the background and understand the objective underlying Article 16, and in particular, clause (4) thereof. The *original intent* comes out clear and loud from these debates.

688. Omitting draft clause (4) [which corresponds to clause (5) of Article 16] the three clauses in draft Article 10, as introduced in the Constituent Assembly, read as follows:

> "10. (1) There shall be equality of opportunity for all citizens in matters of employment under the State.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them by ineligible for any office under the State.
>
> (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."

689. It was the Drafting Committee under the Chairmanship of Dr B.R. Ambedkar that inserted the word "backward" in between the words "in favour of any" and "class of citizens". The discussion on draft Article 10 took place on November 30, 1948. Several members including S/Shri Damodar Swarup Seth, Pt Hirdya Nath Kunzru and R.M. Nalavade complained that the expressions 'backward' and 'backward classes' are quite vague and are likely to lead to complications in future. They suggested that appointments to public services should be made purely on the basis of merit. Some others suggested that such reservations should be available only for a period of first ten years of the Constitution. To this criticism the Vice-President of the Assembly (Dr H.C. Mookherjee) replied in the following words:

> "Before we start the general discussion, I would like to place a particular matter before the Honourable Members. The clause which has so long been under discussion affects particularly certain sections of our population — sections which have in the past been treated very cruelly — and although we are today prepared to make reparation for the evil deeds of our ancestors, still the old story continues, at least here and there, and capital is made out of it outside India .... I would therefore very much appreciate the permission of the House so that I might give full freedom of discussion on this particular matter to our brethren of the backward classes. Do I have that permission?"

690. In the ensuing discussion Shri Chandrika Ram (Bihar-General) supported draft clause (3) with great passion. He pleaded for reservations in favour of Backward Classes both in services as well as in the legislature, just as in the case of Harijans.

691. Shri Chandrika Ram was supported by another Member Shri P. Kakkan (Madras-General) and Shri T. Channiah (Mysore). Shri Channiah, in particular, commented upon the Members coming from Northern India being puzzled about the meaning of the expression 'backward class' and proceeded to clarify the same in the following words:

> "[T]he backward classes of people as understood in South India, are those classes of people who are educationally backward, it is those classes that require adequate representation in the services. There are other classes of people who are socially backward; they also require adequate representation in the services." (*C.A.D.*, Vol. 7, p. 689)

692. After the discussion proceeded for some more time, Shri K.M. Munshi, who was a Member of the Drafting Committee rose to explain the content of the word 'backward'. He said:

> "What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State — highest efficiency which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward classes, classes who are really backward, should be given scope in the State services; for it is realised that State services give a status and an opportunity to serve the country, and this opportunity should be extended to every community, even among the backward people. That being so, we have to find out some generic term and the word 'backward class' was the best possible term." (*C.A.D.*, Vol. 7, p. 697)

Shri Munshi proceeded to state:

> "I may point out that in the province of Bombay for several years now, there has been a definition of backward classes, which includes not only Scheduled Castes and Scheduled Tribes but also other backward classes who are economically, educationally and socially backward. We need not, therefore, define or restrict the scope of the word 'backward' to a particular community. Whoever is backward will be covered by it and I think the apprehensions of the Honourable Members are not justified." (*C.A.D.*, Vol. 7, p. 697)

693. Ultimately Dr B.R. Ambedkar, the Chairman of the Drafting Committee, got up to clarify the matter. His speech, which put an end to all discussion and led to adopting of draft Article 10(3), is worth quoting in extenso, since it throws light on several questions relevant herein:

> "... [T]here 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 whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly 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 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 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; .... 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 service 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 be 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 ....

Somebody asked me: 'What is a backward community'? Well, I think anyone 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." (*C.A.D.*, Vol. 7, p. 701)

694. The above material makes it amply clear that the objective behind clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted thereinto and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16(4) is empowerment of the deprived backward communities — to give them a share in the administrative apparatus and in the governance of the community.

Decisions of this Court on Articles 16 and 15

695. Soon after the enforcement of the Constitution two cases reached this Court from the State of Madras — one under Article 15 and the other under Article 16. Both the cases were decided on the same date and by the same Bench. The one arising under Article 15 is *State of Madras* v. *Champakam Dorairajan*[2] and the other arising under Article 16 is *Venkataramana* v. *State of Madras*[27]. By virtue of certain orders issued prior to coming into force of the Constitution, — popularly known as 'Communal G.O.' — seats in the Medical and Engineering Colleges in the State of Madras were apportioned in the following manner: Non-

2 1951 SCR 525: AIR 1951 SC 226

27 AIR 1951 SC 229 : (1951) 1 MLJ 625

Brahmin (Hindus) — 6, Backward Hindus — 2, Brahmin — 2, Harijan — 2, Anglo-Indians and Indian Christians — 1, Muslims — 1. Even after the advent of the Constitution, the G.O. was being acted upon which was challenged by Smt Champakam as violative of the fundamental rights guaranteed to her by Article 15(1) and 29(2) of the Constitution of India. A full Bench of Madras High Court declared the said G.O. as void and unenforceable with the advent of the Constitution. The State of Madras brought the matter in appeal to this Court. A Special Bench of seven Judges heard the matter and came to the unanimous conclusion that the allocation of seats in the manner aforesaid is violative of Articles 15(1) and 29(2) inasmuch as the refusal to admit the respondent (writ petitioner) notwithstanding her higher marks, was based only on the ground of caste. The State of Madras sought to sustain the G.O. with reference to Article 46 of the Constitution. Indeed the argument was that Article 46 overrides Articles 29(2). This argument was rejected. The Court pointed out that while in the case of employment under the State, clause (4) of Article 16 provides for reservations in favour of backward class of citizens, no such provision was made in Article 15.

696. In the matter of appointment to public services too, a similar Communal G.O. was in force in the State of Madras since prior to the Constitution. In December, 1949, the Madras Public Service Commission invited applications for 83 posts of District Munsifs, specifying at the same time that the selection of the candidates would be made from the various castes, religions and communities as specified in the Communal G.O. The 83 vacancies were distributed in the following manner: Harijans — 19, Muslims — 5, Christians — 6, Backward Hindus — 10, Non-Brahmin (Hindus) — 32 and Brahmins — 11. The petitioner Venkataraman (it was a petition under Article 32 of the Constitution) applied for and appeared at the interview and the admitted position was that if the provisions of the Communal G.O. were to be disregarded, he would have been selected. Because of the G.O., he was not selected (he belonged to Brahmin community). Whereupon he approached this Court. S.R. Das, J speaking for the Special Bench referred to Article 16 and in particular to clause (4) thereof and observed:

> "Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional."

He proceeded to hold:

> "The Communal G.O. itself makes an express reservation of seats for Harijans and Backward Hindus. The other categories, namely, Muslims, Christians, non-Brahmin Hindus and Brahmins must be taken to have been treated as other than Harijans and Backward Hindus. Our attention was drawn to a schedule of

Backward Classes set out in Sch. III to Part I of the Madras Provincial and Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. It is, in the circumstances, impossible to say that classes of people other than Harijans and Backward Hindus can be called Backward Classes. As regards the posts reserved for Harijans and Backward Hindus it may be said that the petitioner who does not belong to those two classes is regarded as ineligible for those reserved posts 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 the backward class of citizens, but the ineligibility of the petitioner for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. For instance, the petitioner may be far better qualified than a Muslim or a Christian or a non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment, as is conceded by the learned Advocate-General of Madras, but, nevertheless, he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the posts reserved for the other communities, although he may have far better qualifications than those possessed by members falling within those categories, is brought about only because he is a Brahmin and does not belong to any of those categories. This ineligibility created by the Communal G.O. does not appear to us to be sanctioned by clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16(1) and (2). The Communal G.O., in our opinion, is repugnant to the provisions of Article 16 and is as such void and illegal."

697. Shri Ram Jethmalani, the learned counsel appearing for the respondent State of Bihar placed strong reliance on the above passage. He placed before us an extract of the Schedule of the backward classes appended to the Madras Provincial and Subordinate Services Rule, 1942. He pointed out that clause (3)(*a*) in Rule 2 defined the expression backward classes to mean "the communities mentioned in Schedule III to this part", and that Schedule III is exclusively based upon caste. The Schedule describes the communities mentioned therein under the heading "*Race, Tribe or Caste*". It is pointed out that when the said Schedule was substituted in 1947, the basis of classification still remained the caste, though the heading "*Race, Tribe or Caste*" was removed. Mr Jethmalani points out that the Special Bench took note of the fact that Schedule III was nothing but a collection of certain 'communities',

notified as backward classes and yet upheld the reservation in their favour. According to him, the decision in *Venkataramana*[27] clearly supports the identification of backward classes on the basis of caste. The Communal G.O. was struck down, he submits, only in so far as it apportioned the remaining vacancies between sections other than Harijans and backward classes. It is rather curious, says the counsel, that the decision in *Venkataramana*[27] has not attracted the importance it deserves all these years; all the subsequent decisions of this Court refer to *Champakam*[2]. Hardly any decision refers to *Venkataramana*[27] notwithstanding the fact that *Venkataramana*[27] was a decision rendered with reference to Article 16.

698. Soon after the said two decisions were rendered Parliament intervened and in exercise of its constituent power, amended Article 15 by inserting clause (4), which reads:

> "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 Scheduled Tribes."

699. It is worthy of notice that the Parliament, which enacted the First Amendment to the Constitution[§], was in fact the very same Constituent Assembly which had framed the Constitution. The speech of Dr Ambedkar on the occasion is again instructive. He said:

> "Then with regard to Article 16, clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in *Mulla's edition* on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste — he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu — that is the fundamental proposition — who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste."

700. After the enactment of the First Amendment the first case that came up before this Court is *Balaji* v. *State of Mysore*[12]. (In the year 1961,

§ Ed.: Assented to on June 18, 1951

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

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

12 1963 Supp 1 SCR 439: AIR 1963 SC 649

this Court decided the *General Manager, Southern Railway* v. *Rangachari*[26], but that related to reservations in favour of the Scheduled Castes and Scheduled Tribes in the matter of promotion in the Railways. *Rangachari*[26] will be referred to at an appropriate stage later.) In the State of Karnataka, reservations were in force since a few decades prior to the advent of the Constitution and were being continued even thereafter. On July 26, 1958 the State of Mysore issued an order under Article 15(4) of the Constitution declaring all the communities excepting the Brahmin community as socially and educationally backward and reserving a total of 75% seats in educational institutions in favour of SEBCs and SCs/STs. Such orders were being issued every year, with minor variation in the percentage of reservations. On July 13, 1962, a similar order was issued wherein 68% of the seats in all Engineering and Medical Colleges and Technical Institutions in the State were reserved in the favour of the SEBCs, SCs and STs. SEBCs were again divided into two categories — backward classes and more backward classes. The validity of this order was questioned under Article 32 of the Constitution. While striking down the said order this Court enunciated the following principles:

(1) Clause (4) of Article 15 is a proviso or an exception to clause (1) of Article 15 and to clause (2) of Article 29;

(2) For the purpose of Article 15(4), backwardness must be both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of a class of citizens, it cannot be made the sole and dominant test. Christians, Jains and Muslims do not believe in caste system; the test of caste cannot be applied to them. Inasmuch as identification of all backward classes under the impugned order has been made solely on the basis of caste, it is bad.

(3) The reservation made under clause (4) of Article 15 should be reasonable. It should not be such as to defeat or nullify the main rule of equality contained in clause (1). While it is not possible to predicate the exact permissible percentage of reservations, it can be stated in a general and broad way that they should be less than 50%.

(4) A provision under Article 15(4) need not be in the form of legislation; it can be made by an executive order.

(5) The further categorisation of backward classes into backward and more backward is not warranted by Article 15(4).

701. It must be remembered that *Balaji*[12] was a decision rendered

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

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

under and with reference to Article 15 though it contains certain observations with respect to Article 16 as well.

a 702. Soon after the decision in *Balaji*[12] this Court was confronted with a case arising under Article 16 — *Devadasan* v. *Union of India*[19]. This was also a petition under Article 32 of the Constitution. It related to the validity of the 'carry-forward' rule obtaining in Central Secretariat Service. The reservation in favour of Scheduled Castes was twelve and b half per cent while the reservation in favour of Scheduled Tribes was five per cent. The 'carry-forward' rule considered in the said decision was in the following terms:

> "If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for c whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies, thus, treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal d course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year."

Because sufficient number of SC/ST candidates were not available e during the earlier years the unfilled vacancies meant for them were carried forward as contemplated by the said rule and filled up in the third year — that is in the year 1961. Out of 45 appointments made, 29 went to Scheduled Castes and Scheduled Tribes. In other words, the extent of reservation in the third year came to 65%. The rule was declared f unconstitutional by the Constitution Bench, with Subba Rao, J dissenting. The majority held that the carry-forward rule which resulted in more than 50% of the vacancies being reserved in a particular year, is bad. The principle enunciated in *Balaji*[12] regarding 50% was followed. Subba Rao, J in his dissenting opinion, however, upheld the said rule. g The learned Judge observed: (SCR p. 700)

> "The expression, 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has h preserved a power untrammelled by the other provisions of the Article."

The learned Judge opined that once a class is a backward class, the question whether it is adequately represented or not is left to the sub-

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

19 (1964) 4 SCR 680: AIR 1964 SC 179: (1965) 2 LLJ 560

jective satisfaction of the State and is not a matter for this Court to prescribe.

703. We must, at this stage, clarify that a 'carry-forward' rule may be in a form different than the one considered in *Devadasan*[19]. The rule may provide that the vacancies reserved for Scheduled Castes or Scheduled Tribes shall not be filled up by general (open competition) candidates in case of non-availability of SC/ST candidates and that such vacancies shall be carried forward.

704. In the year 1964 another case from Mysore arose, again under Article 15 — *Chitralekha* v. *State of Mysore*[7]. The Mysore Government had by an order defined backward classes on the basis of occupation and income, unrelated to caste. Thirty per cent of seats in professional and technical institutions were reserved for them in addition to eighteen per cent in favour of SCs and STs. One of the arguments urged was that the identification done without taking the caste into consideration is impermissible. The majority speaking through Subba Rao, J, held that the identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad and does not offend Article 15(4).

705. During the years 1968 to 1971, this Court had to consider the validity of identification of backward classes made by Madras and Andhra Pradesh Governments. *P. Rajendran* v. *State of Madras*[13] related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, CJ, speaking for the Constitution Bench dealt with the contention in the following words: (SCR p. 790-91)

> "The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten 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 a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4) .... It is true that in the present cases the

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

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

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

list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens .... As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4) ....

In view however of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail."

706. The shift in approach and emphasis is obvious. The Court now held that a caste is a class of citizens and that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). Moreover the burden of proving that the specification/identification was bad, was placed upon the petitioners. In case of failure to discharge that burden, the identification made by the State was upheld. The identification made on the basis of caste was upheld inasmuch as the petitioner failed to prove that any caste mentioned in the list was not socially and educationally backward.

707. Another Constitution Bench took a similar view in *Triloki Nath(II)*[8].

708. *Rajendran*[13] was expressly referred to and followed in *Peeriakaruppan* v. *State of T.N.*[15], a decision rendered by a Bench of three Judges (J.C. Shah, K.S. Hegde and A.N. Grover, JJ). This was a petition under Article 32 of the Constitution and one arising under Article 15. The argument was that identification of SEBCs having been done on the basis of caste alone is bad. Repelling the arguments, Hegde, J held: (SCC p. 49, para 29)

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

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

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

"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. Hence, we are unable to upheld the contention that impugned reservation is not in accordance with Article 15(4)." a

709. Again, in *State of A.P.* v. *U.S.V. Balram*[16], a case arising from Andhra Pradesh, a Division Bench (Vaidyalingam and Mathew, JJ) adopted the same approach and upheld the identification made by b Andhra Pradesh Government on the basis of caste. Answering the criticism that the Backward Classes Commission appointed by the State Government did not do a scientific and thorough job. the Bench observed: (SCC pp. 685-86, para 83-A)

"In our opinion, the Commission has taken considerable pains c to collect as much relevant material as possible to judge the social and educational backwardness of the persons concerned. When, for instance, it had called for information regarding the student population in Classes X and XI from nearly 2224 institutions, if only 50% of the institutions sent replies, it is not the fault of the Com- d mission for they could not get more particulars. If the Commission has only to go on doing the work of collecting particulars and materials, it will be a never ending matter. In spite of best efforts that any commission may make in collecting materials and datas, its conclusions cannot be always scientifically accurate in such matters. e Therefore, the proper approach, in our opinion, should be to see whether the relevant data and materials referred to in the report of the Commission justify its conclusions. In our opinion, there was sufficient material to enable the Commission to be satisfied that the persons included in the list are really socially and educationally backward. No doubt there are few instances where the educational f average is slightly above the State average, but that circumstance by itself is not enough to strike down the entire list .... Even assuming there are few categories which are little above the State average, in literacy, that is a matter for the State to take note of and review the position of such categories of persons and take a suitable decision." g

We respectively agree with these observations.

710. Answering the main criticism that the list of SEBCs was wholly based upon caste, the Bench observed: (SCC p. 689, para 94)

"To conclude, though prima facie the list of Backward Classes h which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Even on the

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

assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of Backward Classes is warranted by Article 15(4). The groups mentioned therein have been included in the list of Backward Classes as they satisfy the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class."

711. In certain cases including *Janki Prasad Parimoo* v. *State of J & K*[61] and *State of U.P.* v. *Pradip Tandon*[6], it was held that poverty alone cannot be the basis for determining or identifying the social and educational backwardness. It was emphasised that Article 15(4) — or for that matter Article 16(4) — is not an instance of poverty alleviation programme. They were directed mainly towards removal of social and educational backwardness, it was pointed out. In *Pradip Tandon*[6], a decision under Article 15(4), Ray, CJ speaking for the Division Bench of three Judges opined: (SCC 273-74, para 15)

> "Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression 'classes' in that case violates the rule of *expressio unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than groups based on caste."

712. This statement was made without referring to the dicta in *Rajendran*[13], a decision of a larger Bench. Though *Balaji*[12] was referred to, we must point out with respect that *Balaji*[12] does not support the above statement. *Balaji*[12] indeed said that "though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf".

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

6 (1975) 1 SCC 267: (1975) 2 SCR 761

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

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

713. *Thomas*[10] marks the beginning of a new thinking on Article 16, though the seed of this thought is to be found in the dissenting opinion of Subba Rao, J in *Devadasan*[19]. The Kerala Government had, by amending Kerala State and Subordinate Service Rules empowered the Government to exempt, by order, for a specified period, any member or members belonging to Scheduled Castes or Scheduled Tribes and already in service, from passing the test which an employee had to pass as a precondition for promotion to next higher post. Exercising the said power, the Government of Kerala issued a notification granting "temporary exemption to members already in service belonging to any of the Scheduled Castes or Scheduled Tribes from passing all tests (unified, special or departmental test) for a period of two years". On the basis of the said exemption, a large number of employees belonging to Scheduled Castes and Scheduled Tribes, who had been stagnating in their respective posts for want of passing the departmental tests, were promoted. They were now required to pass the tests within the period of exemption. Out of 51 vacancies which arose in the category of Upper Division Clerks in the year 1972, 34 were filled up by members of Scheduled Castes leaving only 17 for others. This was questioned by Thomas, a member belonging to non-reserved category. His grievance was: but for the said concession/exemption given to members of Scheduled Castes/Scheduled Tribes he would have been promoted to one of those posts in view of his passing the relevant tests. He contended that Article 16(4) permits only reservations in favour of backward classes but not such an exemption. This argument was accepted by the Kerala High Court. It also upheld the further contention that inasmuch as more than 50% vacancies in the year had gone to the members of Scheduled Castes as a result of the said exemption, it is bad for violating the 50% rule in *Balaji*[12]. The State of Kerala carried the matter in appeal to this Court which was allowed by a majority of 5:2. All the seven Judges wrote separate opinions. The headnote to the decision in Supreme Court Reports succinctly sets out the principles enunciated in each of the judgments. We do not wish to burden this judgment by reproducing them here. We would rest content with delineating the broad features emerging from these opinions. Ray, CJ held that Article 16(1), being a facet of Article 14, permits reasonable classification. Article 16(4) clarifies and explains that classification on the basis of backwardness. Classification of Scheduled Castes does not fall within the mischief of

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

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

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

Article 16(2) since Scheduled Castes historically oppressed and backward, are not castes. The concession granted to them is permissible under and legitimate for the purposes of Article 16(1). The rule giving preference to an un-represented or under-represented backward community does not contravene Article 14, 16(1) or 16(2). Any doubt on this score is removed by Article 16(4). He opined further that for determining whether a reservation is excessive or not one must have to look to the total number of posts in a given unit of department, as the case may be. Mathew, J agreed that Article 16(4) is not an exception to Article 16(1), that Article 16(1) permits reasonable classification and that Scheduled Castes are not 'castes' within the meaning of Article 16(2). He espoused the theory of 'proportional equality' evolved in certain American decisions. He does not refer to the decisions in *Balaji*[12] or *Devadasan*[19] in his opinion nor does he express any opinion on the extent of permissible reservation. Beg, J adopted a different reasoning. According to him, the rule and the orders issued thereunder was "a kind of reservation" falling under Article 16(4) itself. Krishna Iyer, J was also of the opinion that Article 16(1) being a facet of Article 16 permits reasonable classification, that Article 16(4) is not an exception but an emphatic statement of what is inherent in Article 16(1) and further that Scheduled Castes are not 'castes' within the meaning of Article 16(2) but a collection of castes, races and groups. Article 16(4) is one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to, held the learned Judge. He approved the dissenting opinion of Subba Rao, J in *Devadasan*[19]. Fazal Ali, J too adopted a similar approach. The learned Judge pointed out: (SCC p. 385, para 185)

> "[I]f we read Article 16(4) as an exception to Article 16(1) then the inescapable conclusion would be that Article 16(1) does not permit any classification at all because an express provision has been made for this in clause (4). This is, however, contrary to the basic concept of equality contained in Article 14 which implicitly permits classification in any form provided certain conditions are fulfilled. Furthermore, if no classification can be made under Article 16(1) except reservation contained in clause (4) then the mandate contained in Article 335 would be defeated."

He held that the rule and the orders impugned are referable to and sustainable under Article 16. The learned Judge went further and held that the rule of 50% evolved in *Balaji*[12] is a mere rule of caution and was not meant to be exhaustive of all categories. He expressed the opinion

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

that the extent of reservation depends upon the proportion of the backward classes to the total population and their representation in public services. He expressed a doubt as to the correctness of the majority view in *Devadasan*[11]. Among the minority Khanna, J preferred the view taken in *Balaji*[12] and other cases to the effect that Article 16(4) is an exception to Article 16(1). He opined that no preference can be provided in favour of backward classes outside clause (4). A.C. Gupta, J concurred with this view.

714. The last decision of this Court on this subject is in *K.C. Vasanth Kumar* v. *State of Karnataka*[9]. The five Judges constituting the Bench wrote separate opinions, each treading a path of his own. Chandrachud, CJ opined that the present reservations should continue for a further period of 15 years making a total of 50 years from the date of commencement of the Constitution. He added that the means-test must be applied to ensure that the benefit of reservations actually reaches the deserving sections. Desai, J was of the opinion that the only basis upon which backward classes should be identified is the economic one and that a time has come to discard all other bases. Chinnappa Reddy, J was of the view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class. Caste, the learned Judge said, is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. If it is found in the case of a given caste that a few members have progressed far enough so as to compare favourably with the forward classes in social, economic and educational fields, an upper income ceiling can perhaps be prescribed to ensure that the benefit of reservation reaches the really deserving. He opined that identification of SEBCs in the Indian milieu is a difficult and complex exercise, which does not admit of any rigid or universal tests. It is not a matter for the courts. The 'backward class of citizens', he held, are the very same SEBCs referred to in Article 15(4). The learned Judge condemned the argument that reservations are likely to lead to deterioration in efficiency or that they are anti-meritarian. He disagreed with the view that for being identified as SEBCs, the relevant groups should be comparable to SCs/STs in social and educational backwardness. The learned Judge agreed with the opinion of Fazal Ali, J in *Thomas*[10] that the rule of 50% in *Balaji*[12] is a rule of caution and not an

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

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

9 1985 Supp SCC 714: 1985 Supp 1 SCR 352

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

inflexible rule. At any rate, he said, it is not for the court to lay down any such hard and fast rule. A.P. Sen, J was of the opinion that the predominant and only factor for making special provision under Article 15(4) or 16(4) should be poverty and that caste should be used only for the purpose of identification of groups comparable to Scheduled Castes/Scheduled Tribes. The reservation should continue only till such time as the backward classes attain a state of enlightenment. Venkataramiah, J agreed with Chinnappa Reddy, J that identification of backward classes can be made on the basis of caste. He cited the Constituent Assembly and Parliamentary debates in support of this view. According to the learned Judge, equality of opportunity revolves around two dominant principles viz., (*i*) the traditional value of equality of opportunity and (*ii*) the newly appreciated — though not newly conceived — idea of equality of results. He too did not agree with the argument of 'merit'. Application of the principle of individual merit, unmitigated by other consideration, may quite often lead to inhuman results, he pointed out. He supported the imposition of the 'means' test but disagreed with the view that the extent of reservations can exceed 50%. Periodic review of this list of SEBCs and extension of other facilities to them was stressed.

Decisions of US Supreme Court

715. At this stage, it would be interesting to notice the development of law on the subject in the USA. The problem of blacks (Negroes) — holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in USA the problem is just about 200 years' old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters (*Dred Scott* v. *Sandford*[136]). In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. World War II and its aftermath, however, brought about a radical change in this situation, the culmination of which was the celebrated decisions in *Brown* v. *Board of Education*[53] and *Bolling* v. *Sharpe*[65], overruling the 'separate but equal' doctrine evolved in *Plessy* v. *Ferguson*[87]. In quick succession followed several decisions which effectively outlawed all discrimination against blacks in all walks of life. But the ground realities remained.

136 15 L Ed 691: 16 US (19 How) 393 (1857)

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

65 347 US 497: 98 L Ed 884 (1953)

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

Socially, educationally and economically, blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their mark. They were still unable to compete with their white counterparts. Similar was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of 'persisting effects of past discrimination'. The Congress, the State universities and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally, these measures were challenged in Courts with varying results. The four decisions examined hereinafter, rendered during the period 1974-1990 mirror the conflict and disclose the judicial thinking in that country.

716. The first decision is in *DeFunis* v. *Charles Odegaard*[21]. The University of Washington Law School — a school operated by the State — evolved, in December 1973, an admissions policy whereunder certain percentage of seats in the Law School were reserved for minority racial groups. Para 6 of the programme stated:

> "[B]ecause certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under-representation can affect the quality of legal services available to members of such groups, *as well as limit their opportunity for full participation in the governance of our communities*, the faculty recognises a special obligation in its admissions policy to contribute to the solution of the problem." (emphasis added)

Procedure for admission for the minority students was different and of a lesser standard than the one adopted for all others. DeFunis, a non-minority student was denied admission while granting it to minority applicants with lower evaluation. He commenced an action challenging the validity of the programme. According to him, the special admissions programme was violative of the Equal Protection Clause in the Fourteenth Amendment. The trial court granted the requested relief including admission to the plaintiff. On appeal, the Supreme Court of Washington reversed the trial court's judgment. It upheld the constitutionality of the Admissions Policy. The matter was brought by DeFunis to United States Supreme Court by way of certiorari. The judgment of the Washington Supreme Court was stayed pending the decision. By the time the matter reached the stage of final hearing, DeFunis had arrived in the final quarter of the last term. In view of this circumstance, five Members of the Court held that the constitutional question raised has become 'moot' (academic) and, therefore, it is

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

unnecessary to go into the same. Four of the judges Brennan, Douglas, White and Marshall, JJ, however, did not agree with that view. Of them, only Douglas, J recorded his reasons for upholding the Special Admissions Programme. The learned Judge was of the opinion that the Equal Protection Clause did not require that law schools employ an admissions formula based solely upon testing results and undergraduate grades nor does it prohibit Law Schools from evaluating an applicant's prior achievements in the light of the barriers that he had to overcome. It would be appropriate to quote certain observations of the learned Judge to the above effect which inter alia emphasise the importance of looking to the *promise and potential* of a candidate rather than to mere scores obtained in the relevant tests. He said: (L Ed p. 177: US 331)

> "The Equal Protection Clause did not enact a requirement that Law Schools employ as the sole criterion for admissions a formula based upon the LSAT (Law School Admission Test) and under graduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that would lead a fairminded admissions committed to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered to him. Because of the weight of the prior handicaps, that black applicant may not realise his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria."

717. The learned Judge while agreeing that any programme employing racial classification to favour certain minority groups would be subject to strict scrutiny under the Equal Protection Clause, yet concluded that the material placed before the Court did not establish that DeFunis was invidiously discriminated against because of his race. Accordingly, he opined that the matter should be remanded for fresh trial to consider whether the plaintiff has been individually discriminated against because of his race.

718. The next case is *Regents of the University of California* v. *Allan Bakke*[20]. The Medical School of the University of California at Davis had been following two admissions programmes, one in respect of the 84

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

seats (general) and the other, a special admissions programme under which only disadvantaged members of certain minority races were considered for the remaining 16 seats — the total seats available being 100 a year. For these 16 seats, none except the members of the minority races were considered and evaluated. The respondent, Bakke, a white, could not obtain admission for two consecutive years, in view of his evaluation scores, while admission was given to members of minority races who had obtained lesser scores than him. He questioned the validity of special admissions programme on the ground that it violated the Equal Protection Clause in the Fourteenth Amendment to the Constitution and also Title VI of the Civil Rights Act, 1964. The trial court upheld the plea on the ground that the programme excluded members of non-minority races from the 16 reserved seats only on the basis of race and thus operated as a racial quota. It, however, refused to direct the plaintiff to be admitted inasmuch as he failed to establish that he would have been admitted but for the existence of the special admissions programme. The matter was carried in direct appeal to Supreme Court of California, which not only affirmed the trial court's judgment in so far as it held the special admissions programme to be invalid but also granted admission to the plaintiff-respondent into the Medical School. It was of the view that the University had failed to prove that in the absence of special admissions programme the respondent would not have been admitted.The matter was then carried to the United States Supreme Court, where three distinct viewpoints emerged. Brennan, White, Marshall and Blackmun, JJ were of the opinion that the special admissions programme was a valid one and is not violative of the Federal or State Constitutions or of Title VI of the Civil Rights Act, 1964. They were of the opinion that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University's remedial use of race. Since the judgment of the Supreme Court of California prohibited the use of race as a factor in University admissions, they reversed that judgment. Chief Justice Warren Burger, Stevens, Stewart and Rehnquist, JJ took the other view. They affirmed the judgment of the California Supreme Court. They based their judgment mainly on Title VI of Civil Rights Act, 1964, which provided that "no person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal Financial assistance". They opined that Bakke was the victim of, what may be called, reverse discrimination and that his exclusion from consideration in respect of the 16 seats being solely based on race, is impermissible. Powell, J took the third view in his

separate opinion, partly agreeing and partly disagreeing with the other viewpoints. He based his decision on Fourteenth Amendment alone. He did not take into consideration the 1964 Act. The learned Judge held that though racial and ethnic classification of any kind are inherently suspect and call for the most exacting judicial scrutiny, the goal of achieving a racially balanced student body is sufficiently compelling to justify consideration of race in admissions decisions under certain circumstances. He was of the opinion that while preference can be provided in favour of minority races in the matter of admission, setting up of quotas (which have the effect of foreclosing consideration of all others in respect thereof) is not necessary for achieving the said compelling goal. He was of the opinion that the impugned programme is bad since it set apart a quota for minority races. He sustained the admission granted to Bakke on the ground that the University failed to establish that even without the quota, he would not have been admitted.

719. It would be useful to notice the three points of view in a little more detail. Brennan, J (with whom Marshall, White and Blackmun, JJ agreed) observed that though the U.S. Constitution was founded on the principle that "all men are created equal", the truth is that it is not so in fact. Racial discrimination still persists in the society. In such a situation the claim that the law must be "colour-blind"[137] is more an aspiration rather than description of reality. The context and the reasons for which Title VI of the Civil Rights Act, 1964 was enacted leads to the conclusion that the prohibition contained in Title VI was intended to be consistent with the commands of the Constitution and no more. Therefore, "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 VI and its legislative history". On the contrary, said the learned Judge, prior decisions of the court strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible.

720. Dealing with the Equal Protection Clause in the Fourteenth Amendment, the learned Judge observed:

137 This expression was used for the first time in the dissenting opinion of Harlan, J in *Plessey* v. *Ferguson*, 163 US 537: 41 L Ed 256 (1896). The learned Judge said: "...in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colour-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race." [L Ed 263(2)]

"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 a 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. *We conclude, therefore, that racial classifications 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." (emphasis added)

721. After examining a large number of decided cases, the learned Judge held:

"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 past discrimination."

722. Indeed, held the learned Judge, failure to take race into account to remedy unequal access to University programmes caused by their own or by past societal discrimination would not be consistent with the mandate of the Fourteenth Amendment. The special admissions programme whereunder whites are excluded from the 16 reserved seats is not bad for the reason that "its purpose is to overcome the effects of segregation by bringing races together". The learned Judge then pointed out the relevance of race and the lesser impact of economic disadvantage, with reference to certain facts and figures, and concluded:

"While race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites while economically advantaged blacks score less well than do disadvantaged whites."

723. Warren Burger, CJ, with whom Stevens, Stewart and Rehnquist, JJ agreed opined that since in respect of 16 seats reserved for racial minorities, whites are totally excluded only on the basis of their race, it is a clear case of discrimination on the basis of race and, therefore, violative of the Fourteenth Amendment to the Constitution as well as Title VI of the Civil Rights Act, 1964.

724. Powell, J took a different line agreeing in part with both the points of view. His approach is this:

(1) It is not necessary to consider the impact or the scope of Title VI of the Civil Rights Act inasmuch as the said question was

not raised or considered in the courts below. The matter had to be examined only with reference to the Fourteenth Amendment;

(2) Any distinction based on race is inherently suspect in the light of the Equal Protection Clause and calls for more exacting judicial examination. It is for the State in such a case to establish that the distinction was precisely tailored to serve a compelling governmental interest.

(3) Since the special admissions programme of the University totally excluded some individuals (non-minorities) from enjoying the State-provided benefit of admission to the medical school solely because of their race, the classification must be regarded as suspect and it will be sustained only if it is supported by substantial State purpose or interest and only where it is established that the classification is necessary to the accomplishment of such purpose or for safeguarding such interest. The University has failed to discharge this burden, though the State interest in removing 'identified discrimination' and attainment of a 'diverse student body' were certainly compelling interests. In other words, the University has failed to establish that for attaining the said objectives, creation of quotas was necessary.

(4) While preferences can be provided in favour of disadvantaged sections, reservation of seats which had the effect of excluding members of a race or races from those seats altogether, is not permissible. For this reason too, the special admissions programme of the University must be held to violate the Fourteenth Amendment.

725. In the course of his opinion, the learned Judge observed:

"A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element — to be weighed fairly against other elements — in the selection process ....

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time,

the preferred applicants have the opportunity to compete for every seat in the class."

726. In this manner, the learned Judge agreed with Brennan, J that race-conscious admissions programmes are permissible under the Fourteenth Amendment, but qualified the meaning of the race-conscious programmes. At the same time, he agreed with the learned Chief Justice that the special admissions programme of Davis was unconstitutional. He commended the Harvard admissions programme which provided for certain preferences in favour of racially disadvantaged sections, without reserving any seats as such for them.

727. We may next notice the decision in *Fullilove* v. *Phillip M. Klutznick*[51]. The Public Works Employment Act, 1977 contained a provision to the effect that at least 10% of federal funds granted for local public works projects must be used by the State or the local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts". Regulations were framed under the Act and guidelines issued requiring the grantees and private contractors to seek out all available qualified bona fide minority business enterprises (MBE's), to the extent feasible, for fulfilling the 10% MBE requirement. The guidelines provided that contracts shall be awarded to bona fide MBE's, even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. This requirement could, however, be waived in individual cases if the grantee established the infeasibility of the requirement. Several associations of construction contractors and sub-contractors filed a suit in the Federal District Court for a declaration that the said provision of the Public Works Employment Act and the regulations made thereunder are void and unenforceable being violative of the Equal Protection Clause of the Fourteenth Amendment and equal protection component of the Due Process Clause of the Fifth Amendment. The challenge failed in the District Court as well as in the Court of Appeals. The matter was then carried to the United States Supreme Court. By a majority of 6:3 (Stewart, Rehnquist and Stevens, JJ dissenting) the Supreme Court repelled the challenge. Chief Justice Burger speaking for himself, White and Powell, JJ stated the object of the impugned provision in the following words:

> "The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation, otherwise it was thought that repetition of the prior experience could be expected, with

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

participation by minority business accounting for an inordinately small percentage of government contracting."

728. The learned Chief Justice then proceeded to examine "the question whether as a means to accomplish these plainly constitutional objectives, Congress can use racial and ethnic criteria in this limited way as a condition attached to a federal grant". Indeed, he posed the same question in this form: "Whether the limited use of racial and ethnic criteria is a constitutionally permissible *means* for achieving the congressional objectives", and proceeded to answer the same — after referring exhaustively to the earlier decisions of the Court relating to school admissions — in the following words:

> "We held 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 a remedy'.* (emphasis added)
>
> ... In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity."

729. Marshall, J speaking for himself, Brennan and Blackmun, JJ in his concurring opinion, pointed out the approach to be adopted in judging the validity of the race-conscious programmes and concluded with these resounding words:

> "In my separate opinion in *Bakke*[20], I recounted the ingenious and pervasive forms of discrimination against the Negro long condoned under the Constitution and concluded that 'the position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment'. I there stated:
>
> > 'It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.' "

730. We may now examine the decision in *Metro Broadcasting Inc.* v. *Federal Communications Commission*[52], rendered on June 27, 1990 (Copies of the decision have been made available to us by Shri K.

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

52 58 IW 5053

Parasaran, counsel for Union of India). Under the Communications Act, 1934, the Federal Communications Commission was vested with the exclusive authority to grant licences to persons wishing to construct and operate Radio and Television Broadcasting Stations in the United States. The grant of licences was to be based on 'public convenience, interest or necessity'. The commission found that over the last two decades relatively fewer members of minority groups have held broadcasting licences, indeed less than 1%. Even as late as in 1986, they owned just 2.1%. The Commission proposed to remedy this under-representation and accordingly evolved a policy whereunder minorities were to be granted certain preferences in the matter of grant of these licences. The policy had two prominent features. The first was to provide for a preference in the matter of evaluation of applicants and the second was, what may be called, 'distress sale policy'. The second feature meant that where the qualifications of a licence to hold a broadcast licence comes into question he was entitled to transfer the said licence to save the disqualification provided such transfer is made in favour of a member of a minority. The said two features were questioned by Metro Broadcasting Inc., which matter was ultimately brought to the Supreme Court. The decision of the majority (Brennan, White, Marshall, Blackmun and Stevens, JJ) rendered by Brennan, J is noteworthy for the shift of approach from the earlier decisions. It is now held that a classification based on race (benign race-conscious measures) is constitutionally permissible even if it is not designed to compensate victims of past governmental or societal discrimination so long as it serves important governmental objectives and is substantially related to achievement of those objectives. In other words, it is held that it is not necessary that the court apply a strict standard of scrutiny to evaluate racial classification to ascertain whether it is necessary for achieving the relevant objective and further whether it is *narrowly tailored* to achieve a compelling State interest. Brennan, J relied upon the opinion of Chief Justice Burger in *Fullilove*[51] for this liberal approach. It would be appropriate to quote certain observations from his opinion:

> "We hold that benign race-conscious measures mandated by Congress — even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal 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 .... Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important govern-

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

mental objective that can serve as a constitutional basis for the preference policies. We agree ....

Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies .... We must pay close attention to the expertise of the Commission and the fact-finding of the Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this 'complex' empirical questions, ibid., we are required to give 'great weight to the decisions of Congress and the experience of the Commission'."

731. On the other hand, the minority (O'Connor, J speaking for herself, Rehnquist, CJ, Scalia and Kennedy, JJ) protested against the abandonment of what they thought was a well-established standard of scrutiny in such cases in the following words:

" 'Strict scrutiny' requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling State interest. The Court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. This Court's precedents in no way justify the Court's marked departure from our traditional treatment or race classifications and its conclusion that different equal protection principles apply to these federal actions."

732. We have examined the decisions of U.S. Supreme Court at some length only with a view to notice how another democracy is grappling with a problem similar in certain respects to the problem facing this country. The minorities (including blacks) in United States are just about 16 to 18% of the total population, whereas the backward classes (including the Scheduled Castes and Scheduled Tribes) in this country — by whichever yardstick they are measured — do certainly constitute a majority of the population. The minorities there comprise 5 to 7 groups — Blacks, Spanish-speaking people, Indians, Puerto Ricans, Aleuts and so on — whereas the castes and communities comprising backward classes in this country run into thousands. Untouchability — and 'unapproachability', as it was being practised in Kerala — is something which no other country in the world had the misfortune to have nor the blessed caste system. There have been equally old civilisations on earth like ours, if not older, but none had evolved these pernicious practices, much less did they stamp them with scriptural sanction. Now coming to constitutional provisions, Section 1 of the Fourteenth Amendment (insofar as it guarantees equal protection of the laws) corresponds to

Article 14 but they do not have provisions corresponding to Article 16(4) or 15(4). Title VI of the Civil Rights Act enacted in 1964 roughly corresponds to clauses (2) of Articles 15 and 16.

733. At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under clause (1) of Article 16, appointments and/or posts can be reserved in favour of a class. But an argument is now being advanced — evidently inspired by the opinion of Powell, J in *Bakke*[20] that Article 16(1) permits only preferences but not reservations. The reasoning in support of the said argument is the same as was put forward by Powell, J. This argument, in our opinion, disregards the fact that that is not the unanimous view of the court in *Bakke*[20]. Four Judges including Brennan, J took the view that such a reservation was not barred by the Fourteenth Amendment while the other four (including Warren Burger, CJ) took the view that the Fourteenth Amendment and Title VI of the Civil Rights Act, 1964 bars all race-conscious programmes. At the same time, there are a series of decisions relating to school desegregation — from *Brown*[53] to *North Carolina Board of Education* v. *Swann*[138] — where the court has been consistently taking the view that if race be the basis of discrimination, race can equally form the basis of remedial action. The shift in approach indicated by *Metro Broadcasting Inc.*[52] is equally significant. The 'lingering effects' (of past discrimination) theory as well as the standard of strictest scrutiny of race-conscious programmes have both been abandoned. Suffice it to note that no single uniform pattern of thought can be discerned from these decisions. Ideas appear to be still in the process of evolution.

PART III

(Questions 1 and 2)

734. We may now proceed to deal with the questions aforementioned.

138 28 L Ed 2d 586: 402 US 43 (1970)

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

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

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

Question 1 (a):

Whether the 'provision in Article 16(4) must necessarily be made by the Parliament/Legislature?

735. Shri K.K. Venugopal, learned counsel for the petitioner in writ petition No. 930 of 1990 submits that the "provision" contemplated by clause (4) of Article 16 can be made only by and should necessarily be made by the legislative wing of the State and not by the executive or any other authority. He disputes the correctness of the holding in *Balaji*[12] negativing an identical contention. He submits that since the provision made under Article 16(4) affects the fundamental rights of other citizens, such a provision can be made only by the Parliament/Legislature. He submits that if the power of making the "provision" is given to the executive, it will give room for any amount of abuse. According to the learned counsel, the political executive, owing to the degeneration of the electoral process, normally acts out of political and electoral compulsions, for which reason it may not act fairly and independently. If, on the other hand, the provision is to be made by the legislative wing of the State, it will not only provide an opportunity for debate and discussion in the legislature where several shades of opinion are represented but a balanced and unbiased decision free from the allurements of electoral gains is more likely to emerge from such a deliberating body. Shri Venugopal cites the example of Tamil Nadu where, according to him, before every general election a few communities are added to the list of backward classes, only with a view to winning them over to the ruling party. We are not concerned with the aspect of what is ideal or desirable but with what is the proper meaning to be ascribed to the expression 'provision' in Article 16(4) having regard to the context. The use of the expression 'provision' in clause (4) of Article 16 appears to us to be not without design. According to the definition of 'State' in Article 12, it includes not merely the Government and Parliament of India and Government and Legislature of each of the States but all local authorities and other authorities within the territory of India or under the control of the Government of India which means that such a measure of reservation can be provided not only in the matter of services under the Central and State Governments but also in the services of local and other authorities referred to in Article 12. The expression 'Local Authority' is defined in Section 3(31) of the General Clauses Act. It takes in all municipalities, Panchayats and other similar bodies. The expression 'other authorities' has received extensive attention from the court. It includes all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Now, would it be

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

reasonable, possible or practicable to say that the Parliament or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides providing for in respect of services under the Central/State Government? This aspect would become clearer if we notice the definition of "Law" in Article 13(3)(*a*). It reads:

"13(3) In this article, unless the context otherwise requires,—

(*a*) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; ..."

736. The words "order", "bye-law", "rule" and "regulation" in this definition are significant. Reading the definition of "State" in Article 12 and of "law" in Article 13(3)(*a*), it becomes clear that a measure of the nature contemplated by Article 16(4) can be provided not only by the Parliament/Legislature but also by the executive in respect of Central/State services and by the local bodies and "other authorities" contemplated by Article 12, in respect of their respective services. Some of the local bodies and some of the statutory corporations like universities may have their own legislative wings. In such a situation, it would be unreasonable and inappropriate to insist that reservation in all these services should be provided by Parliament/Legislature. The situation and circumstances of each of these bodies may vary. The rule regarding reservation has to be framed to suit the particular situations. All this cannot reasonably be done by Parliament/Legislature.

737. Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Article 16(4) is significant. Whereas clauses (3) and (5) of Article 16 — and clauses (2) to (6) of Article 19 — use the word "law", Article 16(4) uses the world "provision". Regulation of service conditions by orders and rules made by the executive was a well-known feature at the time of the framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of clause (4). Accordingly, we hold, agreeing with *Balaji*[12], that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case. *Balaji*[12] has been followed recently in *Comptroller and Auditor-General of India* v. *Mohan Lal Mehrotra*[28]. With respect to the argument of abuse of power by the political executive, we may say that there is adequate safeguard against misuse by the political executive of the power under Article 16(4) in the provision itself. Any determination of backwardness is not a subjective

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

28 (1992) 1 SCC 20

exercise nor a matter of subjective satisfaction. As held herein — as also by earlier judgments — the exercise is an objective one. Certain objective social and other criteria have to be satisfied before any group or class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power.

Question 1(b):

Whether an executive order making a 'provision' under Article 16(4) is enforceable forthwith?

738. A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Shri Jethmalani. Once we hold that a provision under Article 16(4) can be made by the executive, it must necessarily follow that such a provision is effective the moment it is made. A Constitution Bench of this Court in *B.S. Yadav*[139], (Y.V. Chandrachud, CJ, speaking for the Bench) has observed:

> "Article 235 does not confer upon the High Court the power to make rules relating to conditions of service of judicial officers attached to district courts and the courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1) and (2), 148(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2)."

739. Be that as it may, there is yet another reason, why we cannot agree that the impugned Memorandums are not effective and enforceable the moment they are issued. It is well settled by the decisions of this Court that the appropriate government is empowered to prescribe

139 *B.S. Yadav* v. *State of Haryana*, 1980 Supp SCC 524: 1981 SCC (L&S) 343: AIR 1981 SC 561

the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. It is further held by this Court that even where Rules under the proviso to Article 309 are made, the Government can issue orders/instructions with respect to matters upon which the Rules are silent. (See *Sant Ram Sharma* v. *State of Rajasthan*[140].) This view has been reiterated in a recent decision of this Court in *Comptroller and Auditor-General* v. *Mohanlal Mehrotra*[28] wherein it is held:

> "The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact, it is silent on the subject of reservatior. The Government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but it could be issued to supplement the statutory rules (See the observations in *Sant Ram Sharma* v. *State of Rajasthan*[140].) In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and Scheduled Tribes in the Railway services both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in *Akhil Bhartiya Soshit Karamchari Sangh (Railways)* v. *Union of India*[11]."

740. It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect to reservation in favour of backward classes, it would always be open to the Executive Government to provide for reservation of appointments/posts in favour of Backward Classes by an executive order. We cannot also agree with Shri Jethmalani that the impugned Memorandums should be treated as Rules made under the proviso to Article 309. There is nothing in them suggesting even distantly that they were issued under the proviso to Article 309. They were never intended to be so, nor is that the stand of the Union Government before us. They are executive orders issued under Article 73 of the Constitution read with clause (4) of Article 16. The mere omission of a recital "in the name and by order of the President of India" does not affect the validity or enforceability of the orders, as held by this Court repeatedly.

140 (1968) 1 SCR 111: AIR 1967 SC 1910

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28 (1992) 1 SCC 20

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

Question 2(a):

Whether clause (4) of Article 16 is an exception to clause (1)?

741. In *Balaji*[12] it was held — "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in *Champakam*[2], with a view to remove the defect pointed out by this court namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. Following *Balaji*[12] it was held by another Constitution Bench (by majority) in *Devadasan*[19] — "further this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1)". Subba Rao, J, however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in *Devadasan*[19], it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe setback from the majority decision in *State of Kerala* v. *N.M. Thomas*[10]. Though the minority (H.R. Khanna and A.C. Gupta, JJ) stuck to the view that Article 16(4) is an exception, the majority (Ray, CJ, Mathew, Krishna Iyer and Fazal Ali, JJ) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg, J took a slightly different view which it is not necessary to mention here.) The said four learned Judges — whose views have been referred to in para 713 — held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in *Thomas*[10] is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an

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

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

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

10 (1976) 2 SCC 310: 1976 SCC (L&S) 227: (1976) 1 SCR 906

instance of classification implicit in and permitted by clause (1). The speech of Dr Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly — referred to in para 693 — shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft clause (3) was put in in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

742. Regarding the view expressed in *Balaji*[12] and *Devadasan*[19], it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of clause (4) being an exception to clause (1) became untenable. It had to be accepted that clause (4) is an instance of classification inherent in clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect if clause (4) an exception to clause (2), if 'class' does not means 'caste'. Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit.

Question 2(b):

Whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes?

743. The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "*any* provision for the reservation of appointments or posts". The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms

[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

of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration — the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in *Karamchari Sangh*[11] are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour. The other type of measure is the one in *Thomas*[10]. There was no provision for reservation in favour of Scheduled Castes/Scheduled Tribes in the matter of promotion to the category of Upper Division Clerks. Certain tests were required to be passed before a Lower Division Clerk could be promoted as Upper Division Clerk. A large number of Lower Division Clerks belonging to SC/ST were not able to pass those tests, with the result they were stagnating in the category of LDCs. Rule 13-AA was accordingly made empowering the Government to grant exemption to members of SC/ST from passing those tests and the Government did exempt them, not absolutely, but only for a limited period. This provision for exemption was a lesser form of special treatment than reservation. There is no reason why such a special provision should not be held to be included within the larger concept of reservation. It is in this context that the words "*any* provision for the reservation of appointments and posts" assume significance. The word "any" and the associated words must be given their due meaning. They are not a mere surplusage. It is true that in *Thomas*[10] it was assumed by the majority that clause (4) permits only one form of provision namely reservation of appointments/posts and that if any concessions or exemptions are to be extended to backward classes it can be done only under clause (1) of Article 16. In fact the argument of the writ petitioners (who succeeded before the Kerala High Court) was that the only type of provision that the State can make in favour of the backward classes is reservation of appointments/posts provided by clause (4) and that the said clause does not contemplate or permit granting of any exemptions or concessions to the backward classes. This argument

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

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

was accepted by Kerala High Court. This Court, however, by a majority (Ray, CJ, Mathew, Krishna Iyer and Fazal Ali, JJ) reversed the view taken by Kerala High Court, holding that such exemptions/concessions can be extended under clause (1) of Article 16. Beg, J who joined the majority in upholding the validity of notification rested his opinion on a different basis. According to him, the exemption provided by impugned notification was indeed a kind of reservation and was warranted by and relatable to clause (4) of Article 16 itself. This was because — according to the learned Judge — clause (4) was exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. We are inclined to agree with the view taken by Beg, J for the reasons given hereinabove. In our opinion, therefore, where the State finds it necessary — for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under clause (4) itself. In this sense, clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Article 16.

Question 2(c):

Whether Article 16(4) is exhaustive of the very concept of reservations?

744. The aspect next to be considered is whether clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside clause (4) i.e., under clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in prin-

ciple. But, at the same time, one thing is clear. It is in very exceptional situations, — and not for all and sundry reasons — that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do.

Whether clause (1) of Article 16 does not permit any reservations?

745. For the reasons given in the preceding paragraphs, we must reject the argument that clause (1) of Article 16 permits only extending of preference, concessions and exemptions, but does not permit reservation of appointments/posts. As pointed out in para 733 the argument that no reservations can be made under Article 16(1) is really inspired by the opinion of Powell, J in *Bakke*[20]. But in the very same paragraph we had pointed out that it is not the unanimous opinion of the Court. In principle, we see no basis for acceding to the said contention. What kind of special provision should be made in favour of a particular class is a matter for the State to decide, having regard to the facts and circumstances of a given situation — subject, of course, to the observations in the preceding paragraph.

PART IV

(Questions 3, 4 and 5)

Question 3:

(a) Meaning of the expression "backward class of citizens" in Article 16(4).

746. What does the expression "backward class of citizens" in Article 16(4) signify and how should they be identified? This has been the single most difficult question tormenting this nation. The expression is not defined in the Constitution. What does it mean then? The arguments before us mainly revolved round this question. Several shades of opinion have been presented to us ranging from one extreme to the other. Indeed, it may be difficult to set out in full the reasoning presented before us orally and in several written propositions submitted by various counsel. We can mention only the substance of and the broad features emerging from those submissions. At one end of the spectrum

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

stands Shri N.A. Palkhivala (supported by several other counsel) whose submissions may briefly be summarised in the following words: a secular, unified and casteless society is a basic feature of the Constitution. Caste is a prohibited ground of distinction under the Constitution. It ought be erased altogether from the Indian society. It can never be the basis for determining backward classes referred to in Article 16(4). The Report of the Mandal Commission, which is the basis of the impugned Memorandums, has treated the expression "backward classes" as synonymous with backward castes and has proceeded to identify backward classes solely and exclusively on the basis of caste, ignoring all other considerations including poverty. It has indeed invented castes for non-Hindus where none exist. The Report has divided the nation into two sections, backward and forward, placing 52% of the population in the former section. Acceptance of the Report would spell disaster to the unity and integrity of the nation. If half of the posts are reserved for backward classes, it would seriously jeopardise the efficiency of the administration, educational system, and all other services resulting in backwardness of the entire nation. Merit will disappear by deifying backwardness. Article 16(4) is broader than Article 15(4). The expression "backward class of citizens" in Article 16(4) is not limited to "socially and educationally backward classes" in Article 15(4). The impugned Memorandum, based on the said report must necessarily fall to the ground along with the Report. In fact the main thrust of Shri Palkhivala's argument has been against the Mandal Commission Report.

747. Shri K.K. Venugopal appearing for the petitioner in Writ Petition No. 930 of 1990 adopted a slightly different approach while reiterating that the expression "backward classes of citizens" in Article 16(4) cannot be construed as backward castes. According to him, backwardness may be social and educational and may also be economic. The authority appointed to identify backward classes must first settle the criteria or the indicators for determining backward classes and then it must apply the said criteria to each and every group in the country. In the course of such identification, it may well happen that certain castes answer and satisfy the criteria of backwardness and may as a whole qualify for being termed as a backward class. But it is not permissible to start with castes to determine whether a caste is a backward class. He relied upon the provision in clause (2) of Article 38 and Article 46 to say that the objective is to minimize the inequalities in income not only among individuals but also among groups of persons and to help the weaker sections of the society. The economic criterion is an important one and must be applied in determining backward classes and also for excluding those sections or identified groups who may for the sake of

convenience be referred to as the 'creamy layer'. Since castes do not exist among Muslims, Christians and Sikhs, caste can never be the basis of identification. The learned counsel too pointed out the alleged basic errors in the approach adopted by and conclusions arrived at by the Mandal Commission.

748. Smt Shyamala Pappu also took the stand that caste can never be the basis for identification. According to her, survey to identify backward classes should be from individual to individual; it cannot be caste-wise. To the same effect are the submissions of Shri P.P. Rao appearing for the Supreme Court Bar Association. According to him, the only basis for identifying backward classes should be occupation-cum-means as was done in the State of Karnataka at a particular stage which aspect is dealt with and approved by this Court in *Chitralekha* v. *State of Mysore*[7]. A secular socialist society, he submitted, can never countenance identification of backward classes on the basis of caste which would only perpetuate and accentuate caste differences and generate antagonism and antipathy between castes.

749. At the other end of the spectrum stands Shri Ram Jethmalani, counsel appearing for the State of Bihar supported by several other counsel. According to him, backward castes in Article 16(4) meant and means only the members of Shudra caste which is located between the three upper castes (Brahmins, Kshatriyas and Vaishyas) and the out-castes (Panchamas) referred to as Scheduled Castes. According to him, Article 16(4) was conceived only for these "middle castes" i.e., castes categorised as Shudras in the caste system and for none else. These backward castes have suffered centuries of discrimination and disadvantage, leading to their backwardness. The expression "backward classes" does not refer to any current characteristic of a backward caste save and except paucity or inadequacies of representation in the apparatus of the Government. Poverty is not a necessary criterion of backwardness; it is in fact irrelevant. The provision for reservation is really a programme of historical compensation. It is neither a measure of economic reform nor a poverty-alleviation programme. The learned counsel further submitted that it is for the State to determine who are the backward classes; it is not a matter for the court. The decision of the Government is not judicially reviewable. Even if reviewable, the scope of judicial review is extremely limited — to the only question whether the exercise of power is a fraud on the Constitution. The learned counsel referred to certain American decisions to show that even in that country several programmes of affirmative action and compensatory discrimination have been evolved and upheld by courts.

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

750. Dr Rajeev Dhavan, learned counsel appearing for Srinarayana Dharma Paripalana Yogam (an association of Ezhavas in Kerala) submitted that Articles 16(4) and 15(4) occupy different fields and serve different purposes. Whereas Article 15(4) contemplates positive action programmes, Article 16(4) enables the State to undertake schemes of positive discrimination. For this reason, the class of intended beneficiaries under both the clauses is different. The social and educational backwardness which is the basis of identifying backwardness under Article 15(4) is only partly true in the case of 'backward class of citizens' in Article 16(4). The expression "any backward class of citizens" occurring in Article 16(4) must be understood in the light of the purpose of the said clause namely, empowerment of those groups and classes which have been kept out of the administration — classes which have suffered historic disabilities arising from discrimination or disadvantage or both and who must now be provided entry into the administrative apparatus. In the light of the fact that the Scheduled Castes and Scheduled Tribes were also intended to be beneficiaries of Article 16(4) there is no reason why caste cannot be an exclusive criterion for determining beneficiaries under Article 16(4). Counsel emphasised the fact that Article 16(4) speaks of group protection and not individual protection.

751. Shri. R.K. Garg appearing for the Communist Party of India, an Intervenor, submitted that caste plus poverty plus location plus residence should be the basis of identification and not mere caste. According to the learned counsel, a national consensus is essential to introduce reservations for 'other backward classes' under Article 16(4) and that efforts must be made to achieve such a consensus.

752. Shri Siva Subramanium appearing for the State of Tamil Nadu supported the Mandal Commission Report in its entirety. According to him, backward classes must be identified only on the basis of caste and that no economic criteria should be adopted for the said purpose. He submitted that economic criteria may be employed as one of the indicators for identification of backward classes but once a backward class is identified as such, there is no question of excluding anyone from that class on the basis of income or means or on any other economic criterion. He referred to the history of reservations in the province of Madras prior to independence and how it has been working there successfully and peacefully over the last several decades.

753. Shri P.S. Poti appearing for the State of Kerala supported the identification of backward classes solely and exclusively on the basis of caste. He submitted that the caste system is scientifically organised and

practised in Kerala and, therefore, furnishes a perfectly scientific basis for identification of backward classes. He submitted that besides the vice of untouchability, another greater vice of 'unapproachability' was also being practised in that State.

754. Shri Ram Awadesh Singh, M.P., President of Lok Dal and President of All-India Federation of Backward Classes, Scheduled Castes, Scheduled Tribes and religious minorities submitted that caste should be the sole criterion for determining backwardness. He referred to centuries of injustice meted out by upper castes to Shudras and Panchamas and submitted that these castes must now be given a share in the governance of the country which alone will assure their dignity besides instilling in them a sense of confidence and a spirit of competition.

755. Shri K. Parasaran, learned counsel appearing for the Union of India urged the following submissions:

(1) The reservation provided for by clause (4) of Article 16 is not in favour of backward citizens, but in favour of backward class of citizens. What is to be identified is backward class of citizens and not citizens who can be classified as backward. The homogeneous groups based on religion, race, caste, place of birth etc. can form a class of citizens and if that class is backward there can be a reservation in favour of that class of citizens.

(2) Caste is a relevant consideration. It can even be the dominant consideration. Indeed, most of the lists prepared by the States are prepared with reference to and on the basis of castes. They have been upheld by this Court.

(3) Article 16(2) prohibits discrimination only on any or all of the grounds mentioned therein. A provision for protective discrimination on any of the said grounds coupled with other relevant grounds would not fall within the prohibition of clause (2). In other words, if reservation is made in favour of backward class of citizens the bar contained in clause (2) is not attracted, even if the backward classes are identified with reference to castes. The reason is that the reservation is not being made in favour of castes simplicitor but on the ground that they are backward castes/classes which are not adequately represented in the services of the State.

(4) The criteria of backwardness evolved by Mandal Commission is perfectly proper and unobjectionable. It has made an extensive investigation and has prepared a list of backward classes. Even if there are instances of under-inclusion or over-inclusion, such errors do not vitiate the entire exercise. Moreover, whether a particular caste or class is backward or not and whether it is

adequately represented in the services of the State or not are questions of fact and are within the domain of the executive decision.

756. In paragraphs 700 to 714, we have noticed how this Court has been grappling with the problem over the years. In *Venkataramana case*[27], a seven-Judge Bench of this Court noticed the list of backward classes mentioned in Schedule III to the Madras Provincial and Subordinate Service Rules, 1942, as also the fact that backward classes were enumerated on the basis of caste/race. It found no objection thereto though in *Champakam*[2], rendered by the same Bench and on the same day it found such a classification bad under Article 15 on the ground that Article 15 did not contain a clause corresponding to clause (4) of Article 16. In *Venkataramana case*[27] this Court observed that in respect of the vacancies reserved for backward classes of Hindus, the petitioner (a Brahmin) cannot have any claim inasmuch as "those reserved posts (were reserved) not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such post in favour of a backward class of citizens". The writ petition was allowed on the ground that the allocation of vacancies to and among communities other than Harijans and backward classes of Hindus cannot be sustained in view of clauses (1) and (2) of Article 16.

757. Though *Balaji*[12] was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulations enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4). It is, therefore, necessary to notice precisely the formulations in *Balaji*[12] relevant in this behalf. Gajendragadkar, J speaking for the Constitution Bench found, on an examination of the Nagangowda Committee Report, "that the Committee virtually equated the class with the castes". The learned Judge then examined the scheme of Article 15, the meaning of the expression 'class', the importance of caste in the Hindu social structure and observed, while dealing with social backwardness: (SCR p. 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 ... 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

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

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

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

and may perhaps contain the vice of perpetuating the caste themselves."

a The learned Judge further proceeded to hold: (SCR pp. 460-61)

> "Besides, 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 castes in the conventional
> b 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, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4). It is not unlikely that in some States
> c some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or class of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty, to a very large extent
> d .... It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens."

e The learned Judge stressed the part played by the occupation, conventional beliefs and place of habitation in determining the social backwardness. Inasmuch as the identification of backward classes of Nagangowda Committee was based almost solely on the basis of caste, it was held to be bad.

f **758.** The criticism of the respondents' counsel against the judgment runs thus: While it recognises the relevance and significance of the caste and the integral connection between caste, poverty and social backwardness, it yet refuses to accept caste as the sole basis of identifying socially backward classes, partly for the reason that castes do not exist
g among non-Hindus. The judgment does not examine whether caste can or cannot form the starting point of process of identification of socially backward classes. Nor does it consider the aspect — how does the non-existence of castes among non-Hindus (assuming that the said premise is factually true) makes it irrelevant in the case of Hindus, who constitute
h the bulk of the country's population. There is no rule of law that a test or basis adopted must be uniformly applicable to the entire population in the country as such.

759. Before proceeding further it may be noticed that *Balaji*[12] was dealing with Article 15(4) which clause contains the qualifying words "so-

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

cially and educationally" preceding the expression "backward classes". Accordingly, it was held that the backwardness contemplated by Article 15(4) is both social *and* educational. Though, clause (4) of Article 16 did not contain any such qualifying words, yet they came to be read into it. In *Janki Prasad Parimoo*[61], Palekar, J speaking for a Constitution Bench, took it as "well-settled that the expression 'backward classes' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4)". More of this later.

760. In *P. Rajendran*[13], the caste vis-a-vis class debate took a sharp turn. The ratio in this case marks a definite and clear shift in emphasis. (We have dealt with it at some length in para 705). Suffice it to mention here that in this decision, it was held that (SCR pp. 790-91)

> "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 a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4) .... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens".

This principle was reiterated in *Balram*[16] and *Triloki Nath(II)*[8]. We have referred to these decisions at some length in paras 707-710. In *Peeriakaruppan*[15], Hegde, J concluded, "a caste has always been recognised as a class".

761. This issue was gone into in some detail in *Vasanth Kumar*[9], where all the five Judges constituting the Constitution Bench expressed different opinions. Chandrachud, CJ did not express himself on this aspect but other four learned Judges did. Desai, J recognised that (SCC p. 724, para 4) "in the early stages of the functioning of the Constitution, it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Article 15(4)". He also recognised that (SCC p. 725, para 7) "there has been some vacillation on the part of the judiciary on the question whether the caste should be the basis for recog-

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

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

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

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

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

nising the backwardness". After examining the significance of caste in the Indian social structure, the learned Judge observed:

a ‡‡"Social hierarchy and economic position exhibit an indisputable 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.*" (emphasis in original)

The learned Judge also recognised that caste system has even penetrated other religions to whom the practice of caste should be anathema. He observed:

‡"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 practitioners 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 Kammas, Mujbi Sikhs, etc. etc. In

‡‡ Ed.: It seems that because of an error in printing in the Supreme Court Reports, the above two quotes have been attributed to Desai, J whereas they are part of the judgment of Chinnappa Reddy, J. (See SCR at p. 400 B-D and 400 D-F respectively and in SCC at p. 742, para 40 and p. 743, para 40.)

An extract from the judgment of Chinnappa Reddy, J from SCR p. 400, line 7 [400 B] beginning with "caste in rura society ..." and ending with "... say mountainous, desert" in lines 5-4 from the bottom of p. 400 [400 H] have been repeated as part of Desai, J's judgment on p. 386, line 19 [386 D-E] begining with the same words "Caste in rural society ..." and ending on p. 387, line 13-14 [387 C-D] with the same words "... say mountainous, desert". The discontinuity in sense here with the words following "a fresh lease of life" confirms the error. The error is consequently repeated in the SCR Headnote at 359 E-H.

A comparision with the original certified copy of the judgment shows that the above matter is exactly the matter contained from the beginning of p. 17 till the end of p. 18 in the judgment of Chinnappa Reddy, J and this sheet seems to have got substituted for pp. 17-18 of the judgment of Desai, J, causing the repetition.

The matter of Desai, J's judgment contained in pages 17-18 which thereby got omitted in SCR begins with the words "Rejecting the recommendations of the Mandal Commission ..." and ends with the words "... caste structure unfortunately received" is published in Supreme Court Cases, in 1985 Supp SCC between line 7 of para 23 on p. 731 and line 23 of p. 732. So also the same matter is printed in AIR 1985 SC between line 11 of para 23 on p. 1504 (Col I) and line 4 from bottom of Col II of the same page.

The latter part of the first quote above has been rightly attributed to Chinnappa Reddy, J in para 762, below.

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."

Having thus noticed the pernicious effects of the caste system, the learned Judge opined that the only remedy in such a situation is to devise a method for determining social and educational backward classes without reference to caste. He stressed the significance of economic criterion and of poverty and concluded that a time has come when the economic criterion alone should be the basis for identifying the backward classes. Such an identification has the merit of advancing the secular character of the nation and will tend towards nullifying caste influence, said the learned Judge.

762. Chinnappa Reddy, J dealt with the question at quite some length. The learned Judge quoted Max Weber, according to whom the three dimensions of social inequality are class, status and power — and stressed the importance of poverty in this matter. The learned Judge opined that caste system is closely entwined with economic power. In the words of the learned Judge: (SCC p. 742, para 40)

> "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.*" (emphasis in original)

The learned Judge too recognised the percolation of caste system into other religions and concluded his opinion in the following words: (SCC pp. 766, 768, 769)

> "Poverty, caste, occupation and habitation are the principal factors which contribute to brand a class as socially backward .... But mere poverty it seems is not enough to invite the constitutional branding, because the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backward .... True, a few members of those castes or social groups may have progressed far enough and forged ahead so as to compare favourably with the leading forward classes economically, socially and educationally. In such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it .... Class poverty, not individual poverty is therefore the primary test .... Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined, it will not be for the

Court to interfere in the matter. But, lest there be any misunderstanding, judicial review will not stand excluded."

763. A.P. Sen, J dealt with this question in a short opinion. According to him: (SCC p. 770, para 84)

> "... the predominant and the only factor for making special provisions under Article 15(4) or for reservation of posts and appointments under Article 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes or Scheduled Tribes, till such members of backward classes attain a state of enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life."

764. E.S. Venkataramiah, J too dealt with this aspect at some length. After examining the origins of the caste system and the ugly practices associated with it, the learned Judge opined: (SCC p. 787, para 111)

> "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."

The learned Judge then referred to the debates in the Constituent Assembly on draft Article 10 and other allied articles, including the speech of Dr Ambedkar and observed thus:

> "The whole tenor of discussion in the Constituent Assembly pointed to making reservation for a minority of the population including Scheduled Castes and Scheduled Tribes which were socially backward. During the discussion, the Constitution (First Amendment) Bill by which Article 15(4) was introduced, Dr Ambedkar referred to Article 16(4) and said that backward classes are 'nothing else but a collection of certain castes'. This statement leads to a reasonable inference that this was the meaning which the Constituent Assembly assigned to 'classes' at any rate so far as Hindus were concerned."

The learned Judge also supported the imposition of a means-test as was done by the Kerala Government in *Jayasree*[17].

765. The above opinions emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognise that in the Indian context, lower castes are and ought to be treated as backward classes. *Rajendran*[13] and *Vasanth Kumar*[9] (opinions of Chin-

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

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

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

nappa Reddy and Venkataramiah, JJ) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Article 16(4) and Article 15(4).

766. At this stage, it would be fruitful to examine, how the words "caste" and "class" were understood in pre-Constitution India. We shall first refer to various Rules in force in several parts of India, where these expressions were used and notice how were these expressions defined and understood. In the Madras Provincial and Subordinate Service Rules, 1942, framed by the Governor of Madras under Section 241(2)(*b*) read with Sections 255 and 275 of the Government of India Act, 1935, the expression "*backward classes*" was defined in clause 3-A of Rule 2. (The provinces of Madras at that time covered not only the present State of Tamil Nadu but also a major portion of the present State of Andhra Pradesh and parts of present States of Kerala and Karnataka). The definition read as follows:

> "3-A. 'Backward classes' means the *communities* mentioned in Schedule III of this part."

Schedule III bore the heading "Backward Classes". It was a collection of castes and tribes under the sub-heading "Race, Tribe or Caste". The backward classes in the Schedule not only included the backward castes and tribes in Hindu religion but also certain sections of Muslims in the nature of castes. For example, item (23) in Schedule III referred to 'Dudekula' who, as is well known, is a socially disadvantaged section of Muslims — in effect, a caste — pursuing the occupation of ginning and cleaning of cotton and preparing pillows and mattresses. In this connection, reference may be had to Chapter III — '*History of the Backward Classes Movement in Tamil Nadu*' — of the Report of the Tamil Nadu Second Backward Classes Commission (1985), which inter alia refers to formation of 'The Madras Provincial Backward Classes League, an association representing the various backward Hindu communities' in 1934 and its demand for separate representation for them in services.

767. The former State of Mysore was one of the earliest States where certain provisions were made in favour of Backward Classes. The opinion of E.S. Venkataramiah, J in *Vasanth Kumar*[9] (at pages 442-443: SCC pp. 775-76) traces briefly the history of reservations in the State of Mysore from 1918-21 up to the reorganisation of States. The learned Judge points out how the expression 'backward classes' and 'backward communities' were used interchangeably. All the castes/communities except Brahmins in the State were notified as backward communities/castes. As far back as 1921, preferential recruitment was provided in favour of "backward communities" in government services.

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

768. In Bombay province, the Government of Bombay, Finance Department Resolution No. 2610 dated 5.2.1925 defined "Backward Classes" as all except Brahmins, Prabhus, Marwaris, Parsis, Baniyas and Christians. Certain reservations in government service were provided for these classes. In 1930, the State Committee noticed the overlapping meanings attached to the expressions "depressed classes" and "backward classes" and recommended that "Depressed Classes" should be used in the sense of untouchables, a usage which "will coincide with existing common practice". They proposed that the wider group should be called "Backward Classes", which should be subdivided into Depressed Classes (i.e., untouchables); Aboriginals and Hill Tribes; Other Backward Classes (including wandering tribes). They opined that the groups then currently called Backward Classes should be renamed "intermediate classes". In addition to 36 Depressed Classes (approximate 1921 population 1.475 millions) and 24 Aboriginal and Hill Tribes (approximate 1921 population 1.323 millions), they listed 95 Other Backward Classes (approximate 1921 population 1.041 millions).

769. In the former princely State of Travancore, the expression used was "Communities", as would be evident from the proceedings of the Government of His Highness the Maharaja of Travancore, contained in Order R. Dis. No. 893/General dated Trivandrum, 25th June, 1935. It refers to earlier orders on the subject as well. What is significant is that the expression "communities" was used as taking in Muslims and certain sections of Christians as well; it was not understood as confined to castes in Hindu social system alone. The operative portion of the order reads as follows:

> "... Accordingly, Government have decided that all communities whose population is approximately 2% of the total population of the State or about one lakh, be recognised as separate communities for the purpose of recruitment to the public service. The only exception from the above rule will be the Brahmin community who, though forming only 1.8% of the total population, will be dealt with as a separate community. On the above basis the classification of communities will be as follows:
>
> A. *Hindu*
>
> 1. Brahmin
> 2. Nayar
> 3. Other Caste Hindu
> 4. Kummula
> 5. Nudar
> 6. Ezlmva

7. Cheramar (Pulaya)
8. Other Hindu

B. *Muslim*

C. *Christian*

1. Jacobite
2. Marthomite
3. Syriac Catholic
4. Latin Catholic
5. South India United Church
6. Other Christians."

In the then United Provinces, the term "Backward Classes" was understood as covering both the untouchable classes as well other "Hindu Backward" classes. Marc Galanter says:

> "The United Provinces Hindu Backward Classes League (founded in 1929) submitted a memorandum which suggested that the term 'Depressed' carried a connotation 'of untouchability in the sense of causing pollution by touch as in the case of Madras and Bombay' and that many communities were reluctant to identify themselves as depressed. The League suggested the term 'Hindu Backward' as a more suitable nomenclature. The list of 115 castes submitted included all candidates from the untouchable category as well as a stratum above. 'All of the listed communities belong to non-Dwijas or degenerate or Sudra classes of the Hindus.' They were described as low socially, educationally and economically and were said to number over 60% of the population."

The expression "depressed and *other backward classes*" occurs in the Objectives Resolution of the Constituent Assembly moved by Jawaharlal Nehru on December 13, 1946.

770. We may also refer to a speech delivered by Dr Ambedkar on May 9, 1916 at the Columbia University in the City of New York, USA on the subject "*Castes in India: their Mechanism, Genesis and Development*" (the speech was published in Indian Antiquary, May, 1917 — Vol. XLI), which shows that as early as 1916, "class" and "caste" were used inter-changeably. In the course of the speech, he said:

> "... society is always composed of classes. It may be an exaggeration to assert the theory of class-conflict, but the existence of definite classes in a society is a fact. Their basis may differ. They may be economic or intellectual or social, but an individual in a society is always a member of a class. This is a universal fact and early Hindu society could not have been an exception to this rule,

and, as a matter of fact we know it was not. If we bear this generalization in mind, our study of the genesis of caste would be very much facilitated, for we have only to determine what was the class that first made itself into a caste, for class and caste, so to say, are next-door neighbours, and it is only a span that separates the two. A caste is an enclosed class."

A little later he stated:

"We shall be well advised to recall at the outset that the Hindu society, in common with other societies, was composed of classes and the earliest known are the (1) Brahmins or the priestly class: (2) the Kshatriya, or the military class; (3) the Vaishya, or the merchant class and (4) the Shudra or the artisan and menial class. Particular attention has to be paid to the fact that this was essentially a class system, in which individuals, when qualified, could change their class, and therefore classes did change their personnel. At some time in the history of the Hindus, the priestly class socially detached itself from the rest of the body of people and through a closed-door policy became a caste by itself. The other classes being subject to the law of social division of labour underwent differentiation, some into large, others into very minute groups."

771. In Encyclopaedia Britannica Vol. 16, the following statement occurs under the heading "*Slavery, Serfdom and Forced Labour*" under the sub-heading "*Servitude in Ancient India and China — Castes in India*":

"More abundant than slavery were serfdom. Within the rigid classification of social classes in ancient India, the Sudra caste was obliged to serve the Kshatriyas, or warrior caste, the Brahmins, or priests, and the Vaishyas, or farmers, cattle raisers and merchants. There is an unbreakable barrier, however, separating these castes from the inferior Sudra caste, the descendants of the primitive indigenous people who lived in serfdom.

In those times it was not a person's economic wealth that gave him his social rank but rather his social and racial level; and thus one of the Manu's laws says: 'Although able, a Sudra must not acquire excess riches, since when a Sudra acquires a fortune, he vexes the Brahmins with his insolence.' The barrier separating the servile castes took on extreme cruelty in some laws.

The legal condition of the Sudra left him only death as a means of improving his condition."

In *Legal Thesaurus* (Regular Edition) the following meanings are given to the word "class":

"Assortment, bracket, branch, brand, breed, *caste*, category, classification, classes, denomination, designation, division ... ;

gradation, grade, group, grouping, hierarchy ... sect, social rank, social status ...."

The following meanings are given to the word "caste" in *Webster's English Dictionary*:

"(1) a race, stock, or breed of men or animals; (2) one of the *hereditary classes* into which the society of India is divided in accordance with a system fundamental to Hinduism, reaching back into distant antiquity and dictating to every orthodox Hindu the rules and restrictions of all social intercourse and of which each has a name of its own and special customs that restrict that occupation of its members and their intercourse with the members of the other classes (3)(*a*): a division or class of society comprised of persons within a separate and exclusive order based variously upon differences of wealth, inherited rank or privilege, profession, occupation ... (*b*) the position conferred by caste standing (4) a system of social satisfaction more rigid than a class and characterised by hereditary status, endogamy and social barriers rigidly sanctioned by custom, law or religion."

All the above material does go to show that in pre-independence India, the expressions 'class' and 'caste' were used interchangeably and that caste was understood as an enclosed class.

772. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr Ambedkar as conclusive on the meaning of the expression "backward classes". We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put n clause (4). We are aware that what is said during these debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as *an aid* to interpretation of a constitutional provision is borne out by a series of decisions of this Court. [See *Madhu Limaye, in re*[141]; *Golaknath* v. *State of*

141 AIR 1969 SC 1014, 1018: (1969) 3 SCR 154

Punjab[105] (Subba Rao, CJ); opinion of Sikri, CJ, in *Union of India* v. *H.S. Dhillon*[142] and the several opinions in *Kesavananda Bharati*[1] where the relevance of these debates is pointed out, emphasing at the same time, the extent to which and the purpose for which they can be referred to.] Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable.

773. According to Dr Ambedkar (his speech is referred in para 693 and need not be reproduced here), the Drafting Committee was of the opinion that such a qualifying expression was necessary to indicate that the classes of citizens for whom reservations were to be made are those "communities which have not had so far representation in the State". It was also of the opinion that without such a qualifying expression (like 'backward') the "exemption made in favour of reservation will ultimately eat up the rule altogether". This was also the opinion of Shri K.M. Munshi, who too was a member of the Drafting Committee. In his speech (referred to in para 692) he explains why the said qualifying expression "backward" was inserted by the Drafting Committee in draft Article 10(3). His speech, in so far as it is relevant on this aspect, has been quoted in extenso in para 693 and need not be repeated here.

774. In our opinion too, the words "class of citizens — not adequately represented in the services under the State" would have been a vague and uncertain description. By adding the word "backward" and by the speeches of Dr Ambedkar and Shri K.M. Munshi, it was made clear that the "class of citizens ... not adequately represented in the services under the State" meant only those classes of citizens who were not so represented on account of their social backwardness.

775. Reference can also be made in this context to the speech of Dr Ambedkar in the Parliament at the time the First Amendment to the Constitution was being enacted.

776. It must be remembered that the Parliament which enacted the First Amendment was the very same Constituent Assembly which framed the Constitution and Dr Ambedkar as the Minister of Law was piloting the Bill. He said that backward classes "are nothing else but a collection of certain castes". (The relevant portion of his speech is referred to in

142 (1971) 2 SCC 779: (1972) 2 SCR 33

105 AIR 1967 SC 1643: (1967) 2 SCR 762

1 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225: 1973 Supp 1 SCR 1

para 699) and that it was for those backward classes that Article 15(4) was being enacted.

777. Pausing here, we may be permitted to make a few observations. The speeches of Dr Ambedkar may have to be understood in the context of the then obtaining ground realities viz., (*a*) Hindus constituted 84% of the total population of India. And among Hindus, caste discrimination was unfortunately an unpleasant reality; (*b*) caste system had percolated even the non-Hindu religions — no doubt to varying extents. Particularly among Christians in Southern India, who were converts from Hinduism, it was being practised with as much rabidity as it was among Hindus. [This aspect has been stressed by the Mandal Commission (Chapter 12, paras 11 to 16)] and has also been judicially recognised. (See, for instance, the opinions of Desai and Chinnappa Reddy, JJ in *Vasanth Kumar*[9].) *Encyclopaedia Britannica-II-Micropaedia* refers to existence of castes among Muslims and Christians at pages 618 and 619. Among Muslims, it is pointed out, a distinction is made between 'Ashrafs' (supposed to be descendants of Arab immigrants) and non-Ashrafs (native converts). Both are divided into sub-groups. Particularly, the non-Ashrafs, who are converts from Hinduism, it is pointed out, practice caste system (including endogamy) "in a manner close to that of their Hindu counter parts". All this could not have been unknown to Dr Ambedkar, the keen social scientist that he was. (*c*) It is significant to notice that throughout his speech in the Constituent Assembly, Dr Ambedkar was using the word "communities" (and not 'castes') which expression includes not only the castes among the Hindus but several other groups. For example, Muslims as a whole were treated as a backward community in the princely State of Travancore besides several sections/denominations among the Christians. *The word "community"* is clearly wider than "caste" — and "backward communities" *meant not only the castes* — wherever they may be found — *but also other groups, classes and sections among the populace.*

778. Indeed, there are very good reasons why the Constitution could not have used the expression "castes" or "caste" in Article 16(4) and why the word "class" was the natural choice in the context. The Constitution was meant for the entire country and for all time to come. Non-Hindu religions like Islam, Christianity and Sikh did not recognise caste as such though, as pointed out hereinabove, castes did exist even among these religions to a varying degree. Further, a Constitution is supposed to be a permanent document expected to last several centuries. It must surely have been envisaged that in future many classes may spring up answering the test of backwardness, requiring the protection of Article 16(4). It,

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

therefore, follows that from the use of the word "class" in Article 16(4), it cannot be concluded either that "class" is antithetical to "caste" or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens. The word "class" in Article 16(4), in our opinion, is used in the sense of *social class* — and not in the sense it is understood in Marxist jargon.

778-A. In *Rajendran*[13], *Triloki Nath(II)*[8], *Balram*[16] and *Peeriakaruppan*[15], this reality was recognised and given effect to, notwithstanding the fact that they had to respect and operate within the rather qualified formulation of *Balaji*[12].

778-B. For the sake of completeness, we may refer to a few passages, from *Vasanth Kumar*[9] to show what does the concept of 'caste' signify? D.A. Desai, J defines and describes "caste" in the following terms: (SCC pp. 730-31, para 22)

> "What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it. Homo Hierarchicus is expected to be the central and substantive element of the caste-system which differentiates it from other social systems. The concept of purity and impurity conceptualises the caste system .... There are four essential features of the caste-system which maintained its homo hierarchicus character: (1) hierarchy; (2) commensality; (3) restrictions on marriage; and (4) hereditary occupation. Most of the castes are endogamous groups. Inter-marriage between two groups is impermissible. But 'Pratilom' marriages are not wholly known."

Venkataramiah, J also defined "caste" in practically the same terms. He said: (SCC p. 786, para 110)

> "A caste is an association of families which practices the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste .... A caste is based on various factors, sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth in a family. Certain ideas of ceremonial purity are peculiar

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

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

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

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

to each caste .... Even the choice of occupation of members of caste was predetermined in many cases, and the members of a particular castes were prohibited from engaging themselves in other types of callings, professions or occupations. Certain occupations were considered to be degrading or impure."

779. The above material makes it amply clear that a caste is nothing but a social class — a socially homogeneous class. It is also an occupational grouping, with this difference that its membership is hereditary. One is born into it. Its membership is involuntary. Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogeneous class. Endogamy is its main characteristic. Its social status and standing depends upon the nature of the occupation followed by it. Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. A few members may have gone to cities or even abroad but when they return — they do, barring a few exceptions — they go into the same fold again. It doesn't matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions, it is his social class — the caste — that is relevant. It is a matter of common knowledge that an overwhelming majority of doctors, engineers and other highly qualified people who go abroad for higher studies or employment, return to India and marry a girl from their own caste. Even those who are settled abroad come to India in search of brides and bridegrooms for their sons and daughters from among their own caste or community. As observed by Dr Ambedkar, a caste is an enclosed class and it was mainly these classes the Constituent Assembly had in mind — though not exclusively — while enacting Article 16(4). Urbanisation has to some extent broken this caste-occupation nexus but not wholly. If one sees around himself, even in towns and cities, a barber by caste continues to do the same job — may be, in a shop (hair dressing saloon). A washerman ordinarily carries on the same job though he may have a laundry of his own. May be some others too carry on the profession of barber or washerman but that does not detract from the fact that in the case of an overwhelming majority, the caste-occupation nexus subsists. In a rural context, of course, a member of barber caste carrying on the occupation of a washerman or vice versa would indeed be a rarity — it is simply not done. There, one is supposed to follow his caste-occupation, ordained for him by his birth. There may be exceptions here and there, but we are concerned with generality of the scene and not with exceptions or aberrations. Lowly occupation results not only in low social

position but also in poverty; it generates poverty. 'Caste-occupation-poverty' cycle is thus an ever present reality. In rural India, it is strikingly apparent; in urban centres, there may be some dilution. But since rural India and rural population is still the overwhelmingly predominant fact of life in India, the reality remains. All the decisions since *Balaji*[12] speak of this 'caste-occupation-poverty' nexus. The language and emphasis may vary but the theme remains the same. This is the stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon. We are not saying it ought to be encouraged. It should not be. It must be eradicated. That is the ideal — the goal. But any programme towards betterment of these sections/classes of society and any programme designed to eradicate this evil must recognise this ground reality and attune its programme accordingly. Merely burying our heads in the sand — ostrich-like — wouldn't help. One cannot fight his enemy without recognising him. The U.S. Supreme Court has said repeatedly, if race be the basis of discrimination — past and present — race must also form the basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far. Without a doubt an extensive restructuring of the socio-economic system is the answer. That is indeed the goal, as would be evident from the Preamble and Part IV (Directive Principles). But we are concerned here with a limited aspect of equality emphasised in Article 16(4) — equality of opportunity in public employment and a special provision in favour of backward class of citizens to enable them to achieve it.

(*b*) *Identification of "backward class of citizens"*

780. Now, we may turn to the identification of "backward class of citizens". How do you go about it? Where do you begin? Is the method to vary from State to State, region to region and from rural to urban? What do you do in the case of religions where caste-system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to cease-fire line (in Jammu and Kashmir) or hilly or inaccessible regions to be surveyed and identified as backward classes for the purpose of Article 16(4)? And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or region. Each and every situation cannot be visualised and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines.

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

781. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes.

782. Coming back to the question of identification, the fact remains that one has to begin somewhere — with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a *backward class,* for the purposes of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from

region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by the Justice O. Chinnappa Reddy Commission in this respect.

783. We do not mean to suggest — we may reiterate — that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward.

784. The only basis for saying that caste should be excluded from consideration altogether while identifying the backward class of citizens for the purpose of Article 16(4) is clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of clause (2). It prohibits discrimination on *any* or *all* of the grounds mentioned therein. The significance of the word "any" cannot be minimised[143].

143 In *Air India* v. *Nargesh Meerza*, (1981) 4 SCC 335: 1981 SCC (L&S) 599 this Court held: "What Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer res integra but is covered by several authorities of this Court." Reference was then made to *Yusuf Abdul Aziz* v. *State of Bombay*, 1954 SCR 930: AIR 1954 SC 321 and *C.B. Muthamma (Miss)* v. *Union of India*, (1979) 4 SCC 260: 1979 SCC (L&S) 366.

Reservation is not being made under clause (4) in favour of a 'caste' but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State. In such a situation, the bar of clause (2) of Article 16 has no application whatsoever. Similarly, the argument based upon secular nature of the Constitution is too vague to be accepted. It has been repeatedly held by the U.S. Supreme Court in school desegregation cases that if race be the basis of discrimination, race can equally form the basis of redressal. In any event, in the present context, it is not necessary to go to that extent. It is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born heathen, by baptism, it becomes a Christian — to use a simile. Baptism here means passing the test of backwardness.

785. Another contention urged is that only that group or section of people, who are suffering the lingering effects of past discrimination, can alone be designated as a backward class and not others. This argument, inspired by certain American decisions, cannot be accepted for more than one reason. Firstly, when the caste discrimination is still prevalent, more particularly in rural India (which comprises the bulk of the total population), the theory of lingering effects has no relevance. Where the discrimination has ended, does that aspect become relevant and not when the discrimination itself is continuing. Secondly, as we have noticed hereinabove, the said theory has practically been given up by the U.S. Supreme Court in *Metro Broadcasting*[52]. In this case, it is held sufficient for introducing and implementing a race-conscious programme that such programme serves important State objectives. In other words, according to this test, it is no longer necessary to prove that such programme is designed to compensate victims of past societal or governmental discrimination. Thirdly, the basic premise of the theory of lingering effects is not accepted by all the learned Judges of U.S. Supreme Court. If one sees the opinion of Douglas, J in *DeFunis*[21] and of Marshall, J in *Bakke*[20] and *Fullilove*[51], it would become evident. They also say that discriminatory practices against Blacks and other minorities have not come to an end but are still persisting. In this country too, none can deny — in

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

21 *DeFunis* v. *Charles Odegaard*, (1974) 40 L Ed 2d 164: 416 US 312 (1974)

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

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

the face of the material collected by the various Commission including Mandal Commission — that discrimination persists even today in India. The representation of the socially backward classes in the governmental apparatus is quite inadequate and that conversely the upper classes have a disproportionately large representation therein. This is the lingering effect, if one wants to see it.

(c) *Whether the backwardness in Article 16(4) should be both social and educational?*

786. The other aspect to be considered is whether the backwardness contemplated in Article 16(4) is social backwardness or educational backwardness or whether it is both social *and* educational backwardness. Since the decision in *Balaji*[12] it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4). Though Article 15(4) came into existence later in 1951 and Article 16(4) does not contain the qualifying words "socially and educationally" preceding the words "backward class of citizens" the same meaning came to be attached to them. Indeed, it was stated in *Janki Prasad Parimoo*[61] (Palekar, J speaking for the Constitution Bench) that:

> "Article 15(4) speaks about 'socially and educationally backward classes of citizens' while Article 16(4) speaks only of 'any backward class 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). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4)."

787. It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does clause (4) of Article 15. It may be remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: "backward class of citizens" in

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

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

Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. Thus, SEBCs referred to in Article 340 is only of the categories for whom Article 16(4) was enacted: Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that 'backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services — which may mean, at any level whatsoever — insisting upon educational backwardness may not be quite appropriate.

788. Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in the Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty — which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle. It is a well-known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr Rajeev Dhavan may be right when he says that the object of Article 16(4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is *mainly* social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social *and* educational. The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and

educational backwardness. It is necessary to state at this stage that the Mandal Commission appointed under Article 340 was concerned only with the socially and educationally backward classes contemplated by the said article. Even so, it is evident that social backwardness has been given precedence over others by the Mandal Commission — 12 out of 22 total points. Social backwardness — it may be reiterated — leads to educational and economic backwardness. No objection can be, nor is taken, to the validity and relevancy of the criteria adopted by the Mandal Commission. For a proper appreciation of the criteria adopted by the Mandal Commission and the difficulties in the way of evolving the criteria of backwardness, one must read closely Chapters III and XI of Volume I along with Appendixes XII and XXI in Volume II. Appendix XII is the Report of the Research Planning Team of the Sociologists while Appendix XXI is the 'Final List of Tables' adopted in the course of socio-educational survey. In particular, one may read paras 11.18 to 11.22 in Chapter XI, which are quoted hereunder for ready reference:

> "11.18. Technical Committee constituted a Sub-Committee of Experts (Appendix-20, Volume II) to help the Commission prepare 'Indicators of Backwardness' for analysing data contained in computerised tables. After a series of meetings and a lot of testing of proposed indicators against the tabulated data, the number of tables actually required for the Commission's work was reduced to 31 (Appendix-21, Volume II). The formulation and refinement of indicators involved testing and validation checks at every stage.
>
> 11.19. In this connection, it may be useful to point out that in social sciences no mathematical formulae or precise bench-marks are available for determining various social traits. A survey of the above type has to tread warily on unfamiliar ground and evolve its own norms and bench-marks. This exercise was full of hidden pitfalls and two simple examples are given below to illustrate this point.
>
> 11.20. In *Balaji case*[12] the Supreme Court held that if a particular community is to be treated as educationally backward, the divergence between its educational level and that of the State average should not be marginal but *substantial.* The Court considered 50% divergence to be satisfactory. Now, 80% of the population of Bihar (1971 Census) is illiterate. To beat this percentage figure by a margin of 50% will mean that 120% members of a caste/class should be illiterates. In fact it will be seen that in this case even 25% divergence will stretch us to the maximum saturation point of 100%.
>
> 11.21. In the Indian situation where vast majority of the people are illiterate, poor or backward, one has to be very careful in setting

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

deviations from the norms as, in our conditions, norms themselves are very low. For example, Per Capita Consumer Expenditure for 1977-78 at current prices was Rs 991 per annum. For the same period, the poverty line for urban areas was at Rs 900 per annum and for rural areas at Rs 780. It will be seen that this poverty line is quite close to the Per Capita Consumer Expenditure of an average Indian. Now following the dictum of *Balaji case*[12], if 50% deviation from this average Per Capita Consumer Expenditure was to be accepted to identify economically backward' classes, their income level will have to be 50% below the Per Capita Consumer Expenditure i.e. less than Rs 495.5 per year. This figure is so much below the poverty line both in urban and rural areas that most of the people may die of starvation before they qualify for such a distinction.

11.22. In view of the above, 'Indicators for Backwardness' were tested against various cut-off points. For doing so, about a dozen castes well-known for their social and educational backwardness were selected from amongst the castes covered by our survey in a particular State. These were treated as 'Control' and validation checks were carried out by testing them against 'Indicators' at various cut-off points. For instance, one of the 'Indicators' for social backwardness is the rate of student drop-outs in the age group 5-15 years as compared to the State average. As a result of the above tests, it was seen that in educationally backward castes this rate is at least 25% above the State average. Further, it was also noticed that this deviation of 25% from the State average in the case of most of the 'Indicators' gave satisfactory results. In view of this, wherever an 'Indicator' was based on deviation from the State average, it was fixed at 25%, because a deviation of 50% was seen to give wholly unsatisfactory results and, at times, to create anomalous situations."

It is after these paragraphs that the Report sets out the indicators (criteria) evolved by it, set out in Paras 11.23 and 11.24 of the Report.

789. The SEBCs referred to by the impugned Memorandums are undoubtedly 'backward class of citizens' within the meaning of Article 16(4).

(*d*) *'Means-test' and 'creamy layer'* :

790. 'Means-test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as the "creamy layer" argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they con-

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stitute the forward section of that particular backward class — as forward as any other forward class member — and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since *Jayasree*[17] almost every decision has accepted the validity of this submission.

791. On the other hand, the learned counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representations received. In this behalf, the learned counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J in *Vasanth Kumar*[9] to the following effect: (SCC p. 763, para 72)

> "... One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself? Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?"

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

792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class — a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line — how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become — say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or

IPS or any other All India Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).

793. Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion — whether on the basis of income, extent of holding or otherwise — of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated August 13, 1990 and September 25, 1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise.

(e) Whether a class should be situated similarly to the Scheduled Castes/Scheduled Tribes for being qualified as a Backward Class?

794. In *Balaji*[12] it was held (SCR p. 458) "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". (emphasis supplied) The correctness of this observation is questioned by the counsel for the respondents. Reliance is placed upon the observations of Chinnappa Reddy, J in *Vasanth Kumar*[9] (at page 406: SCC p. 747-48, para 51) where, dealing

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

with the above observations in *Balaji*[12], the learned Judge said: (SCC pp. 747-48, para 51)

> "We do not think that these observations were meant to lay down any proposition that the Socially Backward Classes were those classes of people, whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes .... There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes."

795. We see no reason to qualify or restrict the meaning of the expression "backward class of citizens" by saying that it means those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes. As pointed out in para 786, the relevant language employed in both the clauses is different. Article 16(4) does not expressly refer to Scheduled Castes or Scheduled Tribes; if so, there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection. As a matter of fact, neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated. If any group or class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such *a priori notions* into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say. How difficult is the process of ascertainment of backwardness would be known if one peruses Chapters III and XI of Volume I of the Mandal Commission Report along with Appendixes XII and XXI in Volume II. It must be left to the Commission/Authority appointed to identify the backward classes to evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria. If, in any case, a particular caste or class is wrongly designated or not designated as a backward class, it can always be questioned before a court of law as well. We may add that relevancy of the criteria evolved by Mandal Commission (Chapter XI) has not been questioned by any of the counsel

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before us. Actual identification is a different matter, which we shall deal with elsewhere.

796-797. We may now summarise our discussion under Question No. 3. (*a*) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (*b*) Neither the constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does — what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (*c*) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (*d*) 'Creamy layer' can be, and must be, excluded. (*e*) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens". The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).

(f) Adequacy of Representation in the Services under the State

798. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under

the State. The language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in *Barium Chemicals* v. *Company Law Board*[37] which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive.

Question 4:

(a) Whether backward classes can be identified only and exclusively with reference to the economic criterion?

799. It follows from the discussion under Question No. 3 that a backward class cannot be determined *only and exclusively* with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same.

(b) Whether a backward class can be identified on the basis of occupation-cum-income without reference to caste?

800. In *Chitralekha*[7] this court held that such an identification is permissible. We see no reason to differ with the said view inasmuch as this is but another method to find socially backward classes. Indeed, this test in the Indian context is broadly the same as the one adopted by the Mandal Commission. While answering Question 3(*b*), we said that identification of backward classes can be done with reference to castes along with other occupational groups, communities and classes. We did

37 1966 Supp SCR 311 : AIR 1967 SC 295

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

not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-pullers/drivers, street-hawkers etc. may well qualify for being designated as Backward Classes.

Question No. 5:

Whether Backward Classes can be further divided into backward and more backward categories?

801. In *Balaji*[12] it was held

> "that the sub-classification made by the order between Backward Classes and More Backward Classes does not appear to be justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of Backward Classes, what the impugned order, in substance, purports to do is 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, and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of Backward and More Backward. The classification of the two categories, therefore, is not warranted by Article 15(4)." (SCR p. 465-66)

The correctness of this holding is questioned before us by the counsel for the respondents. It is submitted that in principle there is no justification for the said holding. It is submitted that even among backward classes there are some who are more backward than the others and that the backwardness is not and cannot be uniform throughout the country nor even within a State. In support of this contention, the respondents rely upon the observations of Chinnappa Reddy, J in *Vasanth Kumar*[9] where the learned Judge said: (SCC p. 750, para 55)

> "[W]e do not see why on principle there cannot be a classification into Backward Classes and More Backward Classes, if both classes are not merely a little behind, but far behind the most advanced classes. 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 might walk away with all the seats."

802. We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more

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backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State — and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes etc." Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and C. The 25% vacancies reserved for backward classes are subdivided between them in proportion to their respective population. This categorisation was justified in *Balram*[16]. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What

16 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660: (1972) 3 SCR 247, 286

is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say — we may reiterate — that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law.

PART V

(Question Nos. 6, 7 and 8)

Question 6:

To what extent can the reservation be made?

(*a*) *Whether the 50% rule enunciated in* Balaji *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 a year should be taken as a unit or whether the total strength of the cadre should be looked to*?

(*d*) *Was* Devadasan *correctly decided*?

804. In *Balaji*[12], a Constitution Bench of this Court rejected the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the Court on the extent of reservation. It observed that a provision under Article 15(4) being a "special provision" must be within reasonable limits. It may be appropriate to quote the relevant holding from the judgment: (SCR pp. 467, 470)

> "When Article 15(4) refers to the special provision for the advancement of certain classes or Scheduled Castes and Scheduled Tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the

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> Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored .... 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."

In *Devadasan*[19] this rule of 50% was applied to a case arising under Article 16(4) and on that basis the carry-forward rule was struck down. In *Thomas*[10] however, the correctness of this principle was seriously questioned. Fazal Ali, J observed: (SCC p. 387, para 191)

> "This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon 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. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the 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)

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

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

of Article 16? The answer must necessarily be in the negative. The dominant object to this provision is to take steps to make inadequate representation adequate."

Krishna Iyer, J agreed with the view taken by Fazal Ali, J in the following words: (SCC p. 370, para 143)

"I agree with my learned brother Fazal Ali, J in the view that the arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the 'carry-forward' rule."

Mathew, J did not specifically deal with this aspect but from the principles of 'proportional equality' and 'equality of results' espoused by the learned Judge, it is argued that he did not accept the 50% rule. Beg, J also did not refer to this rule but the following sentence occurs in his judgment at pages 962 and 963: (SCC p. 354, para 99)

"If a reservation of posts under Article 16(4) for employees of backward classes could include complete reservation of higher posts to which they could be promoted, about which there could be no doubt now, I fail to see why it cannot be partial or for a part of the duration of service and hedged round with the condition that a temporary promotion would operate as a complete and confirmed promotion only if the temporary promotee satisfies some tests within a given time."

Ray, CJ, did not dispute the correctness of the 50% rule but at the same time he pointed out that this percentage should be applied to the entire service as a whole.

805. After the decision in *Thomas*[10] controversy arose whether the 50% rule enunciated in *Balaji*[12] stands overruled by *Thomas*[10] or does it continue to be valid. In *Vasanth Kumar*[9] two learned Judges came to precisely opposite conclusions on this question. Chinnappa Reddy, J held that *Thomas*[10] has the effect of undoing the 50% rule in *Balaji*[12] whereas Venkataramiah, J held that it does not.

806. It is argued before us that the observations on the said question in *Thomas*[10] were obiter and do not constitute a decision so as to have the effect of overruling *Balaji*[12]. Reliance is also placed upon the speech of Dr Ambedkar in the Constituent Assembly, where he said that reservation must be confined to a minority of seats (see para 693). It is also

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

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pointed out that Krishna Iyer, J who agreed with Fazal Ali, J in *Thomas*[10] on this aspect, came back to, and affirmed, the 50% rule in *Karamchari Sangh*[11] (at pp. 241 and 242: SCC pp. 296, para 88). On the other hand, it is argued for the respondents that when the population of the other backward classes is more than 50% of the total population, the reservation in their favour (excluding Scheduled Castes and Scheduled Tribes) can also be 50%.

807. We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. *Adequate representation* cannot be read as *proportionate representation*. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits — and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in *V. Narayana Rao* v. *State of A.P.*[144], striking down the enhancement of reservation from 25% to 44% for OBCs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%.

808. It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision — though not an exception to clause (1). Both the

144 AIR 1987 AP 53: 1987 Lab IC 152: (1986) 2 Andh LT 258

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

provisions have to be harmonised keeping in mind the fact that both are but the re-statements of the principle of equality enshrined in Article 14. The provision under Article 16(4) — conceived in the interest of certain sections of society — should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 693). No other member of the Constituent Assembly suggested otherwise. It is, thus, clear that reservation of a majority of seats was never envisaged by the Founding Fathers. Nor are we satisfied that the present context requires us to depart from that concept.

809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations — what is called interlocking reservations. To be more

precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains — and should remain — the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

813. It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be — indeed cannot be — applicable to exemptions, concessions or relaxations, if any, provided to 'Backward Class of Citizens' under Article 16(4).

814. The next aspect of this question is whether a year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. *Balaji*[12] does not deal with this aspect but *Devadasan*[19] (majority opinion) does. Mudholkar, J speaking for the majority says: (SCR pp. 694-95)

> "We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities."

On the other hand is the approach adopted by Ray, CJ in *Thomas*[10]. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, CJ would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has

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

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

not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e., 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

(*d*) *Was* Devadasan *correctly decided?*

815. The rule (providing for carry-forward of unfilled reserved vacancies as modified in 1955) struck down in *Devadasan*[19] reads as follows: (SCR p. 686)

> "3(*a*) If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition

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

should be made to the number of reserved vacancies in the second following year."

The facts of the case relevant for our purpose are the following: a

(*i*) Reservation in favour of Scheduled Castes and Scheduled Tribes was 12 1/2% and 5% respectively;

(*ii*) In 1960, UPSC issued a notification proposing to hold a limited competitive examination for promotion to the category of Assistant Superintendents in Central Secretariat Services. 48 vacancies were to be filled, out of which 16 were unreserved while 32 were reserved for Scheduled Castes/ Scheduled Tribes, because of the operation of the carry-forward rule; 28 vacancies were actually carried forward; b

(*iii*) UPSC recommended 16 for unreserved and 30 for reserved vacancies — a total of 46; c

(*iv*) the Government however appointed in all 45 persons, out of whom 29 belonged to Scheduled Castes/Scheduled Tribes.

The said rule and the appointments made on that basis were questioned mainly on the ground that they violated the 50% rule enunciated in *Balaji*[12]. It was submitted that by virtue of the carry-forward rule, 65% of the vacancies for the year in question came to be reserved for Scheduled Castes/Scheduled Tribes. d

816. The majority, speaking through Mudholkar, J upheld the contention of the petitioners and struck down the rule purporting to apply the principle of *Balaji*[12]. The vice of the rule was pointed out in the following words: (SCR pp. 691-92) e

> "In order to appreciate better the import of this rule on recruitment let us take an illustration. Supposing in two successive years no candidate from amongst the Scheduled Castes and Tribes is found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved vacancies for each of those years would, according to the Government resolution, be 18 for each year. Now, since these vacancies were not filled in those years a total of 36 vacancies will be carried-forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Tribes. By operation of the carry-forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%." f g h

i

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

817. We are of the respectful opinion that *on its own reasoning,* the decision *insofar as it strikes down the rule* is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said rule. But it would not be correct to presume that that is the necessary and the only consequence of that rule. Let us take the very illustration given at pp. 691-92, — namely 100 vacancies arising in three successive years and 18% being the reservation quota — and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are filled up and 9 are carried-forward. Similarly, in the second year again, 9 are filled up and another 9 are carried-forward. Result would be that in the third year, 9 + 9 + 18 = 36 (out of a total of 100) would be reserved which would be far less than 50%; the rule in *Balaji*[12] is not violated. But by striking down the rule itself, carrying forward of vacancies even in such a situation has become impermissible, which appears to us indefensible in principle. We may also point out that the premise made in *Balaji*[12] and reiterated in *Devadasan*[19] to the effect that clause (4) is an exception to clause (1) is no longer acceptable, having been given up in *Thomas*[10]. It is for this reason that in *Karamchari Sangh*[11] Krishna Iyer, J explained *Devadasan*[19] in the following words: (SCC pp. 295-96, para 88)

> "In *Devadasan case*[19] the Court went into the *actuals*, not into the *hypotheticals*. This is most important. The Court actually verified the degree of deprivation of the 'equal opportunity' right ....
>
> .... What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right.... Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. 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% of 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 or appointments of SC and ST candidates considerably in excess of 50% we uphold Annexure I."

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

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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

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

We are in respectful agreement with the above statement of law. Accordingly, we overrule the decision in *Devadasan*[19]. We have already discussed and explained the 50% rule in paras 804 to 814. The same position would apply in the case of carry-forward rule as well. We, however, agree that a year should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength.

818. We may reiterate that a carry-forward rule need not necessarily be in the same terms as the one found in *Devadasan*[19]. A given rule may say that the unfilled reserved vacancies shall not be filled by unreserved category candidates but shall be carried-forward as such for a period of three years. In such a case, a contention may be raised that reserved posts remain a separate category altogether. In our opinion, however, the result of application of carry-forward rule, in whatever manner it is operated, should not result in breach of 50% rule.

Question No. 7:

Whether clause (4) of Article 16 provides reservation only in the matter of initial appointments/direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well?[145]

819. The petitioners' submission is that the reservation of appointments or posts contemplated by clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to leap-frog over his compatriots, which is bound to generate acute heart-burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are given how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved

145 One of us, Ahmadi, J is of the opinion that this question does not arise for consideration in these writ petitions and hence need not be answered. Accordingly, the opinions expressed and conclusion recorded *on this question* are those of the Chief Justice, M.N. Venkatachaliah, and B.P. Jeevan Reddy, JJ only

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

category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of disheartening which kills the spirit of competition and develops a sense of disinterestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon inefficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (*j*) of Article 51-A (Fundamental Duties).

820. Shri K. Parasaran, learned counsel appearing for the Union of India raised a preliminary objection to the consideration of this question at all. According to him, this question does not arise at present inasmuch as the impugned Memorandums do not provide for reservation in the matter of promotion. They confine the reservation only to direct recruitment. Learned counsel reiterated the well-established principle of Constitutional Law that constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case and where it is found necessary to decide them for a proper decision of the case. A large number of decisions of this Court and English courts are relied upon in support of this proposition@. If for any reason this Court decides to answer the said question, says the counsel, the answer can only be one — which is already given by this Court in a number of decisions namely, *Rangachari*[26], *Hira Lal*[29] and *Karamchari Sangh*[11]. He submits that an appointment to a post is made either by direct recruitment or by promotion or by transfer. In all

@ It is this objection, Ahmadi, J. (one of us) upholds

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

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

11 *Akhil Bharatiya Soshit Karamchari Sangh* v. *Union of India*, (1981) 1 SCC 246: 1981

these cases it is but an appointment. If so, Article 16(4) does undoubtedly take in and warrant making a provision for reservation in the matter of promotion as well. Learned counsel commended to us the further reasoning in *Rangachari*[26] that adequate representation means not merely quantitative representation but also qualitative representation. He says further that adequacy in representation does not mean representation at the lowest level alone but at all levels in the administration. Regarding the Constituent Assembly debates, his submission is that those debates do not indicate that the said provision was not supposed to apply to promotions. In such a situation, it is argued, plain words of the Constitution should be given their due meaning and that there is no warrant for cutting down their ambit on the basis of certain suppositions with respect to interpretation of clauses (1), (2) and (4). This is also the contention of the other counsel for respondents.

821. With respect to the preliminary objection of Shri Parasaran, there can hardly be any dispute about the proposition espoused by him. But it must be remembered that reference to this larger Bench was made with a view to "finally settle the legal position relating to reservations". The idea was to have a final look at the said question by a larger Bench to settle the law in an authoritative way. It is for this reason that we have been prrsuaded to express ourselves on this question. But before we proceed to express ourselves on the question, a few clarifications would be in order.

822. Reservation in the case of promotion is normally provided only where the promotion is by selection i.e., on the basis of merit. For, if the promotion is on the basis of seniority, such a rule may not be called for; in such a case the position obtaining in the lower category gets reflected in the higher category (promotion category) also. Where, however, promotion is based on merit, it may happen that members of backward classes may not get selected in the same proportion as is obtaining in the lower category. With a view to ensure similar representation in the higher category also, reservation is thought of even in the matter of promotion based on selection. This is, of course, in addition to the provision for reservation at the entry (direct recruitment) level. This was the position in *Rangachari*[26]. Secondly, there may be a service/class/category, to which appointment is made partly by direct recruitment and partly by promotion (i.e., promotion on the basis of merit). If no provision is made for reservation in promotions, the backward class members may not be represented in this category to the extent prescribed. We may give an illustration to explain what we are saying. Take the category of Assistant Engineers in a particular service where 50% of

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

the vacancies arising in a year are filled up by direct recruitment and 50% by promotion (by selection i.e., on merit basis) from among Junior Engineers. If provision for reservation is made only in the matter of direct recruitment but not in promotions, the result may be that members of backward classes (where quota, let us say, is 25%) would get in to that extent only in the 50% direct recruitment quota but may not get in to that extent in the balance 50% promotion quota. It is for this reason that reservation is thought of even in the matter of promotions, particularly where promotions are on the basis of merit. The question for our consideration, however, is whether Article 16(4) contemplates and permits reservation only in the matter of direct recruitment or whether it also warrants provision being made for reservation in the matter of promotions as well. For answering this question, it would be appropriate, in the first instance, to examine the facts of and dicta in *Rangachari*[26], *Hira Lal*[29] and *Karamchari Sangh*[11].

823. In *Rangachari*[26], validity of the circulars issued by the Railway administration providing for reservation in favour of Scheduled Castes/Scheduled Tribes in promotions (by selection) was questioned. The contention was that Article 16(4) does not take in or comprehend reservation in the matter of promotions as well and that it is confined to direct recruitment only. The Madras High Court agreed with this contention. It held that the world "appointments" in clause (4) did not denote promotion and further that the word "posts" in the said clause referred to posts outside the cadre concerned. On appeal, this Court reversed by a majority of 3:2. Gajendragadkar, J speaking for the majority enunciated certain propositions, of which the following are relevant for our discussion:

> "(*a*) Matters relating to employment [in clause (1)] must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment. (SCR p. 597)
>
> (*b*) In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service. (SCR p. 596)

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

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

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

(*c*) The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. 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. (SCR p. 604)

(*d*) In providing for the reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments of posts." (SCR p. 606)

824. In *State of Punjab* v. *Hira Lal*[29] validity of an order made by the Government of Punjab providing for reservation in promotion (in addition to initial recruitment) was questioned. Though the High Court upheld the challenge, this Court (Shah, Hegde and Grover, JJ) reversed and upheld the validity of the Government order following *Rangachari*[26].

825. Validity of a number of circulars issued by the Railway Administration was questioned in *Karamchari Sangh*[11] a petition under Article 32. The experience gained over the years disclosed that reservation of appointments/posts in favour of SC/STs, though made both at the stage of initial recruitment and promotion was not achieving the intended results, inasmuch as several posts meant for them remained unfilled by them. Accordingly, the Administration issued several circulars from time to time extending further concessions and other measures to ensure that

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

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

members of these categories avail of the posts reserved for them fully. (The original circular is referred to in the judgment as Annexure F, whose validity was upheld in *Rangachari*[26] itself. The other circulars are referred to as Annexures I. H, J and K.) These circulars contemplated (*i*) giving one grade higher to SC/ST candidates than is assignable to an employee, (*ii*) carrying forward vacancies for a period of three years and (*iii*) provision for in-service training and coaching (after promotion) to raise the level of efficiency of SC/ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petitioners was that these circulars, being inconsistent with the mandate of Article 335, are bad. *Rangachari*[26] was sought to be reopened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The Division Bench (Krishna Iyer, Pathak and Chinnappa Reddy, JJ) not only refused to re-open *Rangachari*[26] but also repelled the attack upon the circulars. It was held that no dilution of efficiency in administration resulted from the implementation of the circulars inasmuch as they preserved the criteria of eligibility and minimum efficiency required and also provided for in-service training and coaching to correct the deficiencies, if any. The carry-forward rule was also upheld subject to the condition that the operation of the rule shall not result, in any given year, in selection/appointment of Scheduled Caste/Scheduled Tribe candidates in excess of 50%.

826. In *Comptroller and Auditor General* v. *K.S. Jagannathan*[132] it was held: (SCC p. 694, para 92)

> "It is now well settled by decisions of this Court that the reservation in favour of backward classes of citizens, including the members of the Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made. (See for instance: *State of Punjab* v. *Hira Lal*[29] and *Akhil Bharatiya Soshit Karamchari Sangh* v. *Union of India*[11].)"

827. We find it difficult to agree with the view in *Rangachari*[26] that Article 16(4) contemplates or permits reservation in promotions as well. It is true that the expression "appointment" takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizens.

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

132 (1986) 2 SCC 679: 1986 SCC (L&S) 345: (1986) 1 ATC 1: (1986) 2 SCR 17

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

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

But this question has not to be answered on a reading of Article 16(4) alone but on a combined reading of Article 16(4) and Article 335. In *Rangachari*[26] this fact was acknowledged but explained away on a basis which, with great respect to the learned Judges who constituted the majority — does not appear to be acceptable. The propositions emerging from the majority opinion in *Rangachari*[26] have been set out in para 823. Under proposition (*d*) (as set out in para 823), the majority does say that

> "[i]n providing for the reservation of appointments or posts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency;" (SCR p. 606)

but then it explains it away by saying

> "but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts." (SCR p. 606)

828. We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream — a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of "leap-frogging" need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter

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the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.

829. It is true that *Rangachari*[26] has been the law for more than 30 years and that attempts to re-open the issue were repelled in *Karamchari Sangh*[11]. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in *Rangachari*[26] to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion — be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

830. A purist or a legal theoretician may find this direction a little illogical. We can only answer them in the words of Lord Roskill. In his

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

presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject "*Law Lords, Reactionaries or Reformers?*", the learned Law Lord said:

> "Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves 'this case requires a policy decision — what is the right policy decision?' The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it, is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply."

831. We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration. The relaxation concerned in *Thomas*[10] and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in *Karamchari Sangh*[11] are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs — consistent with the efficiency of administration and the nature of duties attaching to the office concerned — in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove.

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

Question No. 8:

Whether Reservations are anti-meritarian?

832. In *Balaji*[12] and other cases, it was assumed that reservations are necessarily anti-meritarian. For example, in *Janki Prasad Parimoo*[61] it was observed, "it is implicit in the idea of reservation that a less meritorious person be preferred to another who is more meritorious". To the same effect is the opinion of Khanna, J in *Thomas*[10], though it is a minority opinion. Even Subba Rao, J who did not agree with this view did recognize some force in it. In his dissenting opinion in *Devadasan*[19] while holding that there is no conflict between Article 16(4) and Article 335, he did say, "it is inevitable in the nature of reservation that there will be a lowering of standards to some extent", but, he said, on that account the provision cannot be said to be bad, inasmuch as in that case, the State had, as a matter of fact, prescribed minimum qualifications, and only those possessing such minimum qualifications were appointed. This view was, however, not accepted by Krishna Iyer, J in *Thomas*[10]. He said: (SCC p. 366, para 132)

> "[E]fficiency means, in terms of good government, not marks in examinations only, but responsible and responsive service to the people. A chaotic genius is a grave danger in public administration. The inputs of efficiency include a sense of belonging and of accountability which springs in the bosom of the bureaucracy (not pejoratively used) if its composition takes in also the weaker segments of 'We, the people of India'. No other understanding can reconcile the claim of the radical present and the hangover of the unjust past."

833. A similar view was expressed in *Vasanth Kumar*[9] by Chinnappa Reddy, J. The learned Judge said (SCC p. 739, para 36)

> "[T]he mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves

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

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

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

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

why 35 years after Independence, the position of the Scheduled Castes, etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it."

834. It is submitted by the learned counsel for petitioners that reservation necessarily means appointment of less meritorious persons, which in turn leads to lowering of efficiency of administration. The submission, therefore, is that reservation should be confined to a small minority of appointments/posts, — in any event, to not more than 30%, the figure referred to in the speech of Dr Ambedkar in the Constituent Assembly. The mandate of Article 335, it is argued, implies that reservations should be so operated as not to affect the efficiency of administration. Even Article 16 and the directive of Article 46, it is said, should be read subject to the aforesaid mandate of Article 335.

835. The respondents, on the other hand, contend that the marks obtained at the examination/test/interview at the stage of entry into service is not an indicium of the inherent merit of a candidate. They rely upon the opinion of Douglas, J in *DeFunis*[21] where the learned Judge illustrates the said aspect by giving the example of a candidate coming from disadvantaged sections of society and yet obtaining reasonably good scores — thus manifesting his "promise and potential" — vis-a-vis a candidate from a higher strata obtaining higher scores. (His opinion is referred to in para 716.) On account of the disadvantages suffered by them and the lack of opportunities, — the respondents say — members of backward classes of citizens may not score equally with the members of socially advanced classes at the inception but in course of time, they would. It would be fallacious to presume that nature has endowed intelligence only to the members of the forward classes. It is to be found everywhere. It only requires an opportunity to prove itself. The directive in Article 46 must be understood and implemented keeping in view these aspects, say the respondents.

836. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate — if it can be called that — of Article 335 is to take the claims of members of

21 *DeFunis* v. *Charles Odegaard*, (1974) 40 L Ed 2d 164: 416 US 312 (1974)

SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of the article to say that the mandate is maintenance of efficiency of administration.) Maybe, efficiency, competence and merit are not synonymous concepts; maybe, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with — and may, in some cases, excel — members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are *anti-meritarian*. Merit there is even among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others.

837. Having said this, we must append a note of clarification. In some cases arising under Article 15, this Court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in *State of M.P.* v. *Nivedita Jain*[146] admission to medical course was regulated by an entrance test (called Pre-Medical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that Scheduled Caste/Scheduled Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard altogether. The Government's action was challenged in this Court but was upheld. Since it was a case under Article 15, Article 335 had no relevance and was not applied. But in the case of Article 16, Article 335 would be relevant and any order on the lines of the order of the Government of Madhya Pradesh (in *Nivedita Jain*[146]) would not be permissible, being inconsistent with the efficiency of administration. To wit, in the matter of appointment of Medical Officers, the Government or the Public Service

146 (1981) 4 SCC 296: (1982) 1 SCR 759

Commission cannot say that there shall be no minimum qualifying marks for Scheduled Caste/Scheduled Tribe candidates, while prescribing a minimum for others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes — consistent with the requirements of efficiency of administration — it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind.

838. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

839. As a matter of fact, the impugned Memorandum dated August 13, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may, we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors — and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated August 13, 1990 cannot be stayed or withheld.

840. We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335.

841. We may add that we see no particular relevance of Article 38(2) in this context. Article 16(4) is also a measure to ensure equality of status besides equality of opportunity.

PART VI

(Questions 9, 10 & 11 and Other Miscellaneous Questions)

Question No. 9:

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?

842. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the executive — a co-equal wing — in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed.

Questions No. 10:

Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?

843. While dealing with Question No. 3(*d*), we held that that exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a *measure* of social advancement and on that basis 'creamy layer' of a given

caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No. 5, we held that it is not impermissible for the State to categorise backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the goldsmiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backwards classes may indeed serve to help the more backward among them to get their due. But the question now is whether clause (*i*) of the Office Memorandum dated September 25, 1991 is sustainable in law. The said clause provides for preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as a measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e., 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is: what is the meaning and context of the expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally — if the 'more backward' take away all the available vacancies/posts reserved for OBCs, none would remain for 'backward' among the OBCs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion,

is the proper and reasonable way of understanding the expression 'preference' in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true intention behind the clause.

844. In shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the apportionment of reserved vacancies/posts among 'backward' and "more backward". On such notification, the clause will become operational.

Questions No. 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?

845. This clause provides for a 10% reservation (in appointments/posts) in favour of economically backward sections among the open competition (non-reserved) category. Though the criteria is not yet evolved by the Government of India, it is obvious that the basis is either the income of a person and/or the extent of property held by him. The impugned Memorandum does not say whether this classification is made under clause (4) or clause (1) of Article 16. Evidently, this classification among a category outside clause (4) of Article 16 is not and cannot be related to clause (4) of Article 16. If at all, it is relatable to clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated May 25, 1991 fails and is accordingly declared as such.

††"*The Concept of Positive Action and Positive Discrimination*"

846. Dr Rajeev Dhavan describes Article 15(4) as a provision envisaging programmes of positive action and Article 16(4) as a provision warranting programmes of positive discrimination. We are afraid we may

†† **Ed.**: Treated as Question 12 in the headnote

not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs, Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts. But it may not be entirely right to say that Article 15(4) is a provision envisaging programmes of positive action. Indeed, even programmes of positive action may sometimes involve a degree of discrimination. For example, if a special residential school is established for Scheduled Tribes or Scheduled Castes at State expense, it is a discrimination against other students, upon whose education a far lesser amount is being spent by the State. Or for that matter, take the very American cases — *Fullilove*[51] or *Metro Broadcasting*[52] — can it be said that they do not involve any discrimination? They do. It is another matter that such discrimination is not unconstitutional for the reason that it is designed to achieve an important government objective.

‡‡*Desirability of a Permanent Statutory Body to Examine Complaints of Over-inclusion/Under-inclusion*

847. We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of *Other Backward Classes* can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective

‡‡ Ed.: Treated as Question 13 in the headnote

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

52 *Metro Broqdcasting Inc.* v. *Federal Communications Commission*, 58 IW 5053

inquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under clause (4) of Article 16 itself — or under Article 16(4) read with Article 340 — as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of OBCs. As suggested by Chandrachud, CJ in *Vasanth Kumar*[9] there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case my be.

@Should the Matter go back to Constitution Bench to go into the Defects of the Mandal Commission Report?

848. Now that we have answered all the questions raised for our consideration, question now arises, whether in view of the answers given and directions being given by us, is it necessary to send back the matter to the five-Judge Bench to consider whether the investigation and survey done, and conclusions arrived at, by the Mandal Commission are contrary to law and if so, whether the impugned Office Memorandums, based as they are on the report of the said Commission, can be sustained? We think not. This is not a case where the five-Judge Bench framed certain questions and referred them to this Bench. All the matters as such were placed before this Bench for disposal. During the course of hearing, however, when some counsel wanted to take us into details of castes/groups/classes which, according to them, have been wrongly included or excluded, as the case may be, we refused to go into those details saying that those details can be gone into before the five-Judge Bench later. Otherwise, we heard the counsel fully on the alleged illegalities in the approach and methodology adopted by the Commission. The written arguments bear them out. We shall notice the criticism first and then answer the question posed at the inception of this para.

849. The first and foremost criticism levelled against the approach and the procedure adopted by Mandal Commission is that the Mandal Commission has adopted caste and caste alone as the basis of its

@ **Ed.**: Treated as Question 14 in the headnote

(decided on June 27, 1990)

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

approach throughout. On this count alone, it is argued, the entire report of the Commission is vitiated. It is pointed out that in its very first letter dated April 25, 1979 (Appendix VII at page 91, Vol. 2) addressed to all the Ministries and Departments of the Central Government, the Commission has prescribed the following test for determining the socially and educationally backward classes:

"(*a*) In respect of employees belonging to the Hindu communities

(*i*) an employee will be deemed to be socially backward if he does not belong to any of the three twice-born (Dvij) 'Varnas' i.e., he is neither a Brahmin, nor a Kshatriya/nor a Vaishya; and

(*ii*) he will be deemed to be educationally backward if neither his father nor his grandfather has studied beyond the primary level.

(*b*) Regarding the non-Hindu Communities—

(*i*) an employee will be deemed to be socially backward if either

(1) he is a convert from those Hindu communities which have been defined as socially backward as per para 4(*a*)(*i*) above, or

(2) in case he is not such a convert, his parental income is below the prevalent poverty line, i.e., Rs 71 per head per month.

(*ii*) he will be deemed to be educationally backward if neither his father nor his grandfather had studied beyond the primary level."

Serious objection is taken to the above criteria. Treating all the Hindus not belonging to three upper castes as socially and educationally backward classes, it is submitted, is faulty to the core. In the case of non-Hindus, the prescription of income limit is said to be arbitrary. The criteria for identifying backward classes must be uniform for the entire population; it cannot vary from religion to religion. This shows, says the counsel, the impropriety and impermissibility of adopting the caste as the basis of identification, since castes exist only in the Hindu religion and not in others. On the basis of the statements made in Chapters IV and V, it is submitted that the Commission was obsessed by caste and was blind to all other determinants. It is also pointed out that the survey done by the Commission is cursory, totally inadequate and faulty. According to the petitioners, the survey must be an exhaustive one like the one done by Venkataswamy Commission in Karnataka, which also forms the basis of the Justice Chinnappa Reddy Commission Report. Carrying out the

survey to cover merely two villages and one urban block in each District is not likely to disclose a true picture since it does not represent survey of even one per cent of the population. Objection is also taken to use of personal knowledge and also to reliance upon lists of backward classes prepared by State Governments. It is repeatedly urged that the survey done by the Commission cannot be called a scientific one, which has led to discovery of as many as 3,743 castes and their identification as socially and educationally backward classes. This is a steep increase over Kaka Kalelkar Commission, according to which, the number of SEBCs was only 2,733. It is pointed out further that certain castes which obtained less than 11 points on being tested against the criteria evolved by the Commission are included among the backward classes. Conversely, certain castes which obtained 11 or more points are yet excluded from the list of backward classes. It is urged that the caste-based approach adopted by the Commission has practically divided the nation into a forward section and a backward section. If Scheduled Castes and Scheduled Tribes are also added to the Other Backward Classes, more than 81% of the population gets designated as backward. But for the decision in *Balaji*[12] it is submitted, the Commission would certainly have recommended reservation of 52% of the appointments/posts in favour of the backward classes. The Commission was actuated by malice towards upper castes and has submitted an unbalanced, unjust and unconstitutional report, it is argued.

850. Respondent's counsel, on the other hand, have refuted each and every contention of the petitioners. According to them, the criteria evolved, the methodology adopted, identification made and lists prepared are all perfectly valid and legal. The Union of India, while justifying the Report, has taken the stand that even if there are any errors or inadequacies in the work and Report of the Commission, it is no *ground* for throwing out the Report altogether, more particularly when the Government of India has taken care by 'marrying' the Mandal lists with the State lists. If any errors are brought to the notice of the Government, Shri Parasaran says, the Government will certainly look into them and rectify them, if satisfied about the error.

851. Before we decide to answer the question, it is necessary to point out that each and every defect, if any, in the working and Report of the Mandal Commission does not automatically vitiate the impugned Office Memorandums. It has to be shown further that that particular defect has crept into the Office Memorandum as well. In addition to the above, the following factors must also be kept in mind:

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

(*a*) The Mandal Commission Report has not been accepted by the Government of India in its fullness, nor has the Government accepted the list of Other Backward Classes prepared by it in its entirety. What is now in issue is not the validity of the Report but the validity of the impugned Office Memorandum issued on the basis of the Report. The First Memorandum expressly directs that only those classes will be treated as backward classes for the purposes of Article 16(4) as are common to both the Mandal List and the respective State List. (It may be remembered that the Mandal Commission has prepared the lists of Other Backward Classes State-wise). Almost every caste, community and occupational group found in the State lists is also found in the concerned State list prepared by Mandal Commission; Mandal lists contain many more castes/occupational groups than the respective State lists. (It should indeed be rare that a particular caste/group/class is included in the State list and is not included in the Mandal list relating to that State. In such a case, of course, such caste/group/class would not be treated as an OBC under the Office Memorandum dated August 13, 1990.) In such a situation, what the Office Memorandum dated August 13, 1990 does *in effect* is to enforce the respective State lists. In other words, the Government of India has, for all practical purposes, adopted the respective State lists, as they obtained on August 13, 1990. In this sense, the lists prepared by Mandal have no real significance *at present*. The State lists were prepared both for the purposes of Article 16(4) as well as Article 15(4). The following particulars furnished by the Union of India do establish that these State lists have been prepared after due enquiry and investigation and have stood the test of time and judicial scrutiny:

Basis of identification of SEBCs/OBCs in the States covered by O.M. of August 13, 1990

S. No.	Name of States	Whether State's list is based on Report of Commission/Committee	Status
1	2	3	4
1.	Andhra Pradesh	Reports of the Commission headed by Shri K.M. Anantharaman and Shri Muralidhara Rao (June 1970 and August 1982 respectivety).	State's G.O. based on the report of the Anantharam Commission was upheld by the Supreme Court in *Balram case*[16]. The modified list of OBCs based on the report of

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

a				Muralidhara Rao Commission was upheld by the A.P. High Court but the increased quantum of reservation from 25% to 44% was struck down (Judgment of 5-9-1986).
b	2.	Bihar	Commission set up in 1971 under the Chairmanship of Shri Mungeri Lal.	Not challenged
c	3.	Gujarat	Commission headed by Shri A.R. Bakshi, Retd. High Court Judge (Report of February 1976).	
d	4.	Goa	*No Commission/Committee* State Government have notified 4 communities as OBC on their own.	The list was challenged in the High Court in 1986 for quashing the G.O. and instead declare all the 19 communities recommended by the Mandal Commission as OBCs. The High Court rejected the petitioner's claim on March 10, 1988. The matter is now before the Supreme Court through SLP No. 9813 of 1988.
e				
f				
g	5.	Haryana	Committees of 1951 and 1965. (In 1990 Gurnam Singh Commission was also set up and its report accepted by State Government.)	
h	6.	Himachal Pradesh	Based on the list of OBCs declared by the erstwhile State of Punjab for the areas merged in the State of Himachal Pradesh in November 1966. The list is now extended to the entire State.	Not challenged
i				

7.	Karnataka	Commission headed by Shri L.G. Havanuri (Report of Nov. 1975)	The Karnataka High Court struck down the inclusion of certain communities in the list of SEBCs. The matter was then taken to the Supreme Court in *Vasanth Kumar case*[9]. (High Court judgment was prior to Mandal Report).	a
8.	Kerala	(*i*) Commission headed by Shri G. Kumara Pillai set up in 1964. (*ii*) Commission headed by Shri N.P. Damodaran set up in 1967.	The Kerala Govt. vide communication dt. 8.2.1991 has intimated that the list of OBCs has not been challenged.	b
9.	Madhya Pradesh	Mahajan Commission (report of Dec. 1983) (when Mandal was working, no State list)	List stayed by M.P. High Court.	c
10.	Maharashtra	Committee headed by Shri B.D. Deshmukh (report on January 1964)	Not challenged.	d
11.	Punjab	Committees set up in 1951 at 1965. The latter committee was headed by Shri Brish Bhan	Not challenged.	e
12.	Tamil Nadu	(*i*) Commission headed by Shri A.N. Sattanathan set up in 1969. (*ii*) Commission headed by Shri J.A. Ambasankar (report of February 1985).	The revised list prepared by the Ambasankar Commission has been challenged in the Supreme Court vide W.P. No. 1 of 1987 which is pending.	f
13.	Uttar Pradesh	Commission headed by Shri Chhedi Lal Sathi (Report of 1977).	Status report not received from State Government.	g

852. Even if in one or two cases (e.g., Goa), the list is prepared without appointing a Commission, it cannot be said to be bad on that account. The Government, which drew up the list, must be presumed to

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

be aware of the conditions obtaining in their State/area. Unless so held by any competent court — or the permanent mechanism (in the nature of a Commission) directed to be created herewith holds otherwise — the lists must be deemed to be valid and enforceable.

853. At the same time, we think it necessary to make the following clarification: It is true that the Government of India has adopted the State lists obtaining as on August 13, 1990 for its own purposes but that does not mean that those lists are meant to be sacrosanct and unalterable. There may be cases where commissions appointed by the State Government may have, in their reports, recommended modification of such lists by deletion or addition of certain castes, communities and classes. Wherever such commission reports are available, the State Government is bound to look into them and take action on that basis with reasonable promptitude. If the State Government effects any modification or alteration by way of deletions or additions, the same shall be intimated to the Government of India forthwith which shall take appropriate action on that basis and make necessary changes in its own list relating to that State. Further, it shall be equally open to, *indeed the duty of*, the Government of India — since it has adopted the existing States lists — to look into the reports of such commission, if any, and pass its own orders, independent of any action by the State Government, thereon with reasonable promptitude by way of modification or alternation. It shall be open to the Government of India to make such modification/alteration in the lists adopted by way of additions or deletions, as it thinks appropriate on the basis of the Reports of the Commission(s). This direction, in our opinion, safeguards against perpetuation of any errors in the State lists and ensures rectification of those lists with reasonable promptitude on the basis of the Reports of the Commissions already submitted, if any. This course may be adopted *de hors* the reference to or advice of the permanent mechanism (by way of Commission) which we have directed to be created at both Central and State level and with respect to which we have made appropriate directions elsewhere.

854. (*b*) Strictly speaking, appointment of a Commission under Article 340 is not necessary to identify the other backward classes. Article 340 does not say so. According to it, the Commission is to be constituted 'to investigate the conditions of socially and educationally backward classes ... 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 ....' The Government could have, even without appointing a Commission, specified the OBCs, on the basis of such material as it may have had before it (e.g., the lists

prepared by various State Governments) and then appointed the Commission to investigate their conditions and to make appropriate recommendations. It is true that Mandal Commission was constituted "to determine the criteria for defining the socially and educationally backward classes" and the Commission did determine the same. Even so, it is necessary to keep the above constitutional position in mind, — more particularly in view of the veto given to State lists over the Mandal lists as explained in the preceding sub-para. The *criteria* evolved by Mandal Commission for defining/identifying the Other Backward Classes cannot be said to be irrelevant. Maybe there are certain errors in actual exercise of identification, in the nature of over-inclusion or under-inclusion, as the case may be. But in an exercise of such magnitude and complexity, such errors are not uncommon. These errors cannot be made a basis for rejecting either the relevance of the criteria evolved by the Commission or the entire exercise of identification. It is one thing to say that these errors must be rectified by the Government of India by evolving an appropriate mechanism and an altogether different thing to say that on that account, the entire exercise becomes futile. There can never be a perfect report. In human affairs, such as this, perfection is only an ideal — not an attainable goal. More than forty years have passed by. So far, no reservations could be made in favour of OBCs for one or the other reason in Central services though in many States, such reservations are in force. Reservations in favour of OBCs are in force in the States of Kerala, Tamil Nadu, Karnataka, Andhra Pradesh, Maharashtra, Orissa, Bihar, Gujarat, Goa, Uttar Pradesh, Punjab, Haryana and Himachal Pradesh among others. In Madhya Pradesh, a list of OBCs was prepared on the basis of the Mahajan Commission Report but it appears to have been stayed by the High Court.

855. (*c*) The direction made herein for constitution of a permanent Commission to examine complaints of over-inclusion or under-inclusion obviates the need of any such scrutiny by this Court. We have directed constitution of such Commission both at Central and State level. Persons aggrieved can always approach them for appropriate redress. Such Commission, which will have the power to receive evidence and enquire into disputed questions of fact, can more appropriately decide such complaints than this Court under Article 32.

856. In this view of the matter, it is unnecessary for us to express any opinion on the correctness or adequacy of the exercise done by the Mandal Commission. (If and when the Government of India notifies any caste/community/group/class from out of the Mandal list, which caste etc. is not included in the appropriate State list, would the said question fall for consideration. It is then that it would be necessary to deal with the

criticism against the Mandal Commission). For the same reason, it is unnecessary to refer or deal with the arguments of the counsel for Union of India and the respondents in justification of the Mandal Commission Report.

857. Before parting with this aspect, we must say that identifying the impugned Office Memorandums with the Mandal Commission Report is basically erroneous. Such an identification is bound to lead one into confusion. He would be missing the wood for the trees. Instead of concentrating on the real issues, he would deviate into irrelevance and imbalance. Mandal Commission Report may have led to the passing of the impugned Office Memorandum dated August 13, 1990; it may have acted as the catalytic agent in bringing into existence the reservation in favour of OBCs (loosely referred to as SEBCs in the O.M.) but the Office Memorandum dated August 13, 1990 doesn't incorporate the Mandal lists of OBCs as such. It incorporates, in truth and effect, the State lists as explained hereinabove. In a social measure like the impugned one, the court must give due regard to the judgment of the Executive, a co-equal wing of the State and approach the measure in the spirit in which it is conceived. This very idea is put forcefully by Joseph Raz (Fellow of Balliol College, Oxford) in his article "*The Rule of Law and Its Virtue*"[147] in the following words:

> "... one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty."

858. A note of clarification may be appended at this stage. We are told that in the State of Madhya Pradesh a list of Other Backward Classes has been prepared but it has been stayed by the High Court. The said stay, in our opinion, does not affect the operation of the Office Memorandum dated August 13, 1992 even with respect to the other backward classes in Madhya Pradesh. What the said Office Memorandum does is to import and adopt the said list for its own purposes i.e., for the purpose of making reservations in Central services in favour of other backward classes. In such a situation, the stay of the operation of the said list by the State of Madhya Pradesh does have no relevance to the importation and adoption of the said list into Office Memorandum dated August 13, 1990.

147 (1977) 93 Law Quarterly Review 195, 211

PART VII

859. We may summarise our answers to the various questions dealt with and answered hereinabove:

(1) (*a*) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Paras 735-737)

(*b*) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Paras 738-740)

(2) (*a*) Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1). (Paras 741-742)

(*b*) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 743)

(*c*) Reservations can also be provided under clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' — as explained in this Judgment. (Para 745)

(3) (*a*) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (Paras 746 to 779)

(*b*) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply

the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does — what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming minority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 780 and 785).

(*c*) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. (Paras 786-789)

(*d*) 'Creamy layer' can be, and must be excluded. (Paras 790-793)

(*e*) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (Paras 794 and 797)

(*f*) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority. (Para 798)

(4) (*a*) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. (Para 799)

(*b*) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised. (Para 800)

(5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. (Paras 801 to 803)

(6) (*a*) and (*b*) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and

remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to end characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out. (Paras 804 to 813)

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be. (Para 814)

(d) *Devadasan*[19] was wrongly decided and is accordingly overruled to the extent it is inconsistent with this judgment. (Paras 815 to 818)

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion — be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration. (Paras 819 to 831)

(8) While the rule of reservation cannot be called anti-meritarian, there are certain services and posts to which it may not be advisable to apply the rule of reservation. (Paras 832 to 841)

(9) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4). (Para 842)

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(10) The distinction made in the impugned Office Memorandum dated September 25, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as Other Backward Classes, as explained in paras 843-844 of this Judgment. (Para 843-844)

(11) 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 reservation' made in the impugned Office Memorandum dated September 25, 1991 is constitutionally invalid and is accordingly struck down. (Para 845)

(13) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism — in the nature of a Commission — for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of OBCs and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor. (Para 847)

(14) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of five Judges. (Paras 848 to 850)

860. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 681. Our answers question-wise are:

(1) Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under clause (1) of Article 16.

(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', SCs, STs and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis

for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to in Article 46 do include SEBCs referred to in Article 340 and covered by Article 16(4).

(3) Even under Article 16(1), reservations cannot be made on the basis of economic criteria alone.

(4) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.

To the extent, *Devadasan*[19] is inconsistent herewith, it is overruled.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable — nay, necessary — to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement.

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4). It is not possible or necessary to say more than this under this question.

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(8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion — be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thanks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so.

(As pointed out at the end of the paragraph 820 of this judgment, Ahmadi, J having upheld the preliminary objection raised by Shri Parasaran and others has not associated himself with the discussion on the question whether reservation in promotion is permissible. Therefore, the views expressed in this judgment on the said point are not the views of Ahmadi, J)

The following Directions are given to the Government of India, the State Governments and the Administration of Union Territories

861. (*A*) The Government of India, each of the State Governments and the Administrations of Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government.

(*B*) Within four months from today the Government of India shall specify the bases, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections ('creamy layer') from 'Other Backward Classes'. The implementation of the impugned O.M. dated August 13, 1990 shall be subject to exclusion of such socially advanced persons ('creamy layer').

This direction shall not however apply to States where the reservations in favour of backward classes are already in operation. They can continue to operate them. Such States shall however evolve the said

criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated 'Other Backward Classes'.

(C) It is clarified and directed that any and all objections to the criteria that may be evolved by the Government of India and the State Governments in pursuance of the direction contained in clause (B) of para 861 as well as to the classification among backward classes and equitable distribution of the benefits of reservations among them that may be made in terms of and as contemplated by clause (*i*) of the Office Memorandum dated September 25, 1991, as explained herein, shall be preferred *only* before this Court and not before or in any other High Court or other Court or Tribunal. Similarly, any petition or proceeding questioning the validity, operation or implementation of the two impugned Office Memorandums, on any grounds whatsoever, shall be filed or instituted *only* before this Court and not before any High Court or other Court or Tribunal.

862. The Office Memorandum dated August 13, 1990 impugned in these writ petitions is accordingly held valid and enforceable subject to the exclusion of the socially advanced members/sections from the notified 'Other Backward Classes', as explained in para 861(B).

863. Clause (*i*) of the Office Memorandum dated September 25, 1991 requires — to uphold its validity — to be read, interpreted and understood as intending a distinction between backward and more backward classes on the basis of degrees of social backwardness and a rational and equitable distribution of the benefits of the reservations amongst them. To be valid, the said clause will have to be read, understood and implemented accordingly.

864. Clause (*ii*) of the Office Memorandum dated September 25, 1991 is held invalid and inoperative.

865. The writ petitions and transferred cases are disposed of in the light of the principles, directions, clarifications and orders contained in this Judgment.

866. No costs.

END OF THIS VOLUME

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