Article 16(4). This reasoning will apply to the other backward classes with much more force. Mandal has identified 52% of the population as backward. Apart from that 22% are Scheduled Castes and Scheduled Tribes. Those who are canvassing reservations for 74% of the so-called backward classes have no basis whatsoever to say that 40% poor of the country be denied the benefit of job reservations. The poor can be classified on the basis of income, occupation, conditions of living such as slum-dwellers, pavement-dwellers etc. and priorities worked out. They can be operationally defined, categorised, sub-categorised and thereafter the backward sections can be identified for the purposes of Article 16(4). It

is high time that we leave the dogmatic approach of making reservation in public services on the basis of caste as a symbol of social backwardness.

- a We must adopt a practical measure to confining it only to low income groups of people having unremunerative occupations whose talents and abilities are subdued under the weight of poverty. I, therefore, hold that a backward class for the purposes of Article 16(4) can be identified solely on the basis of economic criteria.

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392. This question has been examined by Brother Judges and they have held that the reservations can be provided by the Parliament, State Legislatures, statutory rules as well as by way of Executive Instructions issued by the Central Government and the State Governments from time to time. The Executive Instructions can be issued only when there are no statutory provisions on the subject. Executive Instructions can also be issued to supplement the statutory provisions when those provisions are silent on the subject of reservations. These propositions of law are unexceptionable and I reiterate the same. I, however, make it clear that any Executive Instruction [issued under Article 16(4), 73 or 162] providing reservations, which goes contrary to statutory provisions or the rules under Article 309 or any other statutory rules, shall not be operative to the extent it is contrary to the statutory provisions/rules.

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393. Legal aspects arising out of Article 16(4) have been discussed and decided. Finally we have to examine the process of identification of the backward classes and test the same at the anvil of Article 16(4) as interpreted by us. Mandal Commission was set up on January 1, 1979 under Article 340 to identify the classes for the purposes of Article 16(4). The Commission identified 3743 backward castes and submitted its report on December 31, 1980. No action was taken on the Mandal Report by the successive governments for a decade. The Mandal Report was finally lifted from the morgue by the government of the day which accepted the report and issued Memorandum dated August 13, 1990 providing reservations for 3743 backward castes identified by the Mandal Commission. Later on the successor government amended the reservation policy by the Memorandum dated September 25, 1991. These Memoranda have been reproduced in the judgments proposed by brother Judges. Both the Memoranda are based on the Mandal Report. The reservations provided under the two Memoranda are to be extended to 3743 castes identified by the Mandal Commission. It is, therefore, necessary to find out whether the backward classes to which reservations under the Memoranda are being extended, have been constitutionally

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and validly identified. I do not agree with the theory — apparently without logic — that the Memoranda can be adjudicated de hors Mandal Report. Elaborate arguments were addressed before us challenging the validity of Mandal Report by M/s Palkhivala, Venugopal, Shyamala Pappu and other learned counsel appearing for the petitioners. Agreeing with the learned counsel, I hold that the identification of 3743 castes as the 'beneficiary class' for job reservations under Article 16(4), is wholly unconstitutional, invalid and cannot be acted upon. My reasons for holding so are as under :

- (i) The terms of reference require the Commission "to determine the criteria for defining the socially and educationally backward classes". Assume that Mandal has done so. The reference and the Mandal Commission's investigation is based on the legal fallacy that the expression "backward class of citizens" means the same thing as "socially and educationally backward classes of citizens" in Article 15(4). That is why the Commission was asked to identify socially and educationally backward classes. We have held that two expressions in Articles 16(4) and 15(4) do not mean the same thing. The classes to be identified under Article 16(4) cannot be confined only to social and educational backwardness. The definition therein is much wider and is not limited as under Article 15(4). It is thus, evident that the identification of the "backward classes" under Article 16(4) cannot be based only on the criteria of social and educational backwardness. Other classes which could have been identified on the basis of occupation, economic standards, environments, backward area residence, etc. etc. have been left out of consideration. The identification done by Mandal is thus violative of Article 16(4) and as such cannot be sustained.
- (ii) It has been held by me that the backward classes for the purpose of Article 16(4) are the backward sections of the classes who are inadequately represented in the State services. Admittedly, this exercise was not done. Mandal identified the castes on the criteria, of social and educational backwardness.
- (iii) The Terms of Reference further required the Commission "to examine the desirability or otherwise of making provision for the reservation of appointments or tests ... in public services". This most vital part of the Terms of Reference was wholly ignored by the Commission. Before making its recommendations the Commission was bound, by the Terms of Reference, to determine the desirability or otherwise of such reservations. The Commission did not at all investigate this essential part of the Terms of Reference.

a (iv) Mandal has not done any survey to find out as to whether 3743
castes which according to him are the backward classes, under
Article 16(4), had inadequate representation in the State ser-
vices. There is no material on the record to show that 3743
castes identified by Mandal are not adequately represented in
the State services. The condition of inadequacy is a condition
precedent under Article 16(4) of the Constitution. This having
b not been established, the identification of the so-called
"backward classes", is wholly unconstitutional and inoperative.

(v) Para 12.7 of the report indicates that the list of backward castes
was prepared from the following sources:

- c 1. Socio-educational field survey;
2. Census report of 1961;
3. Personal knowledge gained through extensive touring and
from the evidence; and
d 4. Lists of Other Backward Classes notified by various State
Governments.

The so-called "socio-educational field survey", was an eye-
wash. Only two villages and one urban block in each district of
the country was taken into consideration. According to the
petitioners only .06% of the total villages in the country were
e surveyed. Mr Venugopal relied on a chart showing the sources
from which the list of castes was prepared by the Mandal Com-
mission. The contents of chart were not disputed before us by
the Union of India. Mr Venugopal pointed out that out of 3743
castes only 406 were subjected to the socio-educational field
survey. To be precise the chart shows that only 10.85% castes
f were subjected to survey and the remaining castes were picked
up from other sources. The Commission set up for the purposes
of identifying backward classes is under an obligation to
conduct comprehensive survey. A backward class, identified on
the sole test of caste and that also with only 10.85% socio-
g educational survey, cannot be constitutionally valid under
Article 16(4).

h Large number of castes were picked up by the Mandal
Commission from the State lists. It was illustrated before us that
out of 260 castes identified from the Union Territory of
Pondicherry only 14 were subjected to socio-educational
survey. One was identified on personal assessment of the Com-
mission and the remaining 245 castes were picked up from the
State list. These facts are not denied by the Union of India in
the affidavit filed in Writ Petition No. 930 of 1990. Similarly
i large number of castes were taken from the lists of other

backward classes operating in the States. It was wholly illegal for the Commission to adopt the State lists without any investigation and survey. It is not disputed that no Commission was ever set up in Pondicherry to identify the backward classes. There is nothing in the Mandal Report to show that the State lists which were adopted were ever prepared as a result of any survey, investigation or scrutiny. Mandal Report in paras 2.63 and 2.64 specifically states that Haryana, Himachal Pradesh, Assam, Pondicherry, Rajasthan, Orissa, Meghalaya and Delhi have notified lists of Other Backward Classes without their being any enquiry into their conditions. In para 2.65 it is mentioned that Andaman and Nicobar, Arunachal Pradesh, Chandigarh, Dadra and Nagar Haveli, Goa, Daman and Diu, Lakshadweep, Madhya Pradesh, Manipur, Mizoram, Nagaland, Sikkim, Tripura and West Bengal have never prepared a list of OBCs. If the State lists were to be declared as Other Backward Classes by the Central Government then no Commission under Article 340 was required — an Administrator could do the job. When 90% of the castes selected were not subjected to the socio-educational survey it is impermissible to treat the said castes as backward classes.

The 1961 census was also taken as a source for preparing the list of backward castes. There is nothing on the record to show as to why Mandal relied on 1961 census when the 1971 census was available. A statement filed by Mr Venugopal after examining the government records shows that the castes were also picked up from the Kaka Kalelkar Commission Report. In para 1.13 Mandal condemns Kaka Kalelkar's Report, even otherwise the said report was rejected by the Government of India in 1955 but still Mandal adopts castes from the said Report.

It is, thus, obvious that hardly any investigation was done by the Mandal Commission to find out the backward classes for the purposes of Article 16(4). A collection of so-called backward castes by a clerical act based on drawing-room investigation cannot be the backward classes envisaged under Article 16(4). If the castes enlisted by Mandal are permitted to avail the benefit of job reservations, thereby depriving half the country's population of its right under Article 16(1) the result would be nothing but a fraud on the Constitution.

- (vi) The Mandal Report virtually re-writes Article 16(4) by substituting caste for class. The caste has been made the sole and exclusive test for determining the backward classes. Every other test — economic or non-economic — has been wholly rejected.

a Para 1.21 of the Mandal Report states "the substitution of caste
by economic tests will amount to ignoring the genesis of social
backwardness in the Indian society". Paras 11.5 and 11.25 of the
Mandal Report indicate that the caste was taken as a collec-
tivity for the purposes of socio-educational survey. The
"indicators" for determining social and educational back-
wardness were also applied to the castes alone. Every single
b piece of evidence and other material adverted to by the Com-
mission was only for the purpose of determining whether a
caste was backward. There was no investigation at all to find
out whether a member or family in the caste was backward. The
"indicators" invoked to determine backwardness were
c invariably applied to the castes and not to the individuals. What
emerges is that in the first instance only a caste was taken as a
collectivity. Thereafter no individual or a family of that caste
was subjected to the "indicators". Only the castes were tested
through the "indicators" and the result obtained. Thus the caste
has been made the sole, paramount, overriding and decisive
d factor. The methodology based on caste alone is unconstitu-
tional as it violates Articles 16(2) and 16(4) of the Constitution
of India.

(vii) The Mandal Report invents castes even for non-Hindus. The
obsession with casteism and the desire to apply the same
e yardstick to all Indians impelled the Commission to identify
backward classes among non-Hindus also by the exclusive test
of caste (paras 12.11 to 12.18) regardless of the fact that caste is
anathema to Christianity, Islam and Sikhism. There are various
other denominations and religions in the country like Buddhist,
f Jains, Arya Samajis, Lingayats etc. who do not believe in
casteism. The net-result is that almost 25% of the population
was not taken into consideration by the Mandal Commission.
The approach was anti-secular and against the basic features of
the Constitution.

g (viii) The Mandal Commission has estimated the population of other
backward classes in the country as 52%. To say the least the
exercise to reach the figure of 52% is wholly imaginary. It is in
the realm of conjecture. The conclusion arrived at in para 12.22
of the Mandal Report to the effect that backward classes con-
stitute nearly 52% of the Indian population is based on 1931
h census. It is wholly arbitrary to count the population of
backward classes in the country on the basis of census which
took place fifty years before the report was submitted. In order
to reach the conclusion of 52% Mandal has added up the
population of Scheduled Castes, Scheduled Tribes, non-Hindu
i communities (Muslims, Christians, Sikhs, Buddhists, Jains) and

the forward Hindu castes and communities (Brahmins, Rajputs, Marathas, Jats, Vaishya-Baniyas etc., Kayasthas, other forward Hindu caste/groups) which make 56.30% of the total population. Mandal has assumed that the residual population of 43.70% (100 minus 56.30% equivalent to 43.70%) consists of backward classes. It is difficult to imagine how anybody can accept such an illusory and wholly arbitrary calculations. It is pity that half of the country is being deprived of their fundamental right under Article 16(1) on the basis of the census exhumed from a sixty-year-old grave and the calculations which are unknown to logic and fair play. Mandal further assumed, erroneously, that relative population growth of various communities at the time of Mandal Report was the same as at the time of 1931 census. It is absurd to think that there was no change in their population growth during the long period of 50 years. It is pertinent to observe that India of 1931 comprised of present India, Pakistan, Bangladesh, Burma and Sri Lanka and as such it would be wholly erroneous to relate the caste-based population situation of 1931 to that of 1980.

- (ix) According to Mandal Commission's own showing the materials before the Commission were woefully inadequate. Essential data was non-existent. "Hardly any State was able to give the desired information" (para 9.4). As regards representation of OBCs in government services, the information received by the Commission was "too sketchy and scrappy for any meaningful inference which may be valid for the country as a whole" (para 9.14). "No State Government could furnish figures regarding the level of literacy and education amongst other backward class" (para 9.30). "No lists of OBCs is maintained by the Central Government, nor their particulars are separately compiled in Government offices" (para 9.47).

394. Based on the reasoning and the conclusions reached by me in paras 'A' to 'K' of the judgment, I order and direct as under:

- (i) The identification of 3743 castes as a "backward class" by Mandal Commission is constitutionally invalid and cannot be acted upon.
- (ii) Office Memorandum dated August 13, 1990 issued by the Government of India is unconstitutional, non est and as such cannot be enforced.
- (iii) Para 2(i) of the Office Memorandum dated September 25, 1991 adopts the means-test. The adoption of means-test by the Government of India in principle is upheld. Since para 2(i) is applicable to the 3743 castes identified by the Mandal Commission, the said para shall not operate till the time "backward

classes" for the purposes of Article 16(4) are identified by the Government of India in accordance with the law laid down in this judgment.

- (iv) Para 2(ii) of the Office Memorandum dated September 25, 1991 is upheld. Since this para is integral part of the two Memoranda dated August 13, 1990 and September 25, 1991, it cannot operate independently. I, however, hold that the Government of India can make reservations solely based on economic criterion by a separate order.

395. The writ petition and all connected matters are disposed of in the above terms with no order as to costs.

SAWANT, J (*concurring*)— In a legal system where the Courts are vested with the power of judicial review, on occasions issues with social, political and economic overtones come up for consideration. They are commonly known as political questions. Some of them are of transient importance while others have portentous consequences for generations to come. More often than not such issues are emotionally hypercharged and raise a storm of controversy in the society. Reason and rationalism become the first casualties, and sentiments run high. The Courts have, however, as a part of their obligatory duty, to decide them. While dealing with them the courts have to raise the issues above the contemporary dust and din, and examine them dispassionately, keeping in view, the long term interests of the society as a whole. Such problems cannot always be answered by the strict rules of logic. Social realities which have their own logic have also their role to play in resolving them. The present is an issue of the kind.

397. It is for the first time that a nine-Judge Bench has been constituted to consider issues arising out of the provisions for reservations in the services under the State under Article 16 of the Constitution. The obvious purpose is to reconsider, if necessary, the propositions of law so far laid down by this Court on the various aspects of the subject. While, therefore, it may be true that everything is at large and the Court is not inhibited in its approach and conclusions by the precedents, the view taken so far on certain facets of the subject, may be hard to disregard on the principle of *stare decisis*. This will be more so where certain situations have crystallised and have become a part of the social psyche over a period of time. They may be unsettled only at the risk of creating avoidable problems.

398. The reservation in State employment is not a phenomenon unknown to this country. It is traceable to a deliberate policy of affirmative action or positive discrimination adopted in some parts of the country as early as in the beginning of this century. It is equally known to the employment under the Central Government where reservations in

favour of the Scheduled Castes and Scheduled Tribes have been in existence for a considerable time now. The reasons why the issue has assumed agitational proportion on account of the present reservations, may be varied. While it is true that the Court is concerned with the interpretation of the provisions of the Constitution on the subject and not either with the causes of the turmoil or the consequence of the interpretation of the law, it is equally true that the Constitution being essentially a political document, has to be interpreted to meet the "felt necessities of the time". To interpret it, ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as an immutable cold letter of law unconcerned with the realities. Our Constitution, unlike many others, incorporates in it the framework of the social change that is desired to be brought about. The change has to be ushered in as expeditiously as possible but at the same time with the least friction and dislocation in national life. The duty to bring about the smooth change-over is cast on all institutions including the judiciary. A deep knowledge of social life with its multitudinous facets and their interactions, is necessary to decide social issues like the present one. A superficial approach will be counter-productive.

The Ground Realities

399. Because of its pernicious caste system which may truly be described as its original sin, the Indian society has, for ages, remained stratified. The origin of the caste system is shrouded in speculation, neither the historians nor the sociologists being able to trace it in its present form to any particular period of time or region, or to a specific cause or causes. The fact, however, remains that it consists of mobility-tight hierarchical social compartments. Every individual is born in and, therefore, with a particular caste which he cannot change. Hitherto, he had to follow the occupation assigned to his caste and he could not even think of changing it. The mobility to upper caste is forbidden, even if today he pursues the professions and occupations of the upper caste. He continues to be looked upon as a member of the lower caste even if his achievements are higher than of those belonging to the higher castes. In social intercourse, he has to take his assigned caste-place. The once casteless and unreligious Indian society of Vedic times became multifarious and multi-religious mainly on account of the rebellion of the lower castes against the tyranny of the caste system and their exploitation by the higher castes. Various sects emerged within the Hindu fold itself to challenge the inequitable system. Distinct religions like Buddhism, Jainism and Sikhism were born as revolts against casteism. When, therefore, first Islam and then Christianity made their entries here and ruled this country, many from the lower castes embraced them to escape the tyranny and inequity, while some from the higher castes for pelf and

a power. However, the change of religion did not always succeed in
eliminating castes. The converts carried with them their castes and
occupations to the new religions. The result has been that even among
Sikhs, Muslims and Christians casteism prevails in varying degrees in
practice, their preachings notwithstanding. Only Zoroastrianism is an
exception to the rule; but that is because entry into it by conversion is
impermissible. Casteism has thus been the bane of the entire Indian
b society, the difference in its rigidity being of a degree varying from
religion to religion and from region to region.

400. One of the worst effects of casteism with which we are directly
concerned in the present case, was that access to knowledge and learning
was denied to the lower castes, for centuries. It was not till the advent of
c the British Rule in this country that the doors of education were opened
to them as well as to women who were considered as much disenthralled to
education as the Shudras. Naturally, all the posts in the administrative
machinery (except those of the menials) were manned by the higher
castes, which had the monopoly of learning. The concentration of the
d executive power in the hands of the select social groups had its natural
consequences. The most invidious and self-perpetuating consequence
was the stranglehold of a few high castes over the administration of the
country from the lower to the higher rungs, to the deliberate exclusion of
others. Consequently, all aspects of life were controlled, directed and
e regulated mostly to suit the sectional interests of a small section of the
society which numerically did not exceed 10% of the total population of
the country. The state of the health of the nation was viewed through
their eyes, and the improvement in its health was effected according to
their prescription. It is naive to believe that the administration was
f carried on impartially, that the sectional interests were subordinated to
the interests of the country and that justice was done to those who were
outside the ruling fold. This state of affairs continues even till this day.

401. To accept that after the inauguration of the Constitution and
g the introduction of adult franchise, there has been a change in the
administrative power-balance is to be unrealistic to the point of being
gullible. Undoubtedly, the lower castes and classes who constitute the
overwhelming majority of no less than 75% of the population have
secured, for the first time in the history of this country, an advantage in
h terms of political leverage on account of their voting strength. We do see
today that the political executive is not only fairly representative of the
lower classes but many times dominantly so. But that is on account of the
voting power and not on account of social, educational or economic
i advancement made by them. The entry into the administrative machinery
does not depend on voting strength but on the competitive attainments

requisite for the relevant administrative field and post. Those attainments can be had only as a result of the cumulative progress on social, educational and economic fronts. Political power by itself cannot usher in such progress. It has to be exercised to bring about the progress. The only known medium of exercising the power is the administrative machinery. If that machinery is not sympathetic to the purpose of the exercise, the political power becomes ineffective, and at times is also rendered impotent. The reason why, after forty-four years of Independence and of vesting of political power in the hands of the people, the same section which dominated the nation's affairs earlier, continues to do so even today, lies here.

402. The paradoxical spectacle of political power being unable to deliver the goods to whom it desires, is neither unique nor new to this country. This has happened and happens whenever the implementing machinery is at cross purposes with the political power. Faced with the hostility of the administrative-executive to their plans for reform, realising the inequitous distribution of posts in the administration between different castes and communities, and being genuinely interested in lifting the disadvantaged sections of the society in their States, the enlightened Rulers of some of the then Princely States took initiative and introduced reservations in the administrative posts in favour of the backward castes and communities since as early as the first quarter of this century. Mysore and Kolhapur were among the first to do so. On account of the movement for social justice and equality started by the Justice Party, the then Presidency of Madras (which then comprised the present State of Tamil Nadu, parts of the present Andhra Pradesh and Kerala) initiated reservations in the government employment in 1921. It was followed by the Bombay Presidency which then comprised the major parts of the present States of Maharashtra, Karnataka and Gujarat. Thus the first quarter of this century saw reservations in government employment in almost whole of the Southern India. It has to be noted that these reservations were not only in favour of the depressed classes which are today known as the Scheduled Castes, but also in favour of other backward castes and classes including what were then known as the intermediate castes. The policy did arouse hostility and resistance of the higher castes even at that time. The agitation against reservations today is only a new incarnation of the same attitude of hostility. The resistance is understandable. It springs from the real prospect of the loss of employment opportunities for the eligible young. But the deeper reason of the high castes for opposing the reservation may be the prospect of losing the hitherto exclusive administrative power and having to share it with others on an increasing scale. When it is realised that in a demo-

cracy, the political executive has a limited tenure and the administrative executive wields the real power, (they can truly be described as the permanent politicians), the antipathy to reservation on a pitched note, propelled by the prospective loss of power, is quite intelligible. The loss of employment opportunities can be made good by generating employment elsewhere and by adopting a rational economic structure with planned economy, planned population and planned education. That is where all sections of the society — whether pro or anti-reservation should concentrate. For even if all available posts are reserved or dereserved, they will not provide employment to more than an infinitesimal number of either of the sections. Unfortunately, it is not logic and sanity, but emotions and politics which dominate the issue. The loss of exclusive political power wielded through administrative machine, however, cannot be avoided except by perpetuating the *status quo*.

403. The consequences of the *status quo* are startling and ruinous to the country. One of the major causes of the backwardness of the country in all walks of life is the denial to more than 75% of the population, of an opportunity to participate in the running of the affairs of the country. Democracy does not mean mere elections. It also means equal and effective participation in shaping the destiny of the country. Needless to say that where a majority of the population is denied its share in actual power, there exists no real democracy. It is a harsh reality. It can be mended not by running away from it or by ignoring it, but by taking effective workable remedial measures. Those who point to the past achievements and the present progress of the country, forget that these achievements and the progress are by a tiny section of the society who got an opportunity to realise and use their talent. If all sections of the society had such opportunity, this country's achievements in all fields and walks of life would have been many times more. That this is a realistic estimate and not a mere rhetoric is proved by history. Dr Ambedkar belongs to the very recent past. If what is handed down to us as history is to be believed, then the epic 'Mahabharata' was penned by Vyasa, who was born of a fisher woman; 'Ramayana' was authored by Valmiki, who belonged to a tribe forced to live by depredations. The immortal poet Kalidasa's ancestry is not known. These few instances demonstrate that intelligence, perception, character, scholarship and talent are not a monopoly of any section of the society. Given opportunity, those who are condemned to the lowliest stations in life can rise to the loftiest status in society. One can only guess how much this country has lost for want of opportunities to the vast majority all these centuries. This aspect of the present and the past history has a bearing on the "merit-contention" advanced against reservations.

404. In this connection, it will be worthwhile quoting what Pandit Nehru had to say on the subject in *Discovery of India*:

"Therefore, not only must equal opportunities be given to all, but special opportunities for educational, economic and cultural growth must be given to backward groups so as to enable them to catch up with those who are ahead of them. Any such attempt to open the door of opportunities to all in India will release enormous energy and ability and transform the country with amazing speed."

405. The inequalities in Indian society are born in homes and sustained through every medium of social advancement. Inhuman habitations, limited and crippling social intercourse, low-grade educational institutions and degrading occupations perpetuate the inequities in myriad ways. Those who are fortunate to make their escape from these all-pervasive dragnets by managing to attain at least the minimum of attainments in spite of the paralysing effects of the debilitating social environment, have to compete with others to cross the threshold of their backwardness. Are not those attainments, however low by the traditional standards of measuring them, in the circumstances in which they are gained, more creditable? Do they not show sufficient grit and determination, intelligence, diligence, potentiality and inclination towards learning and scholarship? Is it fair to compare these attainments with those of one who had all the advantages of decent accommodation with all the comforts and facilities, enlightened and affluent family and social life, and high quality education? Can the advantages gained on account of the superior social circumstances be put in the scales to claim merit and flaunted as fundamental rights? May be in many cases, those coming from the high classes have not utilised their advantages fully and their score, though compared with others, is high, is in fact not so when evaluated against the backdrop of their superior advantages — may even be lower. With the same advantages, others might have scored better. In this connection, Dr Ambedkar's example is worth citing. In his matriculation examination, he secured only 37.5% of the marks, the minimum for passing being 35% (See *Dr Ambedkar* by Dr Dhananjay Keer). If his potentialities were to be judged by the said marks, the country would have lost the benefit of his talent for all times to come.

406. Those who advance merit contention, unfortunately, also ignore the very basic fact — (though in other contexts, they may be the first to accept it) — that the traditional method of evaluating merit is neither scientific nor realistic. Marks in one-time oral or written test do not necessarily prove the worth or suitability of an individual to a particular post, much less do they indicate his comparative calibre. What is more, for different posts, different tests have to be applied to judge the

suitability. The basic problems of this country are mass oriented. India lives in villages, and in slums in towns and cities. To tackle their problems and to implement measures to better their lot, the country needs personnel who have first-hand knowledge of their problems and have personal interest in solving them. What is needed is empathy and not mere sympathy. One of the major reasons why during all these years after Independence, the lot of the downtrodden has not even been marginally improved and why majority of the schemes for their welfare have remained on paper, is perceptibly traceable to the fact that the implementing machinery dominated as it is by the high classes, is indifferent to their problems. The Mandal Commission's lament in its report, that it did not even receive replies to the information sought by it from various Governments, departments and organizations on the caste-wise composition of their services, speaks volumes on the point. A policy of deliberate reservations and recruitment in administration from the lower classes, who form the bulk of the population and whose problems primarily are to be solved on a priority basis by any administration with democratic pretensions, is therefore, not only eminently just but essential to implement the Constitution, and to ensure stability, unity and prosperity of the country.

407. What should further not be forgotten is that hitherto for centuries, there have been cent per cent reservations in practice in all fields, in favour of the high castes and classes, to the total exclusion of others. It was a purely caste and class-based reservation. The administration in the States where the reservations are in vogue for about three quarters of a century now, further cannot be said to be inferior to others in any manner. The reservations are aimed at securing proper representation in administration to all sections of the society, intelligence and administrative capacity being not the monopoly of any one class, caste or community. This would help to promote healthy administration of the country avoiding sectarian approaches and securing the requisite talent from all available sources.

408. The assumption that the reservations lead to the appointment or admission of non-meritorious candidates is also not factually correct. In the first instance, there are minimum qualifying marks prescribed for appointment/admission. Secondly, there is a fierce competition among the backward class candidates for the seats in the reserved quota. This has resulted in the cut-off marks for the seats in the reserved quota reaching near the cut-off line for seats in the general quota as some surveys made on the subject show. A sample of such surveys made for the State of Tamil Nadu by Era Sezhian and published in the issue of the *Hindu* dated October 8, 1990 may be reproduced here:

SELECTION TO PROFESSIONAL COURSES: CUT-OFF LEVEL

Course of Study	Open Compe- tition	Back- ward	Most Back- ward	Sche- duled caste	a
Engineering Course (Anna University)					
Computer Science	97.98%	96.58%	93.25%	84.38%	b
Electronics	97.74%	96.08%	92.16%	82.22%	
Electrical	95.84%	95.42%	91.48%	81.98%	
Mechanical Engg.	95.78%	94.10%	90.66%	79.21%	
Medical Course (University of Madras)					
M.B.B.S.	95.22%	93.18%	89.62%	83.98%	c
Agricultural Course (Agricultural University, Coimbatore)					
B.Sc. Agri.	90.90%	90.08%	86.10%	78.04%	d
B.E. Agri.	92.66%	91.96%	87.46%	76.14%	
Veterinary (Tamil Nadu Veterinary and Animal Sciences University)					
BVSc.	94.90%	93.48%	91.18%	85.24%	
BFSc.	96.96%	95.58%	95.02%	93.02%	e

409. By what logic can it be said that the above marks secured by the candidates from the backward classes are not meritorious?

410. The reservations by their very nature have, however, to be imaginative, discriminating and gradual, if they are to achieve their desired goal. A dogmatic, unrealistic and hasty approach to any social problem proves, more often than not, self-defeating. This is more so when ills spread over centuries are sought to be remedied. It is not possible to remove the backlog in representation at all levels of the administration in one generation. More difficult it is to do so in all fields and all branches of administration, and at the same pace. It will not only be destructive of the object of reservations but will positively be harmful even to those for whom it is meant — not to speak of the society as a whole. It must be remembered that some individual exceptions apart, even the advanced classes have not made it to the top in one generation. Such exceptions are found in backward classes as well.

Philosophy and Objectives of Reservations

411. The aim of any civilised society should be to secure dignity to every individual. There cannot be dignity without equality of status and

a opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. The dignity of the individual is dented in direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern, and give one's best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithals to avail of them are denied. Nevertheless, the consequences are as potent.

c 412. Inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the Preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.

d 413. Likewise, the social and political justice pledged by the Preamble of the Constitution to be secured to all citizens, will remain a myth unless first economic justice is guaranteed to all. The liberty of thought and expression also will remain on paper in the face of economic deprivations. A remunerative occupation is a means not only of economic upliftment but also of instilling in the individual self-assurance, self-esteem and self-worthiness. It also accords him a status and a dignity as an independent and useful member of the society. It enables him to participate in the affairs of the society without dependence on, or domination by, others, and on an equal plane depending upon the nature, security and remuneration of the occupation. Employment is an important and by far the dominant remunerative occupation, and when it is with the Government, semi-Government or Government-controlled organisation, it has an added edge. It is coupled with power and prestige of varying degrees and nature, depending upon the establishment and the post. The employment under the State, by itself, may, many times help achieve the triple goal of social, economic and political justice.

g 414. The employment — whether private or public — thus, is a means of social levelling and when it is public, is also a means of directly participating in the running of the affairs of the society. A deliberate attempt to secure it to those who were designedly denied the same in the past, is an attempt to do social and economic justice to them as ordained by the Preamble of the Constitution.

i 415. It is no longer necessary to emphasise that equality contemplated by Article 14 and other cognate articles including Articles 15(1), 16(1), 29(2) and 38(2) of the Constitution, is secured not only when equals are treated equally but also when unequals are treated

unequally. Conversely, when unequals are treated equally, the mandate of equality before law is breached. To bring about equality between the unequals, therefore, it is necessary to adopt positive measures to abolish inequality. The equalising measures will have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalisation will not be of the unequals. Article 14 which guarantees equality before law would by itself, without any other provision in the Constitution, be enough to validate such equalising measures. The Founders of the Constitution, however, thought it advisable to incorporate another provision, viz., Article 16 specifically providing for equality of opportunity in matters of public employment. Further they emphasised in clause (4) thereof that for equalising the employment opportunities in the services under the State, the State may adopt positive measures 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 such services. By hindsight, the foresight shown in making the provision specifically, instead of leaving it only to the equality provision as under the U.S. Constitution, is more than vindicated. In spite of decisions of this Court on almost all aspects of the problem, spread over the past more than forty years now, the validity, the nature, the content and the extent of the reservation is still under debate. The absence of such provision may well have led to total denial of equal opportunity in the most vital sphere of the State activity. Consequently, Article 38(2) which requires the State in particular to strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations, and Article 46 which enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people, and to protect them from social injustice and all forms of exploitation, and Article 335 which requires the State to take into consideration the claims of the Scheduled Castes and Scheduled Tribes in making the appointments to services and posts under the Union or States, would have, all probably remained on paper.

416. The trinity of the goals of the Constitution, viz., socialism, secularism and democracy cannot be realised unless all sections of the society participate in the State power equally, irrespective of their caste, community, race, religion and sex and all discriminations in the sharing of the State power made on those grounds are eliminated by positive measures.

417. Under Article 16(4), the reservation in the State employment is to be provided for a "class of people" which must be "backward" and "in

a the opinion of the State" is "not adequately represented" in the services of the State. Under Article 46, the State is required to "promote with special care" the "educational and economic interests" of the "weaker sections" of the people and "in particular", of the Scheduled Castes and Scheduled Tribes, and "to protect" them from "social injustice" and "all forms of exploitation". Since in the present case, we are not concerned with the reservations in favour of the SCs/STs, it is not necessary to refer b to Article 335 except to point out that, it is in terms provided there that the claims of SCs/STs in the services are to be taken into consideration, consistently with the maintenance of efficiency of administration. It must, therefore, mean that the claims of other backward class of citizens and weaker sections must also be considered consistently with the c maintenance of the efficiency. For, whomsoever, therefore, reservation is made, the efficiency of administration is not to be sacrificed, whatever the efficiency may mean. That is the mandate of the Constitution itself.

418. The various provisions in the Constitution relating to reservation, therefore, acknowledge that reservation is an integral part of the d principle of equality where inequalities exist. Further they accept the reality of inequalities and of the existence of unequal social groups in the Indian society. They are described variously as "socially and educationally backward classes" [Article 15(4) and Article 340], "backward class" [Article 16(4)] and "weaker sections of the people" [Article 46]. e The provisions of the Constitution also direct that the unequal representation in the services be remedied by taking measures aimed at providing employment to the discriminated class, by whatever different expressions the said class is described. How does one identify the discriminated class is a question of methodology. But once it is identified, f the fact that it happens to be a caste, race, or occupational group, is irrelevant. If the social group has hitherto been denied opportunity on the basis of caste, the basis of the remedial reservation has also to be the caste. Any other basis of reservation may perpetuate the *status quo* and may be inappropriate and unjustified for remedying the discrimination. g When, in such circumstances, provision is made for reservations, for example, on the basis of caste, it is not a reservation in favour of the caste as a "caste" but in favour of a class or social group which has been discriminated against, which discrimination cannot be eliminated, otherwise. What the Constitution forbids is discrimination "only" on the h basis of caste, race etc. However, when the caste also happens to be a social group which is "backward" or "socially and educationally backward" or a "weaker section", this discriminatory treatment in its favour, is not *only* on the basis of the caste.

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419. The objectives of reservation may be spelt out variously. As the U.S. Supreme Court has stated in different celebrated cases, viz., *Oliver Brown v. Board of Education of Topeka*⁵³; *Spottswood Thomas Bolling v. C. Melvin Sharpe*⁶⁵; *Marco DeFunis v. Charles Odegaard*²¹; *Regents of the University of California v. Allan Bakke*²⁰; *H. Earl Fullilove v. Philip M. Klutznick*⁵¹ and *Metro Broadcasting Inc. v. Federal Communications Commission*⁵² rendered as late as on June 27, 1990, the reservation or affirmative action may be undertaken to remove the "persisting or present and continuing effects of past discrimination"; to lift the "limitation on access to equal opportunities"; to grant "opportunity for full participation in the governance" of the society; to recognise and discharge "special obligations" towards the disadvantaged and discriminated social groups"; "to overcome substantial chronic under-representation of a social group"; or "to serve the important governmental objectives". What applies to American society, applies *ex proprio vigore* to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous. Unlike in America, the all pervasive discrimination here is against a vast majority.

420. As has been pointed out earlier, our Constitution itself spells out the important objectives of the State Policy. There cannot be a more compelling goal than to achieve the unity of the country by integration of different social groups. Social integration cannot be achieved without giving equal status to all. The administration of the country cannot also be carried on impartially and efficiently without the representation in it of all the social groups and interests, and without the aid and assistance of all the views and social experiences. Neither democracy nor unity will become real, unless all sections of the society have an equal and effective voice in the affairs and the governance of the country.

421. In a society such as ours where there exist forward and backward, higher and lower social groups, the first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups. Unless all social groups are brought on an equal cultural plane, social intercourse among the groups will be an impossibility. Inter-marriage as a matter of course and without inhibitions is by far the most potent means of effecting social integration.

65 347 US 497: 98 L Ed 884

53 347 US 483 : 48 L Ed 2d 873 (1954)

21 40 L Ed 2d 164: 416 US 312 (1974)

20 57 L Ed 2d 750: 438 US 265 (1978)

51 448 US 448: 65 L Ed 2d 902 (1980)

52 58 IW 5053 (decided on June 27, 1990)

- a Inter-marriages between different social groups would not be possible unless all groups attain the same cultural level. Even in the same social group, marriages take place only between individuals who are on the same cultural plane. Culture is a cumulative product of economic and educational attainments leading to social accomplishment and refinement of mind, morals and taste. Employment and particularly the governmental employment promotes economic and social advancement which in turn also leads to educational advancement of the group. Though it is true that economic and educational advancement is not necessarily accompanied by cultural growth, it is also equally true that without them, cultural advancement is difficult. Employment is thus an important aid for cultural growth. To achieve total unity and integration of the nation, reservations in employment are, therefore, imperative, in the present state of our society.

- b 422. Under the Constitution, the reservations in employment in favour of backward classes are not intended either to be indiscriminate or permanent. Article 16(4) which provides for reservations, also at the same time prescribes their limits and conditions. In the first place, the reservations are not to be kept in favour of every backward class of citizens. It is only that backward class of citizens which, in the opinion of the State, is "not adequately represented" in the services under the State, which is entitled to the benefit of the reservations. Secondly, and this follows from the first, even that backward class of citizens would cease to be the beneficiary of the reservation policy, the moment the State comes to the conclusion that it is adequately represented in the services.

The Impugned Orders of the Government

- f 423. In order to appreciate the relevance of the questions which are to be answered by this Court, it is necessary first to analyse the provisions of the two impugned orders. The first order dated August 13, 1990, acknowledges the fact that our society is multiple and undulating, and expressly refers to the Second Backward Classes Commission, popularly known as Mandal Commission and its report submitted to the Government of India on December 31, 1980 and the purpose for which the Commission was appointed, viz., for early achievement of "the objective of social justice" enshrined in the Constitution. The order then states that the Government have considered carefully, the report of the Commission and the recommendations of the Commission in "the present context" regarding the benefits to be extended to the "Socially and Educationally Backward Classes" (SEBCs) as opined by the Commission. The order further declares that the Government are of the clear view

that at the outset "certain weightage is to be provided to such classes in the services of the Union and other public undertakings". With this preface, the order proceeds to —

- (1) provide for reservation of 27% of the vacancies in civil posts and services under the Union Government to "SEBCs"; a
- (2) restrict the reservations to the vacancies to be filled in by direct recruitment only (and thus by necessary implication excludes reservations in recruitment by promotion); b
- (3) leave the procedure to be followed for enforcing reservation to be detailed in instructions to be issued separately;
- (4) make it clear that those belonging to SEBCs who enter into services in the open i.e., unreserved category are not to be counted for the purpose of calculating the reserved quota of 27%; c
- (5) specify that in the first phase of reservation, it is only SEBC castes and communities which are common to both the lists given in the report of the Mandal Commission and the list prepared by the State Governments, would be the beneficiaries of the reservations; d
- (6) state that the list of such common castes and communities will be issued by the Government separately;
- (7) give effect to the reservation from August 7, 1990; and
- (8) explain that the reservation quota will apply not only to the services under the Government of India but also to the services in the public sector undertakings and financial institutions including the public sector banks. e

424. This order was amended by the second order of September 25, 1991. The first purpose of the amendment, as stated in the opening paragraph of the order is to classify the SEBCs into two categories, namely, SEBCs and the poorer sections of the SEBCs, and to give the latter the benefit of reservations on preferential basis. The second purpose is to carve out a new category of "Other Economically Backward Sections" of the people (OEBSs) which are not covered by any existing schemes of reservation, and to provide reservation in services for them. To effectuate these two objectives, the order provides that — f

- (1) out of the 27% of the vacancies reserved for SEBCs, preference shall be given to candidates belonging to poorer sections of SEBCs. If sufficient number of candidates belonging to poorer sections of SEBCs are not available, the unfilled vacancies shall be filled by other SEBC candidates; g

a (2) 10% of the vacancies in civil posts and services shall be reserved for "Other Economically Backward Sections" of the people (OEBSs);

(3) The criteria for determining poorer sections of the SEBCs as well as OEBSs are to be issued separately.

b 425. The effect of the second order is to increase the reservations by 10% making the total reservations in the civil posts and services 59-1/2% (22-1/2% for SCs/STs + 27% for SEBCs + 10% for OEBSs).

c 426. As has been pointed out earlier, Article 16(4) does not use the expression "Socially and Economically Backward Classes". Instead it uses the expression "Backward Class of Citizens". It is Article 15(4) and Article 340 which use the expression "Socially and Educationally Backward Classes". Since the judicial decisions have equated the expression "Backward Class of Citizens" with the expression "Socially and Educationally Backward Classes of Citizens", it appears that the impugned orders have used the two expressions synonymously to mean the same class of citizens. The second order has gone even further. It has carved out yet another class of beneficiaries of reservation, namely, "Other Economically Backward Sections". As would be pointed out a little later, this new class of citizens cannot be a beneficiary of reservations in services under clause (4) of Article 16 nor under clause (1) thereof.

e 427. We may now proceed to deal with the specific questions raised before us.

Question I :

f *Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation of posts in services under the State ?*

g 428. With the majority decision of this Court in *State of Kerala v. N.M. Thomas*¹⁰ having confirmed the minority opinion of Subba Rao, J in *T. Devadasan v. Union of India*¹¹ the settled judicial view is that clause (4) of Article 16 is not an exception to clause (1) thereof, but is merely an emphatic way of stating what is implicit in clause (1).

h 429. Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results. The various provisions of our Constitution and particularly those of Articles 38, 46, 335, 338 and 340 together with the Preamble, show that the right to equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. It is a positive right,

i ¹⁰ (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906
¹¹ (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

and the State is under an obligation to undertake measures to make it real and effectual. A mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them. However, as pointed out by Dr Ambedkar while replying to the debate on the provision in the Constituent Assembly, it became necessary to incorporate clause (4) in Article 16 at the insistence of the members of the Assembly and to allay all apprehensions in that behalf. Thus, what was otherwise clear in clause (1) where the expression "equality of opportunity" is not used in a formal but in a positive sense, was made explicit in clause (4) so that there was no mistake in understanding either the real import of the "right to equality" enshrined in the Constitution or the intentions of the Constitution-framers in that behalf. As Dr Ambedkar has stated in the same reply, the purpose of the clause (4) was to emphasise that "there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' into so to say the administration".

430. If, however, clause (4) is treated as an exception to clause (1), an important but unintended consequence may follow. There would be no other classification permissible under clause (1), and clause (4) would be deemed to exhaust all the exceptions that can be made to clause (1). It would then not be open to make provision for reservation in services in favour of say, physically handicapped, army personnel and freedom fighters and their dependents, project affected persons, etc. The classification made in favour of persons belonging to these categories is not hit by clause (2). Apart from the fact that they cut across all classes, the reservations in their favour are made on considerations other than that of backwardness within the meaning of clause (4). Some of them may belong to the backward classes while some may belong to forward classes or classes which have an adequate representation in the services. They are, however, more disadvantaged in their own class whether backward or forward. Hence, even on this ground it will have to be held that Article 16(4) carves out from various classes for whom reservation can be made, a specific class, viz., the backward class of citizens, for emphasis and to put things beyond doubt.

431. For these very reasons, it will also have to be held that so far as "backward classes" are concerned, the reservations for them can only be made under clause (4) since they have been taken out from the classes for which reservation can be made under Article 16(1). Hence, Article

a 16(4) is exhaustive of all the reservations that can be made for the backward classes as such, but is not exhaustive of reservations that can be made for classes other than backward classes under Article 16(1). So also, no reservation can be made under Article 16(4) for classes other than "backward classes" implicit in that article. They have to look for their reservations, to Article 16(1).

b 432. It may be added here that reservations can take various forms of preferences, concessions, exemptions, extra facilities etc. or of an exclusive quota in appointments as in the present case. When measures other than an exclusive quota for appointments are adopted, they form part of the reservation measures or are ancillary to or necessary for availing of the reservations. Whatever the form of reservation, the backward classes have to look for them to Article 16(4) and the other classes to Article 16(1).

Question II :

d *What would be the content of the phrase "Backward Class" in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether "Backward Classes" in Article 16(4) would include the "weaker sections" mentioned in Article 46 as well?*

e 433. The courts have, as will be instantly pointed out, equated the expression "backward classes of citizens" with the expression "Socially and Educationally Backward Classes of citizens" ("SEBCs" for short) found in Article 15(4) and Article 340. Even the impugned orders have used the expression "socially and educationally backward classes of citizens". As a matter of fact, since the impugned orders have chosen to give the benefit of reservation expressly to SEBCs and since it is not suggested that SEBCs are not "backward class of citizens" within the meaning of Article 16(4), the discussion on the point is purely academic in the present case.

g 434. In this connection, a reference may first be made to Article 335 of the Constitution. There is no doubt that backward classes under Article 16(4) would also include SCs/STs for whose entry into services, provision is also made under Article 335. There is, however, a difference in the language of the two articles. Whereas the provision of Article 16(4) is couched in an enabling language, that of Article 335 is in a mandatory cast. It appears that it became necessary to make the additional provision of reservations for SCs/STs under Article 335 because for them the reservations in services were to be made as obligatory as reservations in the House of the People and the Legislative Assemblies

under Articles 330 and 332 respectively. When we remember that Articles 330, 332 and 335 belong to the family of articles in Part XVI which makes "*Special Provisions Relating to Certain Classes*", the additional and obligatory provision for SCs/STs under Article 335 becomes meaningful. It is probably because of the mandate of Article 335 and the level of backwardness of the SCs/STs — the most backward among the backward classes — that it also became necessary to caution and emphasise in the same vein, that the imperative claims of the SCs/STs shall be taken into consideration consistently with the efficiency of the administration, and not by sacrificing it. It cannot, however, be doubted that the same considerations will have to prevail while making provisions for reservation in favour of all backward classes under Article 16(4). To hold otherwise would not only be irrational but discriminatory between two classes of backward citizens.

435. We may now analyse Article 16 in the light of the question. In the first instance, it is necessary to note that neither clauses (1) and (2) of Article 16 read together, nor clause (2) of Article 29 prohibits discrimination and, therefore classification, which is not made *only* on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them. They do not prevent classification, if religion, race, caste etc. are coupled with other grounds or considerations germane for the purpose for which it is made. Secondly, clauses (1) and (2) of Article 16 prevent discrimination against individuals and not against classes of citizens. Thirdly, clause (4) of Article 16 enables the State to make special provision in favour of any backward "class" of citizens and not in favour of citizens who can be classified as backward. The emphasis is on "class of citizens" and not on "citizens". Fourthly, as has already been pointed out earlier, the class of citizens under Article 16(4) has not only to be backward but also a class which is not adequately represented in the services under the State. Fifthly, when we remember that the Scheduled Castes and Scheduled Tribes are also the members of the backward classes of citizens within the meaning of Article 16(4), the nature of backwardness of the backward class of citizens is implicit in Article 16(4) itself. Further, Part XVI of the Constitution which makes special provision under Article 338 for National Commission for Scheduled Castes and Scheduled Tribes for investigating their conditions, makes a similar provision under Article 340 for appointment of Commission to investigate the conditions also of "socially and educationally backward classes of citizens". The two provisions leave no doubt about the kind of backwardness that the Constitution takes care of in Article 16(4). What is more, clause (4) of Article 15 which was added

- a after the decision in *State of Madras v. Smt. Champakam Dorairajan*² specifically mentions that nothing in Article 15 or in clause (2) of Article 29, shall prevent the State from making any special provision for the advancement of any "socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes". The significance of this amendment should not be lost sight of. It groups "socially and educationally backward classes" with "Scheduled Castes and Scheduled Tribes". When it is remembered that Articles 341 and 342 enable the President to specify by notification, the Scheduled Castes and Scheduled Tribes, it can hardly be debated that such specifications from time to time may only be from the socially and educationally backward classes or from classes whose economic backwardness is on account of their social and educational backwardness.

c 436. We may now refer to the decisions of this Court on the point.

- d 437. In *M.R. Balaji v. State of Mysore*¹² what fell for consideration was Article 15(4), and on the language of the said article, it was held by this Court that the backwardness contemplated by the said article was both social and educational. It is not either social or educational but it is both social and educational. In *Janki Prasad Parimoo v. State of J & K*⁶¹ which was a case under Article 16(4), this Court read "backward class of citizens" in Article 16(4) as "socially and educationally backward class of citizens", although Justice Palekar who delivered the judgment for the Court, proceeded to equate the two expressions on the assumption that "it was well-settled that the expression 'backward class' in Article 16(4) means the same thing as the expression 'any socially and educationally backward classes of citizens' in Article 15(4)". It is true that no decision prior to this decision had in terms sought to equate the two expressions, and to that extent the said statement can be faulted as it is sought to be done before us.

- e 438. In *K.C. Vasanth Kumar v. State of Karnataka*⁹ this Court was called upon to express opinion on the issue of reservations which may serve as a guideline to the Commission which the Government of Karnataka proposed to appoint for examining the question of affording better employment and educational opportunities to the Scheduled Castes and Scheduled Tribes and other backward classes. Hence, the interpretation of the expression "backward class of citizens" under Article 16(4) and of the expression "socially and educationally backward classes" under Article 15(4) and their co-relation, fell for consideration

2 1951 SCR 525: AIR 1951 SC 226

12 1963 Supp 1 SCR 439: AIR 1963 SC 649

61 (1973) 1 SCC 420: 1973 SCC (L&S) 217: (1973) 3 SCR 236

9 1985 Supp 1 SCC 714: 1985 Supp 1 SCR 352

directly. The five Judge of the Bench with the exception of Chief Justice Chandrachud expressed their opinion on these two expressions. Desai, J held that "Courts have more or less ... veered round to the view that in order to be socially and educationally backward classes, the group must have the same indicia as Scheduled Castes and Scheduled Tribes". The learned Judge then proceeded to deal with what, according to him, was a narrow question, viz., whether caste-label should be sufficient to identify social and educational backwardness. However, it appears that the learned Judge proceeded on the footing that the expression "backward class of citizens" was synonymous with the expression "socially and educationally backward classes of citizens". There is no discussion whether the two expressions are in fact similar and of the reasons for the same. Chinnappa Reddy, J dealt with the two expressions a little extensively and came to the conclusion as follows: (SCC pp. 745-46, para 49)

"Now, it is not suggested that the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes for whom special provision for advancement is contemplated by Article 15(4) are distinct and separate from the backward classes of citizens who are not adequately represented in the services under the State for whom reservation of posts and appointments is contemplated by Article 16(4). 'The backward classes of citizens' referred to in Article 16(4), despite the short description, are the same as 'the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes', so fully described in Article 15(4): Vide *Triloki Nath Tikku v. State of J & K(I)*⁴ and other cases."

439. Sen, J also appears to have proceeded on the footing that the two expressions, viz., "socially and educationally backward classes" under Article 15(4) and "backward class of citizens" under Article 16(4) are synonymous.

440. Venkataramiah, J (as he then was) held that "Article 15(4) and Article 16(4) are intended for the benefit of "those who belong to castes, communities which are traditionally disfavoured and which have suffered societal discrimination in the past". The other factors such as physical disability, poverty, place of habitation etc. — according to the learned Judge — were never in the contemplation of the makers of the Constitution while enacting these clauses." The learned Judge has held that "while relief may be given in such cases under Articles 14, 15(1) and Article 16(1) by adopting a rational principle of classification, Article 14, Article 15(4) and Article 16(4) cannot be applied to them". The learned Judge has further held that

4 (1967) 2 SCR 265; AIR 1967 SC 1283; (1967) 2 LLJ 271

a "it is now accepted that the expressions 'socially and educationally backward classes of citizens' and 'the Scheduled Castes and the Scheduled Tribes' in Article 15(4) of the Constitution together are equivalent to 'backward class of citizens' in Article 16(4)".

b 441. There is, therefore, no doubt that the expression "backward class of citizens" is wider and includes in it "socially and educationally backward classes of citizens" and "Scheduled Castes and Scheduled Tribes".

c 442. The next question is whether the social and educational backwardness of the other backward classes has to be akin to or of the same level as that of the Scheduled Castes and the Scheduled Tribes. It is true that some decisions of this Court such as *Balaji*¹² and *State of A.P. v. P. Sagar*¹⁴ have taken the view that the backwardness of the backward class under Article 16(4) being social and educational, must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. In *Balaji*¹² it is stated: (SCR p. 458)

d "It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian society there were other classes of citizens who were equally, or may be somewhat less backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them."

f After referring to the provisions of Articles 338(3), 340(1), 341 and 342, the Court proceeded to hold as follows: (SCR p. 458)

g "It would thus be seen that this provision contemplates that some Backward Classes may by the Presidential order be included in Scheduled Castes and Tribes. That helps to bring out the point that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes."

h 443. The test laid down above of similarity of social and educational backwardness was accepted in *P. Sagar*¹⁴.

444. However, in *State of A.P. v. U.S.V. Balram*¹⁶ the earlier view has been explained by pointing out that the above decisions do not lay down

i 12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

14 (1968) 3 SCR 595: AIR 1968 SC 1379

16 (1972) 1 SCC 660: (1972) 3 SCR 247

that backwardness of the other backward classes must be exactly similar in all respects to that of the Scheduled Castes and the Scheduled Tribes. Further, in *Parimoo*⁶¹ the test laid down in *Balaji*¹² has been explained in the following words: (SCC pp. 434-35, para 25)

"Indeed all sectors in the rural areas deserve encouragement but whereas the former by their enthusiasm for education can get on without special treatment, the latter require to be goaded into the social stream by positive efforts by the State. That accounts for the *raison d'être* of the principle explained in *Balaji case*¹² which pointed out that backward classes for whose improvement special provision was contemplated by Article 15(4) must be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally. If those examples are steadily kept before the mind the difficulty in determining which other classes should be ranked as backward classes will be considerably eased."

445. In *K.S. Jayasree v. State of Kerala*¹⁷ it is stated: (SCC p. 733, para 13, p. 734, para 15)

"Backward classes for whose improvement special provisions are contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes. This Court has emphasised in decisions that the backwardness under Article 15(4) must be both social and educational."

* * *

The concept of backwardness in Article 15(4) is not intended to be relative in the sense that classes who are backward in relation to the most advanced classes of society should be included in it."

446. These observations will also show that the test of comparable backwardness laid down in *Balaji*¹² has not been and is not to be, understood to mean that backwardness of the other backward classes has to be of the same degree as or identical in all respects to, that of the Scheduled Castes and the Scheduled Tribes. At the same time, the backwardness is not to be measured in terms of the forwardness of the forward classes and those who are less forward than the forward are to be classified as backward. The expression "backward class of citizens", as stated earlier, has been used in Article 16(4) in a particular context taking into consideration the social history of this country. The expression is used to denote those classes in the society which could not advance socially and educationally because of the taboos and handicaps

⁶¹ *Janki Prasad Parimoo v. State of J & K*, (1973) 1 SCC 420: 1973 SCC (L&S) 217 : (1973) 3 SCR 236

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

¹⁷ (1976) 3 SCC 730: (1977) 1 SCR 194, 197-198

a created by the society in the past or on account of geographical or other similar factors. In fact, the expression "backward classes" could not be adequately encompassed in any particular formula and hence even Dr Ambedkar while replying to the debate on the point stated as follows:

b "If Honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think honourable Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word 'backward' has been used.

e ... Somebody asked me: 'What is a backward community'? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government". (*CAD*, Vol. 7, p. 702)

f 447. It will have, therefore, to be held that the backwardness of the backward classes other than the Scheduled Castes and Scheduled Tribes who are entitled to the benefit of the reservations under Article 16(4), need not be exactly similar in all respects to the backwardness of the Scheduled Castes and Scheduled Tribes. That it is not necessary that the social, educational and economic backwardness of the other backward classes should be exactly of the same kind and degree as that of the Scheduled Castes and the Scheduled Tribes is recognised by the various provisions of the Constitution itself since they make difference between the Scheduled Castes and the Scheduled Tribes on the one hand, and other "socially and educationally backward classes" or "backward class of the citizens" on the other. What is further, if the other backward classes are backward exactly in all respects as the Scheduled Castes and Scheduled Tribes, the President has the power to notify them as Scheduled Castes and Scheduled Tribes, and they would not continue to

be the other backward classes. The nature of their backwardness, however, will have to be mainly social resulting in their educational and economic backwardness as that of the Scheduled Castes and the Scheduled Tribes. a

448. The next important aspect of the question is whether caste can be used for identifying socially and educationally backward classes.

449. There is no doubt that no classification can validly be made *only* on the basis of caste just as it cannot be made only on the basis of religion, race, sex, descent, place of birth or any of them, the same being prohibited by Article 16(2). What is, however, required to be done for the purposes of Article 16(4) is not classification but identification. The identification is of the backward classes of citizens, which have, as seen above, to be socially and, therefore, educationally and economically backward (for short described as socially and educationally backward). Any factor — whether caste, race, religion, occupation, habitation etc. — which may have been responsible for the social and educational backwardness, would naturally also supply the basis for identifying such classes not because they belong to particular religion, race, caste, occupation, area etc. but because they are socially and educationally backward classes. b c d

450. It is, however, contended that the adoption of caste as a factor even for identifying backwardness would perpetuate casteism. The argument, with respect, begs the question. It presumes that the castes are created the moment they are identified as backward classes for the purposes of Article 16(4). One of the most damaging and perpetuating social consequences of the caste system has admittedly been the discrimination suffered by certain castes and communities as such castes and communities. The result has been that these castes and communities as a whole continued to remain as backward classes. If, therefore, an affirmative action is to be taken to give them the special advantage envisaged by Article 16(4), it must be given to them because they belong to such discriminated castes. It is not possible to redress the balance in their favour on any other basis. A different basis would perpetuate the *status quo* and therefore the caste system instead of eliminating it. On the other hand, by giving the discriminated caste-groups the benefits in question, discrimination would in course of time be eliminated and along with it the casteism. It would thus be seen that the contention to the contrary is counter-productive and will in fact perpetuate, though unintentionally, the very caste system which it seeks to eliminate. e f g h

451. Prime Minister Nehru while replying to the very point raised in the discussion on the amendment to Article 15 by insertion of clause (4), summarised the situation in the following words: i

a "... But you have to distinguish between backward classes which are specially mentioned in the Constitution that have to be helped to be made to grow and not think of them in terms of this community or that. Only if you think of them in terms of the community you bring in communalism. But if you deal with backward classes as such, whatever religion or anything else they may happen to belong to, then it becomes our duty to help them towards educational, social and economic advance." (Lok Sabha Debates May 16, 1951 — Column 1821)

b 452. 'Class' is a wider term. 'Caste' is only a species of the 'class'. The relevant portions of the definitions of 'class' and 'caste' given in *Shorter Oxford Dictionary* may be reproduced here:

c "Class, ... 6. gen. A number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name;

2. Higher (Upper), Middle, Lower Classes."

d "Caste. 1555. [ad. Sp. and Pg. *casta* race, lineage; orig. 'pure (stock or breed)', f. *casta*, fem. of *casto*: — L. *castus* (see CHASTE). Formerly written *cast*.] 1. A race, stock, or breed — 1774. 2. spec. One of the hereditary classes into which society in India has long been divided. Also transf. 1613.

e The members of each caste are socially equal, have the same religious rites, and generally follow the same occupation or profession ; they have no social intercourse with those of another caste. The original castes were four: 1st, the *Brahmans* or priestly caste; 2nd, the *Kshatriyas* or military caste; 3rd, the *Vaisyas* or merchants; 4th, the *Sudras*, or artisans and labourers. Now almost every variety of occupation has its caste.

f 3. fig. A class who keep themselves socially distinct, or inherit exclusive privileges 1807.

4. This system among the Hindus; also the position it confers, as in *To lose, or renounce* c. 1811, Also *gen.* and *fig.*"

g 453. In view of the above meanings ascribed to the terms, it can hardly be argued that caste is not a class. A caste has all the attributes of a class and can form a separate class. If, therefore, a caste is also a backward class within the meaning of Article 16(4), there is nothing in the said article or in any other provision of the Constitution, to prevent the conferment of the special benefits under that article on the said caste. Hence it can hardly be argued that caste in no circumstances may form the basis of or be a relevant consideration for identification of backward class of citizens.

i

454. It will be instructive in this connection to refer to the earlier decisions on the point.

455. The context in which the amendment to Article 15 was made being sufficiently illuminating on the subject, may first be noticed. In *Champakam*² the seven-Judge Bench of this Court struck down the classification made on the basis of caste, race and religion for the purposes of admission to educational institutions on the ground that Article 15 did not contain a clause such as clause (4) of Article 16. The necessary corollary of that view is that with the clause like clause (4) of Article 16, the enumeration of backward classes on the basis of caste, race or religion would not be bad, and that is exactly what was held by the same Bench in a decision delivered on the same day in the case of *B. Venkataramana v. State of Madras*²⁷. This was a case directly under Article 16(4) unlike *Champakam*² which was under Article 15. In this case, the Communal G.O. of the Madras Government made reservations of posts for Harijans and backward Hindus as well as for other communities, viz., Muslims, Christians, non-Brahmin Hindus and Brahmins. The Court upheld the reservations in favour of Harijans and backward Hindus holding that those reserved posts were so reserved not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such posts in favour of a backward class of citizens. The Court, however, struck down the reservations in favour of other than Harijans and backward Hindus on the ground that it was not possible to say that those classes were backward classes. It can be seen from this decision that the classification of the backward classes into Harijans and backward Hindus was upheld by the Court as being permissible under Article 16(4) since it was not a classification made on the ground of religion, race, caste etc. but because the said two groups were backward classes of citizens.

456. In *Balaji*¹² it was observed as follows: (SCR pp. 459-60)

"Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection, it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves."

² *State of Madras v. Smt Champakam Dorairajan*, 1951 SCR 525: AIR 1951 SC 226

²⁷ AIR 1951 SC 229: (1951) 1 MLJ 625

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

a 457. In *R. Chitrallekha v. State of Mysore*⁷ the majority held that caste and class are not synonymous. However, it was also held that caste can be one of the relevant factors though not the sole and dominant one to determine the social and educational backwardness. The social and educational backwardness can be ascertained with the help of factors other than castes. The Court further held that if the entire caste is backward, it should be included in the list of Scheduled Castes. There can be castes b whose majority is socially and educationally backward but minority may be more advanced than another small sub-caste, the total number of which is far less than the advanced minority. In such cases to give benefit to the advanced section of the majority of the socially and educationally backward castes will be unjust to others.

c 458. With respect, these observations leave many things unanswered. In the first instance, it is difficult to understand as to why, when the entire caste or for that matter the majority of the caste is socially and educationally backward, it could not be classified as a backward class, and why when it is done, the caste cannot become a class, d as has been held in a later decision, i.e., *Balram*¹². Secondly, if the entire caste is backward, it is not necessary to include it in the list of Scheduled Castes unless it is contended that the backwardness of the other backward castes must be of the same nature, degree and level in all respects as that of the Scheduled Castes. The said observations also e ignore that the expression "backward class of citizens" is wider than the expression "Scheduled Castes" as the former expression includes not only the Scheduled Castes but also other backward classes which may not be as backward as the Scheduled Castes. In any case, there is no reason, f why before a backward caste is included in the list of Scheduled Castes, it should not be entitled to be accepted as a socially and educationally backward caste. Thirdly, when a minority of a socially and educationally backward caste is advanced, the remedy lies in denying the benefit of reservation to such minority and not neglect the majority.

g 459. In *P. Rajendran v. State of Madras*¹³ it is held that a caste is also a class of citizens, and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such caste on that ground. It is also held that once the State shows that a particular caste is backward, it is for those who challenge it, to disprove it. The propositions h laid down in this case are directly contrary to the propositions laid down in *Chitrallekha*⁷.

i 7 (1964) 6 SCR 368: AIR 1964 SC 1823

12 *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247

13 (1968) 2 SCR 786: AIR 1968 SC 1012

460. In *P. Sagar*¹⁴ it is observed as follows: (SCR p. 600)

"In the context in which it occurs the expression 'class' means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted."

461. In *Triloki Nath v. State of J & K (II)*⁸ it is held: (SCR p. 105)

"The expression 'backward class' is not used as synonymous with 'backward caste' or 'backward community'. *The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class*, but that is not because they are members of a caste or community, *but because they form a class*. In its ordinary connotation, the expression 'class' means a homogeneous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution." (emphasis supplied)

462. With respect, it may be added that when the members of an entire caste are backward and on that account are treated as a backward class, the expressions "backward caste" and "backward class" become synonymous.

463. In *A. Periakaruppan v. State of T.N.*¹⁵ it is observed that a caste has always been recognised as a class. The decision refers in this connection to what is observed in *Narayan Vasudev Phadke v. Emperor*⁶⁶ which observations are as follows:

"In my opinion, the expression 'classes of His Majesty's subjects' in Section 153-A of the Code is used in a restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or

66 AIR 1940 Bom 379: 42 Bom LR 861

14 *State of A.P. v. P. Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379

8 (1969) 1 SCR 103 AIR 1969 SC 1: (1970) 1 LLJ 629

15 (1971) 1 SCC 38: (1971) 2 SCR 430

religion, and that the term 'class' within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community."

464. The decision also quotes with approval from paragraphs 10, 11 and 13 of Chapter V of the *Backward Classes Commission's Report* (*Kalelkar Commission Report*) where it is observed: (SCC p. 48, paras 26-27)

"We tried to avoid caste but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate caste from social backwardness at the present juncture. In modern time anybody can take to any profession. The Brahmin taking to tailoring, does not become a tailor by caste, nor is his social status lowered as a Brahmin. A Brahmin may be a seller of boots and shoes, and yet his social status is not lowered thereby. Social backwardness, therefore, is not today due to the particular profession of a person, but we cannot escape caste in considering the social backwardness in India.

It is not wrong to assume that social backwardness has largely contributed to the educational backwardness of a large number of social groups.

All this goes to prove that social backwardness is mainly based on racial, tribal, caste and denominational differences."

465. The Court then observes that "there is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life". However, the Court thereafter proceeds also to state that "the Government should not proceed on the basis that once a class is considered as a backward class, it should continue to be a backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as taken-off stage the competition is necessary for their future progress."

466. In *Balram*¹² it was held that entire caste can be socially and educationally backward and in such circumstances reservation can be on the basis of castes not because they are castes but because they are socially and educationally backward classes. It was also held that reservation can also be on the basis of the population of the different castes separately as social and educational backward classes. It was further held that if candidates from social and educational backward castes secure 50% or more seats on merit in the general pool, the list of backward classes need not be invalidated but the Government should be asked to review it.

¹² *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247

467. In *Jayasree*¹⁷ it was observed as follows: (SCC p. 735, para 21)

"In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The commission found that the lower income group constitutes socially and educationally backward classes. The basis of the reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of citizens is based solely on the caste of the citizen it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical."

468. In *Vasanth Kumar*⁹ Chinnappa Reddy, J stated as follows: (SCC pp. 742-43, para 40)

"Any view of the caste system, class or cursory, will at once reveal the firm links which the caste system has with economic power. Land and learning, two of the primary sources of economic power in India, have till recently been the monopoly of the superior castes. Occupational skills were practised by the middle castes and in the economic system prevailing till now they could rank in the system next only to the castes constituting the landed and the learned gentry. The lowest in the hierarchy were those who were assigned the meanest tasks, the outcastes who wielded no economic power. The position of a caste in rural society is more often than not mirrored in the economic power wielded by it and vice versa. Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. Such we must recognise is the primeval force and omnipresence of caste in Indian Society, however, much we may like to wish it away."

17 *K.S. Jayasree v. State of Kerala*, (1976) 3 SCC 730: (1977) 1 SCR 194

9 *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

a So sadly and oppressively deep-rooted is caste in our country that it has cut across even the barriers of religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioner of other religious faiths and Hindu dissentients are sometimes as rigid adherents to the system of caste as the conservative Hindus. We find Christian Harijans, Christian Madars, Christian Reddys, Christian Kammars, Mujbi Sikhs, etc., etc. In Andhra Pradesh there is a community known as Pinjaras or Dudekulas (known in the North as 'Rui Pinjane Wala' : Professional cotton-beaters) who are really Muslims, but are treated in rural society, for all practical purposes, as a Hindu caste. Several other instances may be given."

c 469. Venkataramiah, J (as he then was) in the same decision observed as follows: (SCC p. 787, para 111)

d "An examination of the question in the background of the Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward."

e 470. It will also be useful to note the trend in the thinking of some of the learned Judges of the U.S. Supreme Court on measures designed to redress the racial imbalance in that country in various fields. In *Regents of the University of California v. Bakke*²⁰ Marshall, J expressed the view that in the light of the history of discrimination and its devastating impact on the lives of Negroes, bringing the Negroes into the mainstream of American life should be a State interest of the highest order, and that neither the history of the Fourteenth Amendment nor past Supreme Court decisions supported the conclusion that a University could not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors. He also held that affirmative action programs of the type used by the University (to reserve seats for the Negroes) should not be held to be unconstitutional.

g 471. Blackmun, J observed that it would be impossible to arrange an affirmative action programme in a racially neutral way and have it successful.

h 472. Brennan, J observed that the claim that the law must be "colour-blind" is more an aspiration rather than a description of reality and that any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title

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20 57 L Ed 2d 750: 438 US 265 (1978)

VI (of the Civil Rights Act, 1964) and its legislative history. On the contrary, he observed, that the prior decisions of the Court strongly suggested that Title VI *did not prohibit the remedial use of the race* where such action is constitutionally permissible. In this connection, it will be worthwhile to quote two passages from the learned Judge's opinion in that case. While dealing with equal protection clause in the Fourteenth Amendment, the learned Judge observed as follows:

"The assertion of human equality is closely associated with the proposition that differences in colour or creed, birth or status, are neither significant nor relevant to the way in which person should be treated. Nonetheless, the position that such factors must be 'constitutionally an irrelevance' summed up by *the shorthand phrase 'our Constitution is colour-blind' has never been adopted by this Court as the proper meaning of the Equal Protection Clause*. Indeed, we have expressly rejected this proposition on a number of occasions. Our cases have always implied that an 'overriding statutory purpose' could be found that would justify racial classifications.... More recently ... this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board which assigned students on the basis of race, was per se invalid because it was not colour-blind. We conclude, therefore, that *racial classification are not per se invalid* under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

The conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, *even when such programs explicitly take race into account* finds direct support in our cases construing congressional legislation designed to overcome the present effects of the past discrimination."

473. In *Fullilove*⁵¹ where the provision in the Public Works Employment Act, 1977 requiring that at least 10% of the Federal funds granted for local public works projects, should be used by the State or the local grantee to procure services or supplies from businesses owned by minority group members, was challenged, Chief Justice Burger, speaking for himself, White and Powell, JJ upheld the view expressed in the earlier decisions that *if the race was the consideration for earlier discrimination in remedial process, steps will almost invariably require to be based on racial factors and any other approach would freeze the status quo which is the very target of all remedies to correct the imbalance introduced by the past racial discriminatory measures....* (all emphasis supplied)

51 *H. Earl Fullilove v. Philip M. Klutznick*, 448 US 448: 65 L Ed 2d 902 (1980)

474. It is further not correct to say that the caste system is prevalent only among the Hindus, and other religions are free from it. Jains have never considered themselves as apart from Hindus. For all practical purposes and from all counts, there are no socially and educationally backward classes in the Jain community for those who embraced it mostly belonged to the higher castes. As regards Buddhists, if we exclude those who embraced Buddhism along with Dr Ambedkar in 1955, the population of Buddhists is negligible. If, however, we include the new converts who have come to be known as Nav-Buddhists, admittedly almost all of them are from the Scheduled Castes. In fact, in some States, they were sought to be excluded from the list of Scheduled Castes and denied the benefit of reservations on the ground that they had no longer remained the lower castes among the Hindus qualifying to be included among the Scheduled Castes. On account of their agitation, this perverse reasoning was set right and today the Nav-Buddhists continue to get the benefit of reservation on the ground that their low status in society as the backward classes did not change with the change of their religion. As regards Sikhs, there is no doubt that the Sikh religion does not recognise caste system. It was in fact a revolt against it. However, the existence of Mazhabis, Kabirpanthis, Ramdasias, Baurias, Sareras and Sikligars and the demand of the leaders of the Sikhs themselves to treat them as Scheduled Castes could not be ignored and from the beginning they have been notified as a Scheduled Caste (See pp. 768-772 of Vol. I and p. 594 of Vol. IV of the *Framing of India's Constitution* — Ed. B. Shiva Rao). As far as Islam is concerned, Islam also does not recognise castes or caste system. However, among the Muslims, in fact there are Ashrafs and Ajlafs, i.e., high born and low born. The *Census Report* of 1901 of the Province of Bengal records the following facts regarding the Muslims of the then Province of Bengal:

"The conventional division of the Mahomedans into four tribes — Sheikh, Saiad, Moghul and Pathan — has very little application to this Province (Bengal). The Mahomedans themselves recognise two main social divisions, (1) Ashraf or Sharaf and (2) Ajlaf. Ashraf means 'noble' and includes all undoubted descendants of foreigners and converts from high caste Hindus. All other Mahomedans including the occupational groups and all converts of lower ranks, are known by the contemptuous terms, 'Ajlaf', 'Wretches' or 'mean people' : they are also called Kamina or Itar, 'base' or Rasil, a corruption of Rizal, 'worthless'. In some places a third class, called Arzal or 'lowest of all', is added. With them no other Mahomedan would associate and they are forbidden to enter the mosque or to use the public burial ground.

Within these groups there (sic) castes with social precedence of exactly the same nature as one finds among the Hindus.

1. Ashraf or better class Mahomedans:

- (i) Saiads, (ii) Sheikhs, (iii) Pathans, (iv) Moghul, (v) Mallik, (vi) Mirza.

2. Ajlaf or lower class Mahomedans:

- (i) Cultivating Sheikhs, and other who were originally Hindus but who do not belong to any functional group, and have not gained admittance to the Ashraf Community e.g. Pirali and Thakrai, (ii) Darzi, Jolaha, Fakir and Rangrez, (iii) Barhi, Bhathiara, Chik, Churihar, Dai, Dhawa, Dhunia, Gaddi, Kala, Kasai, Kula, Kunjara, Laheri, Mahifarosh, Mallah, Naliya, Nikari, (iv) Adbad, Bako Bediya, Bhat, Chamba, Dafali, Dhobi, Hajjam, Mucho, Nagarchi, Nat, Panwaria, Madaria, Tuntia.

3. Arzal or degraded class:

- Bhanar, Halalkhor, Hirja, Kashi, Lalbegi, Mangta, Mehtar.

The Census Superintendent mentions another feature of the Muslim social system, namely, the prevalence of the 'Panchayat system'. He states:

'The authority of the Panchayat extends to social as well as trade matters and ... marriage with people of other communities is one of the offences of which the governing body takes cognizance. The result is that these groups are often as strictly endogamous as Hindu castes. The prohibition on inter-marriage extends to higher as well as to lower castes, and a Dhuma, for example, may marry no one but a Dhuma. If this rule is transgressed, the offender is at once hauled up before the panchayat and ejected ignominiously from his community. A member of one such group cannot ordinarily gain admission to another, and he retains the designation of the community in which he was born even if he abandons its distinctive occupation and takes to other means of livelihood. Thousands of Jolahas are butchers, yet they are still known as Jolahas.'

(See pp. 218-220 of *Pakistan or Partition of India* by Dr B.R. Ambedkar.)"

475. Similar facts regarding the then other Provinces could be gathered from their respective Census Reports. At present there are many social groups among Muslims which are included in the list of Scheduled Castes in some States, For example, in Tamil Nadu, Labbais including Rawthars and Marakayars are in the list of Scheduled Castes.

This shows that the Muslims in India have not remained immune from the same social evils as are prevalent among the Hindus.

- a 476. Though Christianity also does not recognise caste system, there are upper and lower castes among Christians. In Goa, for example, there are upper caste Catholic Brahmins who do not marry Christians belonging to the lower castes. In many churches, the low caste Christians have to sit apart from the high caste Christians. There are constant bick-
- b erings between Goankars and Gawdes who form a clear cut division in Goan Christian society. In Andhra Pradesh there are Christian Harijans, Christian Madars, Christian Reddys, Christian Kammas etc. In Tamil Nadu, converts to Christianity from Scheduled Castes — Latin Catholics, Christian Shanars, Christian Nadars and Christian Gramani are in the list
- c of Scheduled Castes. Such instances are many and vary from region to region.

- d 477. The division of the society even among the other religious groups in this country between the high and low castes is only to be expected. Almost all followers of the non-Hindu religions except those of the Zoroastrianism, are converts from Hindu religion, and in the new religion they carried with them their castes as well. It is unnatural to expect that the social prejudices and biases, and the notions and feelings of superiority and inferiority, nurtured for centuries together, would disappear by a mere change of religion.

- e 478. The castes were inextricably associated with occupations and the low and the mean occupations belonged to the lower castes. In the new religion, along with the castes, most of the converts carried their occupations as well. The backward classes among the Hindus and non-
- f Hindus can, therefore, easily be identified by their occupations also. Whether, therefore, the backward classes are identified on the basis of castes or occupations, the result would be the same. For, it will lead to the identification of the same collectivities or communities. The social groups following different occupations are known among Hindus by the
- g castes named after the occupations, and among non-Hindus by occupation names. Hence for identifying the backward classes among the non-Hindus, their occupations can furnish a valid test. It is for this reason that both Articles 15(4) and 16(4) do not use the word 'caste' and use the word 'class' which can take within its fold both the caste and occupa-
- h tional groups among the Hindus and non-Hindus.

- i 479. The next issue arising out of this question is whether economic criterion by itself would identify the backward classes under Article 16(4) and whether the expression "backward class of citizens" in the said article would include "weaker sections of the people" mentioned in Article 46.

480. Article 46 enjoins upon the State to promote with special care, the educational and economic interests of the "weaker sections" of the people, and, in particular, of the SCs/STs, and to protect them from social injustice and all forms of exploitation. The expression "weaker sections" of the people is obviously wider than the expression "backward class" of citizens in Article 16(4) which is only a part of the weaker sections. As has been discussed above, the expression "backward class" of citizens is used there in a particular context which is germane to the reservations in the services under the State for which that article has been enacted. It has also been pointed out that in that context, read with Articles 15(4) and 340, the said expression means only those classes which are socially backward and whose educational and economic backwardness is on account of their social backwardness and which are not adequately represented in the services under the State. Hence, the expression "backward class" of citizens in Article 16(4) does not comprise all the weaker sections of the people, but only those which are socially and, therefore, educationally and economically backward, and which are inadequately represented in the services. The expression "weaker sections of the people" used in Article 46, however, is not confined to the aforesaid classes only but also includes other backward classes as well, whether they are socially and educationally backward or not and whether they are adequately represented in the services or not. What is further, the expression "weaker sections" of the people does not necessarily refer to a group or a class. The expression can also take within its compass, individuals who constitute weaker sections or weaker parts of the society. This weakness may be on account of factors other than past social and educational backwardness. The backwardness again may be on account of poverty alone or on account of the present impoverishment arising out of physical or social handicaps. The instances of such weaker sections other than SCs/STs and socially and educationally backward classes may be varied, viz., flood, earthquake, cyclone, fire, famine and project affected persons, war and riot-torn persons, physically handicapped persons, those without any or adequate means of livelihood, those who live below the poverty line, slum-dwellers etc. Hence the expression "weaker sections" of the people is wider than the expression "backward class" of citizens or "socially and educationally backward classes" and "SCs/STs". It connotes all sections of the society who are rendered weaker due to various causes. Article 46 is aimed at promoting their educational and economic interests and protecting them from social injustice and exploitation. This obligation cast on the State is consistent both with the Preamble as well as Article 38 of the Constitution

481. However, the provisions of Article 46 should not be confused with those of Article 16(4) and hence the expression "weaker sections of the people" in Article 46 should not be mixed up with the expression "backward class of citizens" under Article 16(4). The purpose of Article 16(4) is limited. It is to give adequate representation in the services of the State to that class which has no such representation. Hence, Article 16(4) carves out a particular class of people and not individuals from the "weaker sections", and the class it carves out is the one which does not have adequate representation in the services under the State. The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not form a class and they may be weaker as individuals only. Secondly, their weakness may not be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an identifiable class but that class is represented in the services of the State adequately, as individuals forming weaker section, they may be entitled to the benefits of the measures taken under Article 46, but not to the reservations under Article 16(4). Thus, not only the concept of "weaker sections" under Article 46 is different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4). While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true. If this is borne in mind, the reasons why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens under Article 16(4) would be more clear. To the consideration of that aspect we may now turn.

482. Economic backwardness is the bane of the majority of the people in this country. There are poor sections in all the castes and communities. Poverty runs across all barriers. The nature and degree of economic backwardness and its causes and effects, however, vary from section to section of the populace. Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social backwardness. The educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being

the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness. It is necessary to bear this vital distinction in mind to understand the true import of the expression "backward class of citizens" in Article 16(4). If it is mere educational backwardness or mere economic backwardness that was intended to be specially catered to, there was no need to make a provision for reservation in employment in the services under the State. That could be taken care of under Articles 15(4), 38 and 46. The provision for reservation in appointments under Article 16(4) is not aimed at economic upliftment or alleviation of poverty. Article 16(4) is specifically designed to give a due share in the State power to those who have remained out of it mainly on account of their social and, therefore, educational and economic backwardness. The backwardness that is contemplated by Article 16(4) is the backwardness which is both the cause and the consequence of non-representation in the administration of the country. All other kinds of backwardness are irrelevant for the purpose of the said article. Further, the backwardness has to be a backwardness of the whole class and not of some individuals belonging to the class, which individuals may be economically or educationally backward, but the class to which they belong may be socially forward and adequately or even more than adequately represented in the services. Since the reservation under Article 16(4) is not for the individuals but to a class which must be both backward and inadequately represented in the services, such individuals would not be beneficiaries of reservation under Article 16(4). It is further difficult to come across a "class" (not individuals) which is socially and educationally advanced but is economically backward or which is not adequately represented in the services of the State on account of its economic backwardness. Hence, mere economic or mere educational backwardness which is not the result of social backwardness, cannot be a criterion of backwardness for Article 16(4).

483. That only economic backwardness was not in the contemplation of the Constitution is made further clear by the fact that at the time of the First Amendment to the Constitution which added clause (4) to Article 15 of the Constitution, one of the Members, Prof. K.T. Shah wanted the elimination of the word "classes" in and the addition of the word "economically" to the qualifiers of the term "backward classes". This Amendment was not accepted. Prime Minister Nehru himself stated

a that the addition of the word "economically" would put the language of the article at variance with that of Article 340. He added that "socially" is a much wider term including many things and certainly including "economically". This shows that economic consideration alone as the basis of backwardness was not only not intended but positively discarded.

b 484. The reasons for discarding economic criterion as the sole test of backwardness are obvious. If poverty alone is made the test, the poor from all castes, communities, collectivities and sections would compete for the reserved quota. In such circumstances, the result would be obvious, namely, those who belong to socially and educationally advanced sections would capture all the posts in the quota. This would leave the socially and educationally backward classes high and dry c although they are not at all represented or are inadequately represented in the services, and the socially and educationally advanced classes are adequately or more than adequately represented in the services. It would thus result in defeating the very object of the reservations in services, under Article 16(4). It would, also provide for the socially and educa- d tionally advanced classes statutory reservations in the services in addition to their traditional but non-statutory cent per cent reservations. It will thus perpetuate the imbalance, and the inadequate representation of the backward classes in the services. It is naive to expect that the poor from the socially and educationally backward classes would be able to compete e on equal terms with the poor from the socially and educationally advanced classes. There must be an equality of opportunity for the poor from both the socially advanced and backward classes. There will, however, be no equality of results since the competing capacity of the two is unequal. The economic criterion will thus lead, in effect, to the f virtual deletion of Article 16(4) from the Constitution.

485. We may refer to some decisions of this Court on this point.

486. In *Chitralekha*⁷ which was a case under Article 15(4), it is observed: (SCR p. 384)

g "It is, therefore, manifest that the Government, as a temporary measure pending an elaborate study, has taken into consideration only *the economic condition and occupation of the family concerned* as the criteria for backward classes within the meaning of Article 15(4) of the Constitution." (emphasis supplied)

h 487. The Supreme Court upheld the said classification. However, it must be noted that the classification there was not only on the ground of economic condition but was also based on the occupation of the family concerned.

i
7 *R. Chitralekha v. State of Mysore*, (1964) 6 SCR 368: AIR 1964 SC 1823

488. *Parimoo*⁶¹ was a case under Article 16(4). On the test of backwardness, the Court has observed there as follows: (SCC pp. 433-34, para 24)

"It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially backward. In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji case*¹² referred to above that backwardness, socially and educationally, is ultimately and primarily due to poverty. But if poverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor — some being more poor others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is, therefore, to determine whether the class or group is socially and educationally backward. Though the two words 'socially' and 'educationally' are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced it is generally also socially advanced because of the reformatory effect of education on that class. The words 'advanced' and 'backward' are only relative terms — there being several layers or strata of classes, hovering between 'advanced' and 'backward', and the difficult task is which class can be recognised out of these several layers as being socially and educationally backward."

489. It will be observed from the above that poverty as the sole test of backwardness for Article 16(4) was discarded by this Court in the said decision. On the other hand, it is emphasised there that the poverty in question should be the result of social and educational backwardness.

490. This point has elaborately been dealt with by Chinnappa Reddy, J in *Vasanth Kumar*⁹ where the learned Judge has taken pains to point out that although poverty is the dominant characteristic of all backwardness, it is not the cause of all backwardness: (SCC pp. 741-42, para 39)

61 *Janki Prasad Parimoo v. State of J & K*, (1973) 1 SCC 420: 1973 SCC (L&S) 217 : (1973) 3 SCR 236

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

9 *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

a "We, therefore, see that everyone of the three dimensions
propounded by Weber is intimately and inextricably connected with
economic position. However, we look at the question of
'backwardness', whether from the angle of class, status or power, we
find the economic factor at the bottom of it all and we find poverty,
the culprit-cause and the dominant characteristic. Poverty, the eco-
b nomic factor brands all backwardness just as the erect posture
brands the homosapiens and distinguishes him from all other
animals, in the eyes of the beholder from Mars. But, whether his
racial stock is Caucasian, Mongoloid, Negroid, etc., further
investigation will have to be made. So too the further question of
social and educational backwardness requires further scrutiny. In
c India, the matter is further aggravated, complicated and pitilessly
tyrannised by the ubiquitous caste system, a unique and devastating
system of gradation and degradation which has divided the entire
Indian and particularly Hindu society horizontally into such distinct
layers as to be destructive of mobility, a system which has penetrated
and corrupted the mind and soul of every Indian citizen."

d 491. It is, therefore, clear that economic criterion by itself will not
identify the backward classes under Article 16(4). The economic back-
wardness of the backward classes under Article 16(4) has to be on
account of their social and educational backwardness.

Question III:

e *If economic criterion by itself could not constitute a Backward Class
under Article 16(4), whether reservation of posts in services under the
State, based exclusively on economic criterion would be covered by
Article 16(1) of the Constitution?*

f 492. While discussing Question No. I, it has been pointed out that so
far as "backward classes" are concerned, clause (4) of Article 16 is
exhaustive of reservations meant for them. It has further been pointed
out under Question No. II that the only "backward class" for which
reservations are provided under the said clause is the socially backward
g class whose educational and economic backwardness is on account of the
social backwardness. A class which is not socially and educationally
backward though economically or even educationally backward is not a
backward class for the purposes of the said clause. What follows from
these two conclusions is that reservations in posts cannot be made in
h favour of any other class under the said clause. Further, the purpose of
keeping reservations even in favour of the socially and educationally
backward classes under clause (4), is not to alleviate poverty but to give it
an adequate share in power.

i 493. Clause (1) of Article 16 may permit classification on economic
criterion. The purpose of such classification, however, can only be to

alleviate poverty or relieve unemployment. If this is so, no individual or section of the society satisfying the criterion can be denied its benefits — and particularly the backward classes who are more in need of it. If, therefore, the backward classes within the meaning of clause (4) are excluded from the reservations kept on economic criterion under clause (1), it will amount to discrimination. Further, the objects of reservations under the two clauses are different. While those falling under clause (1) from other than the backward classes, will continue to enjoy the reservations for ever, the backward classes can get the benefit of the reservation under clause (4) only so long as they are not adequately represented in the services. What is more, those entering the services under clause (1) may belong to classes which are adequately or more than adequately represented in the services. The reservations for them alone under Article 16(1) would virtually defeat the purpose of Article 16(4) and would be contrary to it. No different result will, further, ensue even if the reservations are kept for all the classes since as pointed out above, all the seats will be captured only by the socially and educationally advanced classes. The two clauses of the article have to be read consistently with each other so as to lead to harmonious results. Hence, so long as the socially backward classes and the effects of their social backwardness continue to exist, the reservations in services on economic criterion alone would be impermissible either under clause (4) or clause (1) of Article 16.

494. Hence no reservation of posts in services under the State, based exclusively on economic criterion would be valid under clause (1) of Article 16 of the Constitution.

Question IV:

Can the extent of reservation of posts in the services under the State under Article 16(4) or, if permitted under Article 16(1) and 16(4) together, exceed 50 % of the posts in a cadre or Service under the State or exceed 50% of appointments in a cadre or service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of Services under the State?

495. It has already been pointed out earlier that clause (4) of Article 16 is not an exception to clause (1) thereof. Even assuming that it is an exception, there is no numerical relationship between a rule and its exception, and their respective scope depends upon the areas and situations they cover. How large the area of the exception will be, will of course, depend upon the circumstances in each case. Hence, legally, it cannot be insisted that the exception will cover not more than 50% of the area covered by the rule. Whether, therefore, clause (4) is held as an

exception to clause (1) or is treated as a more emphatic way of stating what is obvious under the said clause, has no bearing on the percentage of reservations to be kept under it. As Justice Hegde has stated in *State of Punjab v. Hira Lal*²⁹ "the length of the leap to be provided depends upon the gap to be covered". In Article 16(4) itself, there is no indication of the extent of reservation that can be made in favour of the backward classes. However, the object of reservation, viz., to ensure adequacy of representation, mentioned there, serves as a guide for the percentage of reservations to be kept. Broadly speaking, the adequacy of representation in the services will have to be proportionate to the proportion of the backward classes in the total population. In this connection, a reference may be made to the U.S. decision in *Fullilove*³¹ where 10% of the business was reserved for the blacks, their population being roughly 10% of the total population. If the reservation is to be on the basis of the proportion of the population in this country, the backward classes being no less than 77-1/2% (socially and educationally backward classes and Scheduled Castes and Scheduled Tribes taken together) the total reservation will have to be to that extent. It is not disputed that at present the reservations for the SCs/STs are roughly in proportion to their total population.

496. The adequacy of representation in administration is further to be determined on the basis of representation at all levels or in all posts in the administration. It is not only a question of numerical strength in the administration as a whole. It may happen that at the higher level there may be more representation for a class than at the lower level in terms of its population-ratio. This mostly happens with all the advanced classes. In that case, it cannot be said that the class in question is not represented adequately merely because the total representation is not numerically in proportion to the population-ratio. On the other hand, it may happen, as it does so far as the representation of the backward classes is concerned, at the lower rungs they may be represented adequately or more than adequately. Yet at the higher rungs, their presence may be next to nil. In such cases, again, it cannot be said that the class is represented adequately. To satisfy the test of adequacy, therefore, what is necessary is an effective representation or effective voice in the administrator, and not so much the numerical presence. It is instructive to note in this connection that Article 16(4) speaks of "adequate" and not proportionate representation. The practical question, therefore, is of the manner in which the adequate representation should be secured. Whatever the method adopted, it has also to be, consistent with the maintenance of the efficiency of the administration.

²⁹ (1970) 3 SCC 567; (1971) 3 SCR 267, 272

³¹ *H. Earl Fullilove v. Philip M. Klutznick*, 448 US 448: 65 L Ed 2d 902 (1980)

497. In this connection, it will first be worthwhile to quote what Dr Ambedkar had to say with regard to the extent of reservations contemplated under Article 16(4) [*Constituent Assembly Debates*, Vol.7 (1948-49) pp.701-02]: a

“As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a ‘proper look-in’ so to say into the administration. If Honourable Members will bear these facts in mind — the three principles, we had to reconcile, — they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now — for historical reasons — been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70% of the total posts under the State and only 30% are retained as the unreserved. Could anybody say that the reservation of 30% as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10 must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.” b c d e f g

498. Articles 10(1) and 10(3) of the Draft Constitution corresponded to Articles 16(1) and 16(4) of the Constitution. When we realise that these are the observations of the Chairman of the Drafting Committee, the Law Member of the Government and the champion of the backward classes, it should give us an insight into the mind of the Framers of the Constitution on the subject. It is true that the said observations cannot be regarded as decisive on the point. The observations h i

probably also proceeded on the assumption that clause (4) of Article 16 was an exception to its clause (1), and had a numerical relationship with the rule. Whatever the case may be, the observations do give a perceptive and viable guidance to the policy that should be followed in keeping reservations, and in particular on the extent of reservations at any particular point of time. There is, therefore, much force in the contention that at least as a guide to the policy on the subject, the observations cannot be ignored.

499. Although the view expressed in *Balaji*¹² and *Devadasan*¹⁹ that the reservation should not exceed 50% does not refer to Dr Ambedkar's aforesaid observations and is, therefore, not based on it, and is based on other considerations, it cannot be said that it is not in consonance with the spirit, if not the letter, of the provisions.

500. It is seen earlier that 50% rule was propounded in *Balaji*¹². The rule was propounded in the context of Article 15(4), but, while propounding it, this Court stated among other things, as follows : (SCR p. 470)

"... A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50 %; how much less than 50% would depend upon the relevant prevailing circumstances in each case."

501. A reference to Article 16(4) there, therefore, unmistakably shows that it is (*sic* was) presumed that the same rule will apply to Article 16(4) as well. This rule, however, did not see uniform acceptance in all the decisions that followed. The case which immediately followed — *Devadasan*¹⁹ — applied this rule to the "carry forward rule" and struck down the same in its entirety, since 65% of the vacancies for the year in question, came to be reserved for the SCs/STs by virtue of that rule. With respect, even on the application of the 50% rule, it was not necessary to strike down the "carry forward rule" itself. All that was necessary was to

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

¹⁹ *T. Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

confine the carry forward vacancies for the year in question to 50%. Be that as it may. In *Thomas*¹⁰ the correctness of 50% rule was questioned by Fazal Ali, J who stated that although clause (4) of Article 16 does not fix any limit on reservations, the same being part of Article 16, the State cannot be allowed to indulge in excessive reservation so as to defeat the policy of Article 16(1). The learned Judge, however, added that as to what would be a suitable reservation within *permissible limits* will depend on the facts and circumstances of each case and no hard and fast rule can be laid down nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. The learned Judge then went on to say that although the decided cases till that time, had laid down that the percentage of reservation should not exceed 50, it was a rule of caution and did not exhaust all categories. He then gave an illustration of a State in which backward classes constituted 80% of the total population, and stated that in such cases, reservation of 80% of the jobs for them, can be justified. The learned Judge justified reservation to the said extent on the ground that the dominant object of the provision of Article 16(4) is to take steps to make inadequate representation of backward classes adequate. Of the other learned Judges constituting the Bench, Krishna Iyer, J agreed with Fazal Ali, J and stated that the arithmetical limit of 50% in one year set by earlier rulings *cannot "perhaps be pressed too far"*. He added that over-representation in department does not depend on recruitment in a particular year but on the total strength of the cadre.

(emphasis supplied)

502. In *Vasanth Kumar*⁹ Chinnappa Reddy, J held that *Thomas*¹⁰ had undone the 50 per cent rule laid down in the earlier cases, while Venkataramiah, J disagreed with the learned Judge on that point.

503. It does not appear further that Justice Iyer's support to Justice Fazal Ali's view in *Thomas*¹⁰ was unqualified or remained unchanged. For in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*¹¹ after referring to *Balaji*¹² and *Devadasan*¹⁹ he stated as follows: (SCC p. 296, para 88)

"All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC and ST candidates be actually appointed to substantially more than 50 per cent of

¹⁰ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

⁹ *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352
¹¹ (1981) 1 SCC 246: 1981 SCC (L&S) 50: (1981) 2 SCR 185

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

¹⁹ *T. Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ

a the promotional posts. Some excess will not affect as mathematical precision is difficult in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule *shall not result*, in any given year, in the selection of appointments of SC and ST candidates considerably in excess of 50 per cent, we uphold Annexure 'I'."

b 504. The learned Judge has supported this conclusion by the observations made by him in the earlier paragraph of his judgment which show that according to him the reservations made under Article 16(4) should not have the effect of virtually obliterating the rest of the Article — clauses (1) and (2) thereof.

c 505. It is necessary in this connection, to point out that not only Article 16(4) but for that matter, Article 335 also does not speak of giving proportional representation to the backward classes and SCs/STs respectively. Article 16(4), as repeatedly pointed out earlier, in terms, speaks of "adequate" representation to the backward classes, while Article 335 speaks of the "claims" of the members of the SCs/STs.
d However, it cannot be disputed that whether it is the appointments of SCs/STs or other backward classes, both are to be made consistently with the maintenance of the efficiency in administration. Since the reservations contemplated under both the articles include also the giving of concessions in marks, exemptions etc., it is legitimate to presume that the
e Constitution-framers being aware of the level of backwardness, did envisage that the inadequacy in the representation of the backward classes cannot be made up in one generation consistently with the maintenance of efficiency in the administration. In fact, as pointed out earlier, if the backward classes can provide candidates for filling up the
f posts in all fields and at all levels of administration in one generation, they would cease to be backward classes. What was in the mind of the Constitution-framers was the removal of the inadequacy in representation over a period of time, on each occasion balancing the interests of the backward classes and the forward classes so as not to
g affect the provisions of equality enshrined in Articles 14 and 16(1) as also the interests of the society as a whole. As pointed out earlier, Dr Ambedkar was not only not in favour of proportional representation but was on the contrary, of the firm view that the reservations under Article 16(4) should be confined to the minority of the posts/appointments. In
h fact, as the debate in the Constituent Assembly shows nobody even suggested that the reservations under Article 16(4) should be in proportion to the population of the backward classes.

i 506. While deciding upon a particular percentage of reservations, what should further not be forgotten is that between the backward and

the forward classes, there exists a sizeable section of the population, who being socially not backward are not qualified to be considered as backward. At the same time they have no capacity to compete with the forwards being educationally and economically not as advanced. Most of them have only the present generation acquaintance with education. They are, therefore, left at the mercy of chance-crumbs that may come their way. They have neither the benefit of the statutory nor of the traditional in-built reservations on account of the unequal social advantages. It is this section sandwiched between the two which is most affected by the reservation policy. The reservation-percentage has to be adjusted to meet their legitimate claims also.

507. In this connection, one more fact needs to be considered from a realistic angle. A mechanical approach in keeping reservations in all fields and at all levels of administration and that too at a uniform percentage is unrealistic. There is no reason why the authorities concerned should not apply their mind and evolve a realistic policy in this behalf. There are fields and levels of administration where either there may be no candidates from backward classes available or may not be available in adequate number. In such cases, either no reservations should be kept or reservations kept should be at an appropriate percentage. On the other hand, in fields and at levels where the candidates from the backward classes are available in suitable number, the maximum permissible reservations can be kept. The adjustment of the reservations and their percentages, field and grade-wise as well as from time to time, as per the availability of the candidates from the backward classes, is not only implicit in the constitutional provisions but is also warranted for purposeful and effective implementation of the spirit of those provisions.

508. In this connection, it is worth serious consideration whether reservations in the form of preference instead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themselves. Education is the source of advancement of the individual in all walks of life. The teaching profession, therefore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life. It is, therefore, in the interests of all sections of the society — socially backward and forward — and of the nation as a whole, that they aim at securing and ensuring the best of education. The student whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational institution to make sincere and diligent efforts to

- secure the services of the best available teaching talent. In the appointments of teachers, therefore, there should be no compromise on any ground. For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or outside through private tuitions and tutorial classes, those coming from the backward classes would have no means for making up the loss. The teachers themselves must further command respect which they will do more when they do not come through any reserved quota. The indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward. It is, therefore, necessary that there should be no exclusive quota kept in the teaching occupation for any section at all. However, if the candidates belonging to both backward and forward classes are equal in merit, preference should be given to those belonging to the backward classes. For one thing, they must also have a "look into" the teaching profession as in other professions. Secondly, in this vital profession also, the talent, the social experience and the new approach and outlook of the members of the backward classes is very much necessary. That will enrich the profession and the national life. Thirdly, it will also help to meet the complaints of the alleged step-motherly treatment received by the students from the backward classes and of the lack of encouragement to them even when they are more meritorious. Hence in the teaching profession, it is preference rather than reservation, which should be resorted to under Article 16(4) of the Constitution. A precaution, however, has to be taken to see that the selection body has a representation from the backward classes.
509. It must, however, be added that in judging the merits of the individuals for the profession of teaching as for any other profession, it is not the traditional test of marks obtained in examinations, but a scientific test based, among other things, on the aptitude in teaching, the capacity to express and convey thoughts, the scholarship, the character of the person, his interest in teaching, his potentiality as a teacher judged on the considerations indicated generally at the outset, should be adopted.
510. What is stated with regard to the teaching profession above is only by way of an illustration as to how the policy of reservation if it is to subserve its larger purpose can be modulated and applied rationally to

different fields instead of clamping it mechanically in all the fields or withholding it from some areas altogether. It is not meant to lay down any proposition of law in that behalf.

511. The other aspect of the question is whether for the purposes of the percentage-limit of the reservations under Article 16, the reservations made under clause (1) should be taken into consideration together with those made under clause (4) of the article.

512. As has already been pointed out above, the reservations on the basis of economic criterion alone would be impermissible under clause (1). Assuming, however, that they are legal, they cannot cut into the reservations made for the backward classes under clause (4) which are for the specific purpose of making up the adequacy in representation in the services.

513. However, reservations for individuals are permissible under clause (1) on a ground other than economic, provided of course, the ground is not hit by Article 16(2). Instances of such individuals have been given earlier which need not be repeated here. There is, however, no need to make additional reservations for such individuals over and above those made under clause (4). The individuals can be accommodated in the quota reserved for the backward, or in the unreserved or general category depending upon the class to which they belong. For example, the defence personnel and the freedom fighters or their dependents, physically handicapped, etc. can be accommodated in the reserved quota under Article 16(4) if they belong to the backward classes, and in the unreserved posts/appointments if they belong to the unreserved categories. This is so because in their respective classes, they will be more disadvantaged than others belonging to those classes. Such a classification need not hit either clause (1) or clause (2) of Article 16 but would be justifiable. If this is done, there would be no occasion to keep extra posts/appointments reserved for them under clause (1).

514. It is necessary to add here a word about reservations for women. Clause (2) of Article 16 bars reservation in services on the ground of sex. Article 15(3) cannot save the situation since all reservations in the services under the State can only be made under Article 16. Further, women come from both backward and forward classes. If reservations are kept for women as a class under Article 16(1), the same inequitous phenomenon will emerge. The women from the advanced classes will secure all the posts, leaving those from the backward classes without any. It will amount to indirectly providing statutory reservations for the advanced classes as such, which is impermissible under any of the provisions of Article 16. However, there is no doubt that women are a

vulnerable section of the society, whatever the strata to which they belong. They are more disadvantaged than men in their own social class.

a Hence reservations for them on that ground would be fully justified, if they are kept in the quota of the respective class, as for other categories of persons, as explained above. If that is done, there is no need to keep a special quota for women as such and whatever the percentage-limit on the reservations under Article 16, need not be exceeded.

b 515. Yet another aspect of the matter is whether the extent of reservations should be determined (i) on the basis of the total strength of the particular cadre or service, or on the basis of the appointments made for that cadre in a particular year and (ii) without determining the inadequacy of representation of each class in different categories and grades of the services under the State.

c 516. Both to avoid arbitrariness in appointments and to ensure the availability of the expected number of seats every year, for the reserved as well as the unreserved categories as per the pre-defined known norms, it is necessary that the reservations in appointments/posts are made yearwise. Any other practice would give the authorities complete freedom as to when and at what percentage the reservations should be kept. It may happen that in some years, they may not keep reservations at all whereas in other years, they may reserve all or majority of the posts. d Secondly, the periodicity of reservations may also vary depending upon the will of the authorities which may be influenced by several unpredictable considerations. This would spell out uncertainties in the matter of appointments both for the reserved and unreserved categories. e Hence the reservations will have to be kept and calculated on yearwise basis (See *C.A. Rajendran v. Union of India*⁶³) and better still, on the basis of the roster system with suitable number of points to correspond the average vacancies. To permit calculation, further, of the percentage of reservations on the basis of the total strength of the cadre and to enable the authorities concerned, as stated earlier, to keep either all the posts or a majority of them reserved from year to year till there is adequate representation of the reserved categories, will in the process deny to the unreserved categories completely or near completely, their due share in the appointments yearwise, thus obliterating clause (1) of Article 16 totally over a given period of time. Hence as pointed out g earlier, the extent of the percentage of the reservation should be calculated yearwise with due allowance to the operation of the rule with regard to the backlog, if any. Still better method is to regulate and calculate the appointments on the roster basis as stated earlier. h

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63 (1968) 1 SCR 721, 732-33; AIR 1968 SC 507

517. As regards point (ii), since the provisions of Article 16(4) are meant for providing adequate representation in the services to the backward classes, the representation has to be in all categories and grades in the services. The adequacy does not mean a mere proportionate numerical or quantitative strength. It means effective voice or share in power in running the administration. Hence, the extent of reservations will have to be estimated with reference to the representation in different grades and categories. (See : *General Manager, Southern Railway v. Rangachari*²⁶)

518. To summarise, the question may be answered thus. There is no legal infirmity in keeping the reservations under clause (4) alone or under clause (4) and clause (1) of Article 16 together, exceeding 50%. However, validity of the extent of excess of reservations over 50% would depend upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept. Although, further, legally and theoretically the excess of reservations over 50% may be justified, it would ordinarily be wise and nothing much would be lost, if the intentions of the Framers of the Constitution and the observations of Dr Ambedkar, on the subject in particular, are kept in mind. The reservations should further be kept category and gradewise at appropriate percentages and for practical purposes the extent of reservations should be calculated category and gradewise.

Question V:

Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes or permit classification among them based on economic or other considerations?

519. This question is really in two parts and the two do not mean and refer to the same classification. The first part refers to the classification of the backward classes into backward and most backward classes while the second speaks of internal classification of each backward class, into backward and more backward individuals or families. Both classifications are to be made on economic or other considerations. Whereas the first classification will place some backward classes in their entirety above other backward classes, the second will place some sections in each backward class internally above the other sections in the same class. The second classification aims at what has popularly come to be known as weeding out of the so-called "creamy" or "advanced sections" from the backward classes. Although it is not that clear, the second order probably seeks to do it. We may first deal with the second classification.

²⁶ (1962) 2 SCR 586 : AIR 1962 SC 36

520. Society does not remain static. The industrialisation and the urbanisation which necessarily followed in its wake, the advance on
- a political, social and economic fronts made particularly after the commencement of the Constitution, the social reform movements of the last several decades, the spread of education and the advantages of the special provisions including reservations secured so far, have all undoubtedly seen at least some individuals and families in the backward
- b classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. It can further hardly be argued that once a backward class, always a
- c backward class. That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes, as equal citizens. On the other hand, to continue to confer upon such advanced sections from the backward classes
- d the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally. What is more, it will lead to perverting the objectives
- e of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness. The object of the special constitutional provisions is not to uplift a few individuals and families in the
- f backward classes but to ensure the advancement of the backward classes as a whole. Hence, taking out the forwards from among the backward classes is not only permissible but obligatory under the Constitution. However, it is necessary to add that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the
- g forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes. So long as the individuals belonging to the backward classes do
- h not develop sufficient capacities of their own to compete with others, they can hardly be classified as forward. The moment, however, they develop the requisite capacities, they would cease to be backward. It will be a contradiction in terms to call them backward and others more or most backwards. There will always be degrees of backwardness as there
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will be degrees of forwardness, whatever the structure of the society. It is not the degrees of backwardness or forwardness which justify classification of the society into forward and backward classes. It is the capacity or the lack of it to compete with others on equal terms which merits such classification. The remedy therefore, does not lie in classifying each backward class internally into backward and more backward, but in taking the forward from out of the backward classes altogether. Either they have acquired the capacity to compete with others or not. They cannot be both.

521. The mere fact further that some from the backward classes who are more advanced than the rest in that class or score more in competition with the rest of them and thus gain all the advantages of the special provisions such as reservations, is no ground for classifying the backwards into backwards and most backwards. This phenomenon is evident among the forward classes too. The more advantaged among the forwards similarly gain unfair advantage over others among the forwards and secure all the prizes. This is an inevitable consequence of the present social and economic structure. The correct criterion for judging the forwardness of the forwards among the backward classes is to measure their capacity not in terms of the capacity of others in their class, but in terms of the capacity of the members of the forward classes, as stated earlier. If they cross the Rubicon of backwardness, they should be taken out from the backward classes and should be made disentitled to the provisions meant for the said classes.

522. It is necessary to highlight another allied aspect of the issue, in this connection. What do we mean by sufficient capacity to compete with others? Is it the capacity to compete for Class IV or Class III or higher class posts? A Class IV employee's children may develop capacity to compete for Class III posts and in that sense, he and his children may be forward compared to those in his class who have not secured even Class IV posts. It cannot, however, be argued that on that account, he has reached the "creamy" level. If the adequacy of representation in the services as discussed earlier, is to be evaluated in terms of qualitative and not mere quantitative representation, which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward sections reach those levels or at least, near those levels. Till that time, they cannot be called forwards among the backward classes, and taken out of the backward classes.

523. As regards the second part of the question, in *Balaji*¹² it was observed that the backward classes cannot be further classified in backward and more backward classes. These observations, although made in the context of Article 15(4) which fell for consideration there, will no doubt be equally applicable to Article 16(4). The observations were made while dealing with the recommendations of the Nagan Gowda Committee appointed by the State of Karnataka which had recommended the classification of the backward communities into two divisions, the Backward and the More Backward. While making those recommendations the Committee had applied one test, viz., "Was the standard of education in the community in question less than 50% of the State average? If it was, the community was regarded as more backward; if it was not, the community was regarded as backward." The Court opined that the sub-classification made by the Report and the order based thereupon was not justified under Article 15(4) which authorises special provision being made for 'really backward classes'. The Court further observed that in introducing two categories of backward classes, what the impugned order in substance purported to do was to devise measures "for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the State". That, according to the Court, was not the scope of Article 15(4). The result of the method adopted by the impugned order was that nearly 90% of the population of the State was treated as Backward and that, observed the Court, illustrated how the order in fact divided the population of the State into most advanced and the rest, putting the latter into two categories of the Backward and the More Backward. Thus, the view taken there against the sub-classification was on the facts of that case which showed that almost 90% of the population of the State was classified as backward, the backwardness of the Backward (as against that of the More Backward) being measured in comparison to the most advanced classes in the State. Those who were less advanced than the most advanced, were all classified as Backward. The Court held that it is the More Backward or who were really backward who alone would be entitled to the benefit of the provisions of Article 15(4). In other words, while the More Backward were classified there rightly as backward, the Backward were not classified rightly as backward.

524. It may be pointed out that in *Vasanth Kumar*⁹ Chinnappa Reddy, J after referring to the aforesaid view in *Balaji*¹² observed that the propriety of such test may be open to question on the facts of each case but there was no reason why on principle there cannot be a classification

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

⁹ *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

into Backwards and More Backwards if both classes are not merely a little behind, but far far behind the most advanced classes. He further observed that in fact, such a classification would be necessary to help the more backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes, would walk away with all the seats just as if reservation was confined to the more backward classes and no reservation was made to the slightly more advanced of the backward classes, the backward classes would gain no seats since the advanced classes would walk away with all the seats available for the general category. With respect, this is the correct view of the matter. Whether the backward classes can be classified into Backward and More Backward, would depend upon the facts of each case. So long as both backward and more backward classes are not only comparatively but substantially backward than the advanced classes, and further, between themselves, there is a substantial difference in backwardness, not only it is advisable but also imperative to make the sub-classification if all the backward classes are to gain equitable benefit of the special provisions under the Constitution. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated October 13, 1986 on reservations issued after the decision in *Vasanth Kumar*⁹ where the backward classes are grouped into five categories, viz., A, B, C, D and E. In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential. However, for each of them a special quota has to be prescribed as is done in the Karnataka Government order. If it is not done, as in the present case,

⁹ *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714; 1985 Supp 1 SCR 352

- a and the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward may take away all the posts leaving the backward with no posts. The backward will neither get his post in the reserved quota nor in the general category for want of capacity to compete with the forward.

- b 525. Hence, it will have to be held that depending upon the facts of each case, sub-classification of the backward classes into the backward and more or most backward would be justifiable provided separate quotas are prescribed for each of them.

Question VI:

- c *Would making "any provision" under Article 16(4) for reservation "by the State" necessarily have to be by law made by the legislatures of the State or by law made by Parliament? Or could such provisions be made by an executive order?*

- d 526. The language of Article 16(4) is very clear. It enables the State to make a "provision" for the reservation of appointments to the posts. The provision may be made either by an Act of legislature or by rule or regulation made under such Act or in the absence of both, by executive order. Executive order is no less a law under Article 13(3) which defines law to include, among other things, order, bye-laws and notifications. The provisions of reservation under Article 16(4) being relatable to the recruitment and conditions of service under the State, they are also covered by Article 309 of the Constitution. Article 309 expressly provides that until provision in that behalf is made by or under an Act of the appropriate legislature, the rules regulating the recruitment and conditions of service of persons appointed to services under the Union or a State may be regulated by rules made by the President or the Governor as the case may be. Further, wherever the Constitution requires that the provisions may be made only by an Act of the legislature, the Constitution has in express terms stated so. For example, the provisions of Article 16(3) speak of the Parliament making a law, unlike the provisions of Article 16(4) which permit the State to make "any provision". Similarly, Articles 302, 304 and 307 require a law to be enacted by the Parliament or a State legislature as the case may be on the subjects concerned. These are but some of the provisions in the Constitution, to illustrate the point.

- h 527. The impugned orders are no doubt neither enactments of the legislature nor rules or regulations made under any Act of the legislature. They are also not rules made by the President under Article 309 of the Constitution. They are undoubtedly executive orders. It is not suggested that in the absence of an Act or rules, the Government cannot make
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provisions on the subject by executive orders nor is it contended that the impugned orders made in exercise of the executive powers, have transgressed the limits of legislative powers of the Parliament. What is contended by Shri Venugopal is that the power to make provisions on such vital subject must be shared with, and can only be exercised after due deliberations by, the Parliament. The contention, in essence, questions the method of exercising the power and not the absence of it. The method should be left to the discretion and the policy of the Government and the exigencies of the situation. It may be pointed out that, so far the reservations made by the Central Government in favour of the SCs/STs and the State Governments in favour of all backward classes, have been made by executive instructions, or by rules made under Article 309 of the Constitution. No reservations have been made by Acts of legislatures. There is, therefore, no illegality attached to the impugned orders merely because the Government instead of enacting a statute for the purpose, has chosen to make the provisions by executive orders. Such executive orders having been made under Article 73 of the Constitution have for their operation an equal efficacy as an Act of the Parliament or the rules made by the President under Article 309 of the Constitution.

528. If any authority is needed for the otherwise self-evident proposition, one may refer to the following decisions of this Court where reservations made by executive orders were upheld: See *Balaji*¹²; *Mangal Singh v. Punjab State, Chandigarh*³⁰; *Comptroller and Auditor General of India v. Mohan Lal Mehrotra*²⁸.

Question VII:

Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?

529. The answer to the question lies in the question itself. There are no special principles of judicial review nor does the scope of judicial review expand when the identification of backward classes and the percentage of the reservation kept for them is called in question. So long as correct criterion for the identification of the backward classes is applied, the result arrived at cannot be questioned on the ground that other valid criteria were also available for such identification. It is possible that the result so arrived at may be defective marginally or in marginal number of cases. That does not invalidate the exercise itself. No method is perfect particularly when sociological findings are in issue. Hence, marginal

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439; AIR 1963 SC 649

30 AIR 1968 Punj 306

28 (1992) 1 SCC 20

defects when found may be cured in individual cases but the entire finding is not rendered invalid on that account.

a 530. The corollary of the above is that when the criterion applied for identifying the backward classes is either perverse or *per se* defective or unrelated to such identification in that it is not calculated to give the result or is calculated to give, by the very nature of the criterion, a contrary or unintended result, the criterion is open for judicial examination.

b 531. The validity of the percentage of reservation for backward classes would depend upon the size of the backward classes in question. So long as it is not so excessive as to virtually obliterate the claims of others under Clause 16(1), it is not open to challenge. However, it is not necessary, and Article 16(4) does not suggest, that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total population. The only guideline laid down by Article 16(4), as pointed out elsewhere, is the adequacy of representation in the services. Within the said limits, it is in the discretion of the State to keep the reservations at reasonable level by taking into consideration all legitimate claims and the relevant factors. In this connection, the law laid down directly on the subject in the following decisions is worth recounting.

e 532. In *Balaji*¹² the Court struck down the impugned order of reservations on the ground that it had categorised the backward classes on the sole basis of caste and also on the ground that the reservations made were to the extent of 68% which the Court held was inconsistent with the concept of the special provision and authorised by Article 15(4). The Court further held that for these two reasons the impugned order was a fraud on the constitutional power conferred on the State by Article 15(4). It may be pointed out at the cost of repetition, that the second reason was based on the premise that clause (4) was an exception to clauses (1) and (2) of Article 15, and that the exception had a numerical relationship with the rule.

g 533. In *Devadasan*¹⁹ the majority held that the 'carry forward' rule which resulted in the particular year in reserving 65% of the posts for Scheduled Castes and Scheduled Tribes, was unconstitutional since the reservations exceeded 50% of the vacancies. According to the Court, though under Article 16(4), reservation of reasonable percentage of posts for the members of the Scheduled Castes and the Scheduled Tribes was within the competence of the State, the method evolved must be such as to strike reasonable balance between the claims of the backward

i 12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

19 *T. Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

classes and those of the other employees in order to effectuate the guarantee contained in Article 16(1), and that for this purpose each year of recruitment would have to be considered by itself. With respect, the majority decision was based on the reasoning of *Balaji*¹² to which a reference has already been made. Justice Subba Rao dissented from this line of reasoning and it is his reasoning which came to be accepted later both in *Thomas*¹⁰ and *Vasanth Kumar*⁹.

534. In *P. Sagar*¹⁴ the Court upheld the decision of the High Court and dismissed the State's appeal on the ground that there was no material placed before the Court to show that the list of backward classes was prepared in conformity with the requirements of Article 15(4). The Court held that the list prepared was *ex facie* based on castes or communities, and was substantially the same which was struck down by the High Court in *P. Sukhadev v. Government of A.P.*⁶⁷

535. In *Peeriakaruppan*¹⁵ it was observed that the list of backward classes is open to judicial review and the Government should always keep under review the question of reservations of seats, and only those classes which are really socially and educationally backward should be allowed to have the benefit of reservation. The reservation of seats should not be allowed to become a vested interest and since in that case the candidates of backward classes had secured 50% of the seats in the general pool, it, according to the Court, showed that the time had come for a *de novo* comprehensive examination of the question. In other words, it is laid down in this case that if some backward classes which are advanced continue to be, or are included in the list of, backward classes, the list can be questioned and a judicial scrutiny of the list will be permissible.

536. In *Hira Lal*²⁹ it is observed that if the reservations made under Article 16(4) make the rule in Article 16(1) meaningless, the decision of the State would be open to judicial review. But the burden of establishing that a particular reservation is offensive to Article 16(1), is on the person who takes the plea.

537. To sum up, judicial scrutiny would be available (i) if the criterion inconsistent with the provisions of Article 16 is applied for

67 (1966) 1 Andh WR 294

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

9 *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

14 *State of A.P. v. P. Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379

15 *A. Peeriakaruppan v. State of T.N.*, (1971) 1 SCC 38: (1971) 2 SCR 430

29 *State of Punjab v. Hira Lal*, (1970) 3 SCC 567: (1971) 3 SCR 267

- a identifying the classes for whom the special or unequal benefit can be given under the said article; (ii) if the classes which are not entitled to the said benefit are wrongly included in or those which are entitled are wrongly excluded from the list of beneficiaries of the special provisions. In such cases, it is not either the entire exercise or the entire list which becomes invalid, so long as the tests applied for identification are correct and the inclusion or exclusion is only marginal; and (iii) if the percentage of reservations is either disproportionate or unreasonable so as to deny the equality of opportunity to the unreserved classes and obliterates Article 16(1). Whether the percentage is unreasonable or results in the obliteration of Article 16(1), so far as the unreserved classes are concerned, it will depend upon the facts and circumstances of each case, and
- b no hard and fast rule of general application with regard to the percentage can be laid down for all the regions and for all times.
- c

Question VIII:

- d *Would reservation of appointments or posts "in favour of any Backward Class" be restricted to the initial appointment to the post or would it extend to promotions as well?*

- e 538. None of the impugned Government memoranda provide for reservations in promotions. Hence, the question does not fall for consideration at all and any opinion expressed by this Court on the said point would be *obiter*. As has been rightly contended by Shri Parasaran, it is settled by the decisions of this Court that constitutional questions are decided only if they arise for determination on the facts, and are absolutely necessary to be decided. The Court, does not decide questions which do not arise. The tradition is both wise and advisable. There is a long line of decisions of this Court on the point. The principle is so well-settled and not disputed before us that it is not necessary to quote all the authorities on the subject. To mention only two of them, see *Central Bank of India v. Workmen*⁶⁸ and *Harsharan Verma v. Union of India*⁶⁹.
- f

- g 539. The reservations in the services under Article 16(4), except in the case of SCs/STs, are in the discretion of the State. Whether reservations should at all be kept and if so, in which field and at what levels and in which mode of recruitment — direct or promotional — and at what percentage, are all matters of policy. Each authority is required to apply its mind to the facts and circumstances of the case before it and
- h depending upon the field, the post, the extent of the existing representation of different classes, the need, if any, to balance the representation, the conflicting claims etc., decide upon the measures of reservations. The reservations, as stated earlier, cannot be kept mechani-

i ⁶⁸ (1960) 1 SCR 200; AIR 1960 SC 12; (1959) 2 LLJ 205

⁶⁹ 1987 Supp SCC 310; AIR 1987 SC 1969

cally even where it is permissible to do so. For some reasons, if Central Government, in the present case, has not thought it prudent and necessary to keep reservations in promotions, the decision of the Central Government should not be probed further. It is for the Government to frame its policy and not for this Court to comment upon it when it is not called upon to do so.

540. However, if it becomes necessary to answer the question, it will have to be held that the reservations both under Articles 16(1) and 16(4) should be confined only to initial appointments. Except in the decision in *Rangachari*²⁶ there was no other occasion for this Court to deliberate upon this question. In that decision, the Constitution Bench by a majority of three took the view that the reservations under Article 16(4) would also extend to the promotions on the ground that Articles 16(1) and 16(2) are intended to give effect to Articles 14 and 15(1). Hence Article 16(1) should be construed in a broad and general, and not pedantic and technical way. So construed, "matters relating to employment" cannot mean merely matters prior to the act of appointment nor can 'appointment to any office' mean merely the initial appointment but must also include all matters relating to the employment, that are either incidental to such employment or form part of its terms and conditions, and also include promotion to a selection post. The Court further observed that: (SCR headnote p. 587)

"Although Article 16(4), which in substance is an exception to Articles 16(1) and 16(2) and should, therefore, be strictly construed, the court cannot in construing it overlook the extreme solicitude shown by the Constitution for the advancement of socially and educationally backward classes of citizens.

The scope of Article 16(4), though not as extensive as that of Article 16(1) and (2), — and some of the matters relating to employment such as salary, increment, gratuity, pension and the age of superannuation, must fall outside its *non-obstante* clause, there can be no doubt that it must include appointments and posts in the services. To put a narrower construction on the word 'posts' would be to defeat the object and the underlying policy. Article 16(4), therefore, authorises the State to provide for the reservation of appointments as well as selection posts."

541. The majority has, however, added that in exercising the powers under the article, it should be the duty of the State to harmonise the claims of the backward classes and those of the other employees consistently with the maintenance of an efficient administration as contemplated by Article 335 of the Constitution.

²⁶ *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

542. Justice Wanchoo, one of the two Judges who differed with the majority view held that Article 16(4) implies, as borne out by Article 335, that the reservation of appointments or posts for backward classes cannot cover all or even a majority of the appointments and posts and the words "not adequately represented", do not convey any idea of quality but mean sufficiency of numerical representation in a particular service, taken not by its grades but as a whole. Appointments, according to the learned Judge, must, therefore, mean initial appointments and the reservation of appointments means the reservation of a percentage of initial appointments. The other learned Judge, viz., Ayyangar, J, forming the minority held that Article 16(4) has to be read and construed in the light of other provisions relating to services and particularly with reference to Article 335. So construed, the word "post" in that article must mean posts not in the services but posts outside the services. Even assuming that it was not so, according to the learned Judge, the inadequacy of representation sought to be redressed by Article 16(4) meant quantitative deficiency of representation in a particular service as a whole and not in its grades taken separately, nor in respect of each single post in the service. By this reasoning the learned Judge held that Article 16(4) can only refer to appointments to the services at the initial stage and not at different stages after the appointment has taken place.

543. It has been pointed out earlier that the reservations of the backward classes under Article 16(4) have to be made consistently with the maintenance of the efficiency of administration. It is foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors. When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in the seniority list, stealing a march over their seniors to the promotional post. When further reservations are kept at every promotional level, the juniors not only steal march over their seniors in the same grade but also over their superiors at more than one higher level. This has been witnessed and is being witnessed frequently wherever reservations are kept in promotions. It is naive to expect that in such circumstances those who are superseded, (and they are many) can work with equanimity and with the same devotion to and interest in work as they did before. Men are not saints. The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious

effect on the entire administration.

544. It is not only the efficiency of those who are thus superseded which deteriorates on account of such promotions, but those superseding have also no incentive to put in their best in work. Since they know that in any case they would be promoted in their reserved quota, they have no motivation to work hard. Being assured of the promotion from the beginning, their attitude towards their duties and their colleagues and superiors is also coloured by this complex. On that account also the efficiency of administration is jeopardised.

545. With respect, neither the majority nor the minority in the Constitution Bench has noticed this aspect of the reservations in promotions. The later decisions which followed *Rangachari*²⁶ were also not called upon to and hence have not considered this vital aspect. The efficiency to which the majority has referred is with respect to the qualifications of those who would be promoted in the reserved quota.

546. The expression "consistently with the maintenance of efficiency of administration" used in Article 335 is related not only to the qualifications of those who are appointed, it covers all consequences to the efficiency of administration on account of such appointments. They would necessarily include the demoralisation of those already in employment who would be adversely affected by such appointments; and its effect on the efficiency of administration. The only reward that a loyal, sincere and hard-working employee expects and looks forward to in his service career is promotion. If that itself is denied to him for no deficiency on his part, it places a frustrating damper on his zeal to work and reduces him to a nervous wreck. There cannot be a more damaging effect on the administration than that caused by an unreasonable obstruction in the advancement of the career of those who run the administration. The reservations in promotions are, therefore, inconsistent with the efficiency of administration and are impermissible under the Constitution.

547. There is also not much merit in the argument that the adequacy of representation in the administration has to be judged not only on the basis of quantitative representation but also on the basis of qualitative representation in the administration and, hence, the reservations in promotions are a must. There is no doubt, as stated earlier, that the adequacy of representation in administration has also to be judged on the basis of the qualitative representation in it. However, the qualitative representation cannot be achieved overnight or in one generation. Secondly, such representation cannot be secured at the cost of the

²⁶ *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

- a efficiency of the administration which is an equally paramount consideration while keeping reservations. Thirdly, the qualitative representation can be achieved by keeping reservations in direct recruitment at all levels. It is true that there is some basis for the grievance that when reservations are kept only in direct recruitment, on many occasions the rules for appointment to the posts particularly at the higher level of administration, are so framed as to keep no room for direct recruits.
- b However, the remedy in such cases lies in ensuring that direct recruitment is provided for posts at all levels of the administration and the reservation is kept in all such direct recruitments.

- c 548. It must further be remembered that there is a qualitative difference in the conditions of an individual who has entered the service as against those of one who is out of it, though both belong to the backward classes. The former joins the mainstream of all those similarly employed. Although it is true that he does not on that account become socially advanced at once, in some respects, he is not dissimilarly situated. The handicaps he suffers on account of his social backwardness can be
- d removed, once employed, by giving him the necessary relaxations, exemptions, concessions and facilities to enable him to complete with the rest for the promotional posts where the promotions are by selection or on merit-cum-seniority basis. A provision can also be made to man the selection committees with suitable persons including those from the
- e backward classes and to devise methods of assessment of merits on impartial basis. The selection committee should also ensure that the claims of the backward class employees are not superseded. These measures, instead of the exclusive quota, will go a long way in instilling self-confidence and self-respect in those coming into the service through
- f the reserved quotas. They may not have to face and work in a hostile and disrespectful atmosphere since they would have won their promotional posts by dint of their seniority and/or merit no less commendable than those of others. The urge to show merit and shine would also contribute to overall efficiency of the administration.

- g 549. There is no doubt that the meaning of the various expressions used in Article 16, viz., "matters relating to employment or appointment to any office", "any employment or office" and "appointments or posts" cannot be whittled down to mean only initial recruitment and hence the
- h normal rule of the service jurisprudence of the loss of the birth marks cannot be applied to the appointments made under the article. However, as pointed out earlier, the exclusive quota is not the only form of reservation and where the resort to it such as in the promotions, results in the inefficiency of the administration, it is illegal. But that is not the end of
- i the road nor is a backward class employee helpless on account of its

absence. Once he gets an equal opportunity to show his talent by coming into the mainstream, all he needs is the facility to achieve equal results. The facilities can be and must be given to him in the form of concessions, exemptions etc. such as relaxation of age, extra attempts for passing the examinations, extra training period etc. along with the machinery for impartial assessment as stated above. Such facilities when given are also a part of the reservation programme and do not fall foul of the requirement of the efficiency of the administration. Such facilities, however, are imperative if, not only the equality of opportunity but also the equality of results is to be achieved which is the true meaning of the right to equality.

Question IX:

Whether the matter should be sent back to the five-Judge Bench?

550. The attacks against the impugned orders as formulated in the aforesaid eight questions, have been dealt with above. The only other attack against the impugned orders is that they are based on the Mandal Commission Report which suffers in its findings on some counts.

551. In the first instance, it must be remembered that the Government could have passed the impugned orders without the assistance of any report such as the Mandal Commission Report. Nothing prevents the Government from providing the reservations if it is satisfied even otherwise that the backward classes have inadequate representation in the services under the State. It is however, a different matter that in the present case the Government had before it an investigation made by an independent Commission appointed under Article 340 of the Constitution to enable it to come to its conclusions that certain social groups which are socially and educationally backward are inadequately represented in the services and therefore, deserved reservation therein. The Commission has given its own list of such backward classes and that is based primarily on the lists prepared by the States. It is true that in certain States, there are no lists and the Commission has, therefore, made its own lists for such States. However, while issuing the impugned orders the Government has taken precaution to see that the socially and educationally backward classes would comprise in the first phase the castes and communities which are common to the lists prepared by the Mandal Commission and the States. The result is that it is the State Government lists of SEBCs which would prevail for the time being and those SEBCs mentioned in the lists of the Mandal Commission which are not in the State lists would not get the benefit of the impugned orders. It is not seriously contended before us that the State lists are prepared without application of mind or without any basis. It is no doubt urged

- a that in certain States some castes and communities have come to be introduced in the lists of backward classes on the eve of the elections and thus the lists have been expanded from time to time. Assuming that there is some grain of truth in this allegation, the grievance in that behalf can be redressed by a fresh appraisal of the State lists by an independent machinery. The further attack against the lists prepared by the Mandal Commission is that they are prepared without an adequate and a proper
- b survey with the result that some social groups which ought not to be in the SEBC lists have been included therein whereas others which ought to be there have been excluded. The third attack against the Commission-lists is that since there are States where there exist no lists of SEBCs, the SEBCs in those States would suffer and that would be a
- c discrimination against them. The last attack is that the Commission has exaggerated the number of castes. While there are allegedly only 1051 backward castes, the Commission has given a list of about 3743 castes. Assuming that all these contentions are correct, all that they come to is that certain social groups which ought not to be in the SEBC lists are
- d found there whereas others which ought to be there are not there. Such defects can be expected in any survey of this kind since it is difficult to have a cent per cent accurate result in any sociological survey. In any case although the Mandal Commission on its survey has found the total population of SEBCs as 52 per cent, the reservation it has recommended
- e is only 27 per cent which is almost half of the population of SEBCs according to its survey. The impugned orders have also restricted the reservations to 27 per cent. It is not suggested that the margin of error of the survey is as high as 50 per cent population-wise. Assuming, however, that the population of the SEBCs is not even 27% of the total
- f population, even this defect can be cured by another independent survey. For the present, the list as envisaged in the impugned orders may be given effect to and in the meanwhile, a new Commission as suggested earlier may be appointed for preparing an accurate list of the backward
- g classes. No harm would be done if in the meanwhile, at least half of those who are found backward are given the benefit of the impugned orders. If, therefore, the only purpose of sending the matter to the five-Judge Bench now, is to find out the validity of the lists of the SEBCs, that purpose can hardly be fulfilled since the Bench cannot on its own and without adequate material invalidate the lists. The Bench would also
- h have to direct a fresh inquiry into the matter, if it comes to the conclusion that the grievance made in that behalf is correct. The purpose would be better served if this Bench itself directs that the matter be examined afresh by a Commission newly appointed for the purpose. In any view of the matter, it is unnecessary to send the case back to the five-
- i Judge Bench.

552. The answers to the questions may now be summarised as follows:

Question 1:

Clause (4) of Article 16 is not an exception to clause (1) thereof. It only carves out a section of the society, viz., the backward class of citizens for whom the reservations in services may be kept. The said clause is exhaustive of the reservations of posts in the services so far as the backward class of citizens is concerned. It is not exhaustive of all the reservations in the services that may be kept. The reservations of posts in the services for the other sections of the society can be kept under clause (1) of that Article.

Question 2:

The backward class of citizens referred to in Article 16(4) is the socially backward class of citizens whose educational and economic backwardness is on account of their social backwardness. A caste by itself may constitute a class. However, in order to constitute a backward class the caste concerned must be socially backward and its educational and economic backwardness must be on account of its social backwardness.

The economic criterion by itself cannot identify a class as backward unless the economic backwardness of the class is on account of its social backwardness.

The weaker sections mentioned in Article 46 are a genus of which backward class of citizens mentioned in Article 16(4) constitute a species. Article 16(4) refers to backward classes which are a part of the weaker sections of the society and it is only for the backward classes who are not adequately represented in the services, and not for all the weaker sections that the reservations in services are provided under Article 16(4).

Question 3:

No reservations of posts can be kept in services under the State based exclusively on economic criterion either under Article 16(4) or under Article 16(1).

Question 4:

Ordinarily, the reservations kept both under Article 16(1) and 16(4) together should not exceed 50 per cent of the appointments in a grade, cadre or service in any particular year. It is only for extraordinary reasons that this percentage may be exceeded. However, every excess over 50 per cent will have to be justified on valid grounds which grounds will have to be specifically made out.

- a The adequacy of representation is not to be determined merely on the basis of the over all numerical strength of the backward classes in the services. For determining the adequacy, their representation at different levels of administration and in different grades has to be taken into consideration. It is the effective voice in the administration and not the total number which determines the adequacy of representation.

Question 5:

- b Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of the economic consideration alone.
- c If backward classes are classified into backward and more or most backward classes, separate quotas of reservations will have to be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.
- d It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other consideration. The test of advancement lies in the capacity to compete with the forward classes. If the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4).

Question 6:

- f The provisions for reservations in the services under Article 16(4) can be made by an executive order.

Question 7:

- g There is no special law of judicial review when the reservations under Article 16(4) are under scrutiny. The judicial review will be available only in the cases of demonstrably perverse identification of the backward classes and in the cases of unreasonable percentage of reservations made for them.

Question 8:

- h It is not necessary to answer the question since it does not arise in the present case. However, if it has to be answered, the answer is as follows:

i The reservations in the promotions in the services are unconstitutional as they are inconsistent with the maintenance of efficiency of administration.

However, the backward classes may be provided with relaxations, exemptions, concessions and facilities etc. to enable them to compete for the promotional posts with others wherever the promotions are based on selection or merit-cum-seniority basis. a

Further, the committee or body entrusted with the task of selection must be representative and manned by suitable persons including those from the backward classes to make an impartial assessment of the merits. b

To ensure adequate representation of the backward classes which means representation at all levels and in all grades in the service, the rules of recruitment must ensure that there is direct recruitment at all levels and in all grades in the services. c

Question 9:

The matter should not be referred back to the five-Judge Bench since almost all the relevant questions have been answered by this Bench. The grievance about the excessive, and about the wrong inclusion and exclusion of social groups in and from the list of backward classes can be examined by a new Commission which may be set up for the purpose. d

553. Hence the following order:

ORDER

1. The benefit of Clause 2(i) of the first order dated August 13, 1990 cannot be given to the advanced sections of the socially and educationally backward classes because they no longer belong to the socially and educationally backward classes although they may be members of the caste, occupational groups or other social groups which might have been named as socially and educationally backward classes in the lists which are issued or which may be issued under Clause 2(iv) of the said order. This clause if so read down, is valid. e

The rest of the said order is valid. f

The Government may evolve the necessary socio-economic criterion to define the advanced sections of the backward classes to give effect to the order. g

2. Clause 2(i) of the second order dated September 25, 1991 is valid only if it is read down as under:

(a) No distinction can be made in the backward classes as poor and poorer sections thereof. The distinction can be made only between the advanced and the backward sections of the backward classes. The advanced sections are those who have acquired the capacity to compete with the forward classes. Such advanced sections no longer belong to the h

backward classes and as such are disentitled to the reservations under Article 16(4). The reservations can be made only for the benefit of the backward or the non-advanced sections of the backward classes.

- (b) When backward classes are classified into backward and more or most backward classes as stated above on the basis of the degrees of social backwardness (and not on the basis of the economic criterion alone), exclusive quotas of reservations will have to be kept separately for the backward and the more or most backward classes. It will be impermissible to keep a common quota of reservation for all the backward classes together and make available posts for the backward classes only if they are left over after satisfying the requirements of the more or most backward classes. That may virtually amount to a total denial of the posts from the reserved quota to the backward classes.
- (c) Clause 2(i) of the order dated September 25, 1991 is, therefore, invalid, unless it is read, interpreted and implemented as above.

3. Clause 2(ii) of the said order is invalid since no reservations can be kept on economic criterion alone.

554. The writ petitions and transfer cases are disposed of in the above terms. No costs.

555. In view of the reasons given and the conclusions arrived at by me above, I agree with the conclusions recorded in paragraphs 860 and 862 and the directions given in paragraphs 861(A), (B) and (C) of the judgment being delivered by Brother Jeevan Reddy, J on behalf of himself, and on behalf of the learned Chief Justice and Brothers Venkatachaliah and Ahmadi, JJ.

R.M. SAHAI, J (*dissenting*)— Constitutional enigma of identifying 'backward classes' for 'protecting' or 'compensatory benefits' under constitutionally permissive discrimination visualised by Article 16(4) of the Constitution, except for Scheduled Castes and Scheduled Tribes, is as elusive today as it was when the issue was debated in the Constituent Assembly, or in Parliament in 1951, even after appointment of two commissions by the President under Article 340(1) of the Constitution, one, in 1953 known as Kaka Kalelkar Commission and other in 1979 which became famous as Mandal Commission, and furnished basis for reservation of appointment and posts for socially and economically backward classes (SEBC) in services under the Union, by Office Memorandum

dated August 13, 1990⁷⁰ amended further in September 1991⁷¹ adding,

70

OFFICE MEMORANDUM

New Delhi, the 13th August, 1990

Subject: *Recommendation of the Second Backward Classes Commission (Mandal Report) — Reservation for Socially and Educationally Backward Classes in Services under the Government of India.* a

In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12.1980. b

2. Government have carefully considered the report and the recommendations of the Commission in the present context responding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:

- (i) 27 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC. c
- (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.
- (iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27 per cent. d
- (iv) The SEBC would comprise in the first phase the castes and communities which are common to both, the list in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately.
- (v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders. e

3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

Sd/-

(Smt Krishna Singh)

Joint Secretary to the Govt. of India f

71

OFFICE MEMORANDUM

New Delhi, the 25th September 1991

Subject: *Recommendation of the Second Backward Classes Commission (Mandal Report) — Reservation for Socially and Educationally Backward Classes in Services under the Government of India.* g

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August 1990, on the above sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation. Government have decided to amend the said Memorandum with immediate effect as follows:—

- (i) Within the 27 per cent of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates. h
- (ii) 10 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation. i
- (iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

yet, one more class of economically backward. The nature of these orders, their constitutional validity, principle of their issuance and legal infirmity, the Mandal Commission Report, its basis and foundation, scope of reservation, its length, width and depth were subject-matters of intensive debate in these public interest litigations by members of the Bar, representatives of various associations, and numerous intervenors. Range of controversy was, both wide and narrow touching various aspects, sensible and sensitive. But before advertent to them it is imperative to thrash out, at the outset, if the issue of reservation of posts in services by the State is non-justiciable either because it is a political question or a matter of policy and even if justiciable then whether the rule of discretion requires us to leave the field open for State activity to work it out by trial and error.

'A'

(1)

557. Today the 'political thicket' has been entered with *Baker v. Carr*⁷² and *Davis v. Bandemer*⁷³ even, in America where the English shadow of 'King can do no wrong' was most prominently reflected. The test now applied is if the controversy can be decided by "judicially discernible and manageable standards"⁷³. "The political questions doctrine, however, does not mean, that anything that is tinged with politics or even that any matter that might properly fall within the domain of the President or the Congress shall not be reviewable, for that would end the whole constitutional function of the court"⁷⁴. Under our Constitution, the yardstick is not if it is a legislative act or an executive decision on a policy matter but whether it violates any constitutional guarantee or has potential of constitutional repercussions as enforcement of an assured right, under Chapter III of the Constitution, by approaching courts is itself a fundamental right. The "constitutional fiction" of political question, therefore, should not be permitted to stand in way of the court to, "deny the Nation the guidance on basic democratic problems"⁷⁵.

The O.M. of even number dated the 13th August 1990, shall be deemed to have been amended to the extent specified above.

Sd/-
(A.K. Harit)
Dy. Secretary to the Govt. of India

72 369 US 186; 7 L Ed 2d 663 (1962)

73 54 USLW 4898 (1986)

74 Samuel Krislov: *The Supreme Court in the Political Process*, p. 96

75 C. Herman Pritchett: *The American Constitution*, p. 154 (quoted in *The Judicial Review of Legislative Acts* by Dr Chakradhar Jha, p. 355)

Avoidance of entering into a political question may be desirable and may not be resorted to, "not because of doctrine of separation of power or lack of rules but because of expediency"⁷⁶ in larger interest for public good but legislatures, too have, "their authority measured by the Constitution". Therefore absence of norms to examine political question has rarely any place in the Indian constitutional jurisprudence. The, Constitution being, "foremost a social document"⁷⁷ the courts cannot, "retreat behind"⁷⁸ whenever they are called upon to discharge their constitutional obligation as "if the judiciary bows to expediency and puts question in the political rather than in the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, then the judiciary has become a political instrument itself"⁷⁹. Thus, "Legislative or executive action reserving appointments or posts in services of the State is neither a political issue nor a matter of policy."

'B'

(1)

558. Misconception appears to be prevailing that the judiciary by exercising power of judicial review on matters which involve political considerations asserts superior capability thus violates the democratic mandate vested by the people in elected representatives. The judiciary derive their authority as much from 'the people' the ultimate sovereign as the legislature or the executive. Each wing is a delegate of the Constitution. Each stand committed to be ruled under and governed by it. A Legislature is elected by people to enact law in accordance with the Constitution, to work under and for it. By being people's representative the mandate is to act in furtherance of ideals of democracy in accordance with provisions of the Constitution. No Legislature or executive can enact a law or frame a policy against the dictates of the Constitution. 'Popular support expressed through the ballot box cannot validate an ultra vires action'. Elected representatives are as much oath bound to uphold and obey the Constitution as the judges appointed by the President. Both derive their power and authority from, the same source. What the Constitution says, what it means, how it is to be understood and applied was entrusted to the judiciary as when, 'The People' of India resolved, to secure to all its citizens justice, social, economic and political, 'The judiciary was seen as an extension of the rights, for it was the courts

76 Charles Gordon Post, pp. 129-130: *The Supreme Court Questions* (quoted in 'The Judicial Review of Legislative Acts' by Dr Chakradhar Jha, p. 351)

77 Granville Austin: *The Indian Constitution — Cornerstone of a Nation*

78 Tagore Law Lecture: *From Marshall to Mukherjee*

79 William O. Douglas: *Studies in American and Indian Constitutional Law*, p. 38

- that would give the rights force⁷⁷. A declaration by a government to reserve posts in services may be a matter of policy or even a political issue but an order issued or a law made directing reservation can be sustained, only, if it is found to be constitutional. Judicial review in our Constitution has not 'grown' nor it has been 'assumed' or 'inferred' or 'implied' nor 'acquired by force' or 'stealthily' but it was provided for by the Founding Fathers. The higher judiciary has been visualised as "an arm of the social revolution"⁷⁷. When our Constitution was framed the *Wednesbury principle*⁸⁰ evolved by the English Courts and the division of power adopted by the American Constitution was fully known yet the country did not opt for vague resolutions as were adopted at the Philadelphia Convention of United States in 1787 but decided to place the apex court as custodian of the Constitution by declaring that any declaration of law by it was binding under Article 141 of the Constitution, its decree and orders were enforceable under Article 142 throughout the country, and all civil and executive authorities are to act in furtherance of it under Article 144. "The range of judicial review recognised by the superior judiciary in India is perhaps the widest and most extensive known in the world of law"⁸¹. Unlike England or America its sweep extends to all other organs functioning under the Constitution. The Court discharged its constitutional obligation in such sensitive but constitutional matters as President's pardoning power⁸¹ decision of speakers of legislative assemblies⁸² President's power of dissolution of State legislative assemblies etc.⁸³ Reliance on American decisions for very limited scope for interference was not of much assistance as judicial power of the United States Supreme Court to examine race-conscious measures or affirmative action either in economic field or admission programme in educational institutions was never doubted. The only difference was that the measures were tested either on what they described as 'close examination' or 'exacting judicial scrutiny'. For instance in *Bakke*²⁰ it was the latter test that was applied. It was observed, "in order to justify the use of a suspect classification a State must show that its purpose or interest is

80 'Wednesbury principle' is a convenient legal 'shorthand' used by lawyers to refer to the classical review by Lord Greene MR in the *Wednesbury case* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223; (1947) 2 All ER 680 (CA)] of the circumstances in which the courts will intervene to quash as being illegal the exercise of administrative discretion. Wade: *Administrative Law*, 6th Edn., p. 398

81 *Kehar Singh v. Union of India*, (1989) 1 SCC 204; 1989 SCC (Cri) 86

82 *Kihota Hollohon v. Zachilhu*, (1992) 1 SCC 309

83 *State of Rajasthan v. Union of India*, (1977) 3 SCC 592

77 Granville Austin: *The Indian Constitution — Cornerstone of a Nation*

20 *Regents of the University of California v. Allan Bakke*, 57 L Ed 2d 750: 438 US 265 (1978)

both constitutionally permissible and substantial, and that its use of the classification is, 'necessary ... to accomplishment of its purpose for the safeguarding of its interest'." Whereas in *Fullilove*⁵¹ it was observed that, "programme that employs racial or ethnical criteria ... calls for closer examination". It was explained that when a programme employing a benign racial classification was adopted by an administrative agency on the explicit direction of Congress, the courts were 'bound to approach' the "task with appropriate deference to the Congress, the co-equal branch charged by the Constitution with the power to provide for the 'general welfare' "⁵¹. In *Metro Broadcasting*⁵², *Fullilove*⁵¹ was reiterated and it was observed that, "benign race-conscious measure 'mandated by the Congress' even if these measures are not 'remedial' in the sense of being designated to compensate victims of past governmental or social discrimination — are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives". Suffice it to say that the observations were made in different context for different purpose. The grant of broadcasting rights to minority was upheld by the majority as "minority ownership programmes are critical means of promoting broadcasting diversity". But even in this decision Justice Stevens who concurred with majority agreed with minority in *Fullilove*⁵¹ and observed, "I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for desperate treatment only in extremely rare situations and that it is therefore 'especially important that the reasons for any such classification be clearly identified and unquestionably legitimate' "

(2)

559. The sweep and width of judicial power and authority exercised by this Court is much extensive and deep as the constitutional provisions mandate it to be so. Test for interference is constitutional violation. Due regard to legislative measures or executive action directed towards welfare measure has never been disputed but when they are overshadowed with extraneous compulsions or are arbitrary then, "judicial interpretation gives better protection than the political branches"⁸⁴. Even the most reactionary of American Presidents, Thomas Jefferson once said, "The law of the land administered by upright judges would protect you from any exercise of power unauthorised by the Constitution of

84 A. Cox: *The Court and the Constitution*, p. 372

51 *H. Earl Fullilove v. Philip M. Klutznick*, 448 US 448: 65 L Ed 2d 902 (1980)

52 *Metro Broadcasting Inc. v. Federal Communications Commission*, 58 IW 5053 (decided on June 27, 1990)

United States." Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism.

(3)

560. Article 16(1) is a right created constitutionally in favour of all citizens and anyone is entitled to approach the courts against violation of his right by the State and assail State's latitude in remedial measures or affirmative action to improve conditions of weaker sections or improve, lot of the backward class, if they are not so, 'tailored' as not to transgress the constitutional permissible limits. Any State action whether 'affirmative' or 'benign', 'protective' or 'competing' is constitutionally restricted first by operation of Article 16(4) and then by interplay of Articles 16(4) and 16(1). State has been empowered to invade the constitutional guarantee of 'all citizens under Article 16(1) in favour of 'any' backward class of citizens only if in the opinion of the government it is inadequately represented. Objective being to remove disparity and enable the unfortunate ones in the society to share the services to secure equality in, 'opportunity and status' any State action must be founded on firm evidence of clear and legitimate identification of such backward class and their inadequate representation. Absence of either renders the action suspect. Both must exist in fact to enable State to assume jurisdiction to enable it to take remedial measures. "Power to make reservations as contemplated by Article 16(4) can be exercised only to make the inadequate representations in the services adequate"²⁶. Use of the expression, "in the opinion of State" may result in greater latitude to State in determination of either backwardness or inadequacy of representation and sufficiency of material or mere error may not vitiate as State may be left in such field to experiment and learn by trial and error with little interference from the court but if the principle of identification itself is invalid or it is in violation of constitutionally permissible limits or if instead of carefully identifying the characteristics which could clothe the State with remedial action it engages in analysis which is illegal and invalid and is adopted not for remedial purposes but due to extraneous considerations then the court would be shirking in their constitutional obligation if they fail to apply the corrective. States' latitude is further narrowed when on existence of the two primary, basic or jurisdictional facts it proceeds to make reservation as the wisdom and legality of it has to be weighed in the balance of equality pledged and guaranteed to every citizen and tested on the anvil of reasonableness to

²⁶ *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

"smoke out" any illegitimate use and restrict the State from crossing the clear constitutional limits. "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."⁸⁵ Judicial Review has come to be one of the ways of obliging government to control itself. A reservation for a class which is not backward would be liable to be struck down. Similarly if the class is found to be backward but it is adequately represented the power cannot be exercised. Therefore, the exercise of power must precede the determination of these aspects each of which is mandatory. Since the exercise of power depends on existence of the two, its determination too must satisfy the basic requirement of being in accordance with the Constitution, its belief and thought. Any determination of backward class in historical perspective may be legally valid and constitutionally permissible. But if in determination or identification of the backward class any constitutional provision is violated or it is contrary to basic feature of Constitution then the action is rendered vulnerable.

(4)

561. Reservation being negative in content to the right of equality guaranteed to every citizen by Article 16(1) it has to be tested against positive right of a citizen and a direct restriction on State power. Judicial review, thus, instead of being ruled out or restricted is imperative to maintain the balance. The court has a constitutional obligation to examine if the foundation for State's action was within constitutional periphery and even if it was, did the government prior to embarking upon solving the social problem by raising a "narrow bridge" under Article 16(4), to enable the "weaker sections of the people to cross the Rubicon"⁹ discharge its duty of a responsible government by constitutional method so as to put it beyond any scrutiny by the "eye and ear" of the Constitution. What comes out of the preceding discussion can be reduced thus:

(i) (a) Identification of backward class of persons and their inadequate representation in service are the basic or jurisdictional facts to empower the State to exercise the power of reservation.

(b) Either of the conditions precedent are assailable and are subject to judicial review.

⁸⁵ *Federalist* No. 51 (extracted in *American Constitutional Law* by Alpheus T. Mason/D.G. Stephenson, Jr.

⁹ *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

- a (ii) Reservation of appointments and posts under Article 16(4) can be challenged if it is constitutionally invalid or even if it disturbs the balance of equality guaranteed under Article 16(1) for being unreasonable or arbitrary.
- (iii) Burden to prove that reservation does not violate constitutional guarantee and is reasonable is on the State.

'C'

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- c 562. Our Constitution like many modern Constitutions was also, "a break with the past" and was framed with "a need for fresh look". Centuries of deliberate and concerted effort to deface the society by creating caste consciousness, exploiting religious sentiments was attempted to be effaced by "The People" when they resolved to constitute the country into a Secular Democratic Republic. Preamble of the Constitution, echoing the sentiments of a nation, harassed for centuries by foreign domination, "to secure, to all its citizens justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; d Equality of status and opportunity; and to promote among them all Fraternity assuring the dignity of the individual" was not a mere flourish of words but was an ideal set-up for practice and observance as a matter of law through constitutional mechanism. Communal reservations were outlawed both from governance and administration. States and governments e were prohibited from practising race, religion or caste in any form by Articles 15(1), 16(2) and 29(2). Classification made on religion, race and caste was held to be "opposed to the Constitution and constitutes a clear violation of the fundamental rights"². A new beginning was made by f abolishing untouchability, prohibiting exploitation and guaranteeing equality not only before law but in public services and employment both substantive and protective. Concern was shown for weaker sections of the society and backward class of citizens. Article 16(4) was in keeping with this philosophy. Reservation for 'any' backward class of citizens in g services of the State was visualised as an integral part of equality of opportunity as pledge during freedom struggle was, "equality not only of opportunity to be given to all but special opportunities for educational, economic and cultural growth must be given to backward groups so as to enable them to catch up to those who are ahead of them"⁸⁶. Employment h or appointment to an office in the State constituted a "new form of wealth" on the date the Constitution was enforced, therefore equal opportunity to all its citizens was constitutionally provided for without

i 86 Pt. Jawaharlal Nehru

2 *State of Madras v. Smt Champakam Dorairajan*, 1951 SCR 525: AIR 1951 SC 226

any discrimination on religion, race or caste etc. But it would have been mere illusion if no provision was made to ensure similar opportunity to those citizens who remained backward either because of historically social reasons or economic poverty or poor quality of education or any other reason which could be determinative of backwardness. How the doctrine of equality, claimed to be "the core of American democratic aspiration" was twisted "to relegate, racial minorities to inferior status by denying them, 'equal access to the opportunity enjoyed by others' under, cover of, 'separate but equal' doctrine" commented by Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*⁸⁷ as 'pernicious' was well known. The American myth that it was a "nation of equals and a classless society"⁸⁸ had been exploded. Technically and even legally probably the interpretation could be within the provision of constitutional guarantee of equality but it was obnoxious and destructive of social equality. "The effect of the majority's decision in *Plessy*⁸⁷ was to subordinate them until the then dominant *anti-discrimination* principle of the Fourteenth Amendment to the Court-created doctrine of *reasonable classification*"⁸⁹. Although the doctrine of *Plessy*⁸⁷ was gradually abandoned finally but not before 1954 till the *Brown case*⁵³ was decided. Therefore Article 16 while providing for equality of opportunity to all without any distinction and irrespective of forward or backward class of citizens took care to avoid recurrence of the American experience by directing State to reserve posts for backward class if they were not adequately represented in services as "inequality does not harm only the unequals, it hurts the entire society".

563. Thus Article 16(1) and (4) operate in the same field. Both are directed towards achieving equality of opportunity in services under the State. One is broader in sweep and expansive in reach. Other is limited in approach and narrow in applicability. Former applies to 'all' citizens whereas latter is available to 'any' class of backward citizens. Use of words 'all' in Article 16(1) and 'any' in Article 16(4) read together indicate that they are part of the same scheme. The one is substantive equality and the other is protective equality. Article 16(1) is a fundamental right of a citizen whereas Article 16(4) is an obligation of the State. The former is enforceable in a court of law, whereas the latter is "not constitutional compulsion" but an enabling provision. Whether

87 163 US 537 (1896): 41 L Ed 256

88 Herbert J. Gans: *The New Egalitarianism (The Inequality & Justice by Rainwater)*

89 P.G. Polyviou: *The Equal Protection of the Law*, p. 302

53 *Oliver Brown v. Board of Education of Topeka*, 347 US 483 : 48 L Ed 2d 873 (1954)

- Article 16(4) is "in substance, an exception"¹⁰ or "a proviso"^{10-A} or an "emphatic way of putting the extent to which equality of opportunity could be carried"^{10-B} or "presumed to exhaust all exception in favour of backward class"^{10-C} or "expressly designed as benign discrimination devoted to lifting of backward classes"^{10-D} but if Article 16(1) is the "positive aspect of equality of opportunity", Article 16(4) is a complete code for reservation for backward class of citizens as it not only provides for exercise of power but also lays down the circumstances, in which the power can be exercised, and the purpose and extent of its exercise. One is mandatory and operates automatically whereas the other comes into play on identification of backward class of citizens and their inadequate representation.

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564. Compensatory or remedial measures for lesser fortunate are thus not, *ipso facto*, violative of equal opportunity as our society was founded not on abstract theory that all men are equal but on realism of societal differences created by human methodology resulting in existence of the weak and the strong, the poor and the rich. The Preamble, the basic feature of the Constitution, therefore promises equal opportunity and status and dignity to every citizen the actuality of which has been ensured by empowering the State to take positive steps under Articles 15(4) and 16(4). Forty years of recount demonstrate flowering of the principle of equal opportunity and encourage to intensify it for the deserving, past or present. Reverse discrimination, an expression coined by American courts and jurists commented upon "as sharpened edge of a sword"⁹⁰ as "it is as much as an evil as the discrimination it aims to overcome"⁹⁰ as it violates (a) formal justice (b) consistency (c) equality of opportunity (d) due process of equality,⁹¹ are expressions of one-sided thinking without the grip of the constitutional goal set out by the Founding Fathers that "equality of opportunity must be transformed into equality of results". An enlightened society is one which takes care of the poor, the backward, the retarded, the handicapped as much as of the rich, the forward, the healthy and the gifted. Formal equality transforms

90 Anirudh Prasad: *Reservation Policy & Practice in India*

91 B. Sivaramayya: *Inequalities and the Law* (Eastern Book Co., Lucknow, 1984)

10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

10-A *Id.*, p. 939 (Khanna, J)

10-B *Id.*, p. 956 (Mathew, J)

10-C *Id.*, p. 960 (Beg, J)

10-D *Id.*, p. 969 and 978 (Krishna Iyer, J)

into real equality when the disadvantage arising out of social circumstances is levelled and the least and the best advantaged are so paired by the State activism that differences and distinctions arising out of ascribed identify get gradually lost. Various Articles of the Constitution reflect this philosophy. Article 16 is a classic example, and probably unparalleled in the constitutional history of the world, where individualism advocated by the West in eighteenth and nineteenth century co-exist with States predominant role in bridging the gulf between the needy and the affluent, the backward and the forward. It reflects modern and progressive thinking on equality. As observed by Laski, "By adequate opportunity we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal"⁹². According to Ronald Dworkin, "All human beings have a natural right to an equality of concern and respect, a right they possess not by virtue of birth, but simply as human beings with the capacity to make plans and give justice". Articles 39 and 46 are an extension of this belief and thought. Any legislative measure or executive order reserving appointments or posts cannot be assailed as being beyond constitutional sanction. As far back as 1951 it was held by a seven Judges' Constitution Bench of this Court "Reservation of posts in favour of any backward class of citizens cannot therefore be regarded as unconstitutional"²⁷. Nor did the Constitution-makers restrict the period of its continuance as was done for Anglo-Indians by Article 336 as an enlightened and progressive State a responsible government of a welfare country must decide itself periodically on prevalent social and economic conditions and not on political consideration or extraneous compulsion if the protective umbrella has to be kept opened, for whom and for how long.

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565. Before proceeding further it may be mentioned that many decisions were cited of American courts dealing with affirmative action for Negroes and a parallel was attempted to be drawn from it for justifying reservation for other backward classes. But this ignores that unlike the United States our Constitution itself provides for reservation for backward classes, therefore, it is unnecessary to derive inspiration from decisions given by American courts on equal protection clause. They may be relevant for classification and nexus test under Article 14 or even for judging if the provision by being arbitrary was violative of equality doctrine but they cannot furnish relevant guideline for interpreting Article

⁹² *Liberty & Equality* by Harold Laski (A Grammar of Politics published in *Inequality and Justice* by Rainwater)

²⁷ *B. Venkataramana v. State of Madras*, AIR 1951 SC 229 : (1951) 1 MLJ 625

- 16(4). How equality was distorted and how Blacks were made to suffer by biased and narrow construction of the concept of equality for nearly a hundred years is a matter of history. To derive parallel from classification developed by American courts to support reservation on any ground for other backward classes would be constitutionally unjust and legally unsure. Whether the American Constitution was or is colour blind or not, but when our Constitution was framed caste was in "bad odour".
- a Deliberate 'Divide and Rule' policy of Britishers by perpetuating caste was in full glare, therefore, the Founding Fathers while guaranteeing equality prohibited discrimination on the ground of religion, race or caste etc. The unfortunate American experience of, 'separate but equal' doctrine legitimatised in *Plessy v. Ferguson*⁸⁷ resulting in segregating negroes and keeping them at a distance from American prosperity was avoided by making the State responsible both for ameliorative measures or affirmative action and protective steps. The doctrine of 'compelling State interest' developed by American courts to support classification for even race-conscious measures particularly in economic field or business
- c regulation have no relevance as the State has been constitutionally empowered to remedy the social imbalance. From 'separate but equal' in *Plessy*⁸⁸ to 'freedom of choice' developed by *Brown I*⁹³ and *Brown II*⁹³ to, 'just schools' without label of white or Negro in *Green*⁹⁴ to elimination of segregation 'root and branch' in *Swann*⁹⁵ may be a fascinating development for America but our constitutional provisions being more pragmatic and realistic to the problem of equality in public employment it appears unnecessary and risky to derive any inspiration from American decision for interpreting Article 16(4) as, "In its Compensatory Programmes for depressed classes, India, has gone much further than the egalitarian western societies such as the United States."⁹⁶
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566. The conclusion, thus, is that—

- (1) Articles 16(1) and 16(4) operate in the same field.
- (2) Article 16(4) is exhaustive of reservation.

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93 *Brown v. Director, Board of Education*, 349 US 294 : 99 L Ed 1083 (1955)

94 *Green v. Country School Board*, 391 US 430: 20 L Ed 2d 716 (1968)

h 95 *Swann v. Charlotte, Mecklenburg Board of Education*, 402 US 1: 28 L Ed 2d 554 (1971)

96 Glen M. and Johnson Sipra Bose: 'Social Mobility Among Untouchables', in *Cohesion and Conflict in Modern India*

87 163 US 537 (1896) 41 L Ed 256

i 88 *Plessy v. Ferguson*, 163 US 537 (1896): 41 L Ed 256

53 *Oliver Brown v. Board of Education of Topeka*, 347 US 483 : 48 L Ed 2d 873 (1954)

- (3) No period for reservation has been provided but every State must keep on evaluating periodically if it was necessary to continue reservation, and for whom.

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567. Thus the real issue is not reservation but identification. Who, then, are the, 'backward class of citizens'? What is the meaning of the word, 'backward', 'class' and 'citizens' individually and taken together. How are they to be identified. By their caste, occupation, status, economic condition etc. Although the issue of reservation has been agitated before this Court, time and again, the occasion never arose to lay down any principle or test for determination of other backward classes. *Rajendran*⁶³, *Parimoo*⁶¹, *Thomas*¹⁰ and *Soshit Karamchari*¹¹ were no doubt concerned with Article 16 but they were cases of SC/ST who are constitutionally recognised as, backward class of citizens. *Champakam*², *Triloki Nath(I)*⁴, *Triloki Nath(II)*⁸ and *Peeriakaruppan*¹⁵ were concerned with reservation based on caste or religion. *Balaji*¹², *Janardhan*⁹⁷, *Rajendran*⁶³, *Sagar*¹⁴, *Balram*¹⁶, *Pradeep Tandon*⁶, *Chitralkha*⁷ and *Jayasree*¹⁷ were concerned with reservation under Article 15(4). Except for *Vasanth Kumar*⁹ no exercise was undertaken to lay down any prin-

97 *Heggade Janardhan Subbarye v. State of Mysore*, 1963 Supp 1 SCR 475: AIR 1963 SC 702

63 *C.A. Rajendran v. Union of India*, (1968) 1 SCR 721: AIR 1968 SC 507

61 *Janki Prasad Parimoo v. State of J & K*, (1973) 1 SCC 420: 1973 SCC (L&S) 217 : (1973) 3 SCR 236

10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

11 *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, (1981) 1 SCC 246: 1981 SCC (L&S) 50: (1981) 2 SCR 185

2 *Champakam Dorairajan (Smt) v. State of Madras*, AIR 1951 Mad 120: (1950) 2 MLJ 404

4 *Triloki Nath Tikku v. State of J & K(I)*, (1967) 2 SCR 265: AIR 1967 SC 1283: (1967) 2 LLJ 271

8 *Triloki Nath v. State of J & K(II)*, (1969) 1 SCR 103: AIR 1969 SC 1: (1970) 1 LLJ 629

15 *A. Peeriakaruppan v. State of T.N.*, (1971) 1 SCC 38: (1971) 2 SCR 430

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

14 *State of A.P. v. P. Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379

16 *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247

6 *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267: (1975) 2 SCR 761

7 *R. Chitralkha v. State of Mysore*, (1964) 6 SCR 368: AIR 1964 SC 1823

17 *K.S. Jayasree v. State of Kerala*, (1976) 3 SCC 730: (1977) 1 SCR 194

9 *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

- ciple for determination of backward class. Reason for absence of any discussion appears to be that this Court while explaining the word 'backward' in *Balaji*¹² observed that backward classes intended to be covered in Article 15(4) were comparable to SC/ST which was accepted and applied while deciding backward class under Article 16(4) as well. But the kind of comparability — "Whether of status, of disabilities suffered, of economic or educational conditions or of representation in government service" was not elaborated nor it was undertaken even in *Balram*¹⁶ when the Court extended it to, "really backward" even though not "exactly similar in all respects", as they were dealing with SC/ST.

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568. The expression, 'any backward class of citizens' is of very wide import. Its width and depth shall be fully comprehended when the significance of each word and the purpose of its use is explained. To preface the discussion on this vital aspect, on which divergence extended to extremes both legally and sentimentally, it may be stated that in certain decisions given by this Court due weight was not given to the words, 'class' and 'citizens'. The latter is explained in Chapter II of the Constitution. Any person satisfying those conditions is a citizen of this country irrespective of race, religion or caste. Members of every community Hindu, Muslim, Christian, Sikh, Buddhist, Jain etc. who are citizens of this country and are backward and are not adequately represented in services are to be brought into the national stream by protective or benign measures. Provisions of the Constitution apply to all equally and uniformly. Yardstick of backwardness must necessarily, therefore, has to be of universal application.

569. 'Class' has been linked with the word, 'backward' and has been read as one word, 'backward class' thus occasioning the debate that it should be understood as 'backward caste'. Whether such reading is permissible is another aspect which shall be adverted to, presently, but if the word, 'class' is read individually or in conjunction with words 'of citizens' then its plain meaning and purpose is to exclude any reservation for individual. In other words reservation contemplated is for group or collectivity of citizens who are backward and not for any individual. The expression 'any backward class of citizen' thus is capable of being construed as class of backwards, backward among any class of citizens, backward class etc. depending on for whom the reservation is being made and why.

570. Backward may be relative such as professional or occupational backwardness or it may be economic, social, educational or it may be

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

¹⁶ *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247

racial such as in America or caste based as in Hindu social system or it may be natural such as physically handicapped or even of sex. Article 16 of the Constitution deals with equality of opportunity in services under the State. The meaning of the word 'backward' therefore, has to be understood with reference to opportunity in public employment. Since this is a constitutional issue it cannot be resolved by cliches founded on fictional mythological stories or misdirected philosophies or odious comparisons without any regard to social and economic condition but by pragmatic, purposive and value-oriented approach to the Constitution as it is the fundamental law which requires careful navigation by political set-up of the country and any deflection or deviation disturbing or threatening the social balance has to be restored, as far as possible, by the judiciary. Backwardness in such a vast country with divergent religions, culture, language, habits, social and economic conditions arising out of historical reasons, geographical locations, feudal system, rigidity of caste is bound to have regional flavour. For instance, place of habitation and its environment was held in *Pradeep Tandon*⁶ to be determinative for social and educational backwardness in hills of U.P. Interaction of various forces have been responsible for backwardness in different parts of the country. A caste backward in one State may be advanced in another. That is why Dr Ambedkar while quelling misgivings of members in the Constituent Assembly Debate had stated, that backwardness was being, 'left to be determined by the local government'⁵ probably, with hope and belief that once the problem was tackled by the State and backward citizens were adequately represented in State services the problem at the national level shall stand resolved automatically.

571. Individual backwardness in social sense is primarily economic. Article 16(4), however, is concerned with class backwardness. In a technical sense as explained by sociologists it is a problem of 'social stratification' arising out of, as said by Max Weber, due to political, social or economic order. Class or group backwardness may arise due to exclusion of the entire collectivity as a result of combined or individual operation of any of these reasons. For instance in America as slavery receded after Civil War it was succeeded "by a caste system embodying white supremacy. Various 'Jim Crow' laws, or segregation statutes, lent the sanction of the law to a racial ostracism found in churches and schools, in housing facilities, in restaurants and hotels, in most forms of public transportation, on the job, in universities and colleges, and ultimately in morgues and cemeteries. In addition, black Americans were long denied the right to vote, to serve on juries, and to run for public

⁶ *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267: (1975) 2 SCR 761

⁵ *Constituent Assembly Debates*, Vol. 7 (1948-49), pp. 700-03

- a office."⁹⁸ The SC and ST in our country bore a close parallel to it except that their exclusion or segregation was mainly social. That is why the constitutional protection was provided for them. For granting similar benefit on backwardness to other group or collectivity the State must be satisfied, that, they were subjected to at least similar if not same treatment or were excluded from services for any of the reasons social, economic or political individually or collectively and continue to be excluded before they can be identified as backward class for purposes of Article 16(4). Article 340 is, however, concerned with social and educational backwardness. Since the impugned orders have been passed on identification of backward class by a Commission appointed by the President in exercise of power under this provision it will have to be examined if the Commission acted within the scope of its reference and how this expression has to be understood.

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- d 572. Can the word 'class' be understood as caste? What does the word 'class' mean? According to the dictionary it means 'division of society according to status, rank, caste, merit, grace or quality'⁹⁹. Burton defines it, as 'category, classification, breed, caste, group, order, rank'¹⁰⁰. In *Webster* it is defined as, 'member or body of persons with common characteristics, social rank or caste'¹⁰¹. Whereas *Oxford* defines caste as, 'race, lineage, pure stock or breed', English historians have defined caste as 'hereditary classes into which Hindu society is divided'. Sociologists describe it as, 'ascribed status'. Class is thus wider and may mean caste. Is it so for Article 16? In the Hindi version of the Constitution the word is 'varg' that is group and not 'jati' that is caste or community. The word class cannot and was not used as caste as it was constitutionally considered to be destructive of secularism. In our country caste system is peculiar to Hindus. It is unknown to Muslims, Christians, Sikhs, Buddhists and Jains. The Constitution was framed not for Hindus only. Provision was made for a society heterogeneous in character but secular in outlook. "It was a compromistic formula", a positive effort to equalise one and all. Even among Hindus where caste system is an 'institution most highly developed' the society is divided into a large number of separate groups mostly functional or tribal in origin. By the 20th Century the "lowest classes of Hindu society" came to be identified as 'depressed class' or 'untouchable' — a name of comparatively recent origin'. Rigidity, developed over the years, was partly due to Hindu orthodoxy and partly

98 Derck L. Phillips: *Equality, Justice and Rectification*, pp. 289-290

99 *Oxford Dictionary*

100 William C. Burton: *Legal Thesaurus*

101 *Webster Dictionary*

due to British exploitation. Whatever reason but Scheduled Castes and Scheduled Tribes were undoubtedly 'truly', 'relatively' or 'really backward'. When the Constitution was framed the Framers were aware of preferential treatment on religion, race and caste. In Southern States communal reservation in services was in vogue. Yet Dr Ambedkar while defending the use of word 'backward' by the drafting committee explained that, "it was to enable other communities to share the services which for historical reasons, has been controlled by one community or a few communities". The word 'community' has been defined in *Webster Comprehensive Dictionary* as 'The people who reside in one locality and are subject to the same laws, have the same interests, the public or society at large'. And according to *Oxford* it means 'the quality of appertaining to all in common, common ownership, common character'. Class was thus used in a wider sense and not in the restricted sense of caste.

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573. Both the words 'backward' and 'class' thus are of very wide import. Assuming the two words as one and reading it as, 'backward class' the question is can it be understood as cluster of backward Hindu caste? Or in the broad and wide sense as extending and including 'any' backward class of citizens irrespective of race, religion or caste? Which construction would be in keeping with the constitutional purpose? Taking up the narrower construction, it may be stated that to interpret a constitutional provision its history, the circumstances in which it was adopted as well as the events immediately surrounding its adoption are necessary to be looked into to appreciate the purpose and objective of its use. The word 'backward class' had started acquiring meaning at the end of the 19th Century with commencement of enrolment on caste basis in 1891, recognition of special treatment to some and communal representation to others in early 20th Century. The Fort St. George Gazette No. 40 of November 1885 mentions grants-in-aid to schools for the untouchable¹⁰². In 1921 backward community in Mysore meant, 'all other communities other than Brahmins'¹⁰². In Bombay in 1925 backward classes were all except, 'Brahmins, Prabhus, Marwaris, Parsis, Baniyas and Christians'.¹⁰² Indian Statutory Commission (Hartog Committee) defined Backward Classes in 1928 as 'Castes or classes which are educationally backward'.¹⁰² They include the depressed classes, aboriginals, hill tribes and criminal tribes'. The United Province Hindu Backward Classes League founded in 1929 suggested Hindu Backward Classes to be "all of the listed communities belonging to non-dwijya (that is twice born) or

¹⁰² Extracted in Marc Galanter: *Competing Equalities*

a degenerate or Sudra classes of Hindus"¹⁰². Travancore in 1935 passed a resolution on a report of Justice Nokes on communal lines including all classes.¹⁰² Madras Provincial Backward Classes League was founded in 1939 for securing separate treatment for 'forward non-Brahmin communities'¹⁰². It thus did not have a definite meaning. Somewhere it was everyone except Brahmins and others for the so-called Sudras. All depending on social and economic conditions prevailing in a particular State. In any case it 'never acquired a definite meaning at the all-India level. There had been no attempt to define it or employ it on the national level'¹⁰³. The statement of Dr Ambedkar in the Constituent Assembly for determination of backwardness at local or State level was thus not casual but an outcome of practical reality and historical truth.

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d 574. Historically, therefore, what started as social upliftment measure for the down-trodden amongst Hindus in some princely States gradually developed into formation of various associations in different States encouraged by the social caste consciousness created by the Britishers to demonstrate backwardness for claiming preferential treatment injected in the society by communal representation. The Constitution-makers were aware of this background. It is vividly reflected in the *Constituent Assembly Debates*. Therefore a very vital, question arises if the expression, 'backward class' used in Article 16(4) has to be read and understood as extending or applying to backward Hindu castes only. Meaning of the word 'backward' and 'class' have already been explained. Language of the expression does not warrant reading of the expression as backward caste. When two words one wider in import and broader in application and other narrower were available and the Constitution-makers opted for one, the other, on elementary principle of construction, should be deemed to have been rejected. What was avoided by the Framers of the Constitution, for good reasons and, to achieve the objective they had set up for the governance of the country cannot be brought back either by government or courts by interpretation or construction unless the consequences of accepting the literal or the normal meaning appears to be so unreasonable that the Constitution-makers would have never intended. 'Although the spirit of an instrument especially of a constitution is to be respected not less than its letter yet the spirit is to be collected chiefly from its words'¹⁰⁴. For this reason alone any

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103 Marc Galanter: *Competing Equalities*

104 Justice Marshall in *Sturges v. Crowninshield* (1819), quoted in *Encyclopaedia of the American Constitution*, Vol. 1 by Levy, Karst & Mahoney

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102 Extracted in Marc Galanter: *Competing Equalities*

suggestion of accepting the expression as interchangeable with caste cannot be accepted. Even the spirit behind use of the expression was not to provide for a cluster of castes, known as Sudras of the Hindu hierarchy before the Constitution, but for groups or class of different communities following different religions, as rights fundamental or otherwise have been guaranteed to members of every community irrespective of religion, race, caste or birth. Article 340 empowers the President to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. Such classes may belong to any community. Preferential treatment accorded to various communities before 1950 on the basis of religion, race or caste was done away with. Promise was to take care of minorities as well. Article 335 ensured claim of SC/ST in services. Other backward citizens irrespective of race, religion were to be taken care of as "The Constitution was framed with grand compromise. A splendid compromise between formal equalitarian justice and compensatory justice through benign or protective discrimination was devised so beautifully that that was to serve the purpose of assimilation, integration and equal partnership in national building by making equal contribution in the main stream of life."⁹⁰ If Article 16(4) is confined to backward classes of Hindu hierarchy by narrowing it down to caste it would be doing violence to the language of the provision and the spirit in which the expression was used leading to injustice. No provision in the Constitution indicates that the expression has to be understood in such narrow sense. Reading it otherwise may lead to contradiction. Normal and natural meaning of an expression can be, disregarded only if it is found that the Framers of the Constitution did not intend to use it in that sense and "absurdity and injustice of applying the provision would be so monstrous that all mankind would, without hesitation, unite in rejecting the application"¹⁰⁴. When the Constitution was framed the Founding Fathers were aware of the meaning and understanding of the word 'backward'. They were also aware that hereinafter members of all community were to be treated alike. The State was made responsible, therefore, for 'any' backward class of citizens coming from whatever community, caste or religion. State, therefore, cannot discriminate, while identifying backward class on race, religion, caste or birth.

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575. True the discussions in the Constituent Assembly Debates centred round caste and community. Even Dr Ambedkar said "what are called backward classes are ... nothing but a collection of certain castes".

90 Anirudh Prasad: *Reservation Policy & Practice in India*

104 Justice Marshall in *Sturges v. Crowninshield* (1819), quoted in *Encyclopaedia of the American Constitution*, Vol. 1 by Levy, Karst & Mahoney

- a That, however, cannot be conclusive for construing the expression as the historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed may be taken into account, "but not to interpret the Constitution"¹⁰⁵. What emerged out of shared understanding by consensus was not backward caste but backward class, an expression of elasticity capable of expanding depending on the nature and purpose of its use.
- b Motivation for use of the expression 'backward class' might have come from a feeling to accommodate and benefit those who were deprived of entering into services due to social and economic conditions amongst Hindus. But what is being interpreted is a Constitution, a document, an instrument which is good not for a season or a session but for centuries
- c during the course of which even the most stable society may undergo social, economic, political and scientific changes resulting in transformation of values. Are the values in the society the same today as they were in 1950 or 1900? Words or expressions remain the same but its meaning and application with passage of time changes. When the
- d Framers of the Constitution deliberately used an expression of expansive nature then as said by Justice Frankfurter "they should be left to gather meaning from experience. For they relate to whole domain of social and economic fact and statesman who founded this nation knew too well that only a stagnant society remains unchanged." This Court is being asked to
- e interpret the provision in 1990. It cannot ignore the present by going into past.

f "The law, even as it honours the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right. *Brown*⁵³ was 'law' in 1954, even though the 'separate but equal' doctrine had half a century of precedent and practice behind it. Continuity is essential to law as a whole, but the continuity must be creative."⁸⁴

(7)

- g 576. 'Caste is a reality'. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services? Is the State entitled to practice it in any form for any purpose? Not under a constitution wedded to secularism. State responsibility is to protect religion
- h of different communities and not to practice it. Uplifting the backward class of citizens, promoting them socially and educationally, taking care

105 *Golak Nath v. State of Punjab*, AIR 1967 SC 1643: (1967) 2 SCR 762

i 53 *Oliver Brown v. Board of Education of Topeka*, 347 US 483: 48 L Ed 2d 873 (1954)

84 A. Cox: *The Court and the Constitution*, p. 372

of weaker sections of society by special programmes and policies is the primary concern of the State. It was visualised so by Framers of the Constitution. But any claim of achieving these objectives through race-conscious measures or religiously packed programmes would be uncharitable to the noble and pious spirit of the Founding Fathers, legally impermissible and constitutionally ultra vires. Deriving inspiration from the American philosophy that, "just as the race of students must be considered in determining whether a constitutional violation has occurred so also must race be considered in formulating remedy" without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 16(2) and 29(2) would be plunging our nation into disaster not by what was adopted and promised as principle for governance for our people on our soil but from what has been laid down in a country which is yet far away from "equality of result" or "substantive equality" so far *Black* or *Brown* are concerned.

577. *Brown v. Board of Education*⁵³ which is considered as "turning the clock back" on racial discrimination was given much after *Venkataramana*²⁷. Provisions like Article VI were introduced in America in 1964 only. When *Bakke*²⁸ was delivered Justice Marshall lamented:

"[T]his Court in the Civil Rights cases and *Plessy v. Ferguson*²⁹ destroyed the movement towards complete equality. For almost a century no action was taken, and thus non-action was with the approval of the Court. Then we had *Brown v. Board of Education*⁵³ and the Civil Rights Acts of Congress, followed by numerous affirmative action programmes. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California."

The lament was because of failure to bring the Negroes in the mainstream "in light of the sorry history of discrimination and its devastating impact on the lives of Negroes is to ensure that America will forever remain a divided society". But to avoid any risk of keeping ours a divided society, the Constitution-makers provided ample safeguards for Scheduled Castes and Scheduled Tribes (SC/ST) the only category of backward class which could be compared to the Negroes in America. American philosophy developed by courts that discrimination having arisen due to race consciousness the remedy too should be race based, appears to have been inspired by our constitutional provisions which

53 *Oliver Brown v. Board of Education of Topeka*, 347 US 483 : 48 L Ed 2d 873 (1954)

27 *B. Venkataraman v. State of Madras*, AIR 1951 SC 229 : (1951) 1 MLJ 625

28 *Regents of the University of California v. Allan Bakke*, 57 L Ed 2d 750: 438 US 265 (1978)

29 *Plessy v. Ferguson*, 163 US 537 (1896): 41 L Ed 256

- takes every precaution to remedy the caste-related evil of SC/ST by caste-based reservation. But the same cannot be adopted for other
- a backward classes as it would be distortion of constitutional interpretation by importing a concept which was deliberately and purposely avoided. Insistence, for claiming reservation for the remaining or for all others who were in so-called broader category of Sudras not because they were really backward without any regard to social and economic conditions,
 - b would be unfair to history and unjust to society. What is constitutionally provided has to be adhered to in spirit but not on assumption that all amongst Hindus who fell in the broader category of Sudras were subjected to same treatment as untouchables in India or Negroes in America. History, social or political, does not bear it out. Reservation for
 - c other backward class is no doubt constitutionally permissible, on social and economic conditions which prevailed in the country and are still prevailing and not on benign steps for Negroes upheld by foreign courts. Judicial activism has no doubt in America been remarkable in absence of any constitutional protection for the Negroes but our courts are not
 - d required to undertake the exercise as our constitutional statesmanship has no parallel in the world where to achieve egalitarian society truly and really it devised mechanism of treating the backward class of citizens, 'differently' by Articles 16(4) and 15(4) to bring them on par with others so that they could be treated equally. The policy of official discrimination
 - e is "unique in the world both in the range of benefits involved and in the magnitude of the groups eligible for them"¹⁰⁶.

(8)

578. Caste has never been accepted by this Court as exclusive or sole
- f criterion for determination or identification of backward class. That is why the communal Government Order in *Champakam*² and reservation, except for SC/ST and Hindu backward, in *Venkataramana*²⁷ were invalidated. Caste-based evil was so repugnant that even when the communal Government Order issued by the State of Madras, a legacy of
 - g caste-based reservation practised in Madras since the thirties and forties, was struck down and the Constitution was amended and Article 15(4) was added the basic philosophy against the caste was neither eroded nor mitigated and ameliorative steps were made State responsibility for socially and educationally backward castes. *Balaji*¹² adopted test of comparability of backward classes with Scheduled Caste and Scheduled Tribe
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106 Duskin, Lelah: "Scheduled Caste Politics" in *Untouchables in India*

2 *State of Madras v. Smt Champakam Dorairajan*, 1951 SCR 525: AIR 1951 SC 226

27 *B. Venkataramana v. State of Madras*, AIR 1951 SC 229: (1951) 1 MLJ 625

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

as a result of combined reading of Article 340(1) and Article 338(3). Two major drawbacks were noticed in identifying backward class with caste, one, "it may not always be logical and may perhaps contain the vice of perpetuating the caste", and other "if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, the test would inevitably break down in relation to many sections of Indian society which do not recognise caste in the conventional sense known to Hindu society" (SCR p. 460). In *Chitralkha*⁷ the Court observed that "caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court (*Balaji*)¹² which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste". *P. Rajendran*¹³ too did not differ with *Balaji*¹² nor it carved out any new path. The Court accepted the determination of backward class as, the explanation given by the State of Madras had not been controverted by any rejoinder affidavit. The Court observed, "that though the list shows certain castes, the member of those castes are really classes of educationally and socially backward citizens" (SCR p. 791). In *Sagar*⁹ the Court was concerned with a list where backwardness was determined amongst others on caste taking it as one of the relevant tests for determination of backwardness. Therefore, the Court agreeing with *Balaji*¹² observed (SCR p. 600), "in determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon caste or community cannot also be accepted". In *Peeriakaruppan*¹⁵ it was observed that, "a caste has always been recognised as a class". Support for this was sought from *Rajendran*¹³ and it was observed that it was authority for the proposition that the classification of backward classes on the basis of caste is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. But *Rajendran*¹³ was decided as the caste included in the list were in fact socially and educationally backward. *Balram*¹⁶ too, followed the same and relying on *Rajendran*¹³, *Sagar*⁹ and *Peeriakaruppan*¹⁵ upheld the test as entire caste was found to be socially and economically backward. "Caste, ipso facto, is not class in a secular State" was said in *Soshi Karamchari*¹¹. In *Jayasree*¹⁷ it was held

7 *R. Chitralkha v. State of Mysore*, (1964) 6 SCR 368: AIR 1964 SC 1823

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

13 *P. Rajendran v. State of Madras*, (1968) 2 SCR 786: AIR 1968 SC 1012

9 *State of A.P. v. P. Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379

15 *A. Peeriakaruppan v. State of T.N.*, (1971) 1 SCC 38: (1971) 2 SCR 430

16 *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247

11 *Akhil Bharatiya Soshi Karamchari Sangh v. Union of India*, (1981) 1 SCC 246: 1981 SCC (L&S) 50: (1981) 2 SCR 185

17 *K.S. Jayasree v. State of Kerala*, (1976) 3 SCC 730: (1977) 1 SCR 194

a that caste could not be made the sole basis for reservation. The ratio in *Rajendran*¹³, *Sagar*⁹, *Balram*¹⁶ and *Peeriakaruppan*¹⁵ are wrongly understood and erroneously applied. All these decisions turned on facts as the Court in each case upheld the classification not because it was done on caste but those included in the list deserved the protection. Different streams of thought may appear from various decisions but none has accepted caste as the sole criterion for determination of backwardness.

(9)

c 579. 'Backward class' in Article 16(4) thus cannot be read as backward caste. What is the scope then? Is it social backwardness, educational backwardness, economic backwardness, social and economic backwardness, natural backwardness etc.? In absence of any indication expressly or impliedly any group or collectivity which can be legitimately considered as 'backward' for purposes of representation in service would be included in the expression 'backward class'. Word 'any' is indicative of that the backward class was not visualised in singular. When the Constitution was framed the anxiety was to undo the historical backwardness. Yet a word of wider import was used to avoid any closed-door policy. For instance, backwardness arising out of natural reasons was never contemplated. But today with developments of human rights effort is being made to encourage those to whom nature has not been so kind. Do such persons not form a class? Are they not backward? They cannot, obviously compete on equal level with others. Backwardness which the Constitution-makers had to tackle by making special provision, due to social and economic condition, was different but that does not exclude backwardness arising due to different reasons in new set-up.

g 580. Although dictionary the word 'any' may mean one or few and even all yet the meaning of a word has to be understood in the context it has been used. In Article 16(4) it cannot mean all as it would render the whole Article unworkable. The only, reasonable meaning that can be attributed to it is that it should be the States' discretion to pick out one or more than one from amongst numerous groups or collectivity identified or accepted as backward class for purposes of reservation. Whether such picking is reasonable and satisfies the test of judicial review is another matter. That explains the rationale for the non-obstante clause being discretionary and not mandatory. A State is not bound to grant reservation to every backward class. In one State or at

13 *P. Rajendran v. State of Madras*, (1968) 2 SCR 786: AIR 1968 SC 1012

9 *State of A.P. v. P. Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379

16 *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247

15 *A. Peeriakaruppan v. State of T.N.*, (1971) 1 SCC 38: (1971) 2 SCR 430

one place or at one point of time it may be historical and social backwardness or geographical and habitation backwardness and at another it may be social and educational or backwardness arising out of natural cause. a

(10)

581. From out of various backward class of citizens who could be provided protection under Article 16(4) the President has been empowered by Article 340 to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. What does the expression 'socially and educationally backward classes' connote? How should it be understood? Is it social backwardness only? Is the educational backwardness surplusage? Article 340(1) of the Constitution reads as under: b

"The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission." c

A bare reading of the Article indicates that the avowed objective of this provision is to empower the President to appoint a Commission to ascertain the difficulties and the problems of the socially and educationally backward classes and to make recommendations so that steps may be taken by the Union and the States to solve their problems, remove their difficulties and improve their conditions. Since backwardness has been qualified by the words 'social and educational' the ambit of the expression is not as wide as backward class in Article 16(4). What does it mean then? A social class, 'is an aggregate of persons within a society possessing about the same status'¹⁰⁷. How to determine backwardness of such a class? The yardstick of backwardness in any society is, primarily, economic. But Indian society "has made caste as the sole hierarchy of social ranking and uses the caste system as the basic frame of reference"¹⁰⁸. The Expert Panel of the Mandal Commission described it as ascribed status, that is, status of a person determined by his birth. The social backwardness in pre-independence period, no doubt, arose because of caste stratification. Members of castes other than Brahmins, d

107 *The New Encyclopaedia Britannica*, Micropaedia Vol. 10 p. 919

108 Dr Rajendra Pandey: *The Caste System in India*

- a Thakurs and Vaishyas were socially backward. But with foreign domination, enlightened movements, both social and religious, acquisition of wealth and power, a gradual caste mobility took place not only to consolidate but even to assert a higher social status. "The struggle launched by these backward castes as a subaltern in the pre-independence period, changed its course in the post-independence period"¹⁰⁹ due to vested interest in reservation. "It is well known that up to year 1931, the last
- b census year for which castes are recorded, there were several castes applying for changing their names to those indicative of higher caste status. In that period name indicated status. The trend now is to claim backwardness both among the Hindus and Muslims by claiming the same caste status by various devices as those who are legally considered as
- c backward caste"¹¹⁰ are the beneficiaries of reservation. While determining social backwardness, therefore, one cannot lose sight of the type of society, the social mobility, the economic conditions, the political power. Even the Expert Panel noticed a few of these but then it got lost in ascribed status. The social backwardness in 1990 for purposes of
- d employment in services cannot be status by birth but backwardness arising out of other elements such as class, power etc. Dr Pandey in his book *The Caste System in India*¹⁰⁸ after an elaborate study has concluded:

- e "1. Class, independent of caste, determines social ranking in Indian Society in certain domains;
2. Analysis of caste alone is not sufficient to provide the real picture of stratification in India today;
3. A proper study of stratification in modern India must concern with other dimensions, viz., class, status and power."

- f While explaining power he has observed "in past power was located in the dominant caste". But it is now changing in two senses "first, power is shifting from one caste (or group of castes) to another. Secondly, power is shifting from caste itself and comes to be located in more differentiated political organs and institutions". This has been empirically found
- g by Beteille, and others on the basis of his studies of Kammas and Reddis of Andhra Pradesh. Harrison writes: "This picture of political competition between the two caste groups is only a modern recurrence of an historic pattern dating back to the fourteenth century." Srinivas' analysis of politics in Mysore gives a central place to rivalries between the dom-

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109 Pradeep Kumar Bose : "Mobility & Conflict" published in *Caste, Conflict and Reservation*

110 Should the caste be the basis for recognising the backwardness — I.P. Desai (extracted from *Caste, Conflict and Reservation*)

i

108 Dr Rajendra Pandey: *The Caste System in India*

inant castes: "As in Andhra, the Congress is dominated by two leading peasant castes, one of which is Lingayat and the other Okkaliga. Lingayat-Okkaliga rivalry is colouring every issue, whether it be appointment to government posts or reservation of seats in colleges, or election to local bodies and legislatures." Both — Harrison's study in Andhra Pradesh and Srinivas' in Mysore — depict the rise to power of the two pairs of non-Brahmin dominant castes followed by the decline of the Brahmins. Any determination of social backwardness, therefore, cannot be valid unless these important aspects are taken into consideration.

582. Educational backwardness too was not added just for recitation. No word in Statute, more so in a Constitution, can be read as surplusage. In none of the decisions of this Court under Article 15(4) it has been held that educational backwardness was irrelevant. In *Balaji*¹² declaration of minor community as educationally backward was not accepted as correct since the student community of 5 per thousand was not below the State average. In *Balram*¹⁶ the Court approved acceptance by the government of criteria adopted by the Commission for determining social and educational backwardness of the citizen, namely:

- "(i) the general poverty of the class or community as a whole;
- (ii) Occupations pursued by the classes of citizens, the nature of which must be inferior or unclean or undignified and unremunerative or one which does not carry influence or power;
- (iii) Caste in relation to Hindus; and
- (iv) Educational backwardness."

In the hoary past the education amongst Hindus was confined to a particular class, that is, the Brahmins, but with advent of Muslim rule and British regime this barricading fell down, considerably, and the education spread amongst other classes as well. But even in those times there was a section of society which was kept away, deliberately, from education as they were not permitted to enter the schools and colleges. That has been done away with by the Constitution. Yet the education with all efforts has not filtered to certain classes particularly in rural areas and many traditionally educationally backward still suffer from it. At the same time many groups or collectivities did not opt for education for various reasons, personal or otherwise. Therefore, a Commission appointed under Article 340 cannot determine only social backwardness. Any class to be backward under Article 340 must be both socially and educationally backward.

12 *M.R. Balaji v. State of Mysore*. 1963 Supp 1 SCR 439; AIR 1963 SC 649

16 *State of A.P. v. U.S.V. Balram* (1972) 1 SCC 660; (1972) 3 SCR 247

583. Two things emerge from it, one, that the backward class in Article 16(4) and socially and educationally in Article 340, being expressions with different connotations they cannot be understood in one and same sense. The one is wider and includes the other. A socially and educationally backward class may be backward class but not vice versa. Other is that such investigation cannot be caste based. Meaning of the expression "socially and educationally backward" class of citizens was explained in *Pradip Tandon*⁶ as under: (SCC p. 274, para 17)

"The expression 'classes of citizens' indicates a homogeneous section of the people who are grouped together because of certain likenesses and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens."

584. Even when the report of the First Backward Classes Commission was submitted to the Government of India the memorandum prepared by it, and presented to the Parliament, emphasised that, efforts should be made "to discover some criteria other than caste, which could be of practical application in determining the backward classes". Three of the members of the Commission "were opposed to one of the most crucial recommendations of the Report, that is, the acceptance of caste as a criterion for social backwardness and reservations of posts in government service on that basis". One of the reasons given for it by the Chairman in his letter was that adopting of caste criterion was "going to have a most unhealthy effect on the Muslim and Christian sections of the nation".

585. When Second Backward Classes Commission was appointed by the President under Article 340 it was required "to determine the criteria for determining the socially and educationally backward classes" and

"to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State."

The order further outlined the procedure to be followed by the Commission as required by Article 340 by directing it to

"examine the recommendations of the Backward Classes Commission appointed earlier and the considerations which stood in the way of the acceptance of its recommendations by Government."

⁶ *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267; (1975) 2 SCR 761

The Commission thus was required to undertake the exercise so as to avoid repetition of those failings due to which the report of the first Commission could not be implemented. The Commission was not oblivious of it as in paragraph 1.17 of the Report it observed: a

“Though the above failings are serious, yet the real weakness of the Report lies in its internal contradictions. As stated in para 1.5 of this Chapter, three of the Members were opposed to one of the most crucial recommendations of the Report, that is, the acceptance of caste as a criterion for social backwardness and the reservation of posts in government services on that basis.” b

Yet the Commission undertook extensive exercise for ascertaining social system and opined that:

“12.4 In fact, caste being the basic unit of social organisation of Hindu society, castes are the only readily and clearly ‘recognisable and persistent collectivities’.” c

Having done so it determined social and educational backwardness in paragraph 11.23 as under:

“11.23 As a result of the above exercise, the Commission evolved eleven ‘Indicators’ or ‘criteria’ for determining social and educational backwardness. These 11 ‘Indicators’ were grouped under three broad heads, i.e., Social, Educational and Economic. They are: d

A. Social e

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25 per cent females and 10 per cent males above the State average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas. f
- (iv) Castes/Classes where participation of females in work is at least 25 per cent above the State average. g

B. Educational

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25 per cent above the State average. h
- (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25 per cent above the State average.
- (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25 per cent below the State average. i

C. Economic

- a (viii) Castes/Classes where the average value of family assets is at least 25 per cent below the State average.
- (ix) Castes/Classes where the number of families living in *kutcha* houses is at least 25 per cent above the State average.
- b (x) Castes/Classes where the source of drinking water is beyond half a kilometre for more than 50 per cent of the households.
- (xi) Castes/Classes where the number of households having taken consumption loan is at least 25 per cent above the State average.

c 11.24 As the above three groups are not of equal importance for our purpose separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

d 11.25 It will be seen that from the values given to each Indicator, the total score adds up to 22. *All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 per cent (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'.*

e (emphasis supplied)

f In paragraph 12.2 of the Report the Commission observed:

g "As the unit of identification in the above survey is caste, and caste is a peculiar feature of Hindu society only, the results of the survey cannot have much validity for non-Hindu communities. Criteria for their identification have been given separately."

The Commission, thus, on its own showing identified socially and educationally backward class amongst Hindus on caste. The criteria for identifying non-Hindu backward classes was stated in paragraph 12.18:

- h "(i) All untouchables converted to any non-Hindu religion; and
- (ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Example : Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)"
- i

586. Caste was thus adopted as the sole criterion for determining social and educational backwardness of Hindus. For members of other communities test of conversion from Hinduism was adopted. The Commission, even though noticed that the first Commission suffered from inherent defect of identifying on caste, proceeded itself, to do the same.

587. In preceding discussion it has been examined, in detail, as to why caste cannot be the basis of identification of backward class. The constitutional constraint in such identification does not undergo any change because different groups or collectivities identified on caste are huddled together and described as backward class. By grouping together, the cluster of castes does not lose its basic characteristic and continues to be caste.

588. No further need be said as whether the Commission acted in terms of its reference and whether the identification was constitutionally permissible and legally sound, before it could furnish basis for any exercise, legislative or executive, to be undertaken by the government.

589. Use of the expression, 'Nothing in this article shall prevent the State' in Article 16(4) cannot be read as empowering the State to make reservation under Article 16(4) on race, religion or caste. It would result in regenerating the communal representation in services infused by Britishers by different orders issued from 1924 to 1946. How such an expression should be interpreted need not be elaborated. Both the textbooks and judicial decisions are full of it. To comprehend the real meaning the provision itself, the setting or context in which it has been used, the purpose and background of its enactment should be examined, and interpretational exercise may be resorted to only if there is a compelling necessity for it. In earlier decisions rendered by the Court till the sixties Article 16(4) was held to be exception to Article 16(1). But from 1976 onwards it has been understood differently. Today Articles 16(1) and 16(4) are understood as part of one and same scheme directed towards promoting equality. Therefore what is destructive of equality for Article 16(1) would apply equally to Article 16(4). The *non-obstante* clause was to take out absolutism of Article 16(1) and not to destroy the negatism of Article 16(2).

590. Rule of statutory construction explained by jurists is to adopt a construction which may not frustrate the objective of enactment and result in negation of the objective sought to be achieved. Rigour of its application is even more severe in constitutional interpretation as unlike a statute its provisions cannot be amended or repealed easily. Accepting race, religion and caste as the remedy to undo the past evil would be against constitutional spirit, purpose and objectives. As stated earlier this

a remedy was adopted by the Framers of the Constitution for SC/ST. What was not provided for others should be deemed, on principle of interpretation, not to have been approved and accepted. Even if two constructions of the provisions could have been possible, "the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity and give rise to practical inconvenience". Since acceptance of caste, race or religion would be destructive of the entire constitutional philosophy and would be contrary to the Preamble of the Constitution it cannot be accepted as a legal method of identification of backward classes for Article 16(4).

c 591. Would the consequences be different if race, religion or caste etc. are coupled with some other factors? In other words, what is the effect of the word 'only' in Article 16(2). In the context it has been used it operates, both, as permissive and prohibitive. It is permissive when State action, legislative or executive, is founded on any ground other than race, religion or caste. Whereas it is prohibitive if it is based exclusively on any of the grounds mentioned in Article 16(2). *Javed case*¹¹¹ furnishes best illustration of the former. A notification discriminating between candidates of North-Eastern States, Tripura, Manipur, etc. on the one hand and others for IAS examination and exempting them from offering language paper compulsory for everyone was upheld on linguistic concession. When it comes to any State action on race, religion or caste etc. the word, 'only' mitigates the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. Use of word, 'only' was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. For instance, in *State of Rajasthan v. Thakur Pratap Singh*¹¹² where exemption granted to Muslims and Harijans from levy of cost for stationing additional police force was attempted to be defended because the notification was not based 'only' on caste or religion but because persons belonging to these communities were found

i 111 *Javed Niaz Beg v. Union of India*, 1980 Supp SCC 155; 1980 SCC (L&S) 473; AIR 1981 SC 794

112 AIR 1960 SC 1208; (1961) 1 SCR 222

by the State not to have been guilty of the conduct which necessitated stationing of the police force it was struck down as discriminatory since it could not be shown by the State that there were no law-abiding persons in other communities. Similarly identification of backward class by such factors as dependence of group or collectivity on manual labour, lower age of marriage, poor schooling, living in *kutcha* house etc. and applying it to caste would be violative of Article 16(2) not only for being caste-based but also for violation of Article 14 because it excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus determined would not be caste coupled with other but on caste and caste alone.

592. Today if Article 16(2) is construed as justifying identification of backward class by equalizing them with those castes in which the customary marriage age is lower or majority of whom are living in *kutcha* houses or a sizeable number is working as manual labour then tomorrow the identification of backward class amongst other communities where caste does not exist on race or religion coupled with these very considerations cannot be avoided. That would result in making reservation in public services on communal considerations. An interpretation or construction resulting in such catastrophic consequences must be avoided.

(12)

593. 'Backward' used in Article 16(4) is wider than 'socially and educationally backward' used in Article 15(4) and 'weaker sections' used in Article 46. SC/ST are covered in either expression. But same cannot be said for others. Backward cannot be defined as was wisely done by the Constitution-makers. It has to emerge as a result of interaction of social and economic forces. It cannot be static. Many of those who were Sudras in the 17th and 18th Centuries ceased to be so in the 19th and 20th Centuries due to their educational advancement and social acceptability. Members of various backward communities, both, in South and North who were moving upwards even before 1950 compare no less in education, status, economic advancement or political achievement with any other class in society. The average lower middle class of Muslims or Christians may not be better educationally or economically and in many cases even socially than the intermediate class of backward class of Shri Naik's list. For instance the Bhisties (the water-carriers in leather bags) among Muslims. Does Article 340 empowering the President to ascertain educational and social backwardness of citizens of this country not include those poor socially degraded and educationally backward. Are they not citizens of this country? Could backwardness of Muslims, Christians and Buddhists be recognised for purposes of Article 16(4) only if

a they were converts from Hinduism or such backwardness for preferential
treatment be recognised only if a group or class was Hindu at some time
or was occupationally comparable to Hindus. That is if members of other
community carry on an occupation which is not practised by Hindus, for
instance Bhisties amongst Muslims, then they cannot be regarded as
backward class even if it has been their hereditary occupation and they
are socially, educationally and economically backward. A Commission
b appointed under Article 340 by the President is not to identify Hindu
backwards only but the backward class within the territory of India which
includes Hindu, Muslim, Sikh or Christian etc. born and residing in India
within the meaning of Article 5 of the Constitution. The expression is not
only backward class but backward class of citizens. And citizen means all
c those who are mentioned in Articles 5 and 10 of the Constitution.

d 594. Thus neither from the language of Article 16(4) nor the literal
test of interpretation nor from the spirit or purpose of interpretation nor
the present-day social setting warrants construction of the expression
backward class as backward caste. Consequently what comes out of the
examination from different aspects leads to the conclusion that:

- (1) Backward class in Article 16(4) cannot be read as backward caste.
- (2) Expression 'backward class' is of wider import and there being
e no ambiguity or danger of unintended injustice in giving it its
natural meaning it should be understood in its broader and
normal sense.
- (3) Backward class under Article 16(4) is not confined to erstwhile
Sudras or depressed classes or intermediate backward classes
amongst Hindus only.
- (4) Width of the expression includes in its fold any community
f Hindu, Muslim, Christian, Sikh, Buddhist, or Jain etc. as the
expression is 'backward class of citizens'.

'E'

g 595. Reason for backwardness or inadequate representation in ser-
vices of backward Hindus prior to 1950 were caste division, lack of edu-
cation, poverty, feudalistic frame of society, and occupational help-
lessness. All these barriers are disappearing. Industrialisation has taken
over. Education, through State effort and due to awareness of its
h importance, both statistically and actually, has improved. Feudalism died
in the fifties itself. Even the Mandal Commission accepts this reality¹¹³.
Any identification of backward class for purposes of reservation,

i ¹¹³ "5.2 Caste restrictions have loosened considerably as a result of the rule of law intro-
duced by the British, urbanisation, industrialisation, spread of mass education and,
above all, the attainment of Independence and the introduction of adult franchise."

therefore, has to be tested keeping in view these factors as the exercise of power is *in praesenti*. Importance of word 'is' in Article 16(4) should not be lost of. Backwardness and inadequacy should exist on the date the reservation is made. Reservation for a group which was educationally, economically and socially backward before 1950 shall not be valid unless the group continues to be backward today. The group should not have suffered only but it should be found to be suffering with such disabilities. If a class or community ceases to be economically and socially backward or even if it is so but is adequately represented then no reservation can be made as it no more continues to be backward even though it may not be adequately represented in service or it may be backward but adequately represented.

596. Ethical justification for reverse discrimination or protective benefits or ameliorative measures emanates from the moral of compensating such class or group for the past injustices inflicted on it and for promoting social values. Both these aspects are fully borne out from the Constitutional Assembly Debates. Anxiety was to uplift the backward classes by enabling them to participate in administration as they had been excluded by a few who had monopolised the services. Objective was to change the social face as it shall advance public welfare, by demolishing rigidity of caste, promoting representation of those who till now were kept away thus providing status to them, restoring balance in the society, reducing poverty and increasing distribution of benefits and advantages to one and all. The compensatory principle implies that like an individual a group or class that has remained backward, for whatever reason, should be provided every help to overcome the shortcomings but once disadvantage disappears the basis itself must go. For instance there may be four groups of different nature deserving such protection. Some of it may improve and come up in the social stream within short time. Can it be said that since they were kept excluded for hundred years the compensation by way of protective benefits should continue for hundred years. That would be a mockery of protective discrimination. The compensation principle "makes little sense unless it is involved in connection with assertion that the malignant effects of prior deprivation are still continuing". The social utility of preferential treatment extended to the disadvantaged and weaker too should not be pushed too far on what happened in the past without looking to the present. Such construction of Article 16(4) arises not because of what has been said by some of the American judges but on plain and simple reading of the word, 'is' in the Article.

597. An egalitarian society or welfare State wedded to secularism does not and cannot mean a social order in which religion or caste ceases to exist. 'India is a secular but not an anti-religious State.'¹¹⁴ Article 25 is pride of our democracy. But that cannot be basis of State activities. May be caste is being exploited for political ends. Chinnappa Reddy, J has very graphically described it in the Karnataka Third Backward Class Commission Report (1990):

"And, we have political parties and politicians who, if anything, are realists, fully aware of the deep roots of caste in Indian society and who, far from ignoring it, feed the fire as it were and give caste great importance in the choice of their candidates for election and flaunt the caste of the candidates before the electorate. They preach against caste in public and thrive on it in private."

598. Even Mandal Commission observed that what, 'caste lost on ritual front it gained on political front'. In politics caste may or may not play an important role but politics and constitutional exercise are not the same. A candidate may secure a ticket on caste considerations but if he or his agent or any person with his consent or his agent's consent appeals to vote or refrain from voting on the ground of religion, race or caste then he is guilty of corrupt practice under Section 123(3) of the Representation of the People Act and his election is liable to be set aside. Thus caste, race or religion are prohibited even in political process. What cannot furnish basis for exercise of electoral right and is constitutionally prohibited from being exercised by the State cannot furnish valid basis for constitutional functioning under Article 16(4). Utilization of caste as the basis for the purpose of determination of backward class of citizens is thus constitutionally invalid and even ethically and morally not permissible. Existence of caste in the past and present, its continuance in future cannot be denied but insistence that since it is being practised or observed for political purpose even though unfortunately it should be the basis for identification of backwardness in services is not only robbing the Constitution of the fresh look it promised and guaranteed but would result in perpetuating a system under ugly weight of which the society had bent earlier.

599. Thus

- (i) backwardness and inadequacy of representation in service must exist on the date the reservation is being made.
- (ii) Any past injustice which entitles a group for protective discrimination must on principle of compensation or social justice be continuing on the date when reservation is being made.

¹¹⁴ Seervai: *Constitutional Law of India*, p. 897

'F'

(1)

600. 'It is easier to give power but difficult to give wisdom'. Dr Ambedkar quoted this Burke's thought in the Constituent Assembly Debate and exhorted "let us prove by our conduct that we have not only the power but also the wisdom to carry with us all sectors of the country which is bound to lead us to unity". How to effectuate this wisdom? For Article 16(4) how to determine who can be legally considered to be backward class of citizens? The answer is simple. By adopting, constitutionally, permissible methodology of identification irrespective of their race, religion or caste. The difficulty, however, arises in finding out the criteria. Although the work should normally be left to be undertaken by the State as the courts are ill-equipped for such exercise due to lack of data, necessary expertise and relevant material but with development of role of courts from mere 'superintend and supervise' to legitimate constitutional affirmative decision, this Court is not only duty bound but constitutionally obliged to lay down principles for guidance for those who are entrusted with this responsibility, with a sense of duty towards the country as the occasion demands never more than now, but with remotest intention to interfere with legislative, or executive process. What the Nation should remember is that the basic values of constitutionalism guaranteeing judicial independence is to enable the courts to discharge their duty without being guided by any philosophy as judicial interpretation, "gives better protection than the political branches to the weak and outnumbered, to minorities and unpopular individuals, to the inadequately represented in the political process."⁸⁴

601. Before doing so it is necessary to be stated, at the outset, that identification of backward classes for purposes of different States may not furnish safe and sound basis for including all such groups or collectivities for reservation in services under the Union. Reason is that local conditions play major part in such exercise. For instance habitation in hills of U.P. was upheld as valid basis for identifying backwardness. Same may not be true of residents of hills in other States. Otherwise the entire population of Kashmir may have to be treated as backward. In Kerala State most of the Muslims are identified as backward. Can this be a valid basis for other States. Even the Mandal Commission noticed that some castes backward in one State are forward in others. If State list of every State is adopted as valid for Central services it is bound to create confusion. One of the apparent abuse inherent in such inclusion is that it is apt to encourage paper mobility of citizens from a State where such class or caste is not backward to the State where it is so identified. This apart

84 A. Cox: *The Court and the Constitution*, p. 372

- a such inclusion may suffer from constitutional infirmity. Many groups or collectivities in different States are continuing or have been included in the State list to various considerations political or otherwise. State of Karnataka is its best example. Commission after commission beginning from Gowda Commission, Venkataswamy Commission and Havanur Commission despite having found that some of the castes ceased to be backward they continue in the list due to their political pressure and economic power. Ghanshyam Shah¹¹⁵ in *Social Backwardness and Politics of Reservations*, has pointed out:

- c "Among the Sudras their are peasant castes, artisan castes and nomadic castes. Subjective perception of one's position in the 'varna' system varies and changes from time to time, place to place and context to context. For instance, the Patidars of Gujarat were considered Sudras a few decades ago, but now they call themselves Vaishyas, and are acknowledged as such by others. It is significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar."

- d Yet these castes or groups have been identified as backward class in their State. Whether such inclusion on political, economic and social condition is justified in State list or not but inclusion of a group or collectivity in list of socially and educationally backward classes, which is a term narrower and different than backward class for services under the Union without proper identification only on State list may not be valid. For services under the Union, therefore, some principle may have to be evolved which may be of universal application to members of every community and which may be adopted by States. as well, after adjusting it with prevalent local conditions.

- e 602. Ours is a country comprising of various communities. Each community follows a different religion. Centuries of historical togetherness has influenced each other. Caste system which is peculiar to Hindus infiltrated even amongst Muslims, Christians, Sikhs or others although it has no place in their religion. The *Encyclopaedia Americana* (International Edition) describes the development thus:

- g "All important communities, including the Muslims, Christians, and Sikhs, have some sort of caste scheme. These schemes are patterned after the Hindu system, since most of these people originally came from Hindu stock. The large-scale conversions that have been going on for centuries have modified Indian caste society. Thus traditional Hindu commensal and connubial rituals and emphasis on inherited social status or rank though generally rejected in the

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¹¹⁵ *Economic and Political Weekly*, Vol. 26, (1991) p. 601

Islamic or Christian religious ethic, nevertheless operate on social plain in these societies in India. In India social rites and customs vary from region to region rather than from religion to religion. Among the Muslims, the Sayids, Sheikh, Pathan, and Momin, among others, function as exclusive endogamous caste groups. The Christians are divided into a number of groups, including the Chaldean Syrians, Jacobite Syrians, Latin Catholics, Marthom Syrians, Syrian Catholics, and Protestants. Each of these groups practices endogamy. Among the Catholics, the Syrian Romans and the Latin Romans generally do not intermarry. The Christians have not wholly discarded the idea of food restrictions and pollution by lower caste members. When lower caste Hindus were converted to Christianity a generation or two ago, they were not allowed to sit with high caste Christians in church, and separate churches were erected for them."

603. On the social plane therefore there has been lack of mobility from one group to other. Amongst Hindus it has been more marked. Inter se discrimination has been worse. Untouchables prior to 1950 have been victims of social persecutions not only by the twice born but even the so-called intermediate backward classes. But what appears to be common in each community is that the caste divide is more or less occupational-based. A washerman or a barber, a milkman or an agriculturist, are all known among Hindus by castes and amongst others by occupation. In fact they are all occupational. The very genesis of Chaturvarna was occupational:

"According to Kroeber, castes are special form of social classes, 'which in tendency at least are present in every society. Castes differ from social classes, however, in that they have emerged into social consciousness to the point that custom and law attempt their rigid and permanent separation from one another' 'The jatis which developed later and which continued to grow in number have their economic significance; they are for the most part occupational groups and, in the traditional village economy, the caste system largely provides the machinery for the exchange of goods and services.'"

But these rigid stratifications are breaking today. The social inter se barriers are rapidly disappearing. Values are fast changing. In fact many of the backward classes as observed by Shri Naik in his separate note to the Mandal Commission Report 'co-existed since times immemorial with upper castes and had, therefore, some scope to imbibe better association and what all it connotes' (p. 229). Take for instance the list of the 'Intermediate Backward Class' where traditional occupation, according to Shri Naik has been agriculture, market gardening, betel-leaves

- a growers, pastoral activities, village industries like artisans, tailors, dyers and weavers, petty business-cum-agricultural activities, heralding, temple service, toddy selling, oil-mongering, combating, astrology etc. etc.' (p. 229). Their backwardness has been primarily economic or educational. Mobility, too, occupational or professional has not been very rigid. An agriculturist or an artisan, a dyer or weaver had the occupational freedom of moving in any direction. Consideration for marriage or social
- b customs may be different. But that prevails in every strata of society. One sect of a caste or community Hindu or Muslim, or even Christian, forward or backward does not prefer marrying in another sect what to say of caste. But these considerations are not relevant for identifying backward class for public employment. Lack of education, at least among
- c so-called intermediate backward classes, was more due to personal volition than social ostracisation. Historical social backwardness has already been taken care of by providing reservation to SC/ST and empowering President to include any group or collectivity found to be suffering from such disability. Same yardstick cannot be applied for
- d socially and educationally backward class for whom the President has been empowered to appoint a Commission and who only after identification are to be deemed to be included as SC and ST by virtue of Article 338(10). From the preceding discussion it is clear that identification of such class cannot be caste-based. Nor it can be founded,
- e only, on economic considerations as 'mere poverty'⁸⁶ cannot be the test of backwardness. With these two negative considerations stemming out of constitutional constraints two positive considerations, equally important and basic in nature flow from the principle of constitutional construction one that the effort should, primarily, be directed towards
- f finding out a criteria which must apply uniformly to citizens of every community, second that the benefit should reach the needy. Various combinations excluding and including caste as relevant consideration have been discussed in different decisions which need not be mentioned as occasion to examine social and educational backwardness in public
- g services and that also in Union services never arose.

604. In sub-paragraph (ii) of paragraph 12.8 extracted earlier the Mandal Commission recommended occupational identification for non-Hindus if the community was traditionally known to carry on the hereditary occupation of their counterpart amongst Hindus and included

h in the test of OBC. The Commission thus recognised occupational divide among Hindus. If occupation amongst Hindus can be basis for identification of backwardness among non-Hindus then why cannot it furnish basis for identification amongst Hindus itself.

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86 Pt. Jawaharlal Nehru

605. The ideal and wise method, therefore, would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be the caste itself. Find out their social acceptability and educational standard. Weigh them in the balance of economic conditions. Result would be backward class of citizens needing genuine protective umbrella. Group or collectivity which may thus emerge may be members of one or the other community. Advantage of occupational-based identification would be that it shall apply uniformly irrespective of race, religion and caste. Reason for accepting occupation-based identification is that prior to 1950 Sudras amongst Hindus were all those who were not twice born. Amongst them there was vertical and occupational divisions. Similar hierarchy existed amongst Muslims.¹¹⁶ Same is true of other communities.¹¹⁷ Shri Naik narrated a list of, 'intermediate backward classes' and 'depressed backward classes'. It may not be exhaustive. But it is indicative that different categories of persons are, normally, known by occupation they carry. 'Castes, therefore, are special form of classes which in tendency are present in every society.'¹¹⁸ It was said by Lord Bryce long back for America that classes may not be divided, for political purposes into upper and lower and richer and poorer, "but according to their respective occupation they follow"¹¹⁹. Class according to Tawney may get formed due to various reasons, "war, the institution of private property, biological characteristic, the division of labour". And, "[e]ven today, indeed though less regularly than in the past class tends to determine occupation rather than occupational class". So is the case in our society. It is immaterial if caste has given rise to occupation or vice versa. In either case occupation can be the best starting point constitutionally permissible and legally valid for determination of backwardness.

606. For instance, priests either in Hindus or Mullahs in Muslims or Bishops or Padris amongst Christians or Granthis in Sikhs are considered to be at the top of hierarchal system. They cannot be considered to be backward in any community not because of their religion but the nature of occupation. Similarly the untouchables became outcaste due to nature

116 "12.13 There is a notion of hierarchy among the Muslims, though it is hard to say how far the criterion of the ranking among them can be said to conform to the Hindu model It is clear that castes exist as a basis of social relations amongst them (Muslims) but its form has been greatly weakened and modified as it differs from the Hindu model in certain details." — Dr Imtiaz Ahmed.

117 "12.11 There is no doubt that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu communities. Though caste-system is peculiar to Hindu society yet, in actual practice, it also pervades the non-Hindu communities in India in varying degrees."

118 *Encyclopaedia of Social Sciences*, Vol. 3

119 R.H. Tawney: *Equality*

a of the job they performed. On lower level whether it is barber or tailor, washerman or milkman, agricultural class or artisan they are a group or class who can be identified in any community. Identifying them by caste may mean that a Muslim or Christian who for generations has been carrying on same occupation as his counterpart amongst Hindus cannot be identified as backward class. And if it is done then for Hindus it would be caste-based whereas for others occupational. How far that would be legal and constitutional is one matter but if the yardstick of occupation is applied to every community the identification would be uniform without exclusion of any. For instance weavers or washermen. They may be both Hindus and Muslims. It would be unfair to include Hindu washerman and exclude Muslim washerman.

c 607. Having adopted occupation as the starting point next step should be to ascertain the social acceptability. A lawyer, a teacher and a doctor of any community whether he is a teacher of a primary school or university, a Vaid or Hakim practising in the village or a professor in a medical college always commands social respect. Similarly social status amongst those who perform lower job depends on the nature of occupation. A person carrying on scavenging became an untouchable whereas others who were as lower as untouchable in the order became depressed. For instance cobbler. Same did not apply to those who carried on better occupation. A person having landed property and carrying on agricultural occupation did not in social hierarchy command lesser respect than the one carrying on same occupation belonging to higher caste. But backwardness should be traditional. For instance only those washermen or tailors should be considered backward who have been carrying on this occupation for generations and not the modern dry cleaners or fashion tailors. If the collectivity satisfies both the tests then apply the test of education. What standard of education should be adopted should be the concern of the State. Existence of both, that is social and educational backwardness for a group or collectivity is indicated by Article 15(4) itself. Use of such expression was purposive. Mere educational or social backwardness would not have been sufficient as it would have enlarged the field thus frustrating the very purpose of the amendment. That is why it was observed in *Balaji*¹² that the concept of backwardness was intended

h "to be relative in the sense that any class who is backward in relation to the most advanced classes should be included in it. And the purpose of amendment could be achieved if backwardness under Article 15(4) was understood as comprising of social and educational backwardness. It is not either social or educational, but it is both social and educational".

12 *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

Reading the expression disjunctively and permitting inclusion of either socially or educationally backward class of citizens would defeat the very purpose. For instance some of the so-called higher castes who by nature of their occupation or caste have been accepted by society to be socially advanced may enter because of the group or collectivity having been educationally backward. Many agricultural occupationists both in South and North have chosen to remain educationally backward even though by virtue of their landed property they have always been compared to any higher class. Can such persons be permitted to take benefit of such benign measures. Not on the language, purpose and objective of these provisions.

608. After applying these tests the economic criteria or the means-test should be applied. Poverty is the prime cause of all backwardness. It generates social and educational backwardness. But wealth or economic affluence cuts across all. A wealthy man irrespective of caste or community needs no crutches. Not in 1990 when money more than social status and education have become the index. Therefore, even if a group or collectivity is not educated or even socially backward but otherwise rich and affluent then it cannot be considered backward. There is no dearth of class or group who by the nature of the occupation they have been pursuing are economically well off. Including such groups would be doing injustice to others. Thus occupation should furnish the starting point of determination of backward class. And if in ultimate analysis any Hindu caste is found to be occupationally, socially, educationally and economically backward it should be regarded as eligible for benefit under Article 16(4) because it would be within constitutional sanction.

(2)

609. Identification alone does not entitle a group or class to be entitled for protective benefits. Such group or collectivity should be inadequately represented. Use of such words as adequate or inadequate are no doubt wide and vague and their meaning has to be gathered, "largely on the point of view from which the facts may be proved are reconsidered"²⁴. But from the purpose and objective of Article 16(4) a collectivity or group which is found to be backward cannot qualify for being included if it is adequately represented. Word 'any' has great significance. In wider sense it extends to and includes all group or collectivity, which is as much 'any' backward class as any singularity. In the larger sense comprising of entire plurality it continues and may continue but in the limited sense the group may keep on getting in and out depending on continuance of those conditions which entitled it to be determined as backward. A government of a State or the Central Gov-

²⁴ *Halschek's Patents, In re*, (1909) 2 Ch D 68: 25 TLR 457

- ernment may on evaluation after five or ten years direct a group or collectivity to be excluded from the list of backward classes if it finds it adequately represented. What is adequate representation is of course the primary concern of the government. But the exercise should be objective. For instance in some States it was found by Commissions appointed by their governments that certain castes were adequately represented. Yet because of extraneous reasons the government had to bow and include them in the list of backward classes. Such inclusion is a fraud of constitutional power. Any citizen has a right to challenge and court has obligation to strike it down by directing exclusion of such group from the backward class. Inadequacy provides jurisdiction not only for exercise of power but its continuance as well. If that itself ceases to exist the power cannot be continued to be exercised. Where power is coupled with duty the condition precedent must exist for valid exercise of power. Mere identification of collectivity or group by a Commission cannot clothe the government to exercise the power unless it further undertakes the exercise of determining if such group or collectivity is adequately or inadequately represented. The exercise is mandatory not in the larger sense alone but in the narrower sense as well.

‘G’

(1)

610. More important than determination of backward class is the proportion in which reservation can be done as it is not only a social or economic problem or the question of empowering but a constitutional and legal issue which calls for serious deliberation. Although political statesmanship of the Framers of the Constitution intended to confine it to ‘minority of seats’ the judicial pragmatism raised it “broadly and generally” to less than 50 per cent in *Balaji*¹² and not beyond that in *Devadasan*¹⁹. Effect of these two decisions was that the reserved and non-reserved seats both for purposes of admission in educational institutions under Article 15(4) and for appointment and posts in Article 16(4) were divided in half and half. But once the reservation climate spread in the country’s environment it took over the political set-up of different States to provide for reservation for different groups for different reasons. And legal justification for such reservation was provided for by the courts, either on the touchstone of Article 14 being a reasonable classification or under Article 16(1) as preferential treatment for dis-

¹² *M.R. Balaji v. State of Mysore*, 1963 Supp 1 SCR 439: AIR 1963 SC 649

¹⁹ *T. Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

advantaged groups. If in *Chitra Ghosh*¹²⁰ the provision for government nominees in medical colleges was upheld "as the government which bears the financial burden of running medical colleges" could not be "denied the right to decide from what sources the admission will be made" then *Chanchala*¹²¹ did not find it unreasonable to extend the principle of preferential treatment, of socially and educationally backward in Article 15(4), to children of political sufferers as "it would not in any way be improper if that principle were to be applied to those who are handicapped but do not fall under Article 15(4)". The reservation in favour of wards of defence personnel was upheld as a reasonable classification in *Subhashini*¹²² as the reservation was in national interest. Result of such extensions and justification was multiplication of categories and withdrawal of more and more seats and posts from open competition. And when observations were made in *Thomas*¹⁰ that 50 per cent was "a rule of caution" and "percentage of reservation in proportion to population did not violate Article 16(4)", a virtual go by was given by various States to the balancing equality created by courts and reservations were made much beyond 50 per cent and the High Courts had no option but to uphold them. Thus the combined effect of these principles, developed by *Balaji*¹² and *Devadasan*¹⁹ on the one hand and *Chitra Ghosh*¹²⁰, *Chanchala*¹²¹ and *Thomas*¹⁰ on the other was that reservation up to 50 per cent under Articles 15(4) and 16(4) and up to, 'reasonable extent' under Article 16(1). Under one it became SC/ST and BC and under the other wards of Military and Defence personnel¹²³, political sufferers¹²¹, sportsmen¹²², Children of MISA¹²⁴ and DISIR¹²⁵ detenus etc. Is this sound either constitutionally or legally or socially?

(2)

611. Article 16(1), (2) and (4) is extracted below:

"16. Equality of opportunity in matters of public employment.—
(1) There shall be equality of opportunity for all citizens in matters

120 *Chitra Ghosh v. Union of India*, (1969) 2 SCC 288: AIR 1970 SC 35

121 *D.N. Chanchala v. State of Mysore*, (1971) 2 SCC 293: AIR 1971 SC 1762

122 *Subhashini v. State of Mysore*, AIR 1966 Mys 40: (1965) 2 Mys LJ 571

123 *Jagdish Rai v. State of Haryana*, AIR 1977 P & H 56: 1977 Lab IC 353: 79 Punj LR 1

124 *State of Kerala v. R. Jacob Mathew*, ILR 1964 (2) Ker 53: AIR 1964 Ker 316

125 *Chhotey Lal v. State of U.P.*, AIR 1979 All 135

10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

12 *M.R. Balaji v. State of Mysore* 1963 Supp 1 SCR 439: AIR 1963 SC 649

19 *T. Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

relating to employment or appointment to any office under the State.

- a (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

* * *

- b (4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

- c 612. Originally this Article as introduced in the Constituent Assembly was Article 10 and its sub-article (3) identical to sub-article (4) of Article 16 provided for reservation "in favour of any class of citizens". It was the Drafting Committee which qualified the expression "class of citizens" by adding the word 'backward' before it. Effect of this addition was that the clause got narrowed and the reservation could be made only
- d for those class of citizens who could be grouped as backward. Putting it the other way the Framers of the Constitution decided against expansive reservation which under original proposal could have extended to any class of citizens. What was thus consciously and deliberately given up by
- e exercising the option in favour of only those class of citizens who could be identified as backward then reservation in favour of any other class of citizens cannot legitimately and legally be accepted as valid. Extending it to other class of citizens under cover of reasonable classification would be constitutional distortion. What should be deemed to be prohibited in
- f the light of historical background cannot be brought back from the backdoor on principle developed by the American courts under Equal Protection Clause as they had to rise to the occasion due to absence of a provision like Article 16(4), and the fractured interpretation put in the *Slaughterhouse cases*¹²⁶ which eroded the very foundation of the Equal
- g Protective Clause "mainly intended for the benefit of Negro freedom".

(3)

- h 613. Reservation co-related with population was not accepted even by the Constituent Assembly. On plain construction inadequacy of representation cannot be the measure of reservation. That is creative of jurisdiction only. In fact Dr Ambedkar's illustration while persuading all sections to accept the drafting committee proposal is very instructive: (CAD, Vol. 7, pp. 701-02)

i "Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to

126 83 US (16 Wall) 36: 21 L Ed 394 (1873)

something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation."

Even otherwise if the Framers would have intended to provide for reservation to the extent of backwardness of the population it would have been similar to use the expression, 'in proportion to it' after the words 'backward class of citizens' and before 'is not' adequately represented. Article 16(4) then would have read as under:

"Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens *in proportion to it* is not adequately represented in the services under the State."

No rule of interpretation in absence of express or implied indication permits such substituted reading.

614. In *Thomas*¹⁰ Mathew, J, introduced concept of proportional equality from two American decisions *Griffin*¹²⁷ and *Harper*¹²⁸. None of the decisions were concerned with affirmative action. The one related to payment of charges for translation of manuscript in appeal and other with levy of poll tax at uniform rate indiscriminately. In view of clear phraseology and the background of enactment of Article 16(4) any interpretation of it on ratio of American decisions cannot be of any help. Our Constitution does not approve of proportional representation either in services or even in Parliament as is illustrated by Article 331 of the Constitution which empowers the President to nominate not more than two members of the Anglo-Indian community to the House of the People, irrespective of their population, if they are not adequately represented. Same is the theme of Dr Ambedkar's speech, in the Constituent Assembly, extracted earlier. For the same reasons the observation of Fazal Ali, J in *Thomas*¹⁰: (SCC p. 387, para 191)

"... Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the

127 *Griffin v. Illinois*, 351 US 12: 100 L Ed 891 (1956)

128 *Harper v. Virginia Board of Education*, 383 US 663: 16 L Ed 169 (1966)

10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

- a authorities. this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Article 16? The answer must necessarily be in the negative."
- b cannot be accepted as correct construction of Article 16(4). True as observed by Krishna Iyer, J, in *Soshit Karamchari*¹¹ and Chinnappa Reddy, J, in *Vasanth Kumar*⁹ that there is no constitutional provision restricting reservation to 50 per cent but with profound respect, the debates in the Constituent Assembly, the provisions in the Constitution
- c do not support the construction of Article 16(4) as empowering government to reserve posts for backward class of citizens in proportion to their population. Any construction of Article 16(4) cannot be divorced without taking into account Article 16(1). Equality in services has been balanced by providing equal opportunity to every citizen at the same time
- d empowering the State to take protective measure for the backward class of citizens who are not adequately represented. This balancing of equality cannot be lost sight of while interpreting these provisions. Since there is no clear indication either way the role of the courts become both important and responsible, by interpreting the provision reasonably and
- e with common sense so as to carry out the objective of its enactment. And the purpose was to enable the backward class of citizens to share the power if they were not adequately represented but not to grant proportional representation, a typical British concept rejected by our Founding Fathers.

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615. Equality has various shades. Its understanding and application have been shaped by social, economic and political conditions prevailing in the society. The reigning philosophy since 18th century has been the State's responsibility to reduce disparities amongst various sections of the
- g population and promoting a just and social order in which benefits and advantages are evenly distributed. To achieve this basic objective various theories have been advanced from time to time. The formal equality advanced by Aristotle that equals should be treated equally and unequals
- h unequally was as much the result of social and economic conditions as the Rawl's theory of justice or the Dworkin's concepts of right of all to treatment as equals. Liberty and right to equality taken individually may

i 11 *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, (1981) 1 SCC 246: 1981 SCC (L&S) 50: (1981) 2 SCR 185

9 *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714: 1985 Supp 1 SCR 352

appear to pull in different directions. But viewed as part of justice and fairness the two are the primary tenets of modern egalitarian society. The real difficulty is in translating them into practical working. The American concept of 'equal but separate' doctrine is the best illustration of distance between theory and practice of equal protection. The recognition and realisation that neither all men are equal nor are the circumstances in which they are born or grow are same gave rise to classification and grouping of persons similarly situated and extending them equal or same treatment. But the classification has to be reasonable rational bearing a just relation with the legislative purpose and should not be invidious or arbitrary. In our constitutional scheme the classification in matters of employment or appointment in the services has been done constitutionally. From the entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alike for purposes of employment except those who fall under Article 16(4) any further classification or grouping for reservation would be constitutionally invalid. No legislative exercise can transcend the constitutional barrier. For valid classification legislature or executive measures must be co-related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only, any further reservation being beyond constitutional purpose would be impermissible and per se invalid.

616. Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective. Atoning for the past injustices on backward classes through constitutional mechanism was morality raised to a legal plane. Admonition to State not to deny equality before law or equal protection of laws found on sound public policy, is in reality the measure of fundamental right which every person enjoys. But, the principle of the equal protection of law does not mean that, "every law must have universal application to all persons who are not by nature, attainment or circumstance, in the same position"¹²⁹ and the varying needs of different classes of persons require special treatment. Principle of reasonable classification was developed by theorists and courts to enable State to function effectively by classifying reasonably. But the theory developed by *Tussman and Breck*¹³⁰ that the Equal Protection clause really dealt with the problem with the relation of two classes to each other one of

129 *Dhirendra Kumar Mandal v. Supdt. and Remembrancer of Legal Affairs to the Govt. of West Bengal*, (1955) 1 SCR 224; AIR 1954 SC 424; 1954 Cri LJ 1036

130 "The Equal Protection of the Laws", 37 Calif. Rev. 341

- a individuals possessing the definite trait and the other of individuals tainted by the mischief at which the law aims, said to be, 'the first comprehensive analysis of the Equal Protection clause' may be applicable while considering the scope of Article 14 but once the Constitution-makers treated employment in services separately by creating fundamental right in favour of all citizens in pursuance of the ideal of Preamble to secure to all its citizens equality in opportunity and status
- b then it has to be understood in its own perspective. Various sub-articles of Article 16 specially clause (4) indicates constitutional classification and creation of two classes one dealt with in Article 16(1) and the other in Article 16(4). Principle of reasonable classification for purposes of creating another class or planting one class in another would be constitutionally infirm.
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617. All the same the legislative anxiety of affirmative action by preferential treatment to a disadvantaged group lagging behind may not be doubted. Difference between reservation and preferential treatment is that in one a group or class or collectivity is separately provided for and
- d the competition is amongst them only. Whereas in preferential treatment, the collectivity is part of the same group but it is permitted some weightage due to social, economic or any justifiable reason. For purposes of achieving equality by result Article 16 creates two compartments, one general and the other reserved and then both are paired
- e together. But preference is available in the same compartment. Validity of one depends on constitutional sanction whereas the second has to stand on test of reasonableness. For instance the reservation of backward class cannot be assailed as being violative of constitutional guarantee whereas preferential treatment can be upheld only if it is reasonable with
- f the nexus it seeks to achieve. Article 16 unlike Article 14 is a positive right of equal opportunity. Therefore, any preferential treatment shall have to be tested in the light of the constitutional objective the Article seeks to achieve. That is what is its natural, operation and effect. Reservation made for backward class of citizens achieves the constitutional
- g goal of achieving equality of opportunity of all. Same cannot be said for others. Any reservation for any other class would be, as already explained, contrary to constitutional objective thus invalid. Wards of military personnel or political sufferers or any other class cannot be
- h extended the benefit of benign discrimination as that would be violative of equality of opportunity. In absence of any objective or purpose discernible from the Constitution the State action would be liable to be struck down for absence of necessary co-relation between constitutional purpose and its means. Nexus such as national purpose or principle contained in Article 15(4) would not justify such action. Even preferential
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treatment by way of weightage may be permissible in very limited cases and any such measure would be liable to strict judicial scrutiny. The principle of Article 14 of reasonable classification may be relevant only to a limited extent as to whether it is backed by reason and is justified but since it has to be tested further on the touchstone of Article 16(1) the reasonable classification must be so tailored as not to contravene the right to equal opportunity. a

618. No provision of reservation or preference can be so vigorously pursued as to destroy the very concept of equality. Benign discrimination or protection cannot under any constitutional system itself become the principal clause. Equality is the rule. Protection is the exception. Exception cannot exhaust the rule itself. True no restriction was placed on size of reservation. But reason was the consensus understanding that it was for minority of seats. That apart the reservation under Article 16(4) cannot be taken in isolation. Article 16(1) and Article 16(4) being part of same objective and goal, any policy of reservation must constitutionally withstand the test of interaction between the two. In this perspective reservation cannot be except for, 'minority of seats'. Our Founding Fathers were aware that such policies were bound to have political overtones. Various considerations may result in influencing the political decision. That is why their validity in the constitutional framework was left to the courts. Observations by Dr Ambedkar in Constituent Assembly Debates are quite pertinent: (CAD, Vol. 7, p. 702) b c d e

"If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner." f

619. Since this Court has consistently held that the reservation under Articles 15(4) and 16(4) should not exceed 50 per cent and the States and the Union have by and large accepted this as correct it should be held as constitutional prohibition and any reservation beyond 50 per cent would liable to be struck down. Therefore, g

- (i) Reservation under Article 16(4) should in no case exceed 50 per cent. h
- (ii) No reservation can be made for any class other than backward class either under Article 16(1) or 16(4).
- (iii) Preferential treatment in shape of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive. i

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620. Promotion is the most sensitive branch of service jurisprudence. Although its purpose is manifold but the principal objective is "to secure the best possible incumbents for the higher positions while maintaining the morale of the whole organisation"¹³¹ as it not only "serves the public interest"¹³¹ but is founded on the inherent principle that the higher one moves the greater is the responsibility he assumes.
621. Manner and method of promotion is usually linked with the nature of posts, if it is selection or non-selection. Reservation, for SC/ST, has been extended to both, by this Court in *Rangachari*²⁶ and *Soshit Karamchari*¹¹ respectively reiterated in *Hira Lal*²⁹ and *Jagannathan*¹³². In *Rangachari*²⁶ it was held: "The condition precedent may refer either to numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation"²⁶. In the context the expression "adequately represented imports consideration of size as well as values, numbers as well as the nature of appointments"²⁶.
622. But, inadequacy of representation is creative of jurisdiction only. It is not measure of backwardness. That is why less rigorous test or lesser marks and competition amongst the class of unequals at the point of entry has been approved both by this Court and American courts. But a student admitted to a medical or engineering college is further not granted relaxation in passing the examinations. In fact this has been explained as a valid basis in American decisions furnishing justification for racial admissions on lower percentage. Rationale appears to be that everyone irrespective of the source of entry being subjected to same test neither efficiency is effected nor the equality is disturbed. After entry in service the class is one, that of employees. If the social scar of backwardness is carried even thereafter, the entire object of equalisation stands frustrated. No further classification amongst employees would be justified as is not done amongst students.
623. Constitutional, legal or moral basis for protective discrimination is redressing identifiable backward class for historical injustice. That is they are today, what they would not have been but for the victimisation. Remedying this and to balance the unfair advantage gained by others is

¹³¹ *Introduction to the Study of Public Administration* by Leonard D. White, p. 380

¹³² *Comptroller and Auditor-General of India, Gian Prakash v. K.S. Jagannathan*, (1986) 2 SCC 679; 1986 SCC (L&S) 345; (1986) 1 ATC 1; (1986) 2 SCR 17

²⁶ *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

¹¹ *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, (1981) 1 SCC 246; 1981 SCC (L&S) 50; (1981) 2 SCR 185

²⁹ *State of Punjab v. Hira Lal*, (1970) 3 SCC 567; (1971) 3 SCR 267

the constitutional responsibility. But once the advantaged and disadvantaged, the so-called forward and backward, enter into the same stream then the past injustice stands removed. And the length of service, the seniority in cadre of one group, to be specific the forward group, is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimisation. a
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624. Equality either as propagated by theorists or as applied by courts seeks to remove inequality by "parity of treatment under parity of condition"¹⁰. But once in "order to treat some persons equally, we must treat them differently"²⁰ has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it. c
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625. Constitutional sanction is to reserve for backward class of persons. That is class or group interest has been preferred over individual. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against other. No forward class versus backward class or majority against minority. It would, thus, be contrary to the Constitution. Brother Kuldip Singh, for good and sound reasons has rightly opined, that, *Rangachari*²⁶ cannot be held to be laying down good law. e

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626. Reservation, for "economically backward sections of the people who are not covered by any of the existing schemes of reservation" again, raises an important issue. De facto difficulties in determining such backwardness stands established by failure of the government to evolve any workable criteria even after lapse of one year since September 25, 1991, the date on which the order dated August 23, 1990 directing reservation for backward class was amended and it was announced that "the criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately". But the de g
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10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310: 1976 SCC (L&S) 227 : (1976) 1 SCR 906

20 *Regents of the University of California v. Allan Bakke*, 57 L Ed 2d 750: 438 US 265 (1978)

26 *General Manager, S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

a jure hurdles appear, even, greater. Any reservation resulting in curtailing
 right of equal opportunity is to withstand the test of equal protection or
 benign discrimination. Latter has been permitted for a class which had
 suffered injustices in the past and is suffering even now. It is an
 atonement of past segregation and discrimination such as Negroes in
 America and SC/ST of our country and is being extended even to those
 who could legitimately be considered to be backward class. Since Article
 b 16(4) has a constitutional purpose and is to operate only so long the goal
 is not achieved economic backwardness does not qualify for such
 protective measure. And even if such a class or collectivity is held to fall
 in the broader concept of the expression backward class of citizens it
 would not be eligible for the benefit as it would be incapable of satisfying
 c the other mandatory requirement of being inadequately represented in
 services without which the State cannot have any jurisdiction to exercise
 the power. Article 16(4) thus by its nature, and purpose cannot be
 applicable to the economically backwards, except probably when a
 proper methodology is worked out to determine inadequacy of
 d representation of such class.

e 627. Is it possible to reserve under Article 16(1)? Detailed reasons
 have been given earlier, against any reservation under cover of doctrine
 of reasonable classification. Eradication of poverty which "is not to be
 exalted or praised, but is an evil thing which must be fought and stamped
 out"¹³³ is one of the ideals set out in the Preamble of the Constitution as
 it postulates to achieve economic justice and exhorts the State under
 Article 38(2) to "minimise the inequality of income". All the same, can
 the State for this purpose reserve posts for the economically backwards
 f in service. Right to equal protection of laws or equality before law in
 'benefits, and burdens' by operation of law, equally amongst equals and
 unequally amongst unequals is firmly rooted in the concept of equality
 developed by courts in this country and in America. But any reservation
 or affirmative action on economic criteria or wealth discrimination
 g cannot be upheld under doctrine of reasonable classification. Reser-
 vation for backward class seeks to achieve the social purpose of sharing
 in services which had been monopolised by few of the forward classes. To
 bridge the gap, thus created, the affirmative actions have been upheld as
 the social and educational difference between the two classes furnished
 h reasonable basis for classification. Same cannot be said for rich and poor.
 Indigence cannot be a rational basis for classification for public
 employment.

i 628. Any legislative measure or executive action operating unequally
 between rich and poor has been held to be suspect. A provision requiring

133 Jawaharlal Nehru, quoted from Dorothy, Norman (Ed.) *Nehru*

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a person to pay for trial manuscript before filing criminal appeal was struck down in *Griffin*¹²⁷ as it amounted to denial of right of appeal to poor persons. In *Harper*¹²⁸ poll tax for voting was invalidated as "wealth, like race, creed or colour, is not germane to one's ability to participate intelligently in the electoral process". Protection was given to the appellants in effect or consequence of equal protection clause. Duty of State to protect against deprivation due to poverty should not be confused with State's obligation to treat everyone uniformly and equally without discrimination. Protection against application of law due to difference in economic condition, cannot be equated with classification based on disproportion in wealth. Former is in realm of justice and fair play whereas latter is equal protection to which every one is entitled. In the former unjust application of law may be cured by removing the offending part and thus apply the law uniformly to rich and poor. Whereas in the latter the classification has to be justified on the nexus test. Poverty may have relevance and may furnish valid justification while dealing with social and economic measure. Any legislation or executive measure undertaken to remove disparity in wealth cannot be suspect but a classification based on economic conditions for purposes of Article 16(1) would be violative of equality doctrine.

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629. More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart, provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class. Therefore,

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(1) No reservation can be made on economic criteria.
(2) It may be under Article 16(4) if such class satisfies the test of inadequate representation.

127 *Griffin v. Illinois*, 351 US 12: 100 L Ed 891 (1956)

128 *Harper v. Virginia Board of Education*, 383 US 663: 16 L Ed 169 (1966)

- (3) Exclusion of creamy layer is a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

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630. Various infirmities were highlighted in the report of the Second Backward Class Commission and the consequent invalidity of the government order issued on it. Attack on the report varied from the reference being beyond Article 340 to the manner and method of ascertaining backwardness by issuing questionnaires to hardly one per cent of the population, interviewing interested and biased persons only, relying on obsolete material such as caste census of 1931, importing personal knowledge, rewriting Hindu Varna by adding intermediate or middle caste between twice born and Sudra, working out backward population erroneously as in 1931 only 67 per cent of the population was Hindu and if 22 per cent were SC and 43 per cent backward then the remaining were 2 per cent inflating backward classes by conjectures and assumptions as the First Commission identified 2399 whereas the Second determined it at 3743 and the Anthropological Survey of India published a project report identifying only 1057 backward classes, and adopting caste as the sole and the only criterion for identifying backwardness etc. Action of the Government in accepting the report and issuing the Government Order was challenged for exhibition of sudden alacrity not on objective consideration but for extraneous reasons, acceptance of the report without any discussion or debate in the Parliament which was the least, considering the far-reaching consequences of such report, acting by executive order instead of legislative measure, when reservation for backward class was being made in Union services for the first time, propriety of basing the action on a report rendered 10 years earlier without any regard to social and economic changes in the meantime when such period is normally considered sufficient for review and re-assessment of continuance of such actions, etc.

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631. Many of these challenges appear to be well founded but any discussion on it is unnecessary for two reasons, one, failure of any objective consideration of the report by the Government before issuing the orders and the other some of the basic infirmities have been dealt with while dealing with the issue of identification of backward classes. Above all what is not provided in the Constitution, what was not accepted by the Government in 1956, what has not been approved by this Court even for backward classes in Article 16(4) was adopted by the Commission as the basis in its report submitted in 1978 (*sic* 1980) for "socially and educationally backward classes", an expression narrower and different than 'backward classes' and implemented in 1990 by the Government without even placing it before the Parliament or any objective

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consideration by it. An order reserving posts can no doubt be made even by the Executive but the decision being of utmost importance as reservation was being made in services under the Union for the first time the propriety demanded that it should have been placed before the Parliament. For growth and development of healthy conventions and traditions no provision in the Constitution or statute is needed. It may, however, not be out of place to mention that where rules framed under Article 309 exist no executive order in violation of it can be passed.

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632. Vital issues, by agreement of both sides, relating to reservation and preferential treatment in services have been discussed. On many of these this Court, to use the words of the Constitution Bench, has not spoken with "one voice". Therefore, these public interest petitions, filed in unfortunate circumstances which are not necessary to be narrated, were referred to be heard by a larger Bench of nine-Judges, "to finally settle the legal positions relating to reservations".

633. Finality, is necessary not only for courts or tribunal but for the guidance of the affirmative action ameliorative or preferential by the legislature or the executive. What should not be lost sight of is if the history of discrimination and segregations of the SC/ST and the socially, educationally and economically backward is the darkest chapter of our social history, with no parallel anywhere in the world, then constitutional therapy to eradicate it root and branch too is unparalleled and even most developed and democratically advanced democracies, cannot match the socially-oriented effort to achieve an egalitarian society. Practical equality or equality by result is the approach. Effort is to usher in a progressive society by bridging the gap between the forward and backward by demolishing the social barriers and enabling the lowest to share the power to remove inferiority and infuse feeling of equality. But without sacrificing efficiency and disturbing the equality equilibrium by confining it to minority of posts and treating them preferentially for such length of time, as a self-operating mechanism, coming to an end once the constitutional objective of enabling them to stand on their own is fulfilled. Why reservation policy in services or the benefits of welfare measures pursued by different States for the weaker sections of the society have not percolated to the needy and deserving at the rock bottom is more a political issue than constitutional or legal. But no effort can succeed unless the policy-makers eschew extraneous considerations and tackle the problem sincerely and with understanding. So long the identification of the backward class is not made properly and practically it would serve the vested interest only. And the 'haves' among Sudras or

the intermediate backward classes shall not permit it to reach the have-nots the real and genuine backward classes.

- a 634. No exception can be taken to the recommendations of the Mandal Commission for reservation for backward class of citizens in services by the Union. But commissions are only fact-finding bodies. The constitutional responsibility of reserving posts rests with the Government. Unfortunately neither in 1990 nor in 1991 this duty was discharged constitutionally or even legally. Whether the Report was within the term of reference and if the Commission in identifying socially and educationally backward class repeated the same mistake as was done by the first Commission and if the Commission could adopt two different yardsticks for determining backwardness among Hindus and non-Hindus were aspects which were required to be gone into by the Government before issuing any order. The exercise of power to reserve is coupled with duty to determine backward class of citizens and if they were adequately represented. If the Government failed to discharge its duty then the exercise of power stands vitiated. Nothing further need be said except to extract the following words of William O. Douglas: "Judicial Review gives time for the sober second thought."

Conclusions

- e 635. Both the impugned orders issued by the respective governments in 1990 and 1991 reserving appointments and posts for socially and educationally backward classes of citizens, without discharging their constitutional obligation of examining if the identification of backward class by the Commission was in consonance with constitutional principle and philosophy of the basic feature of the Constitution and if the group or collectivity so identified was adequately represented or not which is the sine qua non for the exercise of the power under Article 16(4), are declared to be unenforceable.

- g (1) Reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher Courts in the country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions.

- h (2) (a) Constitutional bar under Article 16(2) against State for not discriminating on race, religion or caste is as much applicable to Article 16(4) as to Article 16(1) as they are part of the same scheme and serve the same constitutional purpose of ensuring equality. Identification of backward class by caste is against the Constitution.

- j (b) The prohibition is not mitigated by using the word, 'only' in Article 16(2) as a cover and evolving certain socio-economic indicators

and then applying it to caste as the identification then suffers from the same vice. Such identification is apt to become arbitrary as well as the indicators evolved and applied to one community may be equally applicable to other community which is excluded and the backward class of which is denied similar benefit.

Identification of a group or collectivity by any criteria other than caste, such as, occupation-cum-social-cum-educational-cum-economic criteria ending in caste may not be invalid.

(c) Social and educational backward class under Article 340 being narrower in import than backward class in Article 16(4) it has to be construed in restricted manner. And the words educationally backward in this Article cannot be disregarded while determining backwardness.

(3) Reservation under Article 16(4) being for any class of citizens and citizen having been defined in Chapter II of the Constitution includes not only Hindus but Muslims, Christians, Sikhs, Buddhists, Jains etc. the principle of identification has to be of universal application so as to extend to every community and not only to those who are either converts from Hinduism or some of who carry on the same occupation as some of the Hindus.

(4) Reservation being an extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation. of any manner, not to exceed 50 per cent.

(5) Article 16(4) being part of the scheme of equality doctrine it is exhaustive of reservation, therefore, no reservation can be made under Article 16(1).

(6) Reservation in promotion is constitutionally impermissible as, once the advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

(7) Economic backwardness may give jurisdiction to State to reserve provided it can find out a mechanism to ascertain inadequacy of representation of such class. But such group or collectivity does not fall under Article 16(1).

(8) Creamy layer amongst backward class of citizens must be excluded by fixation of proper income, property or status criteria.

636. Reservation by executive order may not be invalid but since it was being made for the first time in services under the Union propriety

- a demanded that it should have been laid before Parliament not only to lay down healthy convention but also to consider the change in social, economic and political conditions of the country as nearly ten years had elapsed from the date of submissions of the Report, a period considered sufficient for evaluation if the reservation may be continued or not.

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- b 637. Valuable assistance was rendered by Shri K.K. Venugopal and Shri N.A. Palkhivala, the learned senior counsel, who led the arguments and placed one view. They were ably supported by Shri P.P. Rao and Smt Shyamala Pappu, Senior Advocates. Arguments were also advanced by Smt Hingorani, Mr Mehta, Mr K.L. Sharma, Mr S.M. Ashri, Mr Vishal Jeet. Shri K.N. Rao and Col. (Dr) D.M. Khanna appeared in person as
c interveners and were of assistance.

- d 638. Shri Ram Jethmalani, the learned Senior Advocate appearing for the State of Bihar was equally helpful in projecting the other view. Shri K. Parasaran, the learned Senior Counsel for the Union of India while supporting Shri Jethmalani placed a very dispassionate view of the entire matter. Dr Rajeev Dhavan was also very helpful. Shri R.K. Garg, Shri Shiv Pujan Singh, Shri S. Siva Subramaniam, Shri Poti, Smt Rani Jethmalani also made submissions. Shri Ram Avadhesh Singh argued in person.

- e B.P. JEEVAN REDDY, J (*for M.H. Kania, CJ and M.N. Venkatachaliah, A.M. Ahmadi, JJ and himself*).— Forty and three years ago was founded this republic with the fourfold objective of securing to its citizens justice, liberty, equality and fraternity. Statesmen of the highest order — the like of which this country has not seen since —
f belonging to the fields of law, politics and public life came together to fashion the instrument of change — the Constitution of India. They did not rest content with evolving the framework of the State; they also pointed out the goal — and the methodology for reaching that goal. In the Preamble, they spelt out the goal and in Parts III and IV, they elaborated the methodology to be followed for reaching that goal.
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- h 640. The Constituent Assembly, though elected on the basis of a limited franchise, was yet representative of all sections of society. Above all, it was composed of men of vision, conscious of the historic but difficult task of carving an egalitarian society from out of a bewildering mass of religions, communities, castes, races, languages, beliefs and practices. They knew their country well. They understood their society perfectly. They were aware of the historic injustices and inequities afflicting the society. They realised the imperative of redressing them by constitutional means, as early as possible — for the alternative was frightening.
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Ignorance, illiteracy and above all, mass poverty, they took note of. They were conscious of the fact that the Hindu religion — the religion of the overwhelming majority — as it was being practised, was not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this four tier system (Chaturvarnya) were the out-castes (Panchamas), the lowliest. They did not even belong to the caste system — ugly as its face was. The fourth, Shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, unconnected with their deeds. There was to be no deliverance for them from this social stigma, except perhaps death. They were condemned to be inferior. All lowly, menial and unsavoury occupations were assigned to them. In the rural life, they had no alternative but to follow these occupations, generation after generation, century after century. It was their 'karma', they were told, the penalty for the sins they allegedly committed in their previous birth. Pity is, they believed all this. They were conditioned to believe it. This mental blindfold had to be removed first. This was a phenomenon peculiar to this country. Poverty there has been — and there is — in every country. But none had the misfortune of having this social division — or as some call it, degradation — superimposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted — and do still constitute — a vicious circle. The Founding Fathers were aware of all this — and more.

641. 'Liberty, equality and fraternity' was the battle-cry of the French Revolution. It is also the motto of our Constitution, with the concept of 'Justice — Social, Economic and Political' — the sum total of modern political thought — superadded to it. Equality has been and is the single greatest craving of all human beings at all points of time. It has inspired many a great thinker and philosopher. All religious and political schools of thought swear by it, including the Hindu religious thought, if one looks to it ignoring the later crudities and distortions. Liberty of thought, expression, belief, faith and worship has equally been an abiding faith with all human beings, and at all times in this country in particular. Fraternity assuring the dignity of the individual has a special relevance in the Indian context, as this judgment will illustrate in due course.

642. The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets, relevant to Indian society, have been referred to in the preamble and the articles under the sub-heading "Right to equality" (Articles 14 to 18). In short, the goal is "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several articles in Part IV (Directive Principles of State Policy). "Justice —

Social, Economic and Political", is the sum total of the aspirations incorporated in Part IV.

- a 643. Article 14 enjoins upon the State not to deny to any person "equality before the law" or "the equal protection of the laws" within the territory of India. Most constitutions speak of either "equality before the law" or "the equal protection of the laws", but very few of both. Section 1 of the XIVth Amendment to the US Constitution uses only the latter
- b expression while the Austrian Constitution (1920), the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equal before the law". (Article 7 of the Universal Declaration of Human Rights, 1948, of course, declares that "all are equal before the law".) The content and sweep of these two concepts is not the same
- c though there may be much in common. The content of the expression "equality before the law" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39-A, 41 and 46. Among others, the concept of equality before the law con-
- d templates minimising the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educa-
- e tional and economic interests of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation. Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality — either equality before law or equality in any other respect.
- f

644. The significance attached by the Founding Fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and
- g affirmative terms in Articles 15 to 18. Through Article 15 they declared in positive terms that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. With a view to eradicate certain prevalent undesirable practices it was declared in clause (2) of Article 15 that no citizen shall on the
- h grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and place of public enter-
- i tainment, or to the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. At the same time, with a view to

ameliorate the conditions of women and children a provision was made in clause (3) that nothing in the said article shall prevent the State from making any special provision for women and children.

645. Inasmuch as public employment always gave a certain status and power — it has always been the repository of State power — besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1) expressly declares that in the matter of public employment or appointment to any office under the State, citizens of this country shall have equal opportunity while clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to declare in clause (4) that nothing in the said article shall prevent the State from making 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. Article 17 abolishes untouchability while Article 18 prohibits conferring of any titles (not representing military or academic distinction). It also prohibits the citizens of this country from accepting any title from a foreign State.

646. Article 16 has remained unamended, except for a minor amendment in clause (3) whereas Article 15 had clause (4) inserted in it by the First Amendment Act, 1951. As amended, they read as follows:

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

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

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

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

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

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

16. *Equality of opportunity in matters of public employment.*—

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

b (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

c (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.

d (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

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

f 647. The other provisions of the Constitution having a bearing on Article 16 are Articles 38, 46 and the set of articles in Part XVI. Clause (1) of Article 38 obligates the State to "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 national life".

648. Clause (2) of Article 38, added by the 44th Amendment Act says,

g "[T]he State shall, in particular, strive to minimise 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."

h 649. Article 46 contains a very significant directive to the State. It says:

i "46. *Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.*— The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of

the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

650. It is evident that "the weaker sections of the people" do include the "backward class of citizens" contemplated by Article 16(4). a

651. Part XVI of the Constitution contains "special provisions relating to certain classes". The "classes" for which special provisions are made are, Scheduled Castes, Scheduled Tribes and the Anglo-Indian community. It also provides for appointment of a Commission to investigate the conditions of and the difficulties faced by the socially and educationally backward classes and to make appropriate recommendations. Article 340 reads as follows: b

"340. Appointment of a Commission to investigate the conditions of backward classes.— (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission. c

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper. d

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament." e

652. Article 338, which has been extensively amended by the Sixty-fifth Amendment Act, provides for establishment of a Commission for the Scheduled Castes and Scheduled Tribes to be known as "the National Commission for the Scheduled Castes and Scheduled Tribes". Clause (5) prescribes the duties of the Commission. They are: f

"(5) It shall be duty of the Commission — g

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards; h

- a (b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes and Scheduled Tribes;
- (c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State;
- b (d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
- c (e) to make in such report recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes; and
- d (f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify."

e 653. Clause (6) provides that "the President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations". Clause (7) being
f relevant may also be read here. It reads, "where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for
g the non-acceptance, if any, of any of such recommendations".

h 654. Clause (10) [clause (3) prior to 65th Amendment Act] brings in socially and educationally backward classes identified by the Government on the basis of the report of the Commission appointed under Article 340 and Anglo-Indians within the purview of the expressions "Scheduled Castes and Scheduled Tribes". It reads as follows:

i "10. In this article references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of Article 340, by order specify and also to the Anglo-Indian community."

655. Article 335 provides that "the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State". It is obvious that if the claims of even Scheduled Castes and Scheduled Tribes are to be taken into consideration consistently with the maintenance of efficiency of administration, the said admonition has to be respected equally while taking into consideration the claims of other backward classes and other weaker sections.

The First Backward Classes Commission (Kalelkar Commission):

656. The proceedings of the Constituent Assembly on draft Article 10 disclose a persistent and strident demand from certain sections of the society for providing reservations in their favour in the matter of public employment. While speaking on the draft Article 10(3) [corresponding to Article 16(4)] Dr Ambedkar had stated, "then we have quite a massive opinion which insists that although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration". It was this demand which was mainly responsible for the incorporation of clause (4) in Article 16. As a matter of fact, in some of the southern States, reservations in favour of OBCs were in vogue since quite a number of years prior to the Constitution. There was a demand for similar reservations at the Centre. In response to this demand and also in realisation of its obligation to provide for such reservations in favour of backward sections of the society, the Central Government appointed a Backward Class Commission under Article 340 of the Constitution on January 29, 1953. The Commission, popularly known as Kaka Kalelkar Commission, was required "to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove difficulties and to improve their conditions". The Commission submitted its report on March 30, 1955. According to it, the relevant factors to consider while classifying backward classes would be their traditional occupation and profession, the percentage of literacy or the general educational advancement made by them; the estimated population of the community and the distribution of the various communities throughout the State or their concentration in certain areas. The Commission was also of the opinion that the social position which a community occupies in the caste hierarchy would also have to be considered as well as its representation in Government service or in the industrial sphere. According to the

- Commission, the causes of educational backwardness amongst the educationally and backward communities were (i) traditional apathy for education on account of social and environmental conditions or occupational handicaps; (ii) poverty and lack of educational institutions in rural areas and (iii) living in inaccessible areas. The Chairman of the Commission, Kaka Kalelkar, however, had second thoughts after signing the report. In the enclosing letter addressed to the President he virtually pleaded for the rejection of the report on the ground that the reservations and other remedies recommended on the basis of caste would not be in the interest of society and country. He opined that the principle of caste should be eschewed altogether. Then alone, he said, would it be possible to help the extremely poor and deserving members of all the communities. At the same time, he added, preference ought to be given to those who come from traditionally neglected social classes.

657. The report made by the Commission was considered by the Central Government, which apparently was not satisfied with the approach adopted by the Commission in determining the criteria for identifying the backward classes under Article 15(4). The Memorandum of Action appended to the Report of the Commission while placing it on the table of the Parliament [as required by clause (3) of Article 340] on September 3, 1956, pointed out that the caste system is the greatest hindrance in the way of our progress to egalitarian society and that in such a situation recognition of certain specified castes as backward may serve to maintain and perpetuate the existing distinctions on the basis of caste. The memorandum also found fault with certain tests adopted by the Commission for identifying the backward classes. It expressed the opinion that a more systematic and elaborate basis has to be evolved for identifying backward classes. Be that as it may, the Report was never discussed by the Parliament.

658. No meaningful action was taken after 1956 either for constituting another Commission or for evolving a better criterion. Ultimately, on August 14, 1961, the Central Government wrote to all the State Governments stating inter alia that "while the State Governments have the discretion to choose their own criteria for defining backwardness, in the view of the Government of India it would be better to apply economic tests than to go by caste". The letter stated further, rather inexplicably¹³⁴, that "even if the Central Government were to specify under Article 338(3) certain groups of people as belonging to

¹³⁴ The lists drawn by State Governments would not apply to Central services. The Central Government has got to draw up its own list for the purposes of Central services, though it may not draw up an all-India list applicable to Central and State services — assuming that Central Government can draw up a list for State Government services as well.

'other backward classes', it will still be open to every State Government to draw up its own lists for the purposes of Articles 15 and 16. As, therefore, the State Governments may adhere to their own lists, any all-India list drawn up by the Central Government would have no practical utility." Various State Governments thereupon appointed Commissions for identifying backward classes and issued orders identifying the socially and educationally backward classes and reserving certain percentage of posts in their favour. So far as the Central services are concerned, no reservations were ever made in favour of other backward classes though made in favour of Scheduled Castes and Scheduled Tribes.

The Second Backward Classes Commission (Mandal Commission) :

659. By an Order made by the President of India, in the year 1979, under Article 340 of the Constitution, a Backward Class Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India, which Commission is popularly known as Mandal Commission. The terms of reference of the Commission were:

- "(i) to determine the criteria for defining the socially and educationally backward classes;
- (ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;
- (iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and
- (iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper."

The Commission was empowered to:

- "(a) obtain such information as they may consider necessary or relevant for their purpose in such form and such manner as they may think appropriate, from the Central Government, the State Government, the Union Territory Administrations and such other authorities, organisations or individuals as may in the opinion of the Commission, be of assistance to them; and
- (b) hold their sittings or the sittings of such sub-committees as they may appoint from amongst their own members at such times and such places as may be determined by, or under the authority of the Chairman."

a 660. The report of the Commission was required to be submitted not later than December 31, 1979, which date was later extended up to December 31, 1980. It was so submitted.

b 661. Chapter I of the Report deals with the "*Constitution of First Backward Classes Commission (Kaka Kalelkar Commission)*", its report, the letter of Kaka Kalelkar to the President, the lack of follow-up action and the letter of the Central Government referred to hereinbefore to State Governments to draw up their own lists. It also points out certain "internal contradictions" in the Report. Chapter II deals with the "*Status of Other Backward Classes in Some States*". It sets out the several provisions relating to reservation in favour of OBCs obtaining in several States and the history of such reservations. Chapter III is entitled c "*Methodology and Data Base*". It sets out the procedure followed by the Commission and the material gathered by them. Paras 3.1 and 3.2 read thus:

d "3.1 One important reason as to why the Central Government could not accept the recommendations of Kaka Kalelkar Commission was that it had not worked out objective tests and criteria for the proper classification of socially and educationally backward classes. In several petitions filed against reservation orders issued by some State Governments, the Supreme Court and various High Courts have also emphasised the imperative need for an empirical approach to the defining of socially and educationally backwardness or identification of Other Backward Classes.

e 3.2 The Commission has constantly kept the above requirements in view in planning the scope of its activities. It was to serve this very purpose that the Commission made special efforts to associate the leading sociologists, research organisations and specialised agencies of the country with every important facet of its activity. Instead of relying on one or two established techniques of enquiry, we tried to cast our net far and wide so as to collect facts and get feed-back from as large an area as possible. A brief account of this activity is given below."

g 662. It then refers to the seminar held by Department of Anthropology of Delhi University in March 1979, to the questionnaire issued to all departments of Central Government and to the State Governments (the proformas are compiled in Vol. II of the Report) the country-wide touring undertaken by the Commission, the evidence recorded by it, the socio-educational field survey conducted by it and other studies and reports involved in its work. In Chapter IV the Commission deals with the inter-relationship between social backwardness and caste. It describes how the fourth caste, Shudras, were kept in a state h

of intellectual and physical subjugation and the historical injustices perpetrated on them. In para 4.5 the Commission states:

"The real triumph of the caste system lies not in upholding the supremacy of the Brahmin, but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as a part of the natural order of things It was through an elaborate, complex and subtle scheme of scripture, mythology and ritual that Brahminism succeeded in investing the caste system with a moral authority that has been seldom effectively challenged even by the most ardent social reformers."

663. Chapter V deals with "*Social Dynamics of Caste*". In this chapter, the Commission emphasises the fact that notwithstanding public declarations condemning the caste, it has remained a significant basis of action in politics and public life. Reference is made to several caste associations, which have come into being after the Constitution. The concluding part in this chapter, para 5.17, reads:

"The above account should serve as a warning against any hasty conclusion about the weakening of caste as the basis of social organisation of the Hindu society. The pace of social mobility is no doubt increasing and some traditional features of the caste system have inevitably weakened. But what caste has lost on the ritual front, it has more than gained on the political front. This has also led to some adjustments in the power equation between the high and low castes and thereby accentuated social tensions. Whether these tensions rent the social fabric or the country is able to resolve them by internal adjustments will depend on how understandingly the ruling high castes handle the legitimate aspirations and demands of the historically suppressed and backward classes."

664. Chapter VI deals with "*Social Justice, Merit and Privilege*". It attempts to establish, that merit in a elitist society is not something inherent but is the consequence of environmental privileges enjoyed by the members of higher castes. This is sought to be illustrated by giving an example of two boys — Lallu and Mohan. Lallu is a village boy belonging to a backward class occupying a low social position in the village caste hierarchy. He comes from a poor illiterate family and studies at a village school, where the level of instruction is woeful. On the other hand, Mohan comes from a fairly well-off middle class and educated family, attends one of the good public schools in the city, has assistance at home besides the means of acquiring knowledge through television, radio, magazines and so on. Even though both Lallu and Mohan possess the same level of intelligence, Lallu can never compete with Mohan in any open competition because of the several environmental disadvantages suffered by him.

665. Chapter VII deals with "Social Justice, Constitution and the Law". It refers to the relevant provisions of the Constitution, to the decision in *M.R. Balaji v. State of Mysore*¹² and various subsequent decisions of this Court and discusses the principles flowing from the said decisions. It notes that the subsequent decisions of this Court in *C.A. Rajendran v. Union of India*⁶³; *State of A.P. v. P. Sagar*¹⁴ and *State of A.P. v. U.S.V. Balram*¹⁶ etc. show a marked shift from the original position taken in *Balaji*¹² on several important points. In particular, it refers to the observations in *Rajendran*⁶³ to the effect that

"caste is also a class of citizens and if the class as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it was socially and educationally backward class of citizens within the meaning of Article 15(4)".

It refers to the statement in *A. Peeriakaruppan v. State of T.N.*¹⁵ to the effect that "a caste has always been recognised as a class". It also commends the dissenting view of Subba Rao, J in *T. Devadasan v. Union of India*¹⁹ (wrongly referred to as *Rangachari — General Manager, Southern Railway v. Rangachari*²⁶).

666. Chapter VIII deals with "North-South Comparison of Other Backward Classes' Welfare". It is a case study of provisions in force in two southern States namely Tamil Nadu and Karnataka and the two northern States, Bihar and Uttar Pradesh. The conclusions drawn from the discussion are stated in para 8.45 in the following words:

"In view of the foregoing account, the reasons for much stronger reaction in the North than South to reservations, etc. for Other Backward Classes may be summarised as below:

- (1) Tamil Nadu and Karnataka had a long history of Backward Classes' movements and various measures for their welfare were taken in a phased manner. In Uttar Pradesh and Bihar such measures did not mark the culmination of a mass movement.
- (2) In the South 'the forward communities have been divided either by the classification schemes or politically or both In Bihar and U.P. the G.Os. have not divided the forward castes.'

¹² 1963 Supp 1 SCR 439: AIR 1963 SC 649

⁶³ (1968) 1 SCR 721: AIR 1968 SC 507

¹⁴ (1968) 3 SCR 595: AIR 1968 SC 1379

¹⁶ (1972) 1 SCC 660: (1972) 3 SCR 247

¹⁵ (1971) 1 SCC 38: (1971) 2 SCR 430

¹⁹ (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

²⁶ (1962) 2 SCR 586: AIR 1962 SC 36

- (3) In the South, clashes between Scheduled Castes and backward peasant castes have been rather mild. In the North these cleavages have been much sharper, often resulting in acts of violence. This has further weakened the backward classes' solidarity in the North. a
- (4) In the non-Sanskritic South, the basic Varna cleavage was between Brahmins and non-Brahmins and Brahmins constituted only about 3% of the population. In the Sanskritic North, there was no sharp cleavage between the forward castes and together they constituted nearly 20% of the population. In view of this the higher castes in U.P. and Bihar were in a stronger position to mobilise opposition to backward class movement. b
- (5) Owing to the longer history and better organisation of Other Backward Castes in the South, they were able to acquire considerable political clout. Despite the lead given by the Yadavas and other peasant castes, a unified and strong OBC movement has not emerged in the North so far. c
- (6) The traditions of semi-feudalism in Uttar Pradesh and Bihar have enabled the forward castes to keep tight control over smaller backward castes and prevent them from joining the mainstream of backward classes' movement. This is not so in the South. d
- (7) 'The economies of Tamil Nadu and Karnataka have been expanding relatively faster. The private tertiary sector appears to be growing. It can shelter many forward caste youths. Also, they are prepared to migrate outside the State. The private tertiary sectors in Bihar and U.P. are stagnant. The forward caste youths in these two States have to depend heavily on government jobs. Driven to desperation, they have reacted violently.' e

667. Chapter IX sets out the evidence tendered by Central and State Governments while Chapter X deals with the evidence tendered by the Public. Chapter XI is quite important inasmuch as it deals with the *"Socio-Educational Field Survey and Criteria of Backwardness"*. In this chapter, the Commission says that it decided to tap a number of sources for the collection of data, keeping in mind the criticism against the Kaka Kalelkar Commission as also the several judgments of this Court. It says that Socio-Educational Field Survey was the most comprehensive inquiry made by the Commission in this behalf. Right from the beginning, this survey was designed with the help of top social scientists and specialists in the country. Experts from a number of disciplines were associated with f

- different phases of its progress. It refers to the work of Research Planning Team of Sociologists and the work done by a panel of experts led by Prof. M.N. Srinivas. It refers to the fact that both of them concurred that "in the Indian context such collectivities can be castes or other hereditary groups traditionally associated with specific occupations which are considered to be low and impure and with which educational backwardness and low income are found to be associated". The Commission says further that with a view to providing continuous guidance at the operational level, a Technical Advisory Committee was set up under Dr K.C. Seal, Director General, Central Statistical Organisation with the Chief Executive, National Sample Survey Organisation and representatives of Directors of State Bureaux of Economics and Statistics as members. The Commission sets out the methodology evolved by the Experts' panel and states that survey operations were entrusted to the State Statistical Organisations of the concerned States/Union Territories. It refers to the training imparted to the survey staff and to the fact that the entire data so collected was fed into a computer for electronic processing of such data. Out of the 406 districts in the country, the survey covered 405 districts. In every district, two villages and one urban block was selected and in each of these villages and urban blocks, every single household was surveyed. The entire data collected was tabulated with the aid of National Informatic Centre of Electronics Commission of India. The Technical Committee constituted a Sub-Committee of Experts to help the Commission prepare "*Indicators of Backwardness*" for analysing the data contained in the computerised tables. In para 11.23 (page 52) the Commission sets out the eleven Indicators/Criteria evolved by it for determining social and educational backwardness. Paras 11.23, 11.24 and 11.25 are relevant and may be set out in full:

"11.23. As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are:

A. Social

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.

- (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average. a
- (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average. b
- (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic

- (viii) Castes/Classes where the average value of family assets is at least 25% below the State average. c
- (ix) Castes/Classes where the number of families living in Kutcha houses is at least 25% above the State average. d
- (x) Castes/Classes where the source of drinking water is beyond half a kilometre for more than 50% of the households.
- (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average. e

11.24 As the above three groups are not of equal importance for our purpose, separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each. Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also. f

11.25 It will be seen that from the values given to each Indicator, the total score adds up to 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50% (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference." g

It will also be useful to set out the observations of the Commission in para 11.27:

a "11.27 In the end it may be emphasised that this survey has no pretensions to being a piece of academic research. It has been conducted by the administrative machinery of the Government and used as a rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time. All these factors obviously militate against the requirements of a technically sophisticated and academically satisfying operation."

c 668. Chapter XII deals with "*Identification of OBCs*". In the first instance, the Commission deals with OBCs among Hindu communities. It says that it applied several tests for determining the SEBCs like stigmas of low-occupation, criminality, nomadism, beggary and untouchability besides inadequate representation in public services. The multiple approach adopted by the Commission is set out in para 12.7 which reads:

d "12.7 Thus, the Commission has adopted a multiple approach for the preparation of comprehensive lists of Other Backward Classes for all the States and Union Territories. The main sources examined for the preparation of these lists are:

- e (i) Socio-educational field survey;
- (ii) Census Report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes);
- f (iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described in Chapter X of this Report; and
- (iv) Lists of OBCs notified by various State Governments."

g 669. The Commission next deals with OBCs among non-Hindu communities. In paragraphs 12.11 to 12.16 the Commission refers to the fact that even among Christian, Muslim and Sikh religions, which do not recognise caste, the caste system is prevailing though without religious sanction. After giving a good deal of thought to several difficulties in the way of identifying OBCs among non-Hindus, the Commission says, it has evolved a rough and ready criteria, viz., (1) all untouchables converted to any non-Hindu religion and (2) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs — ought to be treated as SEBCs. The Commission then sought to work out the estimated population of the OBCs in the country and arrived at

the figure of 52%. Paras 12.19 and 12.22 may be set out in full in view of their relevancy:

"12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes, communities and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country."

"12.22 From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, Other Backward Classes constitute nearly 52% of the Indian population."

*Percentage Distribution of Indian Population
by Caste and Religious Groups*

S. No.	Group Name	Percentage of total population	
I.	<i>Scheduled Castes and Scheduled Tribes</i>		
A-1	Scheduled Castes	15.05	
A-2	Scheduled Tribes	07.51	
	Total of 'A'	22.56	
II.	<i>Non-Hindu Communities, Religious Groups, etc.</i>		
B-1	Muslims (other than STs)	11.19 (0.02) [†]	
B-2	Christians (other than STs)	02.16 (0.44) [†]	
B-3	Sikhs (other than SCs & STs)	01.67 (0.22) [†]	
B-4	Budhists (other than STs)	00.67 (0.03) [†]	
B-5	Jains	00.47	
	Total of 'B'	16.16	
III.	<i>Forward Hindu Castes & Communities</i>		
C-1	Brahmins (including Bhumihars)	05.52	
C-2	Rajputs	03.90	
C-3	Marathas	02.21	
C-4	Jats	01.00	
C-5	Vaishyas-Bania, etc.	01.88	
C-6	Kayasthas	01.07	
C-7	Other forward Hindu castes, groups	02.00	
	Total of 'C'	17.58	
	TOTAL OF 'A', 'B' & 'C'	56.30	
IV.	<i>Backward Hindu Castes & Communities</i>		
D.	Remaining Hindu castes/groups which come in the category of "Other Backward Classes"	43.70 [†]	

V. *Backward Non-Hindu Communities*

- E. 52% of religious groups under Section B may also be treated as OBCs 08.40
- F. The approximate derived population of Other Backward Classes including non-Hindu communities 52% (Aggregate of D and E, rounded)"

† Figures in brackets give these population of SC & ST among the non-Hindu communities
‡ This is a derived figure.

670. Chapter XIII contains various recommendations including reservations in services. In view of the decisions of the Supreme Court limiting the total reservation to 50%, the Commission recommended 27% reservation in favour of OBCs (in addition to 22.5% already existing in favour of SCs and STs). It recommended several measures for improving the condition of these backward classes. Chapter XIV contains a summary of the report.

671. Volumes II to VI of the Report contain and set out the material and the data on the basis of which the Commission made its recommendations. Vol. VI contains the State-wise lists of Other Backward Classes, as identified by the Commission. (It may be remembered that both the Scheduled Castes Order and Scheduled Tribes Order notified by the President contain State-wise lists of Scheduled Castes and Scheduled Tribes). Volume II inter alia contains the questionnaire issued to the State Governments/Union Territories, the questionnaire issued to the Central Government Ministries/Departments, the questionnaire issued to the general public, the list of M.Ps. and other experts who appeared and gave evidence before the Commission, the criteria furnished to Central Government Offices for identifying OBC employees for both Hindu and non-Hindu communities, report of the Research Planning Team of the Sociologists and the proformas employed in conducting the Socio-Education Survey.

672. The Report of the Mandal Commission was laid before each House of Parliament and discussed on two occasions — once in 1982 and again in the year 1983. The proceedings of the Lok Sabha placed before us contain the statement of Shri R. Venkataraman, the then Minister for Defence and Home Affairs. He expressed the view that

"the debate has cut across party lines and a number of people on this side have supported the recommendations of the Mandal Commission. A large number of people on the other side have also supported it. If one goes through the entire debate one will be impressed with a fairly unanimous desire on the part of all sections

of the House to find a satisfactory solution to this social evil of backwardness of Scheduled Castes/Scheduled Tribes etc. which is a festering sore in our body politic."

The Hon'ble Minister then proceeded to state:

"The Members generally said that the recommendations should be accepted. Some Members said that it should be accepted in toto. Some Members have said that it should be accepted with certain reservations. Some Members said, there should be other criteria than only social and educational backwardness. But all these are ideas which Government will take into account. The problem that confronts Government today is to arrive at a satisfactory definition of backward classes and bring about an acceptance of the same by all the States concerned."

The Hon'ble Minister referred to certain difficulties the Government was facing in implementing the recommendations of the Commission on account of the large number of castes identified and on account of the variance in the State lists and the Mandal Commission lists and stated the consultation with various departments and State Governments was in progress in this behalf. He stated that a meeting of the Chief Ministers would be convened shortly to take decisions in the matter.

673. The Report was again discussed in the year 1983. The then Hon'ble Minister for Home, Shri P.C. Sethi, while replying to the debate stated:

"While referring to the Commission whose report has been discussed today, I would like to remind the House that although this Commission had been appointed by our predecessor Government, we now desire to continue with this Commission and implement its recommendations."

The Office Memorandum dated August 13, 1990

674. No action was, however, taken on the basis of the Mandal Commission Report until the issuance of the Office Memorandum on August 13, 1990. On that day, the then Prime Minister, Shri V.P. Singh made a statement in the Parliament in which he stated inter alia as follows:

"After all, if you take the strength of the whole of the government employees as a proportion of the population, it will be 1% or 1 1/2. I do not know exactly, it may be less than 1%. We are under no illusion that this 1% of the population, or a fraction of it will resolve the economic problems of the whole section of 52%. No. We consciously want to give them a position in the decision-making of the country, a share in the power structure. We talk about merit. What is the merit of the system itself? That the section which has

a 52% of the population gets 12.55% in government employment. What is the merit of the system? That in Class I employees of the government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power structure it is hardly 4.69%. I want to challenge first the merit of the system itself before we come and question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consciously, with open eyes. And I know when changing the structures comes, there will be resistance

b What I want to convey is that treating unequals as equals is the greatest injustice.

c And, correction of this injustice is very important and that is what I want to convey. Here, the National Front Government's commitment for not only change of government, but also change of the social order, is something of great significance to all of us; it is a matter of great significance. Merely making programmes of economic benefit to various sections of the society will not do

d There is a very big force in the argument to involve the poorest in the power structure. For a lot of time we have acted on behalf of the poor. We represent the poor

e Let us forget that the poor are begging for some crumbs. They have suffered it for thousands of years. Now they are fighting for their honour as a human being

f A point was made by Mahajanji that if there are different lists in different States how will the Union List harmonise? It is so today in the case of the Scheduled Castes and the Scheduled Tribes. That has not caused a problem. On the same pattern, this will be there and there will be no problem."

675. The Office Memorandum dated August 13, 1990 reads as follows:

OFFICE MEMORANDUM

g Subject: *Recommendations of the Second Backward Classes Commission (Mandal Report) — Reservation for Socially and Educationally Backward Classes in Services under the Government of India*

h In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The Second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on December 31, 1980.

i 2. Government have carefully considered the report and the recommendations of the Commission in the present context

regarding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their public undertakings. Accordingly orders are issued as follows: a

- (i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.
- (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation will be issued separately. b
- (iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%. c
- (iv) The SEBC would comprise in the first phase the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately. d
- (v) The aforesaid reservation shall take effect from 7-8-1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders. e

3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively. f

Sd/-

(Smt Krishna Singh)

Joint Secretary to the Govt. of India"

676. Soon after the issuance of the said Memorandum there was widespread protest in certain northern States against it. There occurred serious disturbance to law and order involving damage to private and public property. Some young people lost their lives by self-immolation. Writ petitions were filed in this Court questioning the said Memorandum along with applications for staying the operation of the Memorandum. It was stayed by this Court. g h

The Office Memorandum dated September 25, 1991

677. After the change of the government at the Centre following the general election held in the first-half of 1991, another Office i

Memorandum was issued on September 25, 1991 modifying the earlier Memorandum dated August 13, 1990. The later Memorandum reads as

a follows:

OFFICE MEMORANDUM

Subject: *Recommendation of the Second Backward Classes Commission (Mandal Report) — Reservation for Socially and Educationally Backward Classes in Services under the Government of India*

b

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August 1990, on the above-mentioned subject and to say that in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said memorandum with immediate effect as follows:

c

d

(i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

e

(ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

f

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

The O.M. of even number dated the 13th August 1990, shall be deemed to have been amended to the extent specified above.

Sd/-

g

(A.K. Harit)

Dy. Secretary to the Government of India"

h

678. Till now, the Central Government has not evolved the economic criteria as contemplated by the later Memorandum, though the hearing of these writ petitions was adjourned on more than one occasion for the purpose. Some of the writ petitions have meanwhile been amended challenging the later Memorandum as well. Let us notice at this stage what do the two memorandums say, read together. The first provision made is: 27% of vacancies to be filled up by direct recruitment

i

in civil posts and services under the Government of India are reserved for backward classes. Among the members of the backward classes preference has to be given to candidates belonging to the poorer sections. Only in case sufficient number of such candidates are not available, will the unfilled vacancies be filled by other backward class candidates. The *second* provision made is: Backward class candidates recruited on the basis of merit in open competition along with general candidates shall not be adjusted against the quota of 27% reserved for them. *Thirdly*, it is provided that backward classes shall mean those castes and communities which are common to the list in the report of the Mandal Commission and the respective State Government's list. It may be remembered that Mandal Commission has prepared the list of backward classes State-wise. *Lastly*, it is provided that 10% of the vacancies shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations. As stated above, the criteria for determining the poorer sections among the backward classes or for determining the other economically backward sections among the non-reserved category has so far not been evolved. Though the first Memorandum stated that the orders made therein shall take effect from August 7, 1990, they were not in fact acted upon on account of the orders made by this Court.

Issues for consideration :

679. These writ petitions were heard in the first instance by a Constitution Bench presided over by the then Chief Justice, Shri Ranganath Misra. After hearing them for some time, the Constitution Bench referred them to a Special Bench of nine Judges, "to finally settle the legal position relating to reservations". The reason for the reference being, "that the several judgments of this Court have not spoken in the same voice on this issue and a final look by a larger Bench in our opinion should settle the law in an authoritative way".

680. We have, accordingly, heard all the parties and interveners who wished to be heard in the matter. Written submissions have been filed by almost all the parties and intervenors. Together, they run into several hundreds of pages.

681. At the inception of arguments, counsel for both sides put their heads together and framed eight questions arising for our discussion. They read as follows:

- (I) Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation to posts in services under the State?

- a (II) What would be the content of the phrase 'Backward Class' in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether Backward Classes in Article 16(4) would include the Article 46 as well?
- b (III) If economic criterion by itself could not constitute a Backward Class under Article 16(4) whether reservation of posts in services under the State based exclusively on economic criteria would be covered by Article 16(1) of the Constitution?
- c (IV) Can the extent of reservation to posts in the services under the State under Article 16(4) or, if permitted under Article 16(1) and 16(4) together, exceed 50% of the posts in a cadre or service under the State or exceed 50% of the appointments in a cadre or service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of services under the State?
- d (V) Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes or permit classification among them based on economic or other considerations?
- e (VI) Would making "any provision" under Article 16(4) for reservation "by the State" necessarily have to be by law made by the legislatures of the State or by law made by Parliament? Or could such provisions be made by an executive order?
- f (VII) Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?
- g (VIII) Would reservation of appointments or posts "in favour of any Backward Class" be restricted to the initial appointment to the post or would it extend to promotions as well?

682. For the sake of convenient discussion and in the interest of clarity, we found it necessary to elaborate them. Accordingly, we have re-framed the questions. We shall proceed to answer them in the same order. The reframed questions are:

- h 1. (a) Whether the 'provision' contemplated by Article 16(4) must necessarily be made by the legislative wing of the State?
- i (b) If the answer to clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Article 309?

2. (a) Whether clause (4) of Article 16 is an exception to clause (1) of Article 16?
- (b) Whether clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of 'backward class of citizens'? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes or groups?
- (c) Whether reservations can be made under clause (1) of Article 16 or whether it permits only extending of preferences/concessions?
3. (a) What does the expression 'backward class of citizens' in Article 16(4) mean?
- (b) Whether backward classes can be identified on the basis and with reference to caste alone?
- † (c) Whether a class, to be designated as a backward class, should be situated similarly to the SCs/STs?
- (d) Whether the 'means' test can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?
4. (a) Whether the backward classes can be identified only and exclusively with references to economic criteria?
- (b) Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes?
5. Whether the backward classes can be further categorised into backward and more backward categories?
6. To what extent can the reservation be made?
- (a) Whether the 50% rule enunciated in *Balaji*¹² is a binding rule or only a rule of caution or rule of prudence?
- (b) Whether the 50% rule, if any, is confined to reservations made under clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?
- (c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to?

† Ed.: Keeping in view the order of the discussion and the serial order of the answers to above questions listed in Part VII, Q. 3(c) may be read as Q. 3(e) (discussed in para 794 to 797) and Q. 3(c) (discussed in paras 786 to 789) may be read as:

"(c) Whether the backwardness in Art. 16(4) should be both social and educational?"

So also the additional question discussed in para 798 may be read as Q. 3(f) as follows:

"(f) Adequacy of representation in the services under the State."

12 *M.R. Balaji v. State of Mysore*. 1963 Supp 1 SCR 439; AIR 1963 SC 649

(d) Whether *Devadasan*¹⁹ was correctly decided?

- a 7. Whether Article 16 permits reservations being provided in the matter of promotions?
8. Whether reservations are anti-meritarian? To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?
- b 9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?
- c 10. Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?
- d 11. Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated September 25, 1991 permissible under Article 16?

683. Before we proceed to deal with the question, we may be permitted to make a few observations: The questions arising herein are not only of great moment and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian society, wrapped and presented to us as constitutional and legal questions. On some of these questions, the decisions of this Court have not been uniform. They speak with more than one voice. Several opposing points of view have been pressed upon us with equal force and passion and quite often with great emotion. We recognise that these viewpoints are held genuinely by the respective exponents. Each of them feels his own point of view is the only right one. We cannot, however, agree with all of them. We have to find — and we have tried our best to find — answers which according to us are the right ones constitutionally and legally. Though, we are sitting in a larger Bench, we have kept in mind the relevance and significance of the principle of *stare decisis*. We are conscious of the fact that in law certainty, consistency and continuity are highly desirable features. Where a decision has stood the test of time and has never been doubted, we have respected it — unless, of course, there are compelling and strong reasons to depart from it. Where, however, such uniformity is not found, we have tried to answer the question on principle keeping in mind the scheme and goal of our Constitution and the material placed before us.

i ‡ Ed.: See further miscellaneous questions on pp. 459, 460, 461 (paras 846, 847, 848) which have been treated as Qs. 12, 13 and 14 for the purposes of the headnote.

19 *T. Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179

684. There are occasions when the obvious needs to be stated and, we think, this is one such occasion. We are dealing with complex social, constitutional and legal questions upon which there has been a sharp division of opinion in the society, which could have been settled more satisfactorily through political processes. But that was not to be. The issues have been relegated to the judiciary — which shows both the disinclination of the executive to grapple with these sensitive issues as also the confidence reposed in this organ of the State. We are reminded of what Sir Anthony Mason, Chief Justice of Australia once said:

“Society exhibits more signs of conflict and disagreement today than it did before Governments have always had the option of leaving questions to be determined by the Courts according to law....

There are other reasons, of course ... that cause governments to leave decisions to be made by Courts. They are of expedient political character. The community may be so divided on a particular issue that a government feels that the safe course for it to pursue is to leave the issue to be resolved by the Courts, thereby diminishing the risk it will alienate significant sections of the community.”

But then answering a question as to the legitimacy of the Court to decide such crucial issues, the learned Chief Justice says:

“... my own feeling is that the people accept the Courts as the appropriate means of resolving disputes when governments decide not to attempt to solve the disputes by the political process.”¹³⁵

685. We hope and trust that our people too are mature enough to appreciate our endeavour in the same spirit. They may well remember that “the law is not an abstract concept removed from the society it serves, and that Judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality”.

PART II

686. Before we proceed to answer the questions aforementioned, it would be helpful to notice (a) the debates in the Constituent Assembly on Article 16 (draft Article 10); (b) the decisions of this Court on Articles 16 and 15; and (c) a few decisions of the U.S. Supreme Court considering the validity of race-conscious programmes.

The Framing of Article 16: Debates in the Constituent Assembly

687. Draft Article 10 corresponds to Article 16. The debate in the Constituent Assembly on draft Article 10 and particularly clause (3), thereof [corresponding to clause (4) of Article 16] helps us to appreciate

¹³⁵ *Judging the World: Law and Politics in the World's Leading Courts*, p. 343