VOLUME II

THE SUPREME COURT JUDGMENT
(16-11-1992)

JUDGMENT OF
P. B. SAWANT, S. RATNAVAEL PANDIAN, JJ

Judgment of 9-Judge Constitution Bench of The Supreme Court of India delivered on 16-11-1992 regarding reservations in service for Socially & Educationally Backward Classes and Other Economically Backward Sections, etc.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No.930 of 1990

Indra Sawhney Etc. Etc. ..... *Petitioners*
Versus
Union of India & Ors. Etc. Etc. .....*Respondents*

WITH

Writ Petition (Civil) Nos. 948, 949, 953, 954, 965, 966, 971, 972, 974, 986, 987, 1053, 1061, 1064, 1069, 1071, 1077, 1079, 1081, 1087, 1101, 1102, 1105, 1106, 1112, 1114, 1115, 1116, 1117, 1119, 1120, 1123, 1124, 1126, 1128, 1130, 1141, 1148, 1158, 1276, 1307, 1362, Of 1990

Writ Petition (Civil) Nos. 3, 36, 97, 343, 1094 Of 1991
Writ Petition (Civil) Nos. 11, 111, 261, Of 1992

AND

Transfer Case (civil) Nos. 27, 28-31, 32-33, 34-35, 65 Of 1990, 1 Of 1991

JUDGMENT

SAWANT, J.

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

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

3. The reservation in State employment is not a phenomenon unknown to this country. It is traceable to a deliberate policy of affirmative action or positive discrimination adopted in some parts of the country as early as in the beginning of this century. it is equally known to the employment under the Central Government where reservations in favour of the Scheduled Castes and Scheduled Tribes have been in existence for a considerable time now. The reasons why the issue has assumed agitational proportion on account of the present reservations, may be varied. While it is true that the Court is concerned with the interpretation of the provisions of the Constitution on the subject and not either with the causes of the turmoil or the consequence of the interpretation of the law, it is equally true that the Constitution being essentially a political document, has to be interpreted to meet the "felt necessities of the time". To interpret it, ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as

an immutable cold letter of law unconcerned with the realities. Our Constitution, unlike many others, incorporates in it the framework of the social change that is desired to be brought about. The change has to be ushered in as expeditiously as possible but at the same time with the least friction and dislocation in national life. The duty to bring about the smooth change over is cast on all institutions including the judiciary. A deep knowledge of social life with its multitudinous facets and their interactions, is necessary to decide soicial issues like the present one. A superficial approach will be counter-productive.

THE GROUND REALITIES

4. Because of its pernicious caste system which may truly be described as its original sin, the Indian society has, for ages, remained stratified. The origin of the caste system is shrouded in speculation, neither the historians nor the sociologists being able to trace it in its present form to any particular period of time or region, or to a specific cause or causes. The fact, however, remains that it consists of mobility-tight hierarchical social compartments. Every individual is born in and, therefore, with a particular caste which he cannot change. Hitherto, he had to follow the occupation assigned to his caste and he could not even think of changing it. The mobility to upper caste is forbidden, even if to-day he pursues the professions and occupations of the upper caste. He continues to be looked upon as a member of the lower caste even if his achievements are higher than of those belonging to the higher castes. In social intercourse, he has to take his assigned caste-place. The once casteless and unireligious Indian society of Vedic times became multifactious and multi-religious mainly on account of the rebellion of the lower castes against the tyranny of the caste system and their exploitation by the higher castes. Various sects emerged within the Hindu fold itself to challenge the inequitous system. Distinct religions like Buddhism, Jainism and Sikhism were born as revolts against casteism. When, therefore, first Islam and then Christianity made their entries here and ruled this country, many from the lower castes embraced them to escape the tyranny and inequity, while some from the higher castes for pelf and power. However, the change of religion did not always succeed in eliminating castes. The converts carried with them their castes and occupations to the new religions. The result has been that even among Sikhs, Muslims and Christians casteism prevails in varying degrees in practice, their preachings notwithstanding. Only Zoroastrianism is an exception to the rule; but that is because entry into it by conversion is impermissible. Casteism has thus been the bane of the entire Indian society, the difference in its rigidity being of a degree varying from religion to religion and from region to region.

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

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

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

7. The paradoxical spectacle of political power being unable to deliver the goods to whom it desires, is neither unique nor new to this country. This has happened and happens whenever the implementing machinery is at cross purposes with the political power. Faced with the hostility of the administrative-executive to their plans for reform, realising the inequitous distribution of posts in the administration between different castes and communities, and being genuinely interested in lifting the disadvantaged sections of the society in their states, the enlightened Rule's of some of the then Princely States took initiative and introduced reservations in the administrative posts in favour of the backward castes and communities since as early as the first quarter of this century. Mysore and Kolhapur were among the first to do so. On account of the movement for social justice and equality started by the Justice Party, the then Presidency of Madras (which then comprised the present State of Tamil Nadu, parts of the present Andhra Pradesh and Kerala) initiated reservations in the Government employment in 1921. It was followed by the Bombay Presidency which then comprised the major parts of the present States of Maharashtra, Karnataka and Gujarat. Thus the first quarter of this century saw reservations in Government employment in almost whole of the Southern India. It has to be noted that these reservations were not only in favour of the depressed classes which are today known as the Scheduled Castes, but also in favour of other backward castes and classes including what were then known as the intermediate castes. The policy did arouse hostility and resistance of the higher castes even at that time. The agitation against reservations to-day is only a new incarnation of the same attitude of hostility. The resistance is understandable. It springs from the real prospect of the loss of employment opportunities for the eligible young. But the deeper reason of the high castes for opposing the reservation may be the prospect of losing the hitherto exclusive administrative power and having to share it with others on an increasing scale. When it is realised that in a democracy, the political executive has a limited tenure and the administrative executive wields the real power, (they can truly be described as the permanent politicians), the antipathy to reservation on a pitched note, propelled by the prospective loss of power, is quite intelligible. The loss of employment opportunities can be made good by generating employment elsewhere and by adopting a rational economic structure with planned economy, planned population and planned education. That is where all sections of the society-whether pro or anti-reservation should concentrate. For even if all available posts are reserved or dereserved, they will not provide employment to more than an infinitesimal number of either of the sections. Unfortunately, it is not logic and sanity, but emotions and politics which dominate the issue. The loss of exclusive political power wielded through administrative machine, however, cannot be avoided except by perpetuating the *status quo*.

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

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

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

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

10. Those who advance merit contention, unfortunately, also ignore the very basic fact-(though in other contexts, they may be the first to accept it)-that the traditional method of evaluating merit is neither scientific nor realistic. Marks in one-time oral or written test do not necessarily prove the worth of suitability of an individual to a particular post, much less do they indicate his comparative calibre. What is more, for different posts, different tests have to be applied to judge the suitability. The basic problems of this country are mass-oriented. India lives in villages, and in slums in towns and cities. To tackle their problems and to implement measures to better their lot, the country needs personnel who have first-hand knowledge of their problems and have personal interest in solving them. What is needed is empathy and not mere sympathy. One of the major reasons why during all these years after Independence, the lot of the downtrodden has not even been marginally improved and why majority of the schemes for their welfare have remained on paper, is perceptibly traceable to the fact that the implementing machinery dominated as it is by the high classes, is indifferent to their problems. The Mandal Commission's lament in its report, that it did not even receive replies to the information sought by it from various Governments, departments and organisations on the caste-wise composition of their services, speaks volumes on the point. A policy of deliberate reservations and recruitment in administration from the lower classes, who form the bulk of the population and whose problems primarily are to be solved on a priority basis by any administration with democratic pretensions, is therefore, not only eminently just but essential to implement the Constitution, and to ensure stability, unity and prosperity of the country.

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

11A. The assumption that the reservations lead to the appointment or admission of non-meritorious candidates is also not factually correct. In the first instance, there are minimum qualifying marks prescribed for appointment/admission. Secondly, there is a fierce competition among the backward class candidates for the seats in the reserved quota. This has resulted in the cut-off marks for the seats in the

reserved quota reaching near the cut-off line for seats in the general quota as some surveys made on the subject show. A sample of such surveys made for the State of Tamil Nadu by Era Sezhian and published in the issue of the "Hindu" dated 8th October, 1990 may be reproduced here:

Selection to professional courses: Cut-off level

Course of Study	Open Competition	Backward	Most Backward	Scheduled Caste
Engineering Course (Anna University)				
Computer Science	97.98%	96.58%	93.25%	84.38%
Electronics	97.74%	96.08%	92.16%	82.22%
Electrical	95.84%	95.42%	91.48%	81.98%
Mechanical Engg.	95.78%	94.10%	90.66%	79.21%
Medical Course (University of Madras)				
M.B.B.S.	95.22%	93.18%	89.62%	83.98%
Agricultural Course (Agricultual University, Coimbatore)				
B.Sc. Agri.	90.90%	90.08%	86.10%	78.04%
B.E. Agri.	92.66%	91.96%	87.46%	76.14%
Veterinary (Tamil Nadu Veterinary & Animal Sciences University)				
BVSc.	94.90%	93.48%	91.18%	85.24%
BFSc.	96.96%	95.58%	95.02%	93.02%

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

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

PHILOSOPHY AND OBJECTIVES OF RESERVATIONS

13. The aim of any civilised society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. The dignity of the individual is dented in direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern, and give one's best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithals to avail of them are denied. Nevertheless, the consequences are as potent.

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

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

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

17. It is no longer necessary to emphasise that equality contemplated by Article 14 and other cognate Articles including Articles 15 (1), 16 (1), 29 (2) and 38 (2) of the Constitution, is secured not only when equals are treated equally but also when unequals are treated unequally. Conversely, when unequals are treated equally, the mandate of equality before law is breached. To bring about equality between the unequals, therefore, it is necessary to adopt positive measures to abolish inequality. The equalising measures will have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalisation will not be of the unequals. Article 14 which guarantees equality before law would by itself, without any other provision in the Constitution, be enough to validate such equalising measures. The founders of the Constitution, however, thought it advisable to incorporate another provision, viz., Article 16 specifically providing for equality of opportunity in matters of public employment. Further they emphasised in clause (4) thereof that for equalising the employment opportunities in the services under the State, the State may adopt positive measures for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in such services. By hind sight, the foresight shown in making the provision specifically, instead of leaving it only to the equality provision as under the U.S. Constitution, is more than vindicated. In spite of decisions of this Court on almost all aspects of the problem, spread over the past more than forty years now, the validity, the nature, the content and the extent of the reservation is still under debate. The absence of such provision may well have led to total denial of equal opportunity in the most vital sphere of the State activity. Consequently, Article 38 (2) which requires the State in particular to strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations, and Article 46 which enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people, and to protect them from social injustice and all forms of exploitation, and Article 335 which requires the State to take into consideration the claims of the Scheduled Castes and Scheduled Tribes in making the appointments to services and posts under the Union or States, would have, all probably remained on paper.

18. The trinity of the goals of the Constitution, viz.,

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

19. Under Article 16 (4), the reservation in the State employment is to be provided for a "class of people" which must be "backward" and "in the opinion of the State" is "not adequately represented" in the services of the State. Under Article 46, the State is required to "promote with special care" the "educational and economic interests" of the "weaker sections" of the people and "in particular", of the Scheduled Castes and Scheduled Tribes, and "to protect" them from "social injustice" and "all forms of exploitation". Since in the present case, we are not concerned with the reservations in favour of the SCs/STs, it is not necessary to refer to Article 335 except to point out that, it is in terms provided there that the claims of SCs/STs in the services are to be taken into consideration, consistently with the maintenance of efficiency of administration. It must, therefore, mean that the claims of other backward class of citizens and weaker sections must also be considered consistently with the maintenance of the efficiency. For, whomsoever, therefore, reservation is made, the efficiency of administration is not to be sacrificed, whatever the efficiency may mean. That is the mandate of the Constitution itself.

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

21. The objectives of reservation may be spelt out variously. As the U.S. Supreme Court has stated in different celebrated cases, viz., *Oliver Brown et. al* v. *Board of Eductin of Topeka et. al.* (347 US 483: 98 L Ed 873), *Spottswood Thomas Bolling et. al* v. *C. Melvin Sharpe et. al.* v. *Charles Odegaard* (416 US 312: 40 L Ed 2d 164), *Regents of the University of California* v. *Allan Bakke* (438 US 265 : 57 L Ed 2d 7; 50), *H. Earl Fullilove et. al* v. *Philip M. Klutznick* (448 US 448 : 65 L Ed 2d 902), and *Metro Broadcasting, Inc.* v. *Federal Communications Commission* (111 L Ed. 2d 445) rendered as late as on June 27, 1990, the reservation or affirmative action may be undertaken to remove the "persisting or present and continuing effects of past discrimination"; to lift the "limitation on access to equal opportunities"; to grant "opportunity for full participation in the government" of the society; to recognise and discharge "special obligations" towards the disadvantaged and discriminated social groups"; "to overcome substantial chronic under-representation of a social group"; or "to serve the important governmental objectives". What applies to American society, applies *ex proprio vigore* to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous. Unlike in America, the all pervasive discrimination here is against a vast majority.

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

23. In a society such as ours where there exist forward and backward, higher and lower social groups,

the first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups. Unless all social groups are brought on an equal cultural plane, social intercourse among the groups will be an impossibility. Inter-marriage as a matter of course and without inhibitions is by far the most potent means of effecting social integration. Inter-marriages between different social groups would not be possible unless all groups attain the same cultural level. Even in the same social group, marriages take place only between individuals who are on the same cultural plane. Culture is a cumulative product of economic and educational attainments leading to social accomplishment and refinement of mind, morals and taste. Employment and particularly the governmental employment promotes economic and social advancement which in turn also leads to educational advancement of the group. Though it is true that economic and educational advancement is not necessarily accompanied by cultural growth, it is also equally true that without them, cultural advancement is difficult. Employment is thus an important aid for cultural growth. To achieve total unity and integration of the nation, reservations in employment are, therefore, imperative, in the present state of our society.

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

THE IMPUGNED ORDERS OF THE GOVERNMENT

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

(1) provide for reservation of 27% of the vacancies in civil posts and services under the Union Government to "SEBCs";

(2) restrict the reservations to the vacancies to be filled in by direct recruitment only (and thus by necessary implication excludes reservations in recruitment by promotion);

(3) leave the procedure to be followed for enforcing reservation to be detailed in instructions to be issued separately;

(4) make it clear that those belonging to SEBCs who enter into services in the open i.e., unreserved category are not to be counted for the purpose of calculating the reserved quota of 27%;

(5) specify that in the first phase of reservation, it is only SEBC castes and communities which are common to both the lists given in the report of the Mandal Commission and the list prepared by the State Governments, would be the beneficiaries of the reservations;

(6) state that the list of such common castes and communities will be issued by the Government separately;

(7) give effect to the reservation from 7th August 1990; and

(8) explain that the reservation quota will apply not only to the services under the Government of India but also to the services in the public sector undertakings and financial institutions including the public sector banks;

26. This order was amended by the second order of 25th September, 1991. The first purpose of the amend-

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

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

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

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

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

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

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

Question I

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

28. With the majority decision of this court in *State of Kerala & Anr.* v. *N.M. Thomas & Ors.* [(1976) 1 SCR 906] having confirmed the minority opinion of Subba Rao, J in *T. Devadasan* vs. *Union of India & Anr.* [(1964) 4 SCR 680], the settled judicial view is that clause (4) of Article 16 is not an exception to clause (1) thereof, but is merely an emphatic way of stating what is implicit in clause (1).

29. Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results. The various provisions of our Constitution and particularly those of Articles 38, 46, 335, 338 and 340 together with the Preamble, show that the right to equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. It is a positive right, and the State is under an obligation to undertake measures to make it real and effectual. A mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and 16 (1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them. However, as pointed out by Dr. Ambedkar while replying to the debate on the provision in the Constituent Assembly, it became necessary to incorporate clause (4) in Article 16 at the insistence of the members of the Assembly and to allay all apprehensions in that behalf. Thus, what was otherwise clear in clause (1) where the expression "equality of opportunity" is not used in a formal but in a positive sense, was made explicit in clause (4) so that there was no mistake in understanding either the real import of the "right to equality" enshrined in the Constitution or the intentions of the Constitution-framers in that behalf. As Dr. Ambedkar has stated in the same reply, the purpose of the clause (4) was to emphasise that "there shall be reservation in favour of certain communities which have not so far had 'a proper look into, so to say, in the administration."

30. If, however, clause (4) is treated as an exception to clause (1), an important but unintended consequence may follow. There would be no other classification permissible under clause (1), and clause (4) would be deemed to exhaust all the exceptions that can be made to clause (1). It would then not be open to make provision for reservation in services in favour of say, physically handicapped, army personnel and freedom

fighters and their dependents, project affected persons, etc. The classification made in favour of persons belonging to these categories is not hit by clause (2). Apart from the fact that they cut across all classes, the reservations in their favour are made on considerations other than that of backwardness within the meaning of clause (4). Some of them may belong to the backward classes while some may belong to forward classes or classes which have an adequate representation in the services. They are, however, more disadvantaged in their own class whether backward or forward. Hence, even on this ground it will have to be held that Article 16 (4) carves out from various classes for whom reservation can be made, a specific class, viz., the backward class of citizens, for emphasis and to put things beyond doubt.

31. For these very reasons, it will also have to be held that so far as "backward classes" are concerned, the reservations for them can only be made under clause (4) since they have been taken out from the classes for which reservation can be made under Article 16 (1). Hence, Article 16 (4) is exhaustive of all the reservations that can be made for the backward classes as such, but is not exhaustive of reservations that can be made for classes other than backward classes under Article 16 (1). So also, no reservation can be made under Article 16 (4) for classes other than "backward classes" implicit in that Article. They have to look for their reservations, to Article 16 (1).

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

Question II:

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

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

34. In this connection, a reference may first be made to Article 335 of the Constitution. There is no doubt that backward classes under Article 16 (4) would also include SCs/STs for whose entry into services, provision is also made under Article 335. There is, however, a difference in the language of the two Articles. Whereas the provision of Article 16 (4) is couched in an enabling language, that of Article 335 is in a mandatory cast. It appears that it became necessary to make the additional provision of reservations for SCs/STs under Article 335 because for them the reservations in services were to be made as obligatory as reservations in the House of the People and the Legislative Assemblies under Article 330 and 332 respectively. When we remember that Articles 330, 332 and 335 belong to the family of Articles in Part XVI which makes "Special Provisions Relating to Certain Classes", the additional and obligatory provision for SCs/STs under Article 335 becomes meaningful. it is probably because of the mandate of Article 335 and the level of backwardness of the SCs/STs-the most backward among the backward classes-that it also became necessary to caution and emphasise in the same vein, that the imperative claims of the SCs/STs shall be taken into consideration consistently with the efficiency of the administration, and not by sacrificing it. It cannot, however, be doubted that the same considerations will have to prevail while making provisions for reservation in favour of all backward classes under Article 16 (4). To hold otherwise would not only be irrational but discriminatory between two classes of backward citizens.

35. We may now analyse Article 16 in the light of the question. In the first instance, it is necessary to note that neither clauses (1) and (2) of Article 16 read together, nor clause (2) of Article 29 prohibits discrimination and, therefore classification, which is not made *only* on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them. They do not prevent classification, if religion, race, caste etc. are coupled with other grounds or considerations germane for the purpose for which its is made. Secondly, clauses (1) and (2) of Article 16 prevent discrimination

against individuals and not against classes of citizens. Thirdly, clause (4) of Article 16 enables the State to make special provision in favour of any backward "class" of citizens and not in favour of citizens who can be classified as backward. The emphasis is on "class of citizens" and not on "citizens". Fourthly, as has already been pointed out earlier, the class of citizens under Article 16 (4) has not only to be backward but also a class which is not adequately represented in the services under the State. Fifthly, when we remember that the Scheduled Castes and Scheduled Tribes are also the members of the the backward classes of citizens within the meaning of Article 16 (4), the nature of backwardness of the backward class of citizens is implicit in Article 16 (4) itself. Further, Part XVI of the Constitution which makes special provision under Article 338 for National Commission for Scheduled Castes and Scheduled Tribes for investigating their conditions, makes a similar provision under Article 340 for appointment of Commission to investigate the conditions also of "socially and educationally backward classes of citizens". The two provisions leave no doubt about the kind of backwardness that the Constitution takes care of in Article 16 (4). What is more, clause (4) of Article 15 which was added after the decision in *The State of Madras v. Srimathi Champakam Dorairajan etc.* [(1951) SCR 525] specifically mentions that nothing in Article 15 or in clause (2) of Article 29, shall prevent the State from making any special provision for the advancement of any "socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes". The significance of this amendment should not be lost sight of. It groups "socially and educationally backward classes" with "Scheduled Castes and Scheduled Tribes". When it is remembered that Articles 341 and 342 enable the President to specify by notification, the Scheduled Castes and Scheduled Tribes, it can hardly be debated that such specifications from time to time may only be from the socially and educationally backward classes or from classes whose economic backwardness is on account of their social and educational backwardness.

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

36. In *M.R. Balaji & Ors.* v. *State of Mysore* [(1963) Supp. 1 SCR 4391], what fell for consideration was Article 15 (4), and on the language of the said Article, it was held by this Court that the backwardness contemplated by the said Article was both social and educational. It is not either social or educational but it is both social and educational. In *Janki Prasad Parimoo & Ors. etc. etc. v. State of Jammu & Kashmir & Ors.* [(1973) 3 SCR 236] which was a case under Article 16 (4), this Court read "backward class of citizens" in Article 16 (4) as "socially and educationally backward class of citizens", although Justice Palekar who delivered the judgement for the Court, proceeded to equate the two expressions on the assumption that "it was well-settled that the expression "backward class" in Article 16 (4) means the same thing as the expression "any socially and educationally backward classes of citizens" in Article 15 (4)". It is true that no decision prior to this decision had in terms sought to equate the two expressions, and to that extent the said statement can be faulted as it is sought to be done before us.

In *K.C. Vasanth Kumar & Anr.* v. *State of Karnataka* [(1985) Supp. 1 SCR 352], this Court was called upon to express opinion on the issue of reservations which may serve as a guideline to the Commission which the Government of Karnataka proposed to appoint for examining the question of affording better employment and educational opportunities to the Scheduled Castes and Scheduled Tribes and other backward classes. Hence, the interpretation of the expression "backward class of citizens" under Article 16 (4) and of the expression "socially and educationally backward classes" under Article 15 (4) and their co-relation, fell for consideration directly. The five Judges of the Bench with the exception of Chief Justice Chandrachud expressed their opinion on these two expressions. Desai, J. held that "Courts have more or less.....veered round to the view that in order to be socially and educationally backward classes, the group must have the same indicia as Scheduled Castes and Scheduled Tribes". The learned Judge then proceeded to deal with what, according to him, was a narrow question, viz., whether caste-lable should be sufficient to identify social and educational backwardness. However, it appears that the learned Judge proceeded on the footing that the expression "backward class of citizens" was synonymous with the expression "socially and educationally backward classes of citizens". There is no discussion whether the two expressions are in fact similar and of the reasons for the same. Chinnappa Reddy, J. dealt with the two expressions a little extensively and came to the conclusion as follows:

> "Now, it is not suggested that the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes for whom special provision for advancement is contemplated by Article 15 (4) are distinct and separate from the backward classes of citizens who are inadequately represented in the services under the state for whom reservation of posts and appointments is contemplated by Article 16 (4). 'The backward classes of citizens'

referred to in Article 16 (4), despite the short description, are the same as 'the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes', so fully described in Art. 15 (4): Vide *Trilokinath Tiku* v. *State of Jammu & Kashmir* and other cases."

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

Venkatarmiah, J. (as he then was) held that "Article 15(4) and Article 16(4) are intended for the benefit of "those who belong to castes, communities which are traditionally disfavoured and which have suffered societal discrimination in the past". The other factors such as physical disability, poverty, place of habitation etc. -according to the learned judge-were never in the contemplation of the makers of the Constitution while enacting these clauses." The learned judge has held that "while relief may be given in such cases under Article 14,15 (1) and Article 16(1) by adopting a rational principle of classification, Article14, Article 15,(4) and Article 16 (4) cannot be applied to them". The learned Judge has further held that "it is now accepted that the expressions 'socially and educationally backward classes of citizens' and 'the Scheduled castes and the Scheduled Tribes' in Article 15 (4) of the Constitution together are equivalent to 'backward class of citizens' in Article 16(4)".

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

38. The next question is whether the social and educational backwardness of the other backward classes has to be akin to or of the same level as that of the Scheduled Castes and the Scheduled Tribes. It is true that some decisions of this court such as *Balaji* (supra) and *State of Andhra Pradesh & Anr. V.P.Sagar* ((1968) 3SCR 595) have taken the view that the backwardness of the backward class under Article 16 (4) being social and educational, must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. In *Balaji* it is stated:

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

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

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

39. The test laid down above of similarity of social and educational backwardness was accepted in P. *Sagar*(supra).

40. However, in *State of Andhra Pradesh &Ors. v. U.S.V. Balram etc.* ((1972) 3 SCR 247), the earlier view has been explained by pointing out that the above decisions do not lay down that backwardness of the other backward classes must be exactly similar in all respects to that of the Scheduled Castes and the Scheduled Tribes. Further, in *Parimoo* (supra) the test laid down in *Balaji* has been explained in the following words:

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

In *Kumari K.S. Jayashree and Anr. v. State of Kerala*

& Anr. ((1977) 1 SCR 194 at 197-198) it is stated :

> "Backward classes for whose improvement special provisions are contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes. This court has emphasised in decisions that the backwardness under Article 15 (4) must be both social and educational.
>
> The Concept of backwardness in Article 15 (4) is not intended to be relative in the sense that classes who are backward in relation to the most advanced classes of society should be included in it."

41. These observations will also show that the test of comparable backwardness laid down in *Balaji* has not been and is not to be, understood to mean that backwardness of the other backward classes has to be of the same degree as or identical in all respects to, that of the Scheduled Castes and the Scheduled Tribes. At the same time, the backwardness is not to be measured in terms of the forwardness of the forward classes and those who are less forward than the forward are to be classified as backward. The expression "backward class of citizens", as stated earlier, has been used in Article 16 (4) in a particular context taking into consideration the social history of this country. The expression is used to denote those classes in the society which could not advance socially and educationally because of the taboos and handicaps created by the society in the past or on account of geographical or other similar factors. In fact, the expression "backward classes" could not be adequately encompassed in any particular formula and hence even Dr. Ambedkar while replying to the debate on the point stated as follows:

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

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

43. The next important aspect of the question is whether caste can be used for identifyig socially and educationally bakward classes.

44. There is no doubt that no classification can validly be made *only* on the basis of caste just as it cannot be made only on the basis of religion, race, sex, descent, place of birth or any of them, the same being prohibited by Article 16(2). What is, however, required to be done for the purposes of Article 16(4) is not classification but

identification. The identification is of the backward classes of citizens, which have, as seen above, to be socially and, therefore, educationally and economically backward (for short described as socially and educationally backward). Any factor-whether caste, race, religion, occuption,habitation etc.-which may have been responsible for the social and educational backwardness, would naturally also supply the basis for identifying such classes not because they belong to particular religion, race, caste, occuption, area etc. but because they are socially and educationally backward classes.

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

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

> "...But you have to distinguish between backward classes which are specially mentioned in the Constitution that have to be helped to be made to grow and not think of them in terms of this community or that. Only if you think of them in terms of the community you bring in communalism. But if you deal with backward classes as such, whatever religion or anything else they may happen to belong to, then it becomes our duty to help them towards educaional, social and economic advance"
>
> (Lok Sabha Debates 16.5.1951 Column 1821)

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

> "Class,...6. gen. A number of individuals (persons or things) possessing common attributes and grouped together under a general or 'class' name;
>
> 2. Higher (upper), Middle, Lower Classes (Mod.)."
>
> "Caste .1555. (ad. Sp. and pg.. casta race, linage; orig. 'pure (stock or breed)' , f. casta , fem. of casto: -L. castus (see CHASTE) . Formerly written cast.) I. A race stock, or breed- 1774. 2. spec. One of the hereditary classes into which society in India has long been divided. Also transf. 1613.
>
> The members of each caste are socially equal, have the same religious rites, and generally follow the same occuption or profession; they have no social intercourse with those of another caste. The original castes were four: Ist, the Brahmins or priestly caste; 2nd, the Kshatriyas or miliatry caste; 3rd, the Vaisyas or merchants; 4th, the Sudras, or artisans and labourers. Now almost every variety of occuption has its caste.
>
> 3. fig. A class who keep themselves socially distinct, or inherit exclusive privileges 1807.
>
> 4. this system among the HIndoos; also the position it confers, as in To lose, or renounce c. 18II, Also gen. and fig.

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

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

48. The context in which the amendment to Article 15 was made being suficiently illuminating on the subject, may first be noticed. In Champakam (supra), the

Seven-judge Bench of this Court struck down the classification made on the basis of caste, race and religion for the purposes of admission to educational institutions on the ground that Article 15 did not contain a clause such as clause (4) of Article 16. The necessary corollary of that view is that with the clause like clause (4) of Article 16, the enumeration of backward classes on the basis of caste, race or religion would not be bad, and that is exactly what was held by the same Bench in a decision delivered on the same day in the case of *B. Venkataramana* v. The state of Madras & Anr. (AIR (1951) SC 229). This was a case directly under Article 16 (4) unlike *Champakam* which was under Article 15. in this case, the Communal G.O. of the Madras Government made reservations of posts for Harijans and backward Hindus as well as for other communities, viz., Muslims, Christians, Non-Brahmin Hindus and Brahmins. The court upheld the reservations in favour of Harijans and backward Hindus holding that those reserved posts were so reserved not on the ground of religion , race, caste, etc. but because of the necessity for makling a provision for reservation of such posts in favour of a backward class of citizens. The Court, however, struck down the reservations in favour of other than Harijans and backward Hindus on the ground that it was not possible to say that those classes were backward classes. It can be seen from this decision that the classification of the backward classes into Harijans and backward Hindus was unheld by the Court as being permissible under Article 16 (4) since it was not a classification made on the ground of religion race, caste etc. but because the said two groups were backward classes of citizens.

In *Balaji* it was observed as follows:

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

In *R. Chitralekha & Ors.* v. *State of Mysore* ((!964) 6 SCR 368) , the majority held that caste and class are not synonymous. However, it was also held that caste can be one of the relevant factors though not the solo and dominant one to determine the social and educational backwardness. The social and educational backwardness can be ascertained with the help of factors other than castes. The Court further held that if the entire caste is backward, it should be included in the list of Scheduled Castes. There can be castes whose majority is socially and educationally backward but minority may be more advanced than another small sub-caste, the total number of which is far less than the advanced minority. In such cases to give benefit to the advanced section of the majority of the socially and eduicationally backward castes will be unjust to others.

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

In *Minor P. Rajendran* v. *State of Madras & Ors.* ((1968) 2 SCR 786), it is held that a caste is also a class of citizens, and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such caste on that ground. It is also held that once the state shows that a particular caste is backward, it is for those who challenge it, to disprove it. The propositions laid down in this case are directly contrary to the propositions laid down in *Chitralekha* (supra).

In *P. Sagar* (supra) ,it is observed as follows:

> "In the context in which it occurs the expression "class" means a homogenous section of the people grouped together because of certain

likenesses or common traits and who are identifiable by some common attributes such as status, rank, occuption, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted."

In *Triloki Nath & Anr.* v. *State of Jammu & Kashmir & Ors.* ((1969)1 SCR 103), it is held:

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

(Emphasis supplied)

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

In *Minor A. Periakaruppan etc.* v. *State of Tamil Nadu & Ors. etc.* (AIR 1971 SC 2303 (1971) 2 SCR 4301, it is observed that a caste has always been recognized as a class. The decision refers in this connection to what is observed in *Narayan Vasudev* v. *Emperor* (AIR 1940 Bombay 379) which observations are as follows:

"In my opinion, the expression 'classes of His Majesty's subjects' in Section 153-A of the code is used in restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term "class" within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community".

The decision also quotes with approval from Paragraph 10, 11 and 13 of Chapter V of the *Backward Classes Commission's Report* (Kalelkar Commission Report) where it is observed:

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

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

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

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

In *Balram,* it was held that entire caste can be socially and educationally backward and in such circumstances reservation can be on the basis of castes not because they are castes but because they are socially and educationally backward classes. It was also held that reservastion can also be on the basis of the population of the different castes separately as social and educational backward classes. It was further held that

if candidates from social and educational backward castes secure 50 percent or more seats on merit in the general pool, the list of backward classes need not be invalidated but the Government should be asked to review it.

In *Jayasree* (supra), it was observed as follows:

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

In Vasanth Kumar (supra), Chinnappa Reddy ,J. stated as follows:

> "Any view of the caste system, class or cursory, will at once reveal the firm links which the caste system has with economic power. Land and learning, two of the primary sources of economic power in India, have till recently been the monopoly of the superior castes. Occupational skills were practised by the middle castes and in the economic system prevailing till now they could rank in the system next only to the castes constituting the landed and learned gentry. The lowest in the hierarchy were those who were assigned the meanest tasks, the out castes who wielded no economic power. The position of a caste in rural society is more often than not mirrored in the economic power wielded by it and vice versa. Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that *one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste.* Such we must recognise is the primeval force and omnipresence of caste in Indian Society, however, much we may like to wish it away. 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 practise of caste should be anathema and today we find that practitioner of other religious faiths and Hindu dissentients are sometimes as rigid adherents to the system of caste as the conservative Hindus. We find Christian Harijans, Christian Madras, Christian Reddys, Christian Kammas, Mujbi Sikhs, etc. etc. In Andhra Pradesh there is a community known as Pinjaras or Dudekulas (Known in the North as 'Rui Pinjane Wala': Professional cotton-beaters) who are really Muslims but are treated in rural society, for all practical purposes, as a Hindu caste. Several other instances may be given."

Venkataramiah, J. (as he then was) in the same decision observed as follows:

> "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."

49. It will also be useful to note the trend in the thinking of some of the learned Judges of the U.S. Supreme Court on measures designed to redress the racial inbalance in that country in various fields. In *Regents of the University of California* (supra), Marshall, J. expressed the view that in the light of the history of discrimination and its devastating impact on the lives of Negroes, bringing the Negroes into the mainstream of American life should be a State interest of the highest order, and that neither the history of the Fourteenth Amendment nor past Supreme Court decisions supported the conclusion that a University could not

remedy the cumulative effects of society's discrimination *by giving consideration to race* in an effort to increase the number and percentage of Negro doctors. He also held that affirmative action programs of the type used by the University (to reserve seats for the Negroes) should not be held to be unconstitutional.

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

Brennan, J. observed that the claim that the law must be 'colour-blind' is more an aspiration rather than a description of reality and that any claim that the use of racial criteria is barred by the plain language of the Status must fail in light of the remedial purpose of Title VI (of the Civil Rights Act, 1964) and its legislative history. On the contrary, he observed, that the prior decisions of the Court strongly suggested that Title VI *did not prohibit the remedial use of the race* where such action is constiutionally permissible. In this connection, it will be worthwhile to quote two passages from the learned Judge's opinion in that case. While dealing with equal protection clause in the Fourteenth A mendment, the learned Judge observed as follows:

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

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

In *Fullilove* (supra) where the provision in the Public Works Employment Act, 1977 requiring that at least 10 percent of the Federal funds granted for local public works projects, should be used by the state or the local gantee to procure services or supplies from businesses owned by minority groups members, was challanged, Chief Justice Burger, speaking for himself, White and Powell, JJ. upheld the view expressed in the earlier decisions that *if the race was the consideration for earlier discrimination in remedial process, steps will almost invariably require to be based on racial factors and any other approach would freeze the status quo which is the very target of all remedies to correct* the imbalance introduced by the past racial discriminatory measures...1s1

(All emphasis supplied)

50. It is further not correct to say that the caste system is prevalent only among the Hindus, and other religions are free from it. Jains have never considered themselves as apart from Hindus. For all practical purposes and from all counts, there are no socially and educationally backward classes in the Jain community for those who embraced it mostly belonged to the higher castes. As regards Buddhists, if we exclude those who embraced Buddhism along with Dr. Ambedkar in 1955, the population of Buddhists is negligible. If, however, we include the new converts who have come to be known as Nav-Buddhists, admittedly almost all of them are from the Scheduled castes. In fact, in some States, they were sought to be excluded from the list of Scheduled Castes and denied the benefit of reservations on the ground that they had no longer remained the lower castes among the Hindus qualifying to be included among the Scheduled Castes. On account of their agitation, this perverse reasoning was set right and to-day the Nav-Buddhists continue to get the benefit of reservation on the ground that their low status in society as the backward classes did not change with the change of their religion. As regards Sikhs, there is no doubt that the Sikh religion does not recognise caste system. It was in fact a revolt against it. However, the existence of Mazhabis, Kabirpanthis, Ramdasias, Baurias, Sareras and Sikligars and the demand of the leaders of the Sikhs themselves to treat them as Scheduled Castes could not be ignored and from the begining they have been notified as a Scheduled Caste (See: pp. 768-772 of Vol. 1 and p. 594 of Vol. 1V of the Framing of India's Constitution- Ed. B.

Shiva Rao). As far as Islam is concerned, Islam also does not recognise castes or caste system. However, among the Muslims, in fact there are Ashrafs and Ajlafs, i.e., high born and low born. The Census Report of 1901 of the Province of Bengal records the following facts regarding the Muslims of the then Province of Bengal:

> "the conventional division of the Mahomedans into four tribes- Sheikh, Saiad, Moghul and Pathan- has very little application to this Province (Bengal). The Mahomedans themselves recognise two main social divisions, (1)Ashraf or Sharaf and (2) Ajlaf. Ashraf means 'noble' and includes all undoubted descendants of foreigners and converts from high caste Hindus. All other Mahomedans including the occupational groups and all converts of lower ranks, are known by the contemptuous terms, 'Ajlaf', 'Wretches' or 'mean people' : they are also called Kamina or Itar, 'base' or 'Rasil, a corruption of Rizal, 'worthless' . In some places a third class , called Arzal or 'lowest of all', is added. With them no other Mahomedan would associate and they are forbidden to enter the mosque to use the public burial ground.
>
> Within these groups there (sic.) castes with social precedence of exactly the same nature as one finds among the Hindus.
>
> 1. Ashrat or better class Mahomedans.
>
> (i) Saiads, (ii) Sheikhs, (iii) Pathans, (iv) Moghul (v) Mallik, (vi) Mirza.
>
> 2. Ajlaf or lower class Mahomedans.
>
> (i) Cultivating Sheikhs , and other who were originally Hindus but who do not belong to any functional groups, and have not gained admittance to the Ashrat Community e.g. Pirali and Thakrai, (ii) Darzi, Jolaha, Fakir and Rangrez, (iii) Barhi, Bhathiara , chik, Churihar, Dai, Dhawa, Dhunia, Gaddi, Kala, Kasai, Kula, Kunjara, Laheri, Mahifarosh, Mallah, Naliya, Nikari, (iv) Adbad, Bako, Bediya, Bhat, Chamba, Dafali, Dhobi, Hajjam, Mucho, Nagarchi, Nat, Panwaria, Madaria, Tuntia.
>
> 3. Arzal or degraded class.Bhanar, Halalkhor, Hirja, Kashi, Lalbegi, Mangta, Mehtar.

The Census Superintendent mentions another features of the Muslim social system, namely, the prevalence of the 'Panchayat system' He stated:

> "The authority of the Panchayat extends to social as well as trade matters and...marriage withpeople of other communities is one of the offences of which the governing body takes cognizance. The result is that these groups are often as strictly endogamous as Hindu castes. The prohibition on inter-marriage extends to higher as well as to lower castes, and a Dhuma, for example, may marry no one but a Dhuma. If this rule is transgressed , the offender is at once hauled up before the panchayat and ejected ignominiously from his community. A member of one such group cannot ordinarily gain admission to another, and he retains the designation of the community in which he was born even if he abandons its distinctive occupation and takes to other means of livelihood... thousands of Jalahas are butchers, yet they are still known as Jolahas."
>
> (See:pp. 218-220 of Pakisthan or Partition of India by Dr. B.R. Ambedkar.)

Similar facts regarding the then other Provinces could be gathered from their respective Census Reports. At present there are many social groups among Muslims which are included in the list of Scheduled Castes in some states. For example, in Tamil Nadu, Labbais including Rawthars and Marakayars are in the list of Scheduled Castes. This shows that the Muslims in India have not remained immune from the same social evils as are prevalent among the Hindus.

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

The division of the society even among the other religious groups in this country between the high and low castes is only to be expected. Almost all followers of the non-Hindu religions except those of the Zoroastrianism, are converts from Hindu religion, and in the new religion they carried with them their castes as well. It is unnatural to expect that the social prejudices and pre biases, and the notions and feelings

of superiority and inferiority, nurtured for centuries together, would disappear by a mere change of religion.

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

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

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

54. However, the provisions of Article 46 should not be confused with those of Article 16 (4) and hence the expression "weaker sections of the people" in Article 46 should not be mixed up with the expression "backward class of citizens" under Article 16 (4). The purpose of Article 16(4) is limited. It is to give adequate representation in the services of the State to that class which has no such representation. Hence, Article 16 (4) carves out a particular class of people and not individuals from the "weaker sections" and the class it carves out is the one which does not have adequate representation in the services under the state. The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not form a class and they may be weaker as individuals only. Secondly, their weakness may bot be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an identifiable class but that class is repesented in the services of the State adequately, as individuals forming weaker section, they may be entitled to the benefit of the measures taken under Article 46, but not to the reservations under Article 16 (4). Thus, not only the concept of "weaker sections" under Article 46 is dif-

ferent from that of the "backward class" of citizens in Article 16 (4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16 (4). While those entitled to benefits under Article 16 (4) may also be entitled to avail of the measures taken under Article 46, , the converse is not true. If this is borne in mind, the reasons why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens under Article 16 (4) would be more clear. To the consideration of that aspect we may now turn.

55. Economic backwardness is the bane of the majority of the people in this country. There are poor sections in all the castes and communities. Poverty runs across all barriers. The nature and degree of economic backwardness and its causes and effects, however, vary from section to section of the populace. Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social backwardness. The educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness. It is necessary to bear this vital distinction in mind to understand the true import of the expression "backward class of citizens" in Article 16 (4). If it is mere eductional backwardness or mere economic backwardness that was intended to be specially catered to, there was no need to make a provision for reservation in employment in the services under the State. That could be taken care of under Articles 15 (4), 38 and 46. The provision for reservation in appointments under Article 16 (4) is not aimed at economic upliftment or alleviation of poverty. Article 16(4) is specifically designed to give a due share in the State power to those who have remained out of it mainly on account of their social and, thereore, educaional and economic backwardness. The backwardness that is contemplated by Article 16 (4) is the backwardness which is both the cause and the consequence of non-representation in the administration of the country. All other kinds of backwardness are irrelevant for the purpose of the said Article. Further, the backwardness has to be a backwardness of the whole class and not of some individuals belonging to the class, which individuals may be economically or educationally backward, but the class to which they belong may be socially forward and adequately or even more than adequately represented in the services. Since the reservation under Article 16 (4) is not for the individuals but to a class which must be both backward and inadequately represented in the services. Such individuals would not be beneficiaries of reservation under Article 16 (4). It is further difficult to come across a "class" (not individuals) which is socially and educationally advanced but is economically backward or which is not adequately represented in the services of the State on account ot its economic backwardness. Hence, mere economic or mere educational backwardness which is not the result of social backwardness, cannot be a criterion of backwardness for Article 16 (4).

56. That only economic backwardness was not in the contemplation of the Constitution is made further clear by the fact that at the time of the First Amendment to the Constitution which added clause (4) to Article 15 of the Constitution, one of the Members, Prof. K.T. Shah wanted the elimination of the word "classes" in and the addition of the word "economically" to the qualifiers of the term "backward classes". This Amendment was not accepted. Prime Minister Nehru himself stated that the addition of the word "economically" would put the language of the Article at variance with that of Article 340. He added that "socially" is a much wider term including many things and certainly including "economically". This shows that economic consideration alone as the basis of backwardness was not only not intended but positively discarded.

57. The reasons for discarding economic criterion as the sole test of backwardness are obvious. If poverty alone is made the test, the poor from all castes, communities, collectivities and sections would compete for the reserved quota. In such circumstances, the result would be obvious, namely, those who belong to socially and educationally advanced sections would capture all the posts in the quota. This would leave the socially and educationally backward classes high and dry although they are not at all represented or are inadequately represented in the services, and the socially and educationally advanced classes are adequately or more than adequately represented in the services. It would thus result in defeating the very object of the reservations in services, under Article 16 (4). It would, also

provide for the socially and educationally advanced classes statutory reservations in the services in addition to their traditional but non-statutory cent per cent reservations. It will thus perpetuate the imbalance, and the inadequate representation of the backward classes in the services. It is naive to expect that the poor from the socially and educationally backward classes would be able to compete on equal terms with the poor from the socially and educationally advanced classes. There may be an equality of opportunity for the poor from both the socially advanced and backward classes. There will, however, be no equality of results since the competing capacity of the two is unequal. The economic criterion will thus lead, in effect, to the virtual deletion of Article 16 (4) from the Constitution.

58. We may refer to some decisions of this court on this point.

In *Chitralekha*, which was a case under Article 15 (4), it is observed:

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

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

Parimoo was a case under Article 16 (4). On the test of backwardness, the court has observed there as follows:

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

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

59. This point has elaborately been dealt with by Chinnappa Reddy, J. in *Vasant Kumar* where the learned Judge has taken pains to point out that although poverty is the dominant characteristic of all backwardness, it is not the cause of all backwardness:

> "We, therefore, see that everyone of the three dimensions propounded by Webar is intimately and inextricably connected with economic position. However, we look at the question of 'backwardness', whether from the angle of class, status or power, we find the economic factor at the bottom of it all and we find poverty, the culprit-cause and the dominant characteristic. Poverty, the economic factor brands all backwardness just as the erect posture brands the homosapiens and distinguishes him from all other animals, in the eyes of the beholder from Mars. But, whether his racial stock is Caucasian, Mongoloid, Negroid etc. further investigation will have to be made. So too the further question of social and educational

backwardness requires further scrutiny. In India, the matter is further aggravated, complicated and pitilessly tyrannised by the ubiquitous caste system, a unique and devastating system of gradation and degradation which has divided the entire Indian and particularly Hindu Society horizontally into such distinct layers as to be destructive of mobility, a system which has penetrated and corrupted the mind and soul of every Indian citizen."

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

Question III:

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

61. While discussing Question No. 1, it has been pointed out that so far as "backward classes" are concerned, clause (4) of Article 16 is exhaustive of reserations meant for them. It has further been pointed out under Question No. II that the only "backward class" for which reservations are provided under the said clause is the socially backward class whose educational and economic backwardness is on account of the social backwardness. A class which is not socially and educationally backward though economically or even educationally backward is not a backward class for the purposes of the said clause. What follows from these two conclusions is that reservations in posts cannot be made in favour of any other class under the said clause. Further, the purpose of keeping reservations even in favour of the socially and educationally backward classes under clause (4), is not to alleviate poverty but to give it an adequate share in power.

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

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

Question IV:

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

64. It has already been pointed out earlier that clause (4) of Article 16 is not an exception to clause (1) thereof. Even assuming that it is an exception, there is no numerical relationship between a rule and its exception, and their respective scope depends upon the areas and situations they cover. How large the area of the exception will be, will of course, depend upon the circumstances in each case. Hence, legally ,it cannot be insisted that the exception will cover not more than 50 percent of the area covered by the rule. Whether, therefore, clause (4) is held as an exception to clause (1) or is treated as a more emphatic way of stating what is obvious under the said clause, has no bearing on the percentage of reservations to be kept under it

As Justice Hedge has stated in *State of Punjab* v. *Hiralal & Ors.* (1971) 3 SCR 267 at 272), " the length of the leap to be provided depends upon the gap to be covered". In Article 16 (4) itself, there is no indication of the extent of reservation that can be made in favour of the backward classes. However, the object of reservation, viz., to ensure adequacy of representation, mentioned there, serves as a guide for the percentage of reservations to be kept. Broadly speaking, the adequacy of representation in the services will have to be proportionate to the proportion of the backward classes in the total population. In this connection, a reference may be made to the U.S. decision in *Fullilove* where 10% of the business was reserved for the blacks, their population being roughly 10 percent of the total population. If the reservation is to be on the basis of the proportion of the population in this country, the backward classes being no less than 77-1/2 percent (socially and educationally backward classes and Scheduled Castes and Scheduled Tribes taken together) the total reservation will have to be to that extent. It is not disputed that at present the reservations for the SCs/STs are roughly in proportion to their total population.

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

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

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

67. Article 10 (1) and 10 (3) of the Draft Constiution

corresponded to Article 16 (1) and 16 (4) of the Constitution. When we realise that these are the observations of the Chairman of the Drafting Committee, the Law Member of the Government and the champion of the backward classes, it should give us an insight into the mind of the framers of the Constitution on the subject. It is true that the said observations cannot be regarded as decisive on the point. The observations probably also proceeded on the assumption that clause (4) of Article 16 was an exception to its clause (1), and had a numerical relationship with the rule. Whatever the case may be, the observations do give a perceptive and viable guidance to the policy that should be followed in keeping reservations, and in particular on the extent of reservations at any particular point of time. There is, therefore, much force in the contention that at least as a guide to the policy on the subject, the observations cannot be ignored.

68. Although the view expressed in *Balaji* and *Devdasan* (supra), that the reservation should not exceed 50 percent does not refer to Dr. Ambedkar's aforesaid observations and is, therefore, not based on it, and is based on other considerations, it cannot be said that it is not in consonance with the spirit, if not the letter, of the provisions.

69. It is seen earlier that 50 percent rule was propounded in *Balaji*. The rule was propounded in the context of Art. 15 (4), but, while, propounding it, this Court stated among other things, as follows:

> "...A special provision contemplated by Art. 15 (4) like reservation of posts and appointments contemplated by Art. 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 Art. 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."

70. A reference to Article 16 (4) there, therefore, unmistakably shows that it is presumed that the same rule will apply to Article 16(4) as well. This rule, however, did not see uniform acceptance in all the decisions that followed. The case which immediately followed-*Devadasan*-applied this rule to the "Carry forward rule" and struck down the same in its entirety, since 65 percent of the vacancies for the year in question, came to be reserved for the SCs/STs by virtue of that rule. With respect, even on the application of the 50 percent rule, it was not necessary to strike down the "carry foward rule " itself. All that was necessary was to confine the carry forward vacancies for the year in question to 50 percent. Be that as it may. In *Thomas*, the correctness of 50 per cent rule was questioned by Fazal Ali, J. who stated that although clause (4) of Article 16 does not fix any limit on reservations, the same being part of Article 16, the State cannot be allowed to indulge in excessive reservation so as to defeat the policy of Article 16 (1). The learned judge, however, added that as to what would be a suitable reservation within *permissible limits* will depend on the facts and circumstances of each case and no hard and fast rule can be laid down nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. The learned Judge then went on to say that although the decided cases till that time, had laid down that the percentage of reservation should not exceed 50, it was a rule of caution and did not exhaust all categories. He then gave an illustration of a State in which backward classes constituted 80 percent of the total population, and stated that in such cases, reservation of 80 percent of the jobs for them, can be justified. The learned Judge justified reservation to the said extent on the ground that the dominant object of the provision of Article 16 (4) is to take steps to make inadequate representation of backward classes adequate. Of the other learned Judges constituting the Bench, Krishna Iyer J. agreed with Fazal Ali, J. and stated that the arithmetical limit of 50 percent in one year set by earlier rulings *cannot "perhaps be pressed too far"*. He added that overrepresentation in a department does not depend on recruitment in a particular year but on the total strength of the cadre.

(Emphasis supplied).

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

71. It does not appear further that Justice Iyer's support to Justice Fazal Ali's view in *Thomas* , was unqualified or remained unchanged. For in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India & Ors. ((1981)* 2 SCR 1985), after referring to *Balaji* and *Devadasan*, he stated as follows:

"All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC & ST candidates be actulaly appointed to substantially more than 50 per cent of the promotional posts. Some excess will not affect as mathematical precision is different 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 appoinments of SC & ST candidates considerably in excess of 50 per cent, we uphold Annexure I."

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

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

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

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

In this connection, it is worth serious consideration whether reservations in the form of preference instead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themselves. Education is the source of advancement of the individual in all walks of life. The teaching profession, therefore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life. It is, therefore, in the interests of all sections of the society- socially backward and forward- and of the nation as a whole, that they aim at securing

and ensuring the best of education. The student whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational instutution to make sincere and diligent efforts to secure the services of the best available teaching talent. In the appointments of teachers, therefore, there should be no compromise on any ground. For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or outside through private tuitions and tutorial classes, those coming fromthe backward classes would have no means for making up the loss. The teachers themselves must further command respect which they will do more when they do not come through any reserved quota. The indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward. It is, therefore, necessary that there should be no exclusive quota kept in the teaching occupation for any section at all. However, if the candidates belonging to both backward and forward classes are equal in merit, preference should be given to those belonging to the backward classes. For one thing, they must also have a "look into" the teaching profession as in other professions. Secondly, in this vital profession also, the talent, the social experience and the new approach and outlook of the members of the backward classes is very much necessary. That will enrich the profession and the national life. Thirdly, it will also help to meet the complaints of the alleged step-motherly treatment received by the students from the backward classes and of the lack of encouragement to them even when they are more meritorious. Hence in the teaching profession, it is preference rather than reservation, which should be resorted to under Article 16 (4) of the Constitution. A precaution, however, has to be taken to see that the selection body has a representation from the backward classes.

It must, however, be added that in judging the merits of the individuals for the profession of teaching as for any other profession, it is not the traditional test of marks obtained in examinations, but a scientific test based, among other things, on the aptitude in teaching, the capacity to express and convey thoughts, the scholarship, the character of the person, his interest in teaching, his potentiality as a teacher judged on the considerations indicated generally at the outset, should be adopted.

What is stated with regard to the teaching profession above is only be way of an illustration as to how the policy of reservation if it is to subserve its larger purpose can be modulated and applied rationally to different fields instead of clamping it mechanically in all the fields or withholding it from some areas altogether. It is not meant to lay down any proposition of law in that behalf.

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

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

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

it is necessary to add here a word about reservations for women. Clause (2) of Article 16 bars reservation in services on the ground of sex. Article 15 (3) can-

not save the situation since all reservations in the services under the State can only be made under Article 16. Further, women come from both backward and forward classes. If reservations are kept for women as a class under Article 16 (1), the same inequitous phenomenon will emerge. The women from the advanced classes will secure all the posts, leaving those from the backward classes without any. It will amount to indirectly providing statutory reservations for the advanced classes as such, which is impermissible under any of the provisions of Article 16. However, there is no doubt that women are a vulnerable section of the society, whatever the strata to which they belong. They are more disadvantaged than men in their own social class. Hence reservations for them on that ground would be fully justified, if they are kept in the quota of the respective class, as for other categories of persons, as explained above. If that is done, there is no need to keep a social quota for women as such and whatever the percentage-limit on the reservations under Article 16, need not be exceeded.

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

79. Both to avoid arbitrariness in appointments and to ensure the availability of the expected number of seats every year, for the reserved as well as the unreserved categories as per the pre- defined known norms, it is necessary that the reservations in appointments/posts are made yearwise. Any other practice would give the authorities complete freedom as to when and at what percentage the reservations should be kept. It may happen that in some years, they may not keep reservations at all whereas in other years, they may reserve all or majority of the posts. Secondly, the periodicity of reservations may also vary depending upon the will of the authorities which may be influenced by several unpredictable considerations. This would spell out uncertainties in the matter of appointments both for the reserved and unreserved categories. Hence the reservations will have to be kept and calculated on yearwise [See: *C.A. Rajendran v. Union of India & Ors.* [(1968) 1 SCR 721 at 732-33] and better still, on the basis of the roster system with suitable number of points to correspond the average vacancies. To permit calculation, further, of the percentage of reservations on the basis of the total strength of the cadre and to enable the authorities concerned, as stated earlier, to keep either all the posts or a majority of them reserved from year to year till there is adequate representation of the reserved categories, will in the process deny to the unreserved categories completely or near completely, their due share in the appointments yearwise, thus obliterating clause (1) of Article 16 totally over a given period of time. Hence as pointed out earlier, the extent of the percentage of the reservation should be calculated yearwise with due allowance to the operation of the rule with regard to the backlog, if any. Still better method is to regulate and calculate the appointments on the roster basis as stated earlier.

80. As regards point (ii), since the provisions of Article 16 (4) are meant for providing adequate representation in the services to the backward classes, the representation has to be in all categories and grades in the services. The adequacy does not mean a mere proportionate numerical or quantitative strength. It means effective voice or share in power in running the administration. Hence, the extent of reservations will have to be estimated with reference to the representation in different grades and categories. [See:] *The General Manager, Southern Railway v. Rangachari* [(1962) 2 SCR 586].

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

Question V:

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

81. This question is really in two parts and the two do not mean and refer to the same classification. The first part refers to the classification of the backward

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

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

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

84. It is necessary to highlight another allied aspect of the issue, in this connection. What do we mean by sufficient capacity to compete with others? Is it the capacity to compete for Class- IV or Class-III or higher class posts? A Class-IV employe's children may develop capacity to compete for Class-III post and in that sense, he and his children may be forward compared to those in his class who have not secured even Class-IV posts. It

cannot however, be aruged that on that account, he has reached the "creamy" level. If the adequacy of representation in the services as discussed earlier, is to be evaluated in terms of qualitative and not mere quantitative representatiion, which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity of compete for the higher level posts also. Such capacity will be acquired only when the backward sections reach those levels or at least, near those levels. Till that time, they cannot be called forwards among the backward classes, and taken out of the backward classes.

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

86. It may be pointed out that in *Vasanth Kumar*, Chinnappa Reddy, J. after referring to the aforesaid view in *Balaji* observed that "the propriety of such test may be open to question on the facts of each case but there was no reason why on principle there cannot be a classification into backwards and More backwards if both classes are not merely a little behind, but far far behind the most advanced classes. He further observed that in fact, such a classification would be necessary to help the More Backward classes: otherwise those of the backward classes, who might be a little more advanced than the more backward classes, would walk away with all the seats just as if reservation was confined to the More Backward classes and no reservation was made to the slightly more advanced of the backward classes, the backward classes would gain no seats since the advanced classes would walk away with all the seats available for the general category". With respect, this is the correct view of the matter. Whether the backward classes can be classified into Backward and More Backward, would depend upon the facts of each case. So long as both backward and more backward classes are not only comparatively but substantially backward than the advanced classes, and further, between themselves, there is a substantial difference in backwardness, not only it is advisable but also imperative to make the subclassification if all the backward classes are to gain equitable benefit of all special provisions under the Constitution. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardnes is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated 13th October, 1986 on reservations issued after the decision in *Vasanth Kumar* where the backward classes are grouped into five categories, viz., A.B.C.D and E. In category A, fall such castes or communities that of Bairagi and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking

away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential. However, for each of them a special quota has to be prescribed as is done in the Karnataka Government order. If it is not done, as in the present case, and the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward may take away all the posts leaving the backward with no posts. The backward will neither get his post in the reserved quota nor in the general category for want of capacity to compete with the forward.

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

Questions VI:

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

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

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

90. If any authority is needed for the otherwise self-evident proposition, one may refer to the following decisions of this Court where reservations made by executive orders were upheld: See Balaji [supra], *Mangal Singh v. Punjab State, Chandigarh & Ors.* [AIR (55) 1968 Punjab & Haryana 306], Comptroller & Auditor General of India or Ors. v. Mohan Lal Mehrotra & Ors. [(1992) 1 SCC 20].

Question VII:

> Will the extent of judical review be limited or restricted in regard to the indentification of Backward Classes and the percentage of reservations made for such classes, to a demonstrab-

ly perverse identification or a demonstrably unreasonable percentage?

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

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

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

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

In *Devadasan* the majority held that the carry forward' rule which resulted in the particular year in reserving 65% of the posts for Scheduled Castes and Scheduled Tribes, was unconstitutional sicne the reservations exceeded 50% of the vacancies. According to the Court, though under Article 16 (4), reservation of reasonable percentage of posts for the members of the Scheduled Castes and the Scheduled Tribes was within the competence of the State, the method evolved must be such as to strike reasonable balance between the claims of the backward classes and those of the other employees in order to effectuate the guarantee contained in Article 16 (1), and that for this purpose each year of recruitment would have to be considered by itself. With respect, the majority decision was based on the reasoning of *Balaji* to which a reference has already been made. Justice Subba Rao dissented from this line of reasoning and it is his reasoning which came to be accepted later both in *Thomas* and *Vasanth Kumar*.

In *P. Sagar* [(1968) 8 SCR 595], the Court upheld the decision of the High Court and dismissed the state's appeal on the ground that there was no material placed before the court to show that the list of backward classes was prepared in conformity with the requirements of Article 15 (4). The Court held that the list prepared was *ex facie* based on castes or communities, and was substantially the same which was struck down by the High Court in *P. Sukhadev & Ors.* v. *The Government of Andhra Pradesh* [(1966) 1 Andhra W.R. 294]

In *Periakaruppan*, [(1971) 2 SCR 430] it was observed that the list of backward classes is open to judicial review and the Government should always keep under review the question of reservation of seats, and only those classes which are really socially and educationally backward should be allowed to have the benefit of reservation. The reservation of seats should not be allowed to become a vested interest and since in that case the candidates of backward classes had secured 50% of the seats in the general pool, it, according to the Court, showed that the time had come for a *de novo* comprehensive examination of the question. In other words, it is laid down in this case that if some backward classes which are advanced continue to be, or are included in the list of, backward classes, the list can be questioned and a judicial scrutiny of the list will be permissible.

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

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

Question VIII:

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

95. None of the impugned Government memoranda provide for reservations in promotions. Hence, the question does not fall for consideration at all and any opinion expressed by this Court on the said point would be *obiter*. As has been rightly contended by Shri Parasaran, it is settled by the decisions of this Court that constitutional questions are decided only if they arise for determination on the facts, and are absolutely necessary to be decided. The Court, does not decide questions which do not arise. The tradition is both wise and advisable. There is a long line of decisions of this Court on the point. The principle is so wellsettled and not disputed before us that it is not necessary to quote all the authorities on the subject. To mention only two of them, see *The Central Bank of India.* v. *Their Workmen* [(1960) 1 SCR 200] and *Harsharan Verma* v. *Union of India & Anr.* [AIR 1987 SC 1969].

96. The reservations in the services under Article 16 (4), except in the case of SCs/STs, are in the discretion of the State. Whether reservations should at all be kept and if so, in which field and at what levels and in which mode of recruitment-direct or promotional-and at what percentage, are all matters of policy. Each authority is required to apply its mind to the facts and circumstances of the case before it and depending upon the field, the post, the extent of the existing representation of different classes, the need, if any, to balance the representation, the conflicting claims etc., decide upon the measures of reservations. The reservations, as stated earlier, cannot be kept mechanically even where it is permissible to do so. For some reasons, if Central Government, in the present case, has not thought it prudent and necessary to keep reservations in promotions, the decision of the Central Government should not be probed further. It is for the Government to frame its policy and not for this Court to comment upon it when it is not called upon to do so.

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

> "Although Art. 16 (4), which in substance is an exception to Arts. 16 (1) and 16 (2) and should, therefore, be strictly construed, the court cannot in construing it overlook the extreme solicitude shown by the Constitution for the advancement of socially and educationally backward classes of citizens.
>
> The scope of Art. 16 (4), though not as extensive as that of Art. 16 (1) and (2),-and some of the matters relating to employment such as salary, increment, gratuity, pension and the age of superannuation, must fall outside its *non-obstante* clause, there can be no doubt that it must

include appointments and posts in the services. To put a narrower construction on the word 'posts' would be to defeat the object and the underlying policy. Article 16 (4), therefore, authorises the State to provide for the reservation of appointments as well as selection posts."

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

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

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

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

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

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

ministration than that caused by an unreasonable obstruction in the advancement of the career of those who run the administration. The reservations in promotions are, therefore, inconsistent with the efficiency of administration and are impermissible under the Constitution.

100. There is also not much merit in the argument that the adequacy of representation in the administration has to be judged not only on the basis of quantitative representation but also on the basis of qualitative representation in the administration and, hence, the reservations in promotions are a must. There is no doubt, as stated earlier, that the adequacy of representation in administration has also to be judged on the basis of the qualitative representation in it. However, the qualitative representation cannot be achieved overnight or in one generation. Secondly, such representation cannot be secured at the cost of the efficiency of the administration which is an equally paramount consideration while keeping reservations. Thirdly, the qualitative representation can be achieved by keeping reservations in direct recruitment at all levels. It is true that there is some basis for the grievance that when reservations are kept only in direct recruitment, on many occasions the rules for appointment to the posts particularly at the higher level of administration, are so framed as to keep no room for direct recruits. However, the remedy in such cases lies in ensuring that direct recruitment is provided for posts at all levels of the administration and the reservation is kept in all such direct recruitments.

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

102. There is no doubt that the meaning of the various expressions used in Article 16, viz., "matters relating to employment or appointment to any office", "any employment or office" and "appointments or posts" cannot be whittled down to mean only initial recruitment and hence the normal rule of the service jurisprudence of the loss of the birth-marks cannot be applied to the appointments made under the Article. However, as pointed out earlier, the exclusive quota is not the only form of reservation and where the resort to it such as in the promotions, results in the inefficiency of the administration, it is illegal. But that is not the end of the road nor is a backward class employee helpless on account of its absence. Once he gets an equal opportunity to show his talent by coming into the mainstream, all he needs is the facility to achieve equal results. The facilities can be and must be given to him in the form of concessions, exemptions etc. such as relaxation of age, extra attempts for passing the examinations, extra training period etc. along with the machinery for impartial assessment as stated above. Such facilities when given are also a part of the reservation programme and do not fall foul of the requirement of the efficiency of the administration. Such facilities, however, are imperative if, not only equality of opportunity but also the equality ot results is to be achieved which is the true meaning of the right to equality.

Question 9:

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

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

In the first instance, it must be remembered that the Government could have passed the impugned orders without the assistane of any report such as the Mandal Commission Report. Nothing prevents the Government from providing the reservatins if it is satisfied even otherwise that the backward classes have inadequate representation in the services under the

State. It is however, a different matter that in the present case the Government had before it an investigation made by an independent Commission appointed under Article 340 of the Constitution to enable it to come to its conclusions that certain social groups which are socially and educationally backward are inadequately represented in the services and therefore, deserved reservation therein. The Commission has given its own list of such backward classes and that is based primarily on the lists prepared by the States. it is true that in certain States, there are no lists and the Commission has, therefore, made its own lists for such States. However, while issuing the impugned orders the Government has taken precaution to see that the socially and educationally backward classes would comprise in the first phase the castes and communities which are common to the lists prepared by the Mandal Commission and the States. The result is that it is the State Government lists of SEBCs which would prevail for the time being and those SEBCs mentioned in the lists of the Mandal Commission which are not in the State lists would not get the benefit of the impugned orders. It is not seriously contended before us that the State lists are prepared without application of mind or without any basis. It is no doubt urged that in certain States some castes and communities have come to be introduced in the lists of backward classes on the eve of the elections and thus the lists have been expanded from time to time. Assuming that there is some grain of truth in this allegation, the grievance in that behalf can be redressed by a fresh appraisal of the State lists by an independent machinery. The further attack against the lists prepared by the Mandal Commission is that they are prepared without an adequate and a proper survey with the result that some social groups which ought not to be in the SEBC lists have been included therein whereas others which ought to be there have been excluded. The third attack against the Commission-lists is that since there are States where there exist no lits of SEBCs, the SEBCs in those States would suffer and that would be a discrimination against them. The last attack is that the Commission has exaggerated the number of castes. While there are allegedly only 1051 backward castes, the Commission has given a list of about 3743 castes. Assuming that all these contentions are correct, all that they come to is that certain social groups which ought not to be in the SEBC lists are found there whereas others which ought to be there are not there. Such defects can be expected in any survey of this kind since it is difficult to have a cent per cent accurate result in any sociological survey. In any case although the Mandal Commission on its survey has found the total population of SEBCs as 52 per cent, the reservation it has recommended is only 27 per cent which is almost half of the population of SEBCs according to its survey. The impugned orders have also restricted the reservations to 27 per cent. It is not suggested that the margin of error of the survey is as high as 50 per cent populationwise. Assuming, however, that the population of the SEBCs is not even 27% of the total population, even this defect can be cured by another independent survey. For the present, the list as envisaged in the impugned orders may be given effect to and in the meanwhile, a new Commission as suggested earlier may be appointed for preparing an accurate list of the backward classes. No harm would be done if in the meanwhile, at least half of those who are found backward are given the benefit of the impugned orders. If, therefore, the only purpose of sending the matter to the Five-Judge Bench now, is to find out the validity of the lists of the SEBCs, that purpose can hardly be fulfilled since the Bench cannot on its own and without adequate material invalidate the lists. The Bench would also have to direct a fresh inquiry into the matter, if it comes to the conclusion that the grievance made in that behalf is correct. The purpose would be better served if this Bench itself directs that the matter be examined afresh by a Commisison newly appointed for the purpose. In any view of the matter, it is unnecessary to send the case back to the Five-Judge Bench.

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

Question 1:

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

Question 2:

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

back wardness.

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

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

Question 3:

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

Question 4:

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

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

Question: 5

Article 16 (4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of the economic consideration alone.

If backward classes are classified into backward and more or most backward classes, separate quotas of reservations will have to be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.

It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other consideration. The test of advancement lies in the capacity to compete with the forward classes. If the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16 (4).

Question 6:

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

Question 7:

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

Question 8:

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

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

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

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

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

and in all grades in the services.

Question 9:

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

105. Hence the followng order:

Order

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

The rest of the said order is valid.

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

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

(a) No distinction can be made in the backward calsses as poor and poorer sections thereof. The distinction can be made only between the advanced and the backward sections of the backward classes. The advanced sections are those who have acquired the capacity to compete with the forward classes. Such advanced sections no longer belong to the backward classes and as such are disentitled to the reservation under Article 16 (4). The reservations can be made only for the benefit of the backward or the non-advanced sections of the backward classes.

(b) When backward classes are classified into backward and more or most backward classes as stated above on the basis of the degrees of social backwardness [and not on the basis of the economic criterion alone], exclusive quotas of reservations will have to be kept separately for the backward and the more or most backward classes. It will be impermissible to keep a common quota of reservation for all the backward classes togher and make available posts for the backward classes only if they are left over after satisfying the requirements of the more or most backward classes. That may virtually amount to a total denial of the posts from the reserved quota to the backward classes.

(c) Clause 2 (i) of the order dated 25th September, 1991 is, therefore, invalid, unless it is read, interpreted and implemented as above.

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

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

107. In view of the reasons given and the conclusions arrived at by me above, I agree with the conclusions recorded in paragraphs 122 and 124 and the directions given in paragraph 123 [A], [B] and [C] of the judgement being delivered by brother Jeevan Reddy, J. on behalf of himself, and on behalf of the learned Chief Justice and brothers Venkatachaliah and Ahmadi, JJ.

New Delhi,
16th November, 1992.

.....sd/.....J
(P. B. SAWANT)

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 930 of 1990

Indra Sawhney etc. etc. .....*Petitioners*
Versus
Union of India & Ors. etc. etc. .....*Respondents*

WITH

Writ Petition (Civil) Nos. 97/91, 948/90, 966/90, 965/90, 953/90, 954/90, 971/90, 972/90, 949/90, 986/90, 1079/90, 1106/90, 1158/90, 1071/90, 1069/90, 1077/90, 1119/90, 1053/90, 1102/90, 1120/90, 1112/90, 1276/90, 1148/90, 1105/90, 974/90, 1114/89, 987/90, 1061/90, 1064/90, 1101/90, 1115/90, 1116/90, 1117/90, 1123/90, 1124/90, 1126/90, 1130/90, 1141/90, 1307/90, TC. (C) Nos. 27/90, 28-31/90, 32-33/90, 34-35/90, 65/90, 1/91,

Writ Petition (Civil) Nos. 1081/90, 343/91, 1362/90, 1094/91, 1087/90, 1128/90, 36/91, 3/91

Writ Petition (Civil) Nos. 11/92, 111/92, 261/92.

I.A. Nos. 1-20 IN Transfer Case (Civil) Nos. 27-35/90

JUDGMENT

S. RATNAVAEL PANDIAN, J

'Equality of status and of opportunity...' the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1971 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' (in part III) through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional provisions dealing wiith equal distribution of justice in the social, political and economic spheres.

Though forty-five years from the commencement of the Indian independence after the end of British paramountcy and forty-two years from the advent of our Constitution have marched on, the tormenting enigma that often nags the people of India is whether the principle of 'equality of status and of opportunity' to be equally provided to all the citizens of our country from cradle to grave is satisfactorily consummated and whether the clarion of 'equality of opportunity in matters of public employment' enshrined in Article 16 (4) of the Constitution of India has been called into action ? With a broken heart one has to answer these questions in the negative.

The founding fathers of our Constitution have designedly couched Articles 14, 15 and 16 in comprehensive phraseology so that the frail and emaciated section of the people living in poverty, rearing in obscurity, possessiing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression should not be denied of equality before the law and equal protection of the laws and equal opportunity in the matters of public employment or subjected to any prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

To achieve the above objectives, the Government have enacted innumerable social welfare legislations and geared up social reformative measures for uplifting the social and economic development of the disadvantage section of people. True, a rapid societal transformation and profusion of other progressive changes are taking place, yet a major section of the people living below the poverty line and suffering from social ostracism still stand far behind and lack in every respect to keep pace with the advanced section of the people. The undignified social status and sub human living conditions leave an indelible impression that their forlorn hopes for equality in every sphere of life are only a myth rather than a reality. It is verily believed — rightly too — that the one and only peerless way and indeed a most important and promising way to achieve the equal status and equal opportunity is only by means of constitutional justice so that all the citizens of this country irrespective of their religion, race, caste, sex, place of birth or any of them may achieve the goal of an egalitarian society.

This Court has laid down a series of landmark judgments in relation to social justice by interpreting the constitutional provisions upholding the cherished values of the Constitution and thereby often has shaped the course of our national life. Notwithstanding a catena of expository decisions with interpretive semantics, the naked truth is that no streak of light or no ray of hope of attaining the equality of status and equality of opportunity is visible.

Confining to the issue involved in this case as regards the equal opportunity in the matters of public employment, I venture to articulate without any reservation, even on the possibility of any refutation that it is highly deploratble and heart-rending to note that the constitutional provision, namely, clause (4) of Article 16 proclaiming a "Fundamental Right" enacted about 42 years ago for providing equality of opportunity in matters of public employment to people belonging to any backward class has still not been given effect to in services under the Union of India and many more States. A number of Backward Classes Commissions have been appointed in some of the States, the recommendations of which have been repeatedly subjected to judicial scrutiny. Though the President of India appointed the second Backward Classes Commission under the chairmanship of Shri B.P. Mandal as far back as 1st January, 1979 and the Report was submitted in December, 1980, no effective steps were taken for its implementation till the issuance of the two impugned OMs. Having regard to this appalling situation and the pathetic condition of the backward classes, for the first time the Union of India has issued the Office Memorandum (hereinafter called the 'O.M.') in August 1991 and thereafter an amended O.M. in September 1991 on the basis of the recommendations of the Mandal Commission.

Immediately after the announcement of the acceptance of the Report of the Mandal Commission, as pointed out in Writ Petition No. 930/90 and the Annexures I & II enclosed thereto, there were unabated pro as well as anti-reservation agitations and violent societal disturbances virtually paralysing the normal life. It was unfortunate and painful to note that some youths who are intransigent to recognise the doctrine of equality in matters of public employment and who under the mistaken impression that 'wrinkles and gray heirs' could not do any thing in this matter, actively participated in the agitation. Similarly, another section of people suffering from a fear psychosis that the Mandal recommendations may not at all be implemented entered the fray of the agitation. Thus, both the pro and anti-reservationists on being detonated and inflamed by the ruffled feelings that their future in public employment is bleak raised a number of gnawing doubts which in turn sensationalised the issue. Their pent up fury led to an orgy of violence resulting in loss of innocent life and damaged the public properties. It is heart-rending that some youths — particularly students — in their prime of life went to the extent of even self-immolating themselves. No denying the fact that the horrible, spine — chilling and jarring piece of information that some youths whose feelings ran high had put an end to their lives in tragic and pathetic manner had really caused a tremor in Indian society. My heart bleeds for them.

In fact, a three-judges Bench of this Court comprised of Ranganath Misra, CJ and K.N. Singh and M.H. Kania, JJ (as the learned Chief Justices then were) taking note of the widespread violence, by their order dated 21st September 1990 made the following appeal to the general public and particularly the student community :

> "After we made order on 11th September, 1990, we had appealed to counsel and those who were in the court room to take note of the fact that the dispute has now come to the apex court and it is necessary that parties and the people who were agitated over this question should maintain a disciplined posture and create an atmosphere where the question can be dispassionately decided by this court. . . . . . There is no justification to be panicky over any situation and if any one's rights are prejudiced in any manner, centainly relief would be available at the appropriate stage and nothing can happen in between which would deter this court from exercising its power in an effective manner."

Be that as it may, sitting as a Judge one cannot be swayed either way while interpreting the Constitutional provisions pertaining to the issues under controversy by the mere reflexes of the opinion of any section of the people or by the turbulence created in the society or by the emotions of the day. Because nothing inflicts a deeper wound on our Constituion than in interpreting it running berserk regardless of human rights and dignity.

We are very much alive to the fact that the issues with which we are how facing are hypersensitive, highly explosive and extremely delicate. Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner.

Part-III dealing with 'Fundamental Rights' and Part-IV dealing with 'Directive Principles of State Policy' which represent the core of the Indian Constitutional philosophy envisage the methodology for removal of historic injustice and inequalities — either inherited or artificially created — and social and economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble.

Though all men and women created by the Almighty, whether orthodox or heterodox; whether theist or atheist; whether born in the highest class or lowest class; whether belong to 'A' religion or 'B' religion are biologically same, having same purity of blood. In a Hindu Society they are divided into a number of distinct sections and sub sections known as castes and sub-castes. The moment a child comes out of the mother's womb in a Hindu family and takes its first breath and even before its umbilical cord is cut off, the innocent child is branded, stigmatized and put in a separate slot according to the caste of its parents despite the fact that the birth of the child in the particular slot is not by choice but by chance.

The concept of inequality is unknown in the kingdom of God who creates all beings equal, but the "created" of the creator has created the artificial inequality in the name of casteism with selfish motive and vested interest.

Swami Vivekananda in one of his letters addressed to his disciples in Madras dated 24.1.1894 has stated thus :

> "Caste or no caste, creed or no creed,. . . or class, or caste, or nation, or institution which bars the power of free thought and action of an individual — even so long as that power does not injure others — is devilish and must go down."
>
> (Vide 'The Complete Works of Swami Vivekananda, Vol. V page 29')

A Biblical verse in New Testament says "He denieth none that come upto Him, black and white".

> Sura 10 Verse No. 44 of Holy Quran reads :
> "Verily God will not deal unjustly with man in augit; it is man that wrongs his own soul."

The Hindu who form the majority, in our country, are divided into 4 Varnas — namely, Brahmins, Kshatriyas, Vaishyas (who are all twice born) and lastly Shudras which Varnas are having a four tier demarcated hierarchical caste system based on religious tenets, believed to be of divine origin or divinely ordained, otherwise called the Hindu Varnasharma Dharma. Beyond the 4 Varnas Hinduism recognises a community, by name Panchama (untouchables) though Shudras are recognised as being the lowest rung of the hierarchical race. This system not only creates edtreme forms of caste and gender prejudices, injustices, inequalities but also divides the society into privileged and disabled, revered and despised and so on. The perpetuation of casteism, in the words of Swami Vivekananda "continues social tyranny of ages". The caste system has been religiously preserved in many ways including by the judicial verdicts, pronounced according to the traditional Hindu Law.

On account of the caste system and the consequent inequalities prevailing in Hindusm between person to person on the basis of Varnasharma Dharma new religions such as Buddhism and Jainism came into existence on the soil of this land. Many humanistic thinkers and farseeing revolutionary leaders who stood forsquare by the down — trodden section of the Backward Classes aroused the consciousness of the backward class to fight for justice and join the wider srtuggle for social equality and propagated various reforms. It was their campaign of waging an unending war against social injustice which created a new awareness. The sustained and strenuous efforts of those leaders in that pursuit have been responsible for bringing many new social reforms.

Recognizing and recalling the self-less and dedicated social service carried on by those great leaders from their birth to the last breath; the then

Prime Minister while making his clarificatory statement regarding the implementation of the Mandal Commission's Report in the Rajya Sabha on the 9th August 1990 paid the tributes in the following words :

> "In fact this is the realisation of the dream of BHARAT RATNA Dr. B.R. Ambedkar, of the great PERIYAR Ramaswamy and Dr. Ram Manohar Lohia."

Harkingback, it is for the first time that the controversial issue as regards the equality of opportunity in matters of public employment as contemplated under Article 16 (4) has come up for deliberation before a nine-Judges Bench, on being referred to by a five-Judges Bench.

There are various Constitutional provisions such as Articles 14, 15, 16, 17, 38, 46, 332, 335, 338 and 340 which are designed to redress the centuries old grievances of the scheduled castes and scheduled tribes as well as the backward classes and which have come for judicial interpretation on and off. It is not merely a part of the Constitution but also a national commitment.

This Court which stands as a sentinel on the quievie over the rights of people of this country has to interpret the Constitution in its true spirit with insight into social values and suppleness of the adoption to the changing social needs upholding the basic structure of the Constitution for securing social justice, economic justice and political justice as well as equality of status and equality of opportunity.

The very blood and soul of our Constitutional scheme are to achieve the objectives of our Constitution as contained in the preamble which is part of our Constitution as declared by this Court in *Kesvananda Bharti v. Kerala 1973 (Suppl.) SCR 1.* So it is incumbent to lift the vail and see the notable aspirations of the Constitution.

No one can be permitted to invoke the Constitution either as a sword for an offence or as a shield for anticipatory defence, in the sense that no one under the guise of interpreting the Constitution can cause irrevertible injustice and irredeemable inequalities to any section of the people or can protect those unethically claiming unquestionable dynastic monopoly over the Constitutional benefits.

Therefore, the judges who are entrusted with the task of fostering an advanced social policy in terms of the Constitutional mandates cannot afford to sit in ivory towers keeping Olympian silence unnoticed and uncaring of the storms and stresses that affect the society.

This Summit Court has not only to interpret the Constitution but also sometimes to articulate the Constitutional norms, serving as a publicist for reforms in the ares of the most pressing needs and directing the executive to take the needed actions. Mere verbal gymnastics or empty slogans and sermons honoured more often in rhetoric than practice are of no use.

It may be a journey of thousand miles in achieving the equality of status and of opportunity, yet it must begin with a single step. So let the socially backward people take their first step in that endeavour and march on and on.

When new societal conditions and factual situations demand and Judges to speak they, without professing the tradition of judicial lock-jaw, must speak out. so I speak.

For providing reservations for backward class of citizens, Scheduled Castes and Schedules Tribes in the public educational institutions and for providing equal opportunity in the matters of public employment, some States have appointed Commissions on Backward Classes. The Central Government has also appointed two Commissions under Article 340 (1) of the Constitution of India for identifying the backward class of citizens as contemplated under Article 16 (4) for the purpose of making reservation of appointments or posts in the Services under Union of India. The list of Commissions appointed by the various States and the Central Government is given as under :

COMMISSIONS ON BACKWARD CLASSES
1918-1990

Andhra Pradesh	Manohar Pershad Committee (1968-69) Ananta Raman Commission (1970) Muralidhara Rao Commission (1982)
Bihar	Mungari Lal Commission (1971-76)
Gujarat	A.R. Bakshi Commission (1972-76) Justice C.V. Rane Commission (1981-83) Justice R.C. Man lead Commission (1987)
Haryana	Gurnam Singh Commission (1990)

Jammu and Kashmir	Justice & Gajendragadkar Commission (1967-68) Justice J.N. Wazir Commission (1969) Justice Adarsh Anand Commission (1976-77)
Karnataka	Justice L.C. Miller Committee (1918-1920; Mysore) Naganna Gowda Commission (1960-61) L.G. Havnur Commission (1972-75) T. Venkataswamy Commission (1983-86) Justice Chinnappa Reddy Commission (1989-90)
Kerala	Justice C.D. Nokes Committee (1935; Travancore-Cochin) o.K. Vishvanatham Commission (1961-63) G. Kumar Pillai Commission (1964-66) N.P. Damodaran Commission (1967-70)
Maharashtra	O.H.B. Starte Committee (1928-30; Bombay Presidency) B.D. Deshmukh Committee (1961-64)
Punjab	Brish Ban Committee (1965-66)
Tamil Nadu	A.N. Sattanathan Commission (1969-70) J.M. Ambasankar Commission (1982-86)
Uttar Pradesh	Chhedi Lal Sathi Commission (1975-77)
All India	Kaka Kalelkar Commission (1953-55) B.P. Mandal Commission (1979-80)

Note : 1. Where two dates are mentioned they refer to year of appointment and year of submission. Where only one is mentioned it refers to year of submission which is also the year of appointment in some cases.

2. The three commissions of the colonial period mentioned here had an ambit wider than those groups that later came to be known as Backward Classes.

SECOND BACKWARD CLASSED COMMISSION (POPULARLY KNOWN AS MANDAL COMMISSION)

By a Presidential Order under Article 340 of the Constitution of India the first Backward Class Commission known as Kaka Kalelkar's Commission was set up on January 29, 1953 and it submitted its report on March 30, 1955 listing out 2399 castes as socially and educationally backward on the basis of criteria evolved by it, but the Central Government did not accept that report and shelved it in the cold storage.

It was about twenty-four years after the First Backward Classes Commission submitted its Report in 1955 that the President of India pursuant to the resolution of the Parliament appointed the second Backward Classes Commission on 1st January 1979 under the Chairmanship of Shri B.P. Mandal to investigate the conditions of Socially and Educationally Backward Classes (for short 'SEBCs') within the territory of India. One of the terms of reference of the Commission was to determine the criteria for defining the SEBCs. The commission commenced its functioning on 21st March 1979 and completed its work on 12th December 1980, during the course of which it made an extensive tour throughout the length and breadth of India in order to collect the requisite data for its final report. The Commission submitted its report with a minute of dissent of one of its members, Shri L.R. Naik on 31st December 1980. The Commission appears to have identified as many as 3743 castes as SEBCs and made its recommendations under Chapter XIII of Volume I of its report (vide paras 13 : 1 to 13 : 39) and finally suggested "regarding the period of operation of Commission's recommendations, the entire scheme should be reviewed after twenty years. (Vide para 13 : 40)

The entire Report comprises of fourteen Chapters of which Chapter IV deals with 'Social Backwardness and Caste', Chapter XI deals with 'Socio-Educational Fields Survey and Criteria of Backwardness', Chapter XII deals with 'Identification of OBCs' and Chapter XIII gives the 'Recommendations'. After a thorough survey of the population, the Commission has arrived at the percentage of OBCs as follows :

"12.22 From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, other Backward Classes constitute nearly 52% of the Indian population.

Percentage of Distribution of Indian Population by Caste and Religious Groups

S.No.	Group Name	Percentage of the total population
	I. Scheduled Castes and Scheduled Tribes	
A-1	Scheduled Castes	15.05
A-2	Scheduled Tribes	7.51
	Total of 'A'	22.56
	II. Non-Hindu Communities, Religious Groups, etc.	
B-1	Muslims (other than STs)	11.19 (0.2)*
B-2	Christians (other than STs)	2.16 (0.44)*
B-3	Sikhs (other than SCs & STs)	1.67 (0.22)*
B-4	Budhists (other than STs)	0.67 (0.03)*
B-5	Jains	0.47
	Total of 'B'	16.16
	III. Forward Hindu Castes & Communities	
C-1	Brahmins (including Bhumihars)	5.52
C-2	Rajputs	3.90
C-3	Marathas	2.21
C-4	Jats	1.00
C-5	Vaishyas-Bania etc.	1.88
C-6	Kayasthas	1.07
C-7	Other forward Hindu castes/groups	2.00
	Total of 'C'	17.58
	Total of 'A' 'B' & 'C'	56.30
	IV. Backwrd Hindu Castes & Communities	
D.	Remaining Hindu castes/groups which come in the categopry of 'Other Backward Classes'	43.70@
	V. Backward Non-Hindu Communities	
E.	52% of religious groups under section B may also be treated as OBCs	8.40
F.	The approximate derived population of Other Backward Classes including non-Hindu Communities	52% (Aggregate of D & E, rounded)

@ This is a derived figure

* Figures in brackets give the population of S.C. & S.,T. among these non-Hindu Communities.

On the basis of the Commission's Report — popularly known as Mandal Commission's Report — (for short 'the Report'), two Office Memoranda — one dated 13.8.1990 and the other amended one dated 25.9.1991 were issued by the Government of India. We are reproducing those Memoranda hereunder for proper understanding and appreciation of the significance of these two OMs and the distinctions appearing between them :

"No. 36012/31/90-Estt (SCT)

Government of India
Ministry of Personnel, Publication Grievances & Pensions
(Deptt. of Personnel & Training)

OFFICE MEMORANDUM

New Delhi, the 13th August, 1990

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

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

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

(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately.

(v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department

of Public Enterprises and Ministry of Finance respectively.

Sd/-
(Smt. Krishna Singh)
Joint Secretary to the Govt. of India

Amended Memorandum :

"No. 36012/31/90-Estt. (SCT)
Government of India
Ministry of Personnel, Public Grievances & Pensions
(Deptt. of Personnel & Training)

OFFICE MEMORANDUM

New Delhi, the 25th September, 1991.

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

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

2. (i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

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

sd/-
(A.K. HARIT)
Deputy Secretary to the Govt. of India

The expression deployed in both the OMs, "Socially and Educationally Backward Classes" is on the strength of the Report of the Commission, though no such expression is used in Article 16(4) whereunder the reservation of appointments or posts in favour of any backward class of citizens is to be made. This expression is used as an explanatory one to the words 'backward class' occurring in Article 16(4). Articles 16 (4) and 340 (1) were embodied in the Constitution even at the initial stage ; but Article 15 (4) containing the same expression as in Article 340 (1) was subsequently added by the Constitution (First Amendment) Act of 1951 to over-ride the decision of this court in *State of Madras* v. *Smt. champakam Dorairajan 1951 SCR 525.*

LEGISLATIVE HISTORY OF ARTICLE 15 (4) OF THE CONSTITUTION

A legislative historical event that warranted the botroduction of clause 4 to Article 15 may be briefly retraced.

The Government of Tamil Nadu issued a Communal G.O. in 1927 making compartmental reservation of posts for various communities. Subsequently the G.O. was revised. In 1950 one Smt. Champakam Dorairajan who intended to join the Medical College, on enquiries came to know that in respect of admissions into the Government Medical College the authorities were enforcing and observing an order of the Government, namely, notification G.O. No. 1254 Education dated 17.5.1948 commonly known as Communal G.O. which restricted the number of seats in Government Colleges for certain castes. It appeared that the proportion fixed in the old Communal G.O. had been adhered to even after commencement of the Constitution on January 26, 1950. She filed a Writ Petition on 7th June 1950 under Article 226 of the Constitution for issuance of a writ of mandamus restraining the State of Madras from enforcing the said Communal G.O. on the ground that the G.O. was sought or purported to be regulated in such a manner as to infringe the violation of the Fundamental rights guaranteed under Aritcles 15 (1) and 29 (2). Similarly one Srinivasan who had applied for admission into the Government

Engineering College at Guindy also filed a Writ Petition praying for a writ of mandamus for the same relief as in *Champakam Dorairajan*. A full bench of the Madras High Court heard both the Writ Petitions and allowed them (vide *Smt. Champakam Dorairajan and another v. State of Madras AIR (38) 1951 Madras 120).* In this connection it may be mentioned that while the Writ Petition was pending before the High Court, another revised G.O. No. 2208 dated June 16, 1950 substantially reproducing the communal proportion fixed in the old Communal G.O. came into being. The State on being aggrieved by the judgement of the Madras High Court preferred an appeal before this court in *State of Madras v. Smt. Champakam Dorairajan 1951 SCR 525.* A seven Judges Bench dismissed the appeal holding that "the Communal G.O. being inconsistent with the provisions of Article 29(2) in Part III of the Constitution is void under Article 13." This judgment necessitated the introduction of a Bill called Constitution (First Amendment) Bill for over-riding the decision of this Court in *Champakam's case (supra).*

During the Parliament Debates held on 29th May 1951 Pt. Jawahar Lal Nehru, the then Prime Minister while moving the Bill to amend the Constitution stated as follows :

> "We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has the responsibility, there are groups, classes, individuals, communities, if you like, who are backward. They are backward in many ways - economically, socially, educationally - sometimes they are not backward in one of these respects and yet backward in another. The fact is therefore that if we wish to encourage them in regard to these matters, we have to do something special for them .....
>
> Therefore one has to keep a balance between the existing fact as we find it and the objective and ideal that we aim at."

Thereafter, the Bill was passed and clause (4) to Article 15 was added by the Constitution (First Amendment) Act. The object of the newly introduced clause (4) to Article 15 was to bring Aritcles 15 and 29 in line with Articles 16(4), 46 and 340 and to make it constitutionally valid for the State to reserve seats for backward class of citizens, scheduled castes and scheduled tribes in the public educational institutions as well as to make other special provisions as may be necessary for their advancement.

SCOPE OF ARTICLE 16 (4) OF THE CONSTITUTION

Article 16 (4) expressly permits the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which *in the opinion of the State* are not adequately represented in the services under the State. As the power conferred on the State under this clause 4 is to be exercised only if 'in the opinion of the State' that there is no adequate representation in the services under the State, a vital question arose for consideration whether the issue of determination by the State as to whether a particular class of citizens is backward or not is a justiciable one? This question was answered by the Constitution Bench of this court in *Trilok Nath Tiku & Another v. State of Jammu & Kashmir and Others 1967(2) SCR 265* holding thus:

> "While the State has necessarily to ascertain whether a particular class of citizens are backward or not, having regard to acceptable criteria, it is not the final word on the question; it is a justiciable issue. While ordinarily a Court may accept the decision of the State in that regard, it is open to be canvassed if that decision is based on irrelevant considerations. The power under clause (4) is also conditioned by the fact that in regard to any backward classes of citizens there is no adequate representation in the services under the State. The opinion of the State in this regard may ordinarily be accepted as final, except when it is established that there is an abuse of power."

The words *"backward class of citizens"* occurring in Article 16 (4) are neither defined nor explained in the Constitution though the same words occurring in Article 15 (4) are followed by a qualifying phrase, "Socially and Educationally".

Though initially, Article 10 (3) of the draft Constitution did not contain the qualifying word 'backward' preceding the words 'class of citizens' the said qualifying word was subsequently inserted on the suggestion of the Drafting Committee. Strong objection was taken for insertaion of the word 'backward' and more so for the introudction of Article 10 (3) of the draft Constitution. Amendments were moved by one section of the members of the constituent Assembly for complete deletion of clause (3) and by another section for the omission of the word 'backward'. The discussion and debate took place at length for and against the introduction of clause (3) as well as for the insertion of the word 'backward'. Before the motions for amendments were put on vote Dr. B.R. Ambedkar in answering the scathing criticisum made in the course of the debate and explaining the significance of clause (3) of Article 10 with the qualifying word

'backward' and insisting the sustenance of the said clause emphatically expressed his views as follows:

> "I am not prepared to say that this Constitution will not give rise to question which will involve legal interpretation or judicial interpretation. In fact, I would like to ask Mr. Krishnamachari if he can point out to me any instance of any Constitution in the world which has not been a paradise for lawyers. I would particularly ask him to refer to the vast storehouse of law reports with regard to the Constitution of the United States, Canada and other countries. I am therefore not ashamed at all if this Constition hereafter for purposes of interpretation is required to be taken to the Federal Court. That is the fate of every Constitution and every Drafting Committee. I shall therefore not labour that point at all."

While winding up the debate he 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*.....
> .....
>
> that no better formula could be produced than the one that is embodied in clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity has been ambodied in sub-clause (1) of Article 10. It is a generic principle .....
> Supposing for instance, we are to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity .....
> ..... 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 introducting 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 any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. *A backward community is a community which is backward in the opinion of the Government.* My honourable Friend Mr. T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. personally I think it would be a jusiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.'
>
> (emphasis supplied)
>
> (Constituent Assembly Debates, Volume VII Pages 700-703)

After the debate, two motions were put to vote but they were negatived. The unexpurgated draft Article 10 (3) corresponds to the present Article 16 (4) of the Constitution. It has now become necessary for this Court to interpret and explain the words 'backward class'.

There is a galaxy of decisions of this Court, explaining the words 'backward class' as occurring under Article 16 (4) in relation to Articles 16 (1) and 16 (2) which I shall recapitulate in my endeavour to meet the arguments advanced by the learned counsel appearing for various parties in interpreting the words 'backward class'.

The Government both in the earlier O.M. and the subsequent amended O.M. has used the expression 'socially and educationally backward classes' thereby qualifying the word 'backward' as 'socially and educationally backward' though in the second amended O.M., the 'ec*nomic backwardness' is alone taken as a ground for providing reservation for the economically backward section of the people not covered by the same of reservation meant for 'socially and educationally backward classes'.

The word 'backward' is very wide bringing

within its fold the social backwardness, educational backwardness, economic backwardness, political backwardness and even physical backwardness.

To assimilate the expression 'class' in its legal sense, the said expression should be strictly construed and tested on the orinciples of agreed criteria which throw a flood light on its true meaning. In interpreting the words 'backward class'. I am sorry to say there is no uniform and consistent view expressed by the Court by laying down a rigid formula exhaustively listing out the specific criteria. The battery of tests that are recognised by the Courts in determining 'socially and educationally backward classes' are caste, nature of traditional occupation or trade, poverty, place of residence, lack of education and also the sub-standard education of the candidates for the post in comparison to the average standard of candidates from general category. These factors are not exhaustive.

As to the questions (1) whether 'caste' can be taken as a criteria in determining and identifying a 'backward class' in Hindu society and (2) whether it could be a pre-dominant factor or one of the factors in identifying the backward class, there is a cleavage of opinion.

Ray, C.J. in *State of Uttar Pradesh v. Pradeep Tandon and Ors. 1975 (2) SCR 761 at 766* has gone to the extent of saying that "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)". The effect of this judgment is that caste can never be a criterion. This decision has also ruled that the place of habitation and the environment are also the determining factors in judging the social and educational backwardness.

A good deal of arguments was advanced on the question whether caste can be the sole if not the dominant factor or at the least one of the factors or not at all. Whilst antireservationists contend that the Report should be thrown overboard on the ground that the reservation is made on the caste criterion, the proreservationists would forcibly refute that contention making counter submissions stating, inter-alia, that caste can justifiably be take as an important and dominant factor if not the sole factor in determining the social and educational backwardness for various reasons as pointed out in the Report. Since backwardness is a direct consequence of caste status and the discrimination perpetuated against the socially backward people is based on the caste system, the caste criterion can never be divested while interpreting the word 'class'. Mr. K.K. Venugopal, the learned senior counsel while concluding his arguments has stated that caste if it is to be taken as one of the criteria, it must be at the end point and not the starting point. Therefore, even at the threshold, it has become obligatory to decide the question whether 'caste' should be completely excluded from being considered as one of the criteria, if not to what extent caste would become relevant in the determination and ascertainment of 'socially and educationally backward class'. there is a galaxy of decisiors of this Court in explaining the words *'backward class'* and *'caste'* which I shall refer to at the appropriated place.

Meaning of 'Class' and 'Caste'

to identify the diversity of meanings of the words 'class' and caste' that constitute their inner complexity; to formulate the questions about them that are disputed and to examine as well as to assess the opposed voices in controversies that have ensued and to understand their semiology, I shall first of all reproduce the meanings of those words as lexically defined.

The Oxford English Dictionary (Volume II):

> *Class*
>
> (2) a division or order of society according to status; a rank or grade of society; . . . (6) a number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division.
>
> *Caste*
>
> (2) one of the several hereditary classes into which society in India has from time imemoriae been divided; the members of each caste being socially equal, having the same religious rites, and generally following the same occupation or profession; those of one caste have no social intercourse with those of another; (3) the system or basis of this division among the HIndoos.

In *Webster Comprehensive Dictonary (International Edition)*, the meaning of the words is given as follows:

> *Class*
>
> (1) A number or body of persons with common characteristics: the educated class; (2) social rank; caste.
>
> *Caste*
>
> (1) one of the hereditary classes into which

Hindu society is divided in India (2) the principle of practice of such division or the position it confers; (3) the division of society on artificial grounds; a social class.

According to *Webster's Encyclopedic Unabridged Dictionary of the English Language,* meaning of the words 'class' and 'caste' is as follows:

Class

(1) a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits, kind, sort (2) any division of persons or things according to rank or grade ... (9) Social, a social stratum sharing basic, economic, political or cultural characteristics and having the same social position ... (10) the system of dividing society; caste ...

Caste

(1) Social, an endogamous and hereditary social group limited to persons of the same rank, occupation, economic position etc. and having mores distinguishing it from other such groups, (2) any rigid system of social distinctions (2) Hinduism, any of the four social divisions. the Brahman, Kshatriya, Vaisya and Sudra, into which Hindu society is rigidly divided, each caste having its own privileges and limitations, transferred by inheritance from one generation to the next (3) any class or group of society sharing common cultural features .... (6) pertaining to characterised by caste; a caste society; a caste system; a caste structure.

In *Corpus Juris Secundum (14),* the meaning of words 'class' and 'caste' is given thus:

Class

A number of objects distinguished by common characters from all others, and regarded as a collective unit or group, a collection capable of a general division, a number of persons or things ranked together for some common purpose or possessing some attribute in common; the order of rank acording to which persons or things are arranged or assorted;.....
.....
.....

Caste

A class or grade, or division of society separated from others by differences of wealth, hereditary rank or privileges, or by profession or employment, having special significance when applied to the artificance when applied to the artificial divisions or social classes into which the Hindus are rigidly separated.

Black Law Dictionary (Sixth Edition) Centennial Edition (1891-1991) gives the meaning of 'class' thus:

Class

A group of persons, things, qualities, or activities having common characteristics or attributes.

The word 'caste' is defined in *Encyclopedia Americana (5)* thus:

Caste

Caste is a largely, exclusive social class, membership in which is determined by birth and involves particular customery restrictions and privileges. The word derives from the Portuguese casta, meaning 'breed', 'race', or 'kind' and was first used to denote the Hindu social classification on the Indian subcontinent. While this remains the basic connotation, the word 'caste' is also used to describe in whole or in part social system that emerged at various times in other parts of the world.
.....

The meaning of the word 'backward' is defined in lexicons as 'retarded in physical, material or intellectual development' or 'slow in growth or development; retarded'.

A careful examination of the meaning of the words 'class' and 'caste' as defined above by the various dictionaries, perceivably shows that these two words are not synonymous with each other and they do not convey the same meaning.

See R. Chitralekha and Anr. V. State of Mysore & Ors. 1964 (6) SCR 368 at 388 and Triloki Nath v. J & K State 1969 (1) SCR 103 at 105 and K.C. Vasanth Kumar V. Karnataka 1985 Supp. (1) SCR 352

The quintessence of the above definitions is that a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense not having so much of intellect and ability will fall withan the ambit of 'any backward class of citizens' under Article 16 (4) of the

Constitution.

In the course of debate in the Parliament on the intendment of Article 16 (4), Dr. B.R. Ambedkar, the then Minister for Law expressed his views that "backward classes which are nothing else but a collection of certain castes."

The next important, but central point at issue is whether caste by the name of which a group of persons are identified, can be taken as a criterion in determining that caste as 'socially and educationally backward class' and if so, will it be the sole or dominant or one of the factors in the determination of "social and educational backwardness".

Before embarking upon a discussion relating to this aspect, it is pertinent to note the views of certain States as regards the caste criterion and economic criterion for identifying the 'backwardness'.

In reply to a questionnaire issued by the Second Backward Classes Commission, the State of Assam, Andhra Pradesh, Bihar, Gujarat, Karnataka, Kerala, Maharashtra, Punjab, Rajasthan and Uttar Pradesh stated that caste should be used as one of the criterion for identifying backwardness. Delhi, Dadra and Nagar Haveli, Haryana, Himachal Pradesh and Madhya Pradesh stated that caste should not be made a criterion of backwardness. Bihar, Gujarat, Himachal Pradesh, Kerala, Punjab, Rajasthan and Uttar Pradesh suggested low economic status as one of the significant tests, while Delhi, Dadra and Nagar Haveli and Haryana desired the economic factor to be the sole determinant of backwardness.

Articles 15 (4), 16 (4) and 340 (1) do not speak of 'caste' but only 'class'. The learned counsel particularly those appearing for anti-reservationists have stressed that if the makers of the Constitution had really intended to take 'caste or castes' as conveying the meaning of socially and educationally backward class, they would have incorporated the said word, 'caste or castes' in Articles 15 (4) and 340 (1) as 'socially and educationally backward caste or castes' instead of 'class or classes' as they have adopted the expression in the case of 'scheduled castes and scheduled tribes'. Similarly in Article 16 (4) also, they would have used the words as 'backward caste or 'castes' instead of 'backward class'. It has been futher urged that the very fact that the framers of the Constitution in their wisdom thought of using a wider expression, *'classess'* in Article 15 (4) and 340 (1) and *'class'* in Article 16 (4) alludes that they did not have the intention of equating classes with the castes.

The word 'caste' is not used in the Constitution as idicative of any section of people or community except in relation to 'Scheduled Castes' which is defined in Article 366 (24). However, the word 'caste' in Articles 15 (2), 16 (2) and 29 (2) does not include 'scheduled caste' but it refers to a caste within the ordinary meaning of caste. The word 'scheduled caste' came into being only by the notification of President under Article 341. It would be appropriate, in this connection, to recall the observationof Fazal Ali, J in his separate but concurring judgment in *State of Kerala and Others v. N.M. Thomas and Others 1976 (1) SCR 906* wherein at page 996, he has said that "the word 'caste appearing after 'scheduled' is really a misnomer and has been used only for the prupose of identifying this particular class of citizens which has a special history of several hundred years behind it".

Mathew, J in his separate judgment in the same case *(Thomas)* has expressed that "it is by virtue of the notification of the President that the 'Scheduled Castes' came into being".

Reference also may be made to the observation of Krishna Iyer, J in *Akhil Bhartiya Soshit Karamchari Sangh V. Union of India and Others 1981 (2) SCR 185 at 234* where he has said:

> "Terminological similarities are an illusory guide and we cannot go by verbal verisimilitude. It is very doubtful whether the expression caste will apply to Scheduled Castes. At any rate, Scheduled Tribes are identified by their tribal denomination. A tribe cannot be equated with a caste. As stated earlier, their are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes."

There is a long line of decisions dealing with the significance of the word 'caste' in relation to Hindus as being one of the relevant criteria, if not the sole criterion for ascertaining whether a particular person or group of persons will fall within the wider connotation of 'class'.

In *M.R. Balaji V State of Mysore 1963 (Suppl) 1 SCR 439.* Gajendragadkar, J observed, "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 the sole or the dominant test in that behalf."

Subba Rao, J speaking for the majority of the Constitution Bench in *R. Chitralekha v. State of Mysore 1964 (6) SCR 368 at 389* has stated:

> "..... what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individual may be

considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Art. 15 (4) of the Constitution, it does not vitiate the classification if it satisfied other tests."

Mudholkar, J in his dissenting judgment in considering the caste in determination of the backward class, has expressed his view thus:

"..... it would not be in accordance either with cl. (1) of Art. 15 or cl. (2) of Art. 29 to require the consideration of the castes of persons to be borne in mind for determining what are socially and educationally backward classes. It is true that cl. (4) of Art. 15 contains a non-obstante clause with the result that power conferred by that clause can be exercised despite the provisions of cl. (1) of Art. 15 and cl. (2) of Art. 29. But that does not justify the inference that castes have any relevance in determining what are socially and educationally backward communities."

Wanchoo, C.J. speaking for the Constitution Bench in *Minor P. Rajendran V. State of madras & Ors. 1968 (2) SCR 786 at 790* pointed out that "it 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)". (emphasis supplied).

The learned Chief Justice in support of his above observation has placed reliance on *Balaji.*

In State of Andhra Pradesh V. P. Sagar 1968 (3) SCR 595, if has been observed:

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

In *Triloki Nath V. J & K State (II) 1969 (1) SCR 103* Shah, J speaking for the Constitution Bench has reiterated the meaning of the word 'class' as defined in the case of *Sagar* and added that "for the purpose of Article 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution."

Further, this judgment reaffirms the view in *Minor P. Rajendran's case* to the effect that if the members of an entire caste or community at a given time are socially, economically and educationally backward that caste on that account be treated as a backward class. This is not because they are members of that caste or community but because they form a class.

Hegde, J in *A. Peeriakaruppan. etc. v. State of Tamil Nadu 1971 (2) SCR 430 at 443* has observed:

"A caste has always been recognised as a class."

Vaidialingam, J in *State of Andhra Pradesh and Ors. V. U.S.V. Balram etc. 1972 (3) SCR 247* in his conclusion upheld the list of Backward Class in that case as they satisfied the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class even though the said list was *exclusively based on caste.* (emphasis ours)

Chief Justice Ray in *Kumari K.S. Jayasree & Anr. V. The State of Kerala & Anr. 1977 (1) SCR 194* was of the view that "In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test ....."

Speaking for the Bench in *U.P. State v. Pradip Tandon* Ray, the learned Chief Justice after stating that 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 discriminationon grounds only of religion, race, caste - observed that caste cannot be made one of the criteria for determining social and educational backwardness and that if the caste or religion is recognised as a criterion of social and educational backwardness, Article 15 (4) still stultify Article 15 (1). Further be observed that "It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste but when a classification taken 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 backwards classes of citizens are groups other than

groups based on caste."

The learned Chief Justice also recognised the meaning of the expression "classes of citizens" in line with the observation made in *Triloki Nath (II) and Sagar (supra)* and explained the traits of social backwardness, economic backwardness and educational backwardness.

See also *Akhil Bhartiya Soshit Karamchari Sangh (supra) and K.C. Vasanth Kumar (supra).*

Though there is tremendous ambivalence in a host of judgments rendered by this Court, not even a single judgment has held that class has no relevance to caste at all wherever caste system is prevalent.

Collating the above said views expressed by this Court in a catena of decisions as regards the relevance and significance of the caste criterion in the field of identification of 'socially and educationally backward classes' it may be stated that caste neither can be the sole criterion nor can it be equated with 'class' for the prupose of Article 16 (4) for ascertaining the social and educational backwardness of any section or group of people so as to bring them within the wider connotation of 'backward class'. Nevertheless 'caste' in Hindu society becomes a dominant factor or primary criterion in determining the backwardness of a class of citizens. Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established and accepted criteria to identity the 'backward class'. a caste per se without satisfying the agreed formulae generally cannot fall within the meaning of 'backward class of citizens' under Article 16 (4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of the lower strata - indicating the social backwardness.

True, the caste system is predominantly known in Hindu society and runs through the entire fabric of the social structure. Therefore, the caste criterion cannot be divested from the other established and agreed criteria in identifying and ascertaining the backward classes.

It is said that the caste system is unknown to other communities such as Muslims, Christians, Sikhs, Jews, Parsis, Jains etc. in whose respective religion, the caste system is not recognised and permitted. But in practice, it cannot be irrefutably asserted that Islam, Christianity, Sikhism are all completely immune from casteism.

There are marked distinctions in one form or another among various sections of the Muslim community especially among converts to Islam though Islam does not recognise such kind of divisions among Muslims and professes only common brotherhood.

There are various sects or separate group of people in Muslim communities being identified by their occupation such as Pinjara in Gujarat, Dudekula (cotton beaters) in Andhra Pradesh, Labbais, Rowthar and Marakayar in Tamil Nadu.

Though Christianity doew not acknowledge caste system, the evils of caste system in some States are as prevalent as in Hindu society especially among the converts. In Andhra Pradesh, there are Harijan Christians, Reddy Christians, Kamma Christians etc. Similarly, in Tamil Nadu, there are Pillai Christians, Marvar Christians, Nadar Christians and Harijan Christians etc. That is to say all the converts to Christianity have not divested or set off themselves from their caste labels and crossed the caste barrier but carry with them the banners of their caste labels. Like Hindus, they interact and have their familial relationship and marital alliances only within the converted casite groups.

In Tamil Nadu, after persistent effort and agitations some of the sections of people belonging to some castes or communities converted either to Islam or Christianity have become successful in having them included in the list of 'backward classes' on par with their corresponding Hindu caste people.

The Government of Tamil Nadu on the basis of the report of the Second Backward Classes Commission issued a revised list of 'backward classes' by GO Ms. No. 1564 (Social welfare Department) dated 30th July 1985 where in the following castes and communities converted to Islam and Christianity are included for the purpose of reservationunder Articles 15 (4) and 16 (4) of the Constitution.

Serial No.

26 Converts to Christianity from Scheduled Castes irrespective of the generation of conversion for the purpose of reservation of seats in Educational Institutions and for seats in Public Services.

98* Labbais including Rowthar and Marakayar (whether their spoken language is Tamil or Urdu.)

100 Latin Catholics .....: in Kanyakumari district and Shenkottah taluk of Tirunelveli district.

110 Meenavar, Parvatharajakulam, Pattanavar, Sembadavar (including converts to Christianity).

115 Mukkuvar or Kukayar (including converts to Christianity)

118 Nadar, Shanar and Gramani, including Christian Nadar, Christian Shanar and Christian Gramani.

136 Paravar including converts to Christianity (except in Kanyakumari district and Shenkottah taluk of Tirunelveli district where the community is a Scheduled Caste.)

* Item No. 98 denotes Muslim community.

By another G.O MD No. 1565 dated 30th July 1985, the Government of Tamil Nadu directed the reservation of seats at 50% for Backward Classes and 18% for Scheduled Castes and Scheduled Tribes in respect of all courses in all kinds of educational institutions as well as in all Services in the Government of Tamil Nadu. Thereafter, another G.O. M No. 558 dated 24th February 1986 on the representation of Christian converts was issued, the relevant paragraphs of which read as follwos:

> "(5) Accordingly, the Government declare that, in addition to the Christian Converts mentioned in paragraph one above, the persons helonging to the other Christian communities who are converts from any Hindu community includded in the list of Backward Classes also will be considered as socially and educationally backward for the purposes of Article 15 (4) of the Constitution.
>
> (6) The Government also declare that, in addition to the Christian converts mentioned in paragraph one above, the persons belonging to the other Christian communities who are converts from any Hindu community included in the list of Backward Classes also will be considered as Backward Classes of citizens and that they are not adequately represented in the services under the State with reference to Article 16 (4) of the Constitution."

The Christian converts mentioned in the above G.O.M. relates to the list of Christian converts mentioned G.O. M No. 1564 dated 30th July 1985.

As per the statistics given in the Report of the Second Backward Classes Commission, in Tamil Nadu out of 27,05,960 people belonging to Muslim minorities 25,60,195 are included in the backward list which works out to 94.61% of the total Muslim population of the State. Similarly, among Christians, out of 31. 91, 988 of the total population, 25, 48, 148 are included in the backward list which works out to 79.83%.

The Nav. Budhists, and Neo Budhists the majority of whom are converts from Scheduled Castes enjoy the reservation on the ground that their low status in that community have not become advanced equal to the status of others and their social backwardness is not changed inspite of the change of their religion.

Sikhism, no doubt, strictly believes in social equality and justice, denounces all sorts of social discrimination between man and man, strongly advocates the equality and parity in all humanity and propagates that caste, birth or colour cannot make one superior or inferior. All the Gurus of Sikhism have advocated and articulated the concept of equality of man as the basis of egalitarian society. Notwithstanding Sikhism is violently against casteism, some converts to Sikhism from the Scheduled Castes still retain their caste label.

Thus even among non-Mindus, there are occupational organisations or social groups or sects which are having histroical background/evolution. They too constitute social collectives and form separate classes for the purposes of Article 16 (4).

Though in India, caste evil originated from Hindu religion that evil has taken its root so deep in the social structure of all the Indian communities and spread its tentacles far and wide thereby leaving no community from being influenced by the caste factor. In other words, it cannot be authoritatively said that some of the communities belonging to any particular religion are absolutely free from casteism or at least from its shadow. The only difference being that the rigour of caste varies from religion to religion and from region to region. Of course, in some of the communities, the influence of the csste factor may be minimal. So far as the Hindu society is concerned, it is most distressing to note that it receives sanction from the Hindu religion itself and perpetuated all through.

Reference may be made to paragraph 12.11, to 12.16 of Chapter XII of the Report.

After identifying in paragraph 12.18, the Commission has laid down the following tests for identifying non-Hindu OBCs:

> "12.18 After giving a good deal of thought to these difficulties, the Commission has evolved the following rough and ready criteria for identifying non Hindu OBCs:-
>
> i) All untouchables converted to any non-Hindu religion; and
>
> ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples: Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)"

Even assuming that the caste factor would not furnish a reliable yardstick to identify 'socially and

ed ucationally groups' in the communities other than Hindu community as there is no commonness since all sections of people among Budhists, Muslims, Sikhs and Christians etc. and as the respective religion of those communities do not recognise the caste system, yet on the principle of the other agreed criteria such as traditional occupation, trade, place of residence, poverty lack of education or economic backwardness etc, the social and economic backwardness of those communities could be identified independently of the caste criterion. Once these 'casteless socities' are tested on the anvil of the established relevant criteria de hors the caste criterion, there may not be any difficulty in identifying the social and educational backwardness of the section of the people of that community and classifying them as 'backward class of citizens' within the meaning of Article 16 (4).

In this connection, reference may be made to the observation of this Court in *Chitralekha (supra)* that "..... if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15 (4) of the Constitution, it does not vitiate the classification if it satisfied other tests."

More often than not, a question that is put forth is should the caste label be accepted as criterion in ascertaining the social and educational backwardness of a group of persons or community. No doubt, it is felt that in identifying and classifying a group of persons or community as 'socially and educationally backward class', it should be done *de hors* the caste label. But all those who address such a question turn a blind eye to the existing stark reality that in the Hindu society ever since the caste system was introduced, till today, the social status of Hindu is so woven or inextricably intertwined and fused with the caste system to such an extent that no one in such a situation can say that the caste is not a primary indicator of social backwardness and that social backwardness is not identifiable with reference to the caste of an individual or group of persons or community. Howerver, painful and distasteful, it may be, we have to face the reality that under the hydraulic pressure of caste system in Hindu society, a major section of the Hindus under multiple caste labels are made to suffer socially, educationally and economically. There appears no symptoms of early demise of this dangerous disease of caste system or getting sway from the caste factor inspite of the fact that many reformative measures have been taken by the Government. Unless this caste system, unknown to other parts of the world is completely eradicated and all the socially and educationally backward classed to whichever religion they belong inclusive of Scheduled Castes and Scheduled Tribes are brought up and placed on par with the advanced section of the people, the caste label among Hindus will continue to serve as a primary indicator of its social backwardness.

Though I am not inclined to exhaustively elaborate the untold agony and immeasurable sufferings undergone by the people in the lower strata under the label of their respective caste, I cannot avoid but citing a jarring piece of information appearing in the Report. The noted and renowned Sociologist *Shri J.R. Kamble in Rise & Awakening of Depressed Classes in India published by National Publishing House, New Delhi* has quoted a passage from the issue of 'Hindu' dated 24.12.1932 as an example of visual pollution existing in Tinnevelli (Tamil Nadu) which the Mandal Commission has extracted in Chapter IV vide para 4.13 of its report:

> "4.13 ..... In this (Tinnevelly) district there is a class of unseeables called purada vannans. They are not allowed to come out during day time because their sight is considered to be pollution. Some of these people who wash the clothes of other exterior castes working between midnight and day-break, were with difficulty persuaded to leave their houses to interview."

Does not the very mention of the caste name 'purada vannans' indicate that the people belonging to that community were so backward, both socially, economically as well as educationally beyond compreshension? Would the children of those people who were not allowed to come out during day time have gone to any school? Does not the very fact that those people were treated with contempt and disgrace as if they were vermin in the human form freeze our blood? Alas! What a terrible and traumatic experience it was for them living in their hide-outs having occasional pot-luck under pangs of misery, all through mourning over their perilous predicament on account of this social ostracism. When people placed at the base level in the hierarchical caste system are living like mutes, licking their wounds - caused by the deadening weight of social customs and mourning over their fate for having born in lower castes - can it be said by any stretch of imagination that caste can never be the primary criterion in identifying the social, economic and educational backwardness? Are not the social and economic activities of Shudras and Panchamas (untouchables) severely influenced by their low caste status?

There is no denying that many of the castes are identified even by their traditional occupation. This is so because numerous castes arranged in a hierarchical order in the Hindu social structure are tied up with their respective particular traditional occupation

consequent upon the creation of four Varnas on the concept of divine origin of caste system based on the Vedic principles. Can it be said that the propagation and practice on the caste - based discrimination; the marked dividing line between upper caste Hindus and Shudras, and the practice of untouchability inspite of the Constitutional declaration of abolition of untouchability under Article 17 are completely eradicated and erased? Can it be said that the social backwardness has no relation to caste status? The unchallengeable answer for the first question would be in the negative and for the second question, the answer would be that social backwardness does have a relation with the caste status.

It is not germane for my purpose to enter into a lengthy deliberation as to how religion and mythology were used for founding the social institution in Hindu society containing so much of inequalities and discrimination among the people professing the same Hindusism.

The Mandal Commission in Chapter IV of its report under the heading "Social Backwardness and Caste" has concluded its view with a query under paragraph 4.33 of its Report (Volume I) thus:

> "In view of the foregoing will it be too much to say that in the traditional Indian society social backwardness was a direct consequence of caste status....."

Though the Government both on the Central and State level have taken and are taking positive steps through law and other reformative measures to eradicate this social evil, it is heart-rending to note that in many circumstances, the caste system is being perpetuated instead of being banished for the reasons best known to those perpetrators.

It is common knowledge that in Hindu society, if a person merely mentions the name of a traditional occupation, another by his empirical knowledge can immediately identify the caste by the said traditional occupation. To illustrate, the traditional occupation of washing clothes is identified with washerman (Dhobi)-caste, traditional occupation of hair-cutting is identified with Barber (Nai) - caste, traditional occupation of pottery is identified with Potter (Kumhar's caste), and so on. Of course in modern times, persons belonging to any particular caste might have shifted over to other occupation leaving their traditional occupation but generally speaking, the occupation is identified with the caste and vice-versa. Many backward castes have taken 'agriculture' as their profession. In such an unquestionable situation, in my opinion, there can be no justification in saying that caste in Hindu society cannot serve as primary criterion even at the starting point in ascertaining it. social, economic and educational backwardness. To say that in the effort of ascertaining social backwardness, caste should be considered only at the end point, is a misnomer and fallacious. Because after identifying and classifying a group of persons belonging to a particular caste by testing with the application of the relevant criteria other than the caste criterion, the identification of the caste of the class of persons is no more required as in the case of identification of casteless society as a backward class. In fact, this Court in a number of decisions has held that a caste may become a 'backward class' provided that caste satisfies the test of backwardness.

It is apposite, in this context, to make reference of the views expressed by the Mandal Commission stating that there is "a close linkage between caste ranking of a person and his social educational and economic status. ..... In India, therefore, the low ritual caste status of a person has a direct bearing on his social backwardness".

Chinnappa Reddy, J in *Vasanth Kumar* points out that the social investigator "..... may freely perceive those pursuing certain 'lowly' occupation as socially and educationally backward classes."

In passing, I would like to make reference to the pith and substance of the report of Kaka Kalelkar, according to which the relevant factors to consider in classifying 'backward class' would be their traditional occupation or profession, the percentage of literary or the general educational advancement made by them; the estimated population of the community, and the distribution of the various communities throughout the State or their concentration in certain areas.

WHAT THE EXPRESSION "BACKWARD CLASS" MEANS?

In *Minor P. Rajendran (supra)*, Wanchoo, CJ speaking for the Constitution Bench has stated that "a caste is also a 'class of citizens' and that reservation can be made in such a case provided if that caste as a whole is socially and educationally backward within the meaning of Article 15 (4)".

Reference may also be made to *Triloki Nath (II) (supra) and Balaram.*

The facts in *Balaram (cited above)* disclose that for the admission to the integrated M.B.B.S. Course in the Government medical colleges in Andhra Pradesh, the Government issued a GO making a reservation of 25% of seats in favour of 'backward classes' as recommended by the Andhra Pradesh Backward Classes Commission besides other reservations

inclusive of reservation for Scheduled Castes and Scheduled Tribes. The reservation for the 'backward classes' was challenged on the ground that the Government Order violated Article 15 (1) read with Article 29 and that the reservation was not saved by Article 15 (4). The High Court held that the Commission had merely enumerated the various persons belonging to a particular caste as 'backward classes' which was contrary to the decision of this Court and violative of the constitutional provisions and consequently struck down the GO. The Government preferred an appeal before this Court. Vaidialingam, J speaking for the Bench observed:

> "In the determination of a class to be grouped as backward, a test solely based upon caste or community cannot be valid. But, in our opinion, though Directive Principles contained in Art. 46 cannot be enforced by Courts, Art. 15 (4) will have to be given effect to in order to assist the weaker sections of the citizens, as the State has been charged with such a duty. No doubt, we are aware that any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not also be missed *that a caste is also a class of citizens* and that a caste as such may be socially and educationally backward. *If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, in our opinion, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average.* There is no gainsaying the fact that there are numerous castes in the country, which are socially and educationally backward and, therefore, a suitable provision will have to be made by the State as charged in Art. 15 (4) to safeguard their interest.
>
> (emphasis supplied)

The decisions which we have referred to above support the view that a caste is also a class of citizens and that if that caste satisfies the requisite tests of backwardness, then the classification of that caste as a backward class is not opposed to Article 16 (4) notwithstanding that a few individuals of that caste are socially and educationally above the general average. I am in full agreement with the above view.

The composition and terms of reference of the Second Backward Classes Commission show that the Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India but not the socially, economically and educationally backward classes. The earlier O.M. Issued on 13.8.90 reads that with a view to providing certain weightage to socially and educationally backward classes in the services of the Union and their Public Undertakings, as recommended by the Commission, the orders are issued in the terms mentioned therein. The said O.M. also expalins that "the SEBC would comprise in the first phase the castes and communities which are common to both the lists, in the report of the Commission and the State Governments' list". In addition it is said that a list of such castes/ communities is being issued separately. The subsequent amended O.M. dated 25.9.91 states that in order to enable the 'poorer sections' of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, the Government have decided to amend the earlier Memorandum. Thus this amended O.M. firstly speaks of the 'poorer sections' of the SEBCs and secondly about the economically backward sections of the people not covered by any of the existing schemes of reservation. However, both the O.M.s while referring to the SEBCs, do not include the 'economic backwardness' of that class along with 'social and 'educational backwardness'. By the amended O.M., the Government while providing reservation for the backward sections of the people not covered by the existing schemes of reservation meant for SEBCs, classifies that section of the people as 'economically backward', that is to say that those backward sections of the people are to be identified only by their economic backwardness and not by the test of social and educational backwardness, evidently for the reason that they are all socially and educationally well advanced.

Coming to Article 16 (4) the words 'backward class' are used with a wider connotation and without any qualification or explanation. Therefore, it must be construed in the wider perspective. Though the OMs speak of social and educational backwardness of a class, the primary consideration in identifying a class and in ascertaining the inadequate representation of that class in the services under the State under Article 16 (4) is the social backwardness which results in educational backwardness, both of which culminate in economic backwardness. The degree of importance to be attached to social backwardness is much more than the importance to be given to the educational backwardness and the economic backwardness, because in identifying and classfying a section of people as a backward class within the meaning of Article 16(4) for the reservation of appointments or posts, the 'social backwardness' plays a predominant role.

Ray, C.J. in *Jayashree* is of the view that "Social backwardness can contribute to educational backwardness and educational backwardness may perpetuate social backwardness. Both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition."

The very fact that the Commission itself has given a weightage of 12 points to 'social backwardness' and 6 points to 'educational backwardness; and 4 points to 'economic backwardness' (vide paragraph 11.24 of Chapter XI) shows in very clear terms that 'social backwardness' is taken as a predominant factor in ascertaining the backwardness of a class under Article 16 (4).

In *M.R. Balaji v State of Mysore 1963 (Suppl.) 1 SCR 439* at page 454 Gajendragadkar, J observed that "economic backwardness might have contributed to social backwardness ....." This observation tends to show that Gajendragadkar, J was of the view that economic backwardness may contribute to social backwardness. With respect to the learned Judge, I am unable to agree with his view.

Desai, J in *Vasanth Kumar* has expressed a similar view that if economic criterion for compensatory discrimination or affirmative action is accepted, It would strike at the root cause of 'socially and educationally backwardness ....." thereby holding that only criterion which can be devised is the 'economic backwardness' for identifying 'socially and educationally backward classes' ignoring the predominance of social backwardness. I am unable to share with this above view.

How far the Courts would be competent to identify the 'Backward class' is explained by Chinnappa Reddy, J in *Vasanth Kumar* in the following words:

> "We are afraid Courts are not necessarily the most competent to identify backward classes or to lay down guidelines for their identification except in broad and very general way. We are equipped for; that we have no legal barometers to measure social backwardness. We are truly removed from the people, particularly those of the backward classes, by layer upon layer of gradation and degradation."

Let us have a glance over the Report in identifying the 'backward classes' by testing the same on the touchstone of various established criteria.

In chapter XI of the Report (Volume I part I) under the caption 'Socio-Educational Field Survey and Criteria of Backwardness' it is categorically stated that after most comprehensive enquires and survey in the socio-educational fields with the association and help of top social scientists and specialists in the country as well as experts from a number of disciplines, the Commission had prepared the "Indicators (Criteria) for Social and Educational Backwardness" on the analysis of data and submitted its report. The relevant paragraphs 11.23, 11.24 and 11.25 showing the criteria for identifycation of backwardness are as follows:

> *"Indicators (Criteria) for Social and Educational Backwardness*
>
> *11.23* As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e. Social, Educational and Economic. They are:-
>
> *A. Social*
>
> (i) Castes/Classes considered as socially backward by others.
>
> (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
>
> (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.
>
> (iv) Castes/Classes where participation of females in work is at least 25% above the State average.
>
> *B. Educational*
>
> (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.
>
> (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average.
>
> (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.
>
> *C. Economic*
>
> (viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kucchā houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyoud half a kilometer for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

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

11.25 It will be seen that from the values given to each Indicator, the total score adds upto 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 per cent (i.e. 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference."

It is crystal clear that the Commission only on the basis of the galaxy of facts unearthed and massive statistics collected by it, has made its recommendations on a very scientific basis of course taking 'caste' as the primary criterion in identifying the backward class in Hindu society and the occupation as the basis for identifying all those in whose societies, the caste system is not prevalent.

It is not necessary for a class to be designated as a backward class that it should be situated similarly to the Scheduled Castes and Scheduled Tribes.

Vaidialsingam, J in *Balaram* while examining a similar issue after making reference to the cases of *Balaji, Chitralekha and P. Sagar* stated, "None of the above decisions lay down that socially and educationally backward class must be exactly similar in all respects to that of Scheduled Castes and Scheduled Tribes."

Chinnappa Reddy. J in *Vasanth Kumar* while dealing with the observations made in *Balaji* "that the backward classes for whose improvement special provision is contempleted by Article 15 (4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes" observed thus:

> "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."

CRITICISM LEVELLED AGAINST MANDAL COMMISSION REPORT

The learned senior counsel, Mr. N.A. Palkhiwala, Mr. K.K. Venugopal, Smt. Shyamala Pappu and Mr. P.P. Rao assisted by a battery of lawers appearing for the petitioners condemn the recommendations of the Commissions on the various grounds. Therefore, it has become unavoidable to meet their challenges, it may not be necessary otherwise to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commision.

Taking pot-shots at the Mandal Report recommending exclusive reservation for SEBCs, the belligerent anti-reservationists denigrate the report by making scathing criticism and indiscriminately trigger off a volley of bullets against the Report. The first attack against the Report is that is is perpetuaing the evils of caste system and accentuating caste consciousness besides impeding the doctrine of secularism, the net effect of which would be dangerous and disastrous for the rapid development of the Indian society as a whole marching towards the goal of the welfare state. According to them, the identification of SEBCs by the Commission on the basis of caste system is bizzare and barren of force, muchless exposing hollowness. Therefore, the OMs issued on the strength of the Mandal Report which is solely based on the caste criterion are violative of Article 16 (2).

The above criticism, in my considered view, is very uncharitable and bereft of the factual position. Hence it has to be straightaway rejected as unmeritorious since the Report is not actually based solely on caste criteria but on the anvil of various factors grouped under three

ıeads i.e. social, educational and economic ›ackwardness but giving more importance - rightly too to the social backwardness as having a direct onsquence of caste status.

Adopting the policy of 'Running with the hare and ıunting with the hounds', a conciliatory argument was dvanced saying that although it is necessary to make ›rovisions for providing equality of opportunity in natters of public employment 'in favour of any ›ackward class' in terms of Article 16 (4), the present Report based on 1931 census can never serve a correct ›asis for identifying the 'backward class', that herefore, a fresh Commission under Article 340 (1) of he Constitution is required to be appointed to make a resh wide survey throughout the length and breadth ›f the country and submit a new list of OBCs (other ›ackward classes) on the basis of the present day Census and that there are million ways of guaranteeing ›rogress of backward classes and ensuring that it ›ercolates down the social scale, but the Mandal :ommission is the one.

Firstly, in my view if the above argument is ıccepted it will result in negation of the just claim of he SEBCs to avail the benefit of Articles 16 (4) which is ı fundamental right.

Secondly, this attack is based on a misconception. A ›erusal of the Report would indicate that the 1931 :ensus does not have even a remote connection with he identification of OBCs. But on the other hand, they ıre identified only on the basis of the country-wide ;ocioeducational field survey and the census report of 1961 particularly for the identification of primitive :ribes, aborigional tribes, hill tribes, forest tribes and ndigenous tribes and personal knowledge gained :hrough extensive touring and receipt of voluminous ›ublic evidence and lists of OBCs notified by various States. It was only after the identification of OBCs, the Commission was faced with the task of determining :heir population percentage and at that stage 1931 :ensus became relevant. It is to be further noted after 1931 census, no caste-wise statistics had been collected. In fact, the identification of classes by the Commission was based on the realities prevailing in 1980 and not in 1931. It is brought to our notice that the same method had already been adopted in Section 5 to the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976.

Thirdly, the Commission cannot be said to have ignored this factual position and found fault with for relying on 1931 census. In fact, this position is made clear by the Commission itself in Chapter XII of its Report, the relevant paragraphs of which read thus:

> "12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes, communities, and religious groups over the last half a century, has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country.
>
> 12.10 Working on the above basis, the Commission culled out caste/community wise population figures from the census records of 1931 and, then grouped them into broad caste-clusters and religious groups. These collectivities were subsequently aggregated under five major heads i.e. (i) Scheduled Castes and Scheduled Tribes; (ii) Non-Hindu communities, Religious Groups, etc.; (iii) Forward Hindu Castes and Communities; (iv) Backward Hindu Castes and Communities; and (v) Backward Non-Hindu Communities....."

In *Balaram*, wherein a similar argument was addressed, this Court after going through the Report of the Backward Classes Commission of the State of Andhra Pradesh, felt the difficulty of the non-availability of the caste-wise statistics after 1931 census and pointed out that in Andhra, the figures of 1921 cunsus were available and in Telangana area, 1931 census of castewise statistics was available.

In the background of the above discussion, the anti-reservationists cannot have any legitimate grievance and justifiably demand this Court to throw the Report over-board on the mere ground that 1931 census had been taken into consideration by the Commission.

As pointed out by this Court in *Balaram* that no conclusions can always be scientifically accurate in such matters. If at all the attack perpetrated on the Report renders any remedy to the anti-reservationists, it would be only for the purpose of putting the Report in cold storage as has happened to the Report of the First Backward Classes Commission.

Therefore, for the aforementioned reasons, I hold that the above submission made against the Report with reference to the consideration of Census of 1931 cannot be countenanced.

After having gone through the Commission's Report very assiduously and punctiliously, I am of the firm view that the Commission only after deeply considering the social, educational and economic backwardness of various classes of citizens of our country in the light of the various propositions and tests laid down by this Court had submitted its Report enumerating various classes of persons who are to be treated as OBCs. The recommendations made in the present Report after a long lull since the submission of the Report by the First Backward Classes Commission, are supportive of affirmative action programmes holding the members of the historically disadvantaged groups for centuries to catch up with the standards of competition set up by a well advanced society.

As a matter of fact, the Report wanted to reserve 52% of *all the posts in the Central Government* for OBCs commensurate with their ratio in the population. However, in deference to legal limitation it has recomended a reservation of 27% only even though the population of OBCs is almost twice this figure.

Yet another argument on behalf of the antireservationists was addressed contending that if the recommendations of the Commission are implemented, it would result in the sub-standard replacing the standard and the reins of power passing from meritocracy to mediocrity; that the upshot will be in demoralization and discontent and that it would revitalize caste system, and cleave the nation into two - forward and backward - and open up new vistas for internecine conflict and fissiparous forces, and make backwardness a vested interest.

The above tortuous line of reasoning, in my view is not only illogical, inconceivable, unreasonable and unjustified but also utterly overlooks the stark grim reality of the SEBCs suffering from social stigma and ostracism in the present day scenario of hierarchical caste system. The very object of Article 16 (4) is to ensure equality of opportunity in matters of public employment and give adequate representation to those who have been placed in a very discontent position from time immemorial on account of sociological reasons. To put it differently, the purpose of clause (4) is to ensure the benefits flowing from the fountain of this clause on the beneficiaries - namely the Backward Classes - who in the opinion of the Constitution makers, would have otherwise found it difficult to enter into public services, competing with advanced classes and who could not be kept in limbo until they are benefited by the positive action schemes and who have suffered and are still suffering from historic disabilities arising from past discrimination or disadvantage or both. However, unfortunately all of them had been kept at bay on account of various factors, operating against them inclusive of poverty. They continue to be deprived of enjoyment of equal opportunity in matters of public employment despite there being sufficient statistical evidence in proof of manifest imbalance in Government jobs which evidence is sufficient to supoort an affirmative action plan. If candidates belonging to SEBCs (characterised as mediocre by anti-reservationists), are required to enter the open field competition, along with the candidates belonging to advanced communities without any preferential treatment in public Services in their favour and go through a rigid test mechanism being the highly intelligence test and professional ability test as conditions of employment, certainly those conditions would operate as "built-in headwinds" for SEBCs. It is, therefore, in order to achieve equality of employment opportunity, clause 4 of Article 16 empowers the State to provide permissible reservation to SEBCs in the matters of appointments or posts as a remedy so as to set right the manifest imbalance in the field of public employment.

The argument that the implementation of the recommedndations of the Commission would result in demoralisation and discontent has no merit because conversely can it not be said that the non-implementation of the recommendations would result in demoralisation and discontent among the SEBCs.

Though 'equal protection' clause prohibits the State from making unreasonable discrimination in providing preferences and facilities for any section of its people, nonetheless it requires the State to afford substantially equal opportunities to those, placed unequally.

The basic policy of reservation is to off-set inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies... Therefore, a comprehensive methodological approach encompassing jurisprudential, compartive, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of societal discrimination require compensatory treatment. Needless to emphasise that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally.

It is more appropriate to recall that "There is equality only among equals and to equate unequals is to perpetuate inequality."

Therefore, the submission that the implementation of the recommendations of the Report will curtail concept of equality as enshrined under Article 14 of the Constitution and destroy the basic structure of the Constitution, cannot be countenanced.

One of the arguments criticising the Report is that the said Report virtually rewrites the Constitutions and in effect buries 50 fathoms deep the ideal of equality and that if the recommendations are given effect to and implemented, the efficiency of administration will come to a grinding halt. This submission is tantamount to saying that the reservation of 27% to SEBCs as per the impugned OMs is opposed to the concept of equality.

There is no question of rewriting the Constitution, because the Commission has acted only under the authority of the notification issued by the President. It has after laying down the parameters in the light of the various pronouncements of this Court has ultimately submitted its Report recommending the reservation in tune with the spirit of Article 16 (4).

The question whether the candidates, belonging to the SEBCs should be given a preferential treatment in matters of public employment to such time as it is necessary, receives a fitting reply in *Devadasan* wherein Subba Rao, J (as the learned Chief Justice then was) has observed, by citing an illustration as to how the manifest imbalance and inequality will occur otherwise, thus:

> "To make my point clear, take the illustration of a horse race. Two horses are set down to run a race - one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced cl. (4) in Article 16."

It will be befitting, in my opinion, to extract a passage from the book, *Bakke, Defunis and Minority Admissions (The Quest for Equal Opportunity) by allan P. Sindler* wherein at page 9, the unequal competition is explained by an analogy which is as follows:

> "A good way to appreciate the "something more" quandary is to consider the metaphor of the shackled runner, an analogy frequently advanced by spokesmen for minorities:
>
> "Imagine two runners at the starting line, readying for the 100-yard dash. One has his legs shackled, the other not. the gun goes off and the race begins. Not surprisingly, the unfettered runner immediately takes the lead and then rapidly increases the distance between himself and his shackled competition. Before the finsih line is crossed, over the judging official blows his whistle, calls off the contest on the grounds that the unequal conditions between the runners made it an unfair competition, and orders removal of the shackles."
>
> Surely few would deny that pitting a shackled runner against an unshackled one is unequitable and does not provide equality of opportunity. Hence, cancelling the race and freeing the disadvantaged runner of his shackles seem altogether appropriate. Once beyond this point, however, agreement fades rapidly. The key question becomes: what should be done so that the two runners can resume the contest on a basis of fair competition? Is it enough after removing the shackles, to place both runners back at the starting point? Or is "something more" needed, and if so, what? Should the rules of the running be altered, and if so, how? Should the previously shackled runner be given a compensatory edge, or should the other runner be handicapped in some way? How much edge or handicap?"

To one of the queries poses by the author of the above analogy, the proper reply would be that even

if the shackles whether of iron chains or silken cord, are removed and the shackled person has become unfettered, he must be given a compensatory edge until he realises that there is no more shackle on his legs because even after the removal of shackles he does not have sufficient courage to compete with the runner who has been all along unfettered.

Mr. Ram Awadesh Singh, an intervener demonstrably explained that as unwatered seeds do not germinate, unprotected backward class citizens will wither away.

The above illustration and analogies would lead to a conclusion that there is an ocean of difference between a well advanced class and a backward class in a race of open competition in the matters of public employment and they, having been placed unequally, cannot be measured by the same yardstick. As repeatedly pointed out, it is only in order to make the unequals equals, this constitutional provision, namely, clause (4) of Article 16 has been designed and purposely introduced providing some preferential treatment to the backward class. It is only in case of denial of such preferential treatment, the very concept of equality as enshrined in the Constitution, will get buried 50 fathoms deep.

A programme of reservation may sacrifice merit but does not in any way sacrifice competence because the beneficiaries under Article 16(4) have to possess the requisite basic qualifications and eligibility and have to compete among themselves though not with mainstream candidates.

As Chinnappa Reddy, J in *Vasanth Kumar* has rightly observed, "Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a mantra which is whispered by the Guru in the Sishya's ear."

In yet another context, in the same decision, the learned Judge at page 394 has firmly and irrefutably put the merit argument at rest stating thus :

> "The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is no enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences."

Be that as it may, the intelligence, merit, ability, competence, meritocracy, administrative efficiency and achievement cannot be measured by skin-pigmentation or by the surname of an individual indicating his caste.

In this regard, the observation of Subba Rao, J in *Devadasan* at page 706 may be recapitulated, which to some extent answers the doubt raised by a section of anti-reservationists that reservation will result in deterioration in the standard of service. The said observation reads as follows :

> "If the provision deals with reservation - which I hold it does - I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad. Indeed, the State laid down the minimum qualifications and all the appointments were made from those who had the said qualifications. How far the efficiency of the administrations suffers by this provision is not for me to say, but it is for the State, which is certainly interested in the maintenance of standards of its administration."

Submission on the theory of past discrimination based on the decisions of the Supreme Court of United States

Based on certain American decisions, it has been urged that only that group or section of people suffering from the lingering effects of past discrimination can be classified as 'backward classes' and not others. This submission has to be mentioned for being simply rejected for more than one reason. Even today, the caste discrimination is very much prevalent in India particularly in the rural areas. Secondly, even among the Judges of the Supreme Court of United States, there is a division of opinion on the theory of lingering effects of past discrimination. Thirdly, this theory cannot be imported to the Indian conditions where the Hindu society even today is suffering from the firm grip of discrimination based on caste system. The vastness and richness of the materials unearthed by the various Commissions inclusive of States' Commissions unambiguously and pellucidly reveal that in our country, representation of the SEBCs in the services under the State is grossly inadequate when compared to the representation of the advanced class of citizens leave the complete absence of reservation for SEBCs in the Central Services. This inad-

equate representation is not confined to any specific section of the people, but all those who fall under the group of social backwardness whether they are Shudras of Hindu community or similarly situated other backward classes of people in other communities, namely, Muslims, Sikhs, Christians etc.

Drawing strength on the opinion of Powell, J in *Regents of the University of California v. Allan Bakke 57 L Ed 2d 750*, an argument has been advanced that Article 16 (1) permits only preferences but not reservations. In the above *Bakke's case*, a white male who had been denied admission to the medical school at the University of California at Davis for two consecutive years, instituted an action for declaratory and injunctive relief against the Regents of the University in the Superior Court of Yolo County, California alleging the invalidity under the equal protection clause of the Fourteenth Amendment, a provision of the California Constitution, and the proscription in racial discrimination in any programme receiving federal financial assistance of the medical school's special admissions programme. The Supreme Court announced its decision amid confusion and controversy. There was no clear majority, but a three-way split namely four Judges took one view and four other Judges took a different view, leaving Justice Powell straddling the middle. In their joint opinion partially concurring and partially dissenting, Justice Brennan, White, Marshal and Blackmun took issue with Powell's conclusion that the Davis programme was unconstitutional and said, "We cannot ... let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."

Attention was also drawn to *Defunis Vs. Charles Odegaurd 1974 (40) L.Ed. 2nd 164.*

The analytical study of American cases shows that the American-style justification of positive discrimination is on the ground of utility whereas the Indian-style justification is on the ground of constitutional rights. Therefore, the decision in relation to a racial discrimination relating to an admission to the medical school cannot be of much assistance in the matter of identification of 'backward classes' falling under Article 16 (4). The dicta in *Bakke* and *Defunis* is one akin to the principle covered under Article 15 (4) and not under Article 16 (1) or 16 (4).

Whether Article 16 (4) is an exception to Articles 16 (1) and (2)?

Mr. Parasaran, the learned senior counsel, appearing on behalf of the Union of India articulated that Articles 16(4) and 335 are so worded as to give a wide latitude to the State in the matter of reservation and that Article 16(4) having non-obstante clause reading "Nothing in this Article shall prevent the State from making any provision....." has an over-riding effect on Article 16(2).

In support of the above argument based on the non-obstante clause, much reliance was placed on various decisions, namely, (1) *Punjab Province v. Daulat Singh & Others 1942 F.C.R. 67 at 87 and 88;* (2) *Orient Paper and Industries Ltd. v. State of Orissa AIR 1991 SC 672 at 677 and 678;* (3) *In re. Hatschek's Patents 1909 Chancery Division Vol. II 68 at 82 and 85;* and (4) *Hari Vishnu Kamath v. Syed Ahmed Ishaque and others 1955(1) SCR 1104 at 1121.*

Yet another argument placing reliance on *TrilokiNath's case (I) (supra)* was advanced contending that Article 16(4) is an enabling provision conferring a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens. Placing reliance on the view expressed by Wanchoo, J (as the learned Chief Justice then was) in *General Manager, Southern Railways v. Rangachari 1962 (2) SCR 586* it was further urged that Article 16(4) which is in the nature of an exception or proviso to Article 16(1) cannot nullify equality of opportunity guaranteed to all citizens by that article.

In my view, that clause (4) of Article 16 is not an exception to Article 16 (1) and (2) but it is an enabling provision and permissive in character overriding Article 16(1) and (2); that it is a source of reservation for appointments or posts in the Services so far as the backward class of citizens is concerned and that under clause (1) of Article 16 reservation for appointments or posts can be made to other sections of the society such as physically handicapped etc.

There is complete unanimity of judicial opinion of this Court that under Article 16(4) the State can make adequate provisions for reservations of appointments or posts in favour of any backward class of citizens, if in the opinion of the State such 'backward class' is not adequately represented in the State. In fact in *B. Venkataramana v. State of Madras AIR 1951 SC 229* a seven Judges Bench of this Court held that "reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional". Not a single decision of this Court has cast slightest shadow of doubt on the constitutional validity of reservation. Therefore, in view of the above position of law, I am not inclined to embark upon an elaborate discussion on this question any further.

Whether Reservation under Article 16 (4) can be made by Executive Order?

The next submission that the provision for reservation of appointments or posts under Article 16(4) can be made only by a legislation and not by an executive order is unsustainable. This contention as a matter of fact has already been answered in *(1) Balaji (supra) and (2), Comptroller & Auditor General v. Mohan Lal Mehrotra 1992 (1) SCC 20.*

In passing, it may be stated that this Court while reversing the judgement of the Punjab and Haryana High Court in favour of the appellant (State) in *State of Punjab v. Hirala Lal and Ors. 1971 (3) SCR 267* upheld the reservation which was made not by a legislation but by an executive order. See also *Mangal Singh v. Punjab State Police AIR 1968 Punjab 306.*

Agreeing with the reasonings of Balaji. I hold that the provision for reservation in the "Services under the State" under Article 16(4) can be made by an executive order.

Whether the power conferred under Art. 16(4) is coupled with duty?

Mr. K. Parasaran put forth an argument that the enabling power conferred under Article 16 (4) is intended for the benefit of the 'backward classes of citizens' who in the opinion of the State are not adequately represented in the Services under the State and that the power is one coupled with a duty and, therefore, has to be exercised by the State for the benefit of those for whom it is intended. Reference was made to *H.W.R. Wade Administrative Law V Edn. Pages 228 and 229, Halsbury's Laws of England IV Edn. Vol. 1 paras page 34 para 27 and page 35 para 29.* He adds that the duty caused on the State is to be exercised in keeping with the directive principles laid down under Article 46 to promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all other forms of exploitation. In this connection, attention was drawn to a few decisions of this Court, namely, *(1) Chief Controlling Revenue Authority V. Maharashtra Sugar Mills Ltd. 1950 SCR 536; (2) Official Liquidator V. Dharti Dhan 964; (3) Delhi Administration V. I.K. Nangia 1980 (1) SCR 1016; and (4) Jaganathan (supra).*

Whether formation of opinion by State is subjective?

The expression *"in the opinion of the State"* would mean the formation of opinion by the State which is purely a subjective process. It cannot be challenged in a Court on the ground of propriety, reasonableness and sufficiency though such an opinion is required to be formed on the subjective satisfaction of the Government whether the identified 'backward class of citizens' are adequately represented or not in the Services under the State. But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a *sine quo non.* If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds the scope of Statute, or irrelevant and extraneous material then that opinion is challengeable.. See *(1) Dr. N.B. Khare V. The State of Delhi 1950 SCR 519; (2) Govindji V. Municipal Corporation, Ahmedabad 1957 Bom. 147; (3) Virendra V. The State of Punjab and Another 1958 SCR 308; (4) The Barium Chemicals Ltd. and Anr. V. The Company Law Board and Others 1966 Suppl. SCR 311 and (5) Rohtas Industries V. S.D. Agarwal and Others 1969 (1) SCC 325.*

In the present case, nothing is shown that the opinion of the Government as regards the inadequacy of representation in the Services is vitiated on any of the grounds mentioned above.

Whether the policy of the Government can be subjected to judicial review?

The action of the Government in making provision for the reservation of appointments or posts in favour of any 'backward class of citizens' *is a matter of policy of the Government.* What is best for the 'backward class' and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservation is a matter for decision exclusively within the province of the Government and such matters do not ordinarily attract the power of judicial review or judicial interference except on the grounds which are well settled by a catena of decisions of this Court. Reference may be made to *(1) Hindustan Zinc V. A.P. State Electricity Board 1991 (3) SCC 299; (2) Sitaram Sugars V. Union of India and Others 1990 (3) SCC 223; (3) D.C.M. V. S. Paramjit Singh 1990 (4) SCC 723; (4) Minerva Talkies V. State of Karnataka and Others 1988 Suppl SCC 176; (5) State of Karnataka V. Ranganath Reddy 1978 (1) SCR 641; (6) Kerala State Electricity Board V. S.N. Govind Prabhu 1986 (4) SCC; (7) Prag Ice Company V. Union of India and Others 1978 (2) SCC 459; (8) Saraswati Industries Syndicate Ltd. Union of India 1975 (1) SCR 956; (9) Murti Match Works V. Assistant Collector, Central Excise and Others 1974 (3) SCR 121; (10) T. Govindraja Mudaliar V. State of Tamil Nadu and Others 1973 (3) SCR 222; and (11) Narender Kumar V. Union of India and Others 1969 (2) SCR 375.*

To what extent can the reservation be made?

The next baffling question relates to the permissible extent of reservation in appointments.

It was for the first time that this Court in *Balaji* has indicated broadly that the reservation should be less than 50% and the question how much less than 50% would depend on the relevant prevailing circumstances in each case. Though in *Balaji*, the issue in dispute related only to the reservation prescribed for admissions in the medical college from the educationally and socially backward classes, scheduled castes and scheduled tribes as being violative of Article 15 (4), this Court after expressing its view that it should be less than 50 % observed further that "the provisions of Article 15 (4) are similar to those of Article 16(4) .....Therefore, what is true in regard to Article 15 (4) is equally true in regard to Article 16 (4) .....reservation made under Article 16 (4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution." This decision has gone further holding that the reservation of 68% seats made in that case was offending Article 15 (4) of the Constitution. To say in other words, *Balaji* has fixed that the maximum limit of reservation all put together should not exceed 50% and if it exceeds, it is nothing but a fraud on the Constitution. Even at the threshold, I may emphatically state that I am unable to agree with the proposition fixing the reservation for SEBCs at 50% as the maximum limit.

Mr. Jethmalani strongly articulated that the observation in *Balaji* that reservation under Article 16 (4) should not be beyond 50% is only an *obiter dicta* since that question did not at all arise for consideration in that case. Therefore, according to him, this observation is not a law declared by the Supreme Court within the meaning of Article 141 of the Constitution. He continued to state that unfortunately some of the subsequent decisions have mistakenly held as if the question of permissible limit has been settled in *Balaji* while, in fact, the view expressed in it was an *obiter dicta*. According to him, the policy of reservation is in the nature of affirmative action, firstly to eliminate the past inhuman discrimination and secondly to ameliorate the sufferings and reverse the genetic damage so that the people belonging to 'backward class' can be uplifted. When it is the main objective of clause (4) of Article 16 any limitation on reservation would defeat the very purpose of this Article falling under Fundamental Rights and, therefore, reservation if the circumstances so warrant can go even upto 100%.

This view of Mr. Jethmalani has been fully supported by Mr. Siva Subramaniam appearing on behalf of the State of Tamil Nadu who pointedly referred to the speech of the Chief Minister of Tamil Nadu made in the Chief Ministers' Conference held on 10th April 1992 and produced a copy of the printed speech of the Chief Minister, issued by the Government of Tamil Nadu as an annexure to the written submissions. It is seen from the said annexure that the Chief Minister has categorically emphasised the stand of the Government of Tamil Nadu stating that the total reservation for backward classes, scheduled castes and scheduled tribes is 69%; that it is but fair and proper that socially and educationally backward classes (alone) as a whole should be given at least 50% reservation for employment opportunities in Central Government services and its undertakings as well as for admission in educational institutions run by the Central Government. It has also been pointed out that in consonance with this avowed policy, the Tamil Nadu Legislative Assembly passed unanimously a resolution on 30.9.1991 urging the Government of India to adopt a policy of 50% reservation for the Backward Classes instead of 27% and to apply this reservation not only for employment opportunities in all Central Government departments and Public Sector Undertakings, but also for admission in all Educational Institutions run by the Central Government.

Mr. Rajiv Dhawan appearing in W.P. No. 1094/91 submits that the limits to the reservation in Article 16 (4) cannot be fixed on percentage but it must be with the ulterior objective of achieving adequate representation for 'backward classes'.

I see much force in the above submissions and hold that any reservation in excess of 50% for 'backward classes' will not be violative of Article 14 and/or 16 of the Constitution. But at the same time, I am of the view that such reservations made either under Article 16 (4) or under Article 16 (1) and (4) cannot be extended to the totality of 100%. In fact, my learned brother, P.B. Sawant J in his separate judgement has also expressed a similar view that "there is no legal infirmity in keeping the reservations under clause (4) alone or under clause (4) and clause (1) of Article 16 together exceeding 50 percent" though for other reasons the learned Judge has concluded that ordinarily the reservations kept under Article 16 (1) and 16 (4) together should not exceed 50% of the appointments in a cadre or service in any particular year, but for extraordinary reasons this percentage may be exceeded. My learned brother, B.P. Jeevan Reddy, J in his separate judgement has expressed his view that in given circumstances, some relaxation in the strict rule of reservation may become imperative and added that in doing so extreme caution is to be exercised and a special case made out.

As to what extent the proportion of reservation will be so excessive as to render it bad must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50% is neither

based on scientific data nor on any established and agreed formula. In fact, Article 16 (4) itself does not limit the power of the Government in making the reservation to any maximum percentage; but it depends upon the quantum of adequate representation required in the Services. In this context, it would be appropriate to recall some of the decisions of this Court, not agreeing with *Balaji* as regards the fixation of percentage of reservation.

The question of percentage of reservation was examined in *Thomas* wherein Fazal Ali, J not agreeing with *Balaji* has observed thus :

> "..... clause (4) of Art. 16 does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Art. 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 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) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate."

Krishna Iyer, J in the same decision has agreed with the above view of Fazal Ali, J stating that " ... the arithmetical limit of 50% in any one year by some earlier rulings cannot perhaps be pressed too far."

Though Mathew, J did not specifically deal with this maximum limit of reservation, nevertheless the tenor of his judgement indicates that he did not favour 50% rule.

Chinnappa Reddy, J in *Karamchari case 1981 (2) SCR 185 (supra)* has expressed his view on the ceiling of reservation as follows :

> "..... There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty percent. There is no rigidity about the fifty percent rule which is only a convenient guideline laid down by Judges. Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future. Judged in the light of this discussion I am unable to find anything illegal or unconstitutional in any one of the impugned orders and circulars....."

Again in *Vasanth Kumar*, Chinnappa Reddy, J reiterates his view taken in *Karamchari* in the following words :

> "We must repeat here, what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess of 50 percent may impair efficiency."

I fully share the above views of Fazal Ali, Krishna Iyer, Chinnappa Reddy, JJ holding that no maximum percentage of reservation can be justifiably fixed under Articles 15 (4) and/or 16 (4) of the Constitution.

It should not be out of place to recall the observation of Hegde, J in *Hira Lal* observing, " The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review ..... *The length of the leap to be provided depends upon the gap to be covered.*" (emphasis supplied)

Desai, J in *Vasanth Kumar* expressed his view that in dealing with the question of reservation in favour of Scheduled Castes, Scheduled Tribes as well as other SEBCs 'Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities."

Whether the further arbitrary classification as 'poorer sections' from and out of the identified SEBCs is permissible under Article 16 (4) after acceptance and approval of the list without reservation and whether such classification suffers from non-application of mind?

The most important and crucial issue that I would now like to ponder relates to the intent of para 2 (i) of the

OM dated 25th September 1991 where under it is declared that "Within the 27%of the vacancies in civil posts and services under the Government of India reserved for SEBCs, *preference will be given to the candidates belonging to the poorer sections of the SEBCs.* In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates". (emphasis supplied)

To say in other words, the Government intends to prescribe an income ceiling for determination of 'poorer sections' of the SEBCs who will be eligible to avail of the preference of reservation of appointments or posts in the Services under the State. It is an admitted fact that the Government so far has not laid down any guideline or test for identifying and ascertaining the 'poorer sections' among the identified SEBCs.

The OM has specifically used the expression, 'poorer sections' but not 'weaker sections' as contemplated under Article 46 of the Constitution. Though the expressions 'poorer sections' and 'weaker sections' may connote in general 'the disadvantaged position of a section of the people' they do not convey one and the same meaning and they are not synonymous. When the OM deliberately uses the expression 'poorer sections', it has become incumbent to examine what that expression means and whether there can be any sub-classification as 'poorer' and 'non-poorer' among the same category of potential backward class of citizens on the anvil of economic criterion.

The word 'poor' lexically means "having little or no money, goods or other means of support" (Webster's Encyclopedic Unabridged Dictionary) or "lacking financial or other means of subsistence" (Collins English Dictionary).

The OM uses the expression 'poorer' in its comparative term for the word 'poor'. It is common knowledge that the superlative term for the word 'poor' is 'poorest'. The very usage of the word 'poorer' is in comparison with the positive word 'poor'. Therefore, it necessarily follows that the OM firstly considers all the identified SEBCs in general as belonging to 'poor sections' from and out of which the 'poorer sections' are to be culled out by applying a test to be yet formulated by the Government evidently on economic criterion or by application of poverty test based on the ceiling of income. After the segregation of 'poorer sections' of the SEBCs, the left out would be the 'poor sections'. By the use of the word 'poorer', the Government is super-imposing a relative poverty test for identifying and determining a preferential class among the identified SEBCs. It is stated that the preference will be given first to the 'poorer sections' and only in case there are unfilled vacancies, those vacancies will be filled by the left out SEBCs, namely, those other than poorer sections. In other words, it means that all the identified SEBCs do not belong to affluent sections but to poor and poorer sections, that the expression 'poorer sections' denotes only the economically weaker sections of SEBCs compared with the remaining same category of SEBCs and that those, other than the 'poorer sections' although socially and educationally backward are economically better off compared with the 'poorer sections'. The view that all the identified SEBCs are considered as 'poor' or 'poorer' is fortified by the fact that there is an inbuilt explanation in the amended OM itself to the effect that those who do not fall within the category of 'poorer sections' also will be entitled for the benefit of reservation but of course subject to the availability of unfilled vacancies.

An argument was advanced that for identifying 'poorer sections', the 'means test' signifying an imposition of outer income limit should be applied and those who are above the cut off income limit should be excluded so that the better off sections of the SEBCs may be prevented from taking the benefit earmarked for the less fortunate brethren, and the only genuine and truly members of 'poorer sections' of SEBCs may avail the benefit of reservation. In support of this argument, an attempt has been made to draw strength on two decisions of this Court rendered in *Jayashree* and *Vasanth Kumar.*

Chief Justice Ray in *Jayashree* seems to have been inclined to take the view that reservation of seats in educational institutions should not be allowed to be enjoyed by the rich people suffering from the same communal disabilities.

Chinnappa Reddy, J in *Vasanth Kumar* recognises this 'means test' saying that "an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserved it", with which view Venkataramiah, J (as the learned Chief Justice then was) has agreed.

Thus the above argument based on 'means test' though seems to be plausible at the first sight is, in my opinion, not well founded and must be rejected on the ground that the identified category of SEBCs, having common characteristics or attributes - namely the potential social backwardness cannot be bisected or further classified by applying the economic or poverty test.

A doubt has been created as to whether the word 'poorer' connotes economic status or social status or is to be understood in any other way.

The word 'poorer' when examined in the context in which it is deployed both syntactically and etymologically, in my view, may not convey any other meaning except relative poverty or comparative economic status. If any other meaning is imported which the Government evidently appears to have not contemplated, virtually one will be rewriting the second OM.

An order of a Constitution Bench dated 1st October 1991 clearly spells out that Bench was of the view that 'poorer sections' are to be identified by the economic criterion. The relevant portion of the above Order reads as follows :

> "The matters are adjourned to 31st October 1991 when learned Additional Solicitor General will tell us how and when Government would be able to give *the list of the economic criteria* referred to in the notification of 25th September 1991."
> (emphasis supplied)

The same view is reflected in a subsequent Order dated 4th December 1991 made by this nine-Judges Bench, the relevant part of which reads thus :

> "Learned Additional Solicitor General states that the Government definitely expects to be able to fix the *economic criteria* by January 28, 1992.....As far as the question of stay granted by us earlier is concerned, we see no reason to pass any order at this stage as the petitions are posted for hearing on January 28, 1992 and in view of the *economic criterion* not being yet determined and other relevant circumstances, no question of immediate implementation of the notification arises."
> (emphasis supplied)

The above Orders of this Court support my view that the Government has to identify the 'poorer sections' only by the economic criteria or by the application of poverty test otherwise called 'means test'. It appears that this Court has all along been given to understand that 'poorer sections' will be tested by the Government on economic criterion.

The above view is further fortified by the very fact that the second OM providing 10% of the reservation *'for economically backward sections* of the people not covered by any other scheme of the reservation' indicates that the Government has taken only the economic criteria in making the classification of the various sections of the people (emphasis supplied). Therefore, I proceed on the basis that the second OM identifies the 'poorer sections' only on the basis of economic status.

When the 'means test' is analysed in depth so as to explore its merits and demerits, one would come to an inevitable conclusion that it is not a decisive test but on the other hand it will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods. Further, this test will be totally unworkable and impracticable in the determination of "getting somebody in and getting somebody out" from among the same identified SEBCs. If this 'means test' argument is accepted and put into action by scanning the identified SEBCs by applying a super-imposition test, the very object and purpose of reservation, intended for the socially backward class would reach only a *culde sac* and the identified SEBCs would be left in a maze. In my considered opinion, it will be a futile exercise for the courts to find out the reasons in support of the division between and among the group of SEBCs and make rule therefor, for multiple reasons, a few of which I am enumerating hereunder.

(1) The division among the identified and ascertained SEBCs having common characteristics and attributes - the primary of which being the potential social backwardness, as 'poorer sections' and 'non-poorer sections' on the anvil of economic criterion or by application of a super-imposition test of relative poverty is impermissible as being opposed to the scope and intent of Article 16 (4).

(2) If this apex Court puts its seal of approval to para 2 (i) of the second OM whereunder a section of the people under the label of 'poorer sections' is carved out from among the SEBCs, it becomes a law declared by this Court for the entire nation under Article 141 of the Constitution and is binding on all the Courts within the territory of India and that the decision of this Court on a constitutional question cannot be over-ridden except by the constitutionally recognised norms. When such is the legal position, the law so declared should be capable of being effectively implemented in its full measure, in the generality of cases and not confined in its applicability to some rare or freakish cases. The law should not be susceptible of being abused or misused and leave scope for manipulation which can remain undetected. If the law so declared by this Court is indecisive and leaves perceivable loop-holes, by the aid of which one can defeat or circumvent or nullify that law by adopting an insidious, tricky, fraudulent and strategic device to suit one's purpose then that law will become otiose and remain as dead letter.

I would like to indicate the various reasons in support of my opinion that this process of elimination or exclusion of a section of people from and out of the same category of SEBCs cannot be sustained leave apart the

authority of the Government to take any decision and formulate its policy in its discretion or opinion provided that the policy is not violative of any constitutional or legal provisions or that discretion or opinion is not vitiated by non-application of mind, arbitrariness, formulation of collateral grounds or consideration of irrelevant and extraneous material etc.

a) If the annual gross income of a government servant derived from all his sources during a financial year is taken as a test for identifying the 'poorer sections', that test could be defeated by reducing the income below the ceiling limit by a Government servant voluntarily going on leave on loss of pay for few months during that financial year so that he could bring his annual income within the ceiling limit and claim the benefit of reservation meant for 'poorer sections'. Similarly, a person owning extensive land also may lay a portion of his fallow in any particular year or dispose of a portion of his land so as to bring his agricultural income below the ceiling limit so that he may fall within the category of 'poorer sections'.

b) The fluctuating fortunes or misfortunes also will play an important role in determining whether one gets within the area of 'poorer sections' or gets out of it.

c) Take a case wherein there are two brothers belonging to the same family of 'backward class' of whom one is employed in Government service and another is privately employed or has chosen some other profession. The annual income of the Government employee if slightly exceeds the ceiling limit, his children will not fall within the category of 'poorer sections' whereas the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit.

d) Among the pensioners also, the above anomaly will prevail as pointed out in *Janaki Prasad.*

e) Any member of SEBCs who is in Government job and is on the verge of his superannuation and whose income exceeds the ceiling limit, will go out of the purview of 'poorer section' but in the next financial year, he may get into the 'poorer sections' if his total pensionary benefits fall within the ceiling limit.

f) A person who is within the definition of 'poorer sections' may suddenly go out of its purview by any intervening fortuitous circumstances such as getting a marital alliance in a rich family or by obtaining any wind-fall wealth.

g) If poverty test is made applicable for identifying the 'poorer sections' then in a given case wherein a person is socially oppressed and educationally backward but economically slightly advanced in a particular year, he will be deprived of getting the preferential treatment.

The above are only by way of illustrations, though this type can be multiplied, for the purpose of showing that a person can voluntarily reduce his income and thereby circumvent the declared law of this Court. In all the above illustrations, enumerated as (a) to (g), the chance of "getting into or getting out of" the definition of 'poorer sections' will be *like a see-saw* depending upon the fluctuating fortunes of misfortunes.

(2) The income test for ascertaining poverty may severely suffer from the vice of corruption and also encourage patronage and nepotism.

(3) When the Government has accepted and approved the lists of SEBCs, identified by the test of social backwardness, educational backwardness and economic backwardness which lists are annexed to the Report, there is no justification by dividing the SEBCs into two groups, thereby allowing one section to fully enjoy the benefits and another on a condition only if there are unfilled vacancies.

(4) The elimination of a section of SEBCs by putting an arbitrary and unnecessary barrier on the basis of economic criterion is absolutely unjustified. This process of elimination or exclusion of a section of SEBCs will be tantamount to pushing those persons into the arena of open competition along with the forward class if there are no unfilled vacancies out of the total 27% meant for SEBCs. This will cause an irretrievable injustice to all the non-poorer sections though they are also theoretically declared as SEBCs.

(5) The second OM providing a scanning test is neither feasible nor practicable. It will be perceptible and effectual only if the entire identified backward class enjoys the benefit of reservation.

(6) The proposed 'means test' is highly impressionistic test, the result of which is likely to be influenced by many uncertain and imponderable facts.

(7) It may theoretically sound well but in practice may be made in a underhanded way to get round the problem.

What I have indicated above is only the tip of the iceberg and more of it is likely to surface at the time when any scanning process and super-imposition test are put into practice.

In this connection, I would like to mention the views of the Tamil Nadu Government as expressed by the Chief Minister of Tamil Nadu in the Chief Ministers' Conference held in New Delhi (already referred to) stating that the application of income limit on reservation will exclude those people whose income is above the 'cut-off' limit and literally, it means that they will come under the open competition quota and if caste is not the sole criterion, income limit cannot also be the decisive and determining factor for social backwardness and that the exclusion of certain people from the benefits of reservation by the application of economic criterion will not bring the desired effect for the 1s2 advancement and improvement of the backward classes who have suffered deprivations from the time immemorial.

Reference also be made to *Balaji* wherein it has been ruled that backward classes cannot be further classified into backward and more backward and that such a sub-classification "does not appear to be justified under Article 15 (4)". This view, in my opinion, can be equally applied even for sub-classification under Article 16 (4).

Arguing with the above view of *Balaji*, I hold that the further sub-classification as 'poorer sections' out of the ascertained SEBCs after accepting the group in which the common thread of social backwardness runs through as an identifiable unit within the meaning of the expression 'backward class', is violative of Article 16 (4).

Of course, in *Vasanth Kumar*, Chinnappa Reddy, J in his separate judgement has taken a slightly contrary view, holding that there can be classification for providing some reservation to the more backward classes compared to little more advanced backward classes. This view is expressed only by the learned Judge (Chinnappa Reddy, J) on which view other Judges of that Bench have not expressed any opinion. However, it appears that the learned Judge has not said that the entire reservation should go only to the more backward classes but only some percentage of reservation should be provided and earmarked exclusively for the more backward classes.

In the present case, the entire reservation of 27 percent is given firstly to be enjoyed by the 'poorer sections' and only the unfilled vacancies, if any, can be availed of by others. As I have already held, the view expressed by the Constitution Bench in *Balaji* is more acceptable to me.

It may not be out of place to mention here that in Tamil Nadu, based on one of the recommendations of the First Backward Classes Commission constituted in 1969 - known as 'Sattanatham Commission; - the Government issued orders in GO Ms No. 1156, Social Welfare Department, dated 2nd July 1979, superimposing the income ceiling of Rs. 9,000/- per annum as additional criterion for the backward classes to be eligible for reservation for admission in educational institutions and recruitment to public services. This order was challenged before the High Court but the High Court by 2:1 upheld the G.O. However, the order provoked a considerable volume of public criticism. After an All-party meet, the Government in GO Ms No. 72, Social Welfare Department dated 1st February 1980 revoked their orders and the position as it stood prior to 2nd July 1979 was restored. Simultaneously, by another GO Ms No. 73, Social Welfare Department dated 1st February 1980, the Government raised the percentage of reservation for backward classes from 31 percent to 50 percent commensurate with the population of the backward classes in the State. Both the GOs i.e., GO Ms No. 72 and 73 dated 1st February 1980 were challenged in the Supreme Court in Writ Petition Nos. 4995-4997 of 1980 along with W.P. No. 402 of 1981.

The Constitution Bench of this Court by its order dated 14th October 1980 directed the State Government to appoint another Commission to review the then existing enumeration and classification of backward classes and to take necessary steps for identifying the backward classes in the light of the report of the said Commission and that both the GOs "shall lapse after January 1, 1985". However, by order dated 5.5.1981, the above writ petitions were directed to be listed alongwith W.P. Nos. 1297-98/79 and 1497/79 (*Vasanth Kumar*). Thereafter, a number of CMPs in the writ petitions for extension of time for implementation of this Court's directions were filled. This Court periodically extended the time upto July 1985. A CMP for further extension of time was dismissed on 23.7.1985 by a three-Judges Bench of this Court since the judgement in *Vasanth Kumar* involving the same question was delivered on 8.5.1985. Vide (1) Orders of Supreme Court in W.P. Nos. 4995-97/1980 and W.P. No. 402/1981, (2) Orders of High Court of Madras in W.P. Nos. 3069, 3292 and 3436/79 dated 20th August 1979 and (3) Paragraph 1.01 of Chapter I of the Report of the Tamil Nadu Second Backward Classes Commission (popularly known as Ambasankar Commission)

We have referred to the above facts for the purpose of showing that the fixation of ceiling limit on economic criterion was not successful and that for identifying the 'weaker sections', ceiling limit is not the proper test, once the backward class is identified and ascertained.

Further, it is clear for the afore-mentioned reasons t the Executive while making the division of sub- ssification has not properly applied its mind to vari- ; factors, indicated above which may ultimately de- t the very purpose of the division or sub-classification. hat view, para 2(i) not only becomes constitutionally alid but also suffers from the vice of non-application nind and arbitrariness.

For the aforementioned reasons, I am of the firm w that the division made in the amended OM divid- ; a section of the people as 'poorer sections' and ving the remaining as 'non-poorer sections' on eco- mic criterion from and among the same unit of iden- ed and ascertained SEBCs, having common charac- istics the primary of which is the social backwardness listed in the report of the Commission, is not permis- le and valid and such a division or sub-classification iable to be struck down as being violative of clause (4) Article 16 of the Constitution.

A further submission has been made stating that the nefits of reservation are often snatched away or eaten by top creamy layer of socially advanced backward ss who consequent upon their social development no ger suffer from the vice of social backwardness and o are in no way handicapped and who by their high ofessional qualifications occupy upper echelons in the blic services and therefore, the children of those so- lly advanced section of the people, termed as 'creamy yer' should be completely removed from the lists of ackward Classes' and they should not be allowed to mpete with the children of socially under-privileged ople and avail the quota of reservation. By way of ustration it is said that if a member of a designated ckward class holds a high post by getting through the alifying examinations of IAS, IFS, IPS, or any other All dia Service, there can be no justification in extending e benefit of reservation to their children, because the cial status is well advanced and they no longer suffer om the grip of poverty.

On the same analogy, it has been urged that the ildren of other professionals such as Doctors, Engi- ers, Lawyers etc. etc. also should not be given the nefit of reservation, since in such cases, they are not cially handicapped.

No doubt the above argument on the face of it ppears to be attractive and reasonable. But the question whether those individuals belonging to any particular aste, community or group which satisfies the test of ackward class should be segregated, picked up and rown over night out of the arena of backward class. ne should not lose sight of the fact that the reservation of appointments or posts in favour of 'any backward class of citizens' in the Central Government services have not yet been put in practice in spite of the impugned OMs. It is after 42 years since the advent of our Constitution, the Government is taking the first step to implement this scheme of reservation for OBCs under Article 16(4). In fact, some of the States have not even introduced policy of reservation in the matters of public employment in favour of OBCs.

In opposition, it is said that only a very minimal percentage of BCs have stepped into All India Civil Services or any other public services by competing in the mainstream along with the candidates of advanced classes despite the fact that their legs are fettered by social backwardness and hence it would be very uncharitable to suddenly deprive their children of the benefit of reservation under Article 16 (4) merely on the ground that their parents have entered into Government services especially when those children are otherwise entitled to the preferential treatment by falling within the definition of 'backward class'. It is further stressed that those children so long as they are wearing the diaper of social backwardness should be given sufficient time till the Government realises on review that they are completely free from the shackles of social backwardness and have equated themselves to keep pace with the advanced classes. There are a few decisions of this Court which I have already referred to, holding the view that even if a few individuals in a particular caste, community or group are socially and educationally above the general average, neither that caste nor that community or group can be held as not being socially backward. (Vide *Balaram*).

In the counter affidavit dated 30th October 1990 filed by the Union of India sworn by the Additional Secretary to the Government of India in the Ministry of Welfare, the following averments with statistical figures are given :

> "Based on the replies furnished by 30 Central Ministries and Departments and 31 attached and subordinate offices and administrative control of 14 Ministries (which may be treated as sufficiently representative of the total picture) the Commission arrived at the following figures :-
>
> | | |
> |---|---|
> | *Category of Employees :* | All classes |
> | *Total number of employees :* | 15,71,638 |
> | *Percentage of SC/ST* | 18.72 |
> | *Percentage of OBCs* | 12.55 |
>
> (Extracted from page 92 of First Part of Mandal Commission Report)"

The above figures clearly show that the SEBCs are inadequately represented in the Services of the Government of India and that SCs and STs in spite of reservation have not yet been able to secure representation commensurate with the percentage of reservation provided to them.

Meeting an almost similar argument that the 'creamy layers' are snatching away the benefits of reservation, Chinnappa Reddy, J observed in *Vasanth Kumar* to the following effect :

> "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 fortunes 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 layers amongst them on the same principle of merit on which the non reserved 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 unreserved posts by the top creamy layer of society itself is not bad?"

The above observation, in my view, is an apt reply to such a criticism with which I am in full agreement. To quote Krishna Iyer, J "For every cause there is a martyr". I am also reminded of an adage," One swallow does not make the summer."

Reverting to the case on hand, the O.M. does not speak of any 'creamy layer test'. It cannot be said by any stretch of imagination that the Government was not aware of some few individuals having become both socially and educationally above the general average and entered in the All India Services or any other Civil Services. Despite the above fact, the Government has accepted the listed groups of SEBCs as annexed to the Report and it has not thought it prudent to eliminate those individuals. Therefore, in such circumstances, I have my own doubt whether the judicial supremacy can work in the broad area of social policy or in the great vortex of ideological and philosophical decisions directing the exclusion of any section of the people from the accepted list of OBCs on the mere ground that they are all 'creamy layers' which expression is to be tested with reference to various factors or make suggestions for exclusion of any section of the people who are otherwise entitled for the benefit of reservation in the decision of the Government so long that decision does not suffer from any constitutional infirmity.

Added to the above submission, it has been urged that some pseudo communities have smuggled into the backward classes and they should be removed from the list of OBCs, lest those communities would be eating away the major portion of the reservation which is meant only for the true and genuine backward classes. There cannot be any dispute that such pseudo communities should be weeded out from the list of backward classes but that exercise must be done only by the Government on proper verification.

The identification of the backward classes by the Mandal Commission is not with a seal of perpetual finality but on the other hand it is subjected to reviewability by the Government. The Mandal Commission itself in paragraph 13.40 in Chapter XIII has suggested that "the entire scheme should be reviewed after 20 years." Mr. Jethmalani suggested that the list may be reviewed at the interval of 10 years. There are judicial pronouncements to the effect that the Government has got the right of reviewability. There cannot be any controversy indeed there is none - that the Government which is certainly interested in the maintenance of standards of its administration, possesses and retains its sovereign authority to adopt general regulatory measures within the constitutional framework by reviewing any of its schemes or policies. The interval of the period at which the review is to be held is within the authority and discretion of the Government, but of course subject to the constitutional parameters and well settled principles of judicial review. Therefore, it is for the Government to review the lists at any point of time and take a decision for the exclusion of any pseudo community or caste smuggled into the backward class or for inclusion of any other community which in the opinion of the Government suffers from social backwardness.

It may be recalled that the petitioner herself in W.P. No. 930 of 1990 has stated, "..... the Courts cannot sit as a super legislature to determine and decide the social issue as to who are socially and educationally backward....."

It will be appropriate to refer to an observation of the five-Judges Bench of this Court (which heard initially these matters) in its order dated 8th August 1991 stating :

> "The validity of the Mandal Commission Report as such is not an issue before us....."

A three-Judge Bench of this Court comprising of Ranganath Mishra, K.N. Singh, M.H. Kania, JJ (as the learned Chief Justices then were) has observed in their order dated 21st September 1990 that the implementation of executive decisions is in the hands of the Government of the day but constitutional validity of such action is a matter for Court's examination.

Thereafter, a Constitution Bench of this Court by their order dated 1st October 1990 explained the earlier order stating: "Three out of us sitting as a Bench on the 21st September 1990 made an order after hearing parties wherein we had indicated that the decision to implement three aspects of the recommendations of the Mandal Commission was a political one and ordinarily the Court would not interfere with such a decision."

Therefore, when this Court is not called upon to lay a test or give any guideline as to who are all to be eliminated from the listed groups of the Report, there is no necessity to lay any test muchless 'creamy layer test'. I find no grey area to be clarified and consequently hold that what one is not free to do directly cannot do it indirectly by adopting any means. Therefore, the argument of creamy layer pales into insignificance.

Further I hold that all SEBCs brought in the lists of the Commission which have been accepted and approved by the Government should be given equal opportunity in availing the benefits of the 27 percent reservation. In other words, the entire 27% of the vacancies in civil posts and services under the Government of India shall be reserved and extended to all the SEBCs.

In fact, the first OM dated 13th August 1990 does not make any division or sub-classification as in the amended OM. Para 2(i) of the first OM reads, "27% of the vacancies in civil posts and services in the Government of India shall be reserved for SEBC". In reading para 2 (i) of the first OM in juxtaposition with para 2 (i) of the amended OM, no basic difference in the policies of the two Governments is spelt out; in that both the impugned OMs have made 27% reservation in civil posts and services under the Government of India for SEBCs on the basis of the recommendations of the Second Backward Classes Commission (Mandal Report). The only difference between the two impugned OMs is that in the amended OM a division among the SEBCs is made as 'poorer sections' and others that the 'poorer sections' is firstly allowed to avail the benefit of reservation and that others to avail the benefit of reservation of only the unfilled vacancies. Therefore, by striking down para 2 (i) of the amended OM as unconstitutional, I hold that there is no legal impediment in implementing para 2 (i) of the first OM dated 13th August 1990 which has not been supersed, rescinded or repealed but "deemed to have been amended."

Before parting with this aspect of the matter, I would like to express my view that the 'poorer sections' of the SEBCs may be provided with various kinds of concessions and facilities such as educational concessions, special coaching facilities, financial assistance, relaxation of upper age limit, increase of number of attempts etc. for government services with a view to give them equal opportunity to compete and keep pace with the advanced sections of the people.

Whether 10% reservation in favour of 'other economically backward section is permissible under Article 16?

Now I shall pass on to paragraph 2 (ii) of the amended OM which reveals that 10 percent of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

This reservation of 10 percent cannot be held to be constitutionally valid as concluded by my learned brother B.P. Jeewan Reddy, J for the reasons, mentioned in paragraph 115 of his judgement. I am in full agreement with his conclusion on this issue of 10% reservation.

Whether Art. 16 (4) contemplates reservation in the matter of promotion?

In *Mohan Kumar Singhania V. Union of India 1992 (Supp) 1 SCC 594*, a three-Judge Bench of this Court to which I was a party has taken a view that once candidates even from reserved communities are allocated and appointed to a Service based on their ranks and performance and brought under the one and same stream of category, then they too have to be treated on par with all other selected candidates and there cannot be any question of preferential treatment at that stage on the ground that they belong to reserved community though they may be entitled for all other statutory benefits such as relaxation of age, the reservation etc. Reservation referred to in that context is referable to the reservation at the initial stage or the entry point as could be gathered from that judgement.

It may be recalled, in this connection, the view expressed by Chief Justice Ray in *Thomas* that "efficiency has been kept in view and not sacrificed"

Hence, I share the view of my learned brother B.P. Jeewan Reddy, J holding that "Article 16 (4) does not permit provision for reservation in the matter of promo-

tions and that 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" and the direction given by him that wherever reservations are provided in the matter of promotion such reservation may continue in operation for a period of five years from this day.

In Summation

1) Article 16 (4) of the Constitution is neither an exception nor a proviso to Article 16 (1). It is exhaustive of all the reservations that can be made in favour of backward class of citizens. It has an over-riding effect on Article 16 (1) and (2).

2) No Reservation can be made under Article 16 (4) for classes other than backward classes. But under Article 16 (1), reservation can be made for classes, not covered by Article 16 (4).

3) The expression, 'backward class of citizens' occurring in Article 16 (4) is neither defined nor explained in the Constitution. However, the backward class or classes can certainly be identified in Hindu society with reference to castes along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc. and in communities where caste is not recognised by the above recognised and accepted criteria except caste criterion.

4) In the process of identification of backward class of citizens under Article 16 (4) among Hindus, caste is a primary criterion or a dominant factor though it is not the sole criterion.

5) Any provision under Article 16(4) is not necessarily to be made by the Parliament or Legislature. Such a provision could also be made by an Executive order.

6) The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended.

7) The provision for reservation of appointments or posts in favour of any backward class of citizens is a matter of policy of the Government, of course subject to the constitutional parameters and well settled principles of judicial review.

8) The expression 'poorer sections' mentioned in para 2(i) of the amended Office Memorandum of 1991 denotes a division among SEBCs on economic criterion. Therefore, no division or sub-classification as 'poorer sections' and other backward class (non poorer sections) out of the identified SEBCs can be made by application of 'means test' based on economic criterion. Such a division in the same identified and ascertained unit consisting of SEBCs having common characteristics and attributes, the primary characteristic or attribute being the social backwardness is violative of clause (4) of Article 16 of the Constitution. Hence, the division of the SEBCs as 'poorer sections' and others, brought out in para 2(i) of the impugned amended Office Memorandum dated 25th September 1991 is constitutionally invalid and impermissible. Accordingly, para 2(i) of the said amended Office Memorandum is struck down.

9) No maximum ceiling of reservation can be fixed under Article 16 (4) of the Constitution for reservation of appointments or posts in favour of any backward class of citizens "in the Services under the State". The decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable.

10) As regards the reservation in the matter of promotion under Article 16(4), I am in agreement with conclusion No. (7) made in paragraph 121 in Part VII of the judgement of my learned brother, B.P. Jeevan Reddy, J.

11) I also agree with conclusion No. (8) of paragraph 121 of the judgement of my learned brother, B.P. Jeevan Reddy, J *quo* the exception to the rule of reservation to certain Services and posts.

12) The reservation of 10% of the vacancies in civil posts and services in favour of other economically backward sections of the people who are not covered by any other scheme of the reservation as mentioned in para 2 (ii) of the impugned amended Office Memorandum dated 25th September 1991 is constitutionally invalid and it is accordingly struck

down. In this regard, I am also in agreement with conclusion No.(11) of paragraph 121 of the judgement of my learned brother, B.P. Jeevan Reddy, J.

13) No section of the SEBCs can be excluded on the ground of creamy layer till the Government - Central and State - takes a decision in this regard on a review on the recommendations of a commission or a Committee to be appointed by the Government.

14) Para 2(i) and (ii) of the amended Office Memorandum dated 25th September 1991 for the reasons given in my judgement and the conclusions drawn above, are struck down as being violative of Article 16 (4).

15) The impugned Office Memorandum dated 13th August 1990 is held valid and enforceable. So there is no legal impediment in immediately enforcing and implementing this first Office Memorandum of 1990.

16) In Writ Petition No. 1094 of 1991 (Sreenarayana Dharma Paripalana Yogam Vs. Union of India), there is a prayer (prayer 'b'), inter alia, for issuance of a writ of mandamus directing the respondent to implement the impugned unamended office memorandum dated 13th August 1990. In the light of my conclusions, striking down the amended office memorandum dated 25th September 1991, I direct the Union of India to immediately implement the unamended office memorandum dated 13th August 1990.

17) The Government of India and the State Governments have to create a permanent machinery either by way of a Commission or a Committee within a reasonable time for examining the requests of inclusion or exclusion of any caste, community or group of persons on the advice of such commission or Committee, as the case may be, and also for examining the exclusion of any pseudo community if smuggled into the list of OBCs. The creation of such a machinery in the form of a Commission or Committee does not stand in the way of immediate implementation of the office memorandum dated 13.8.1990 and the purpose of creating such machinery is for future guidance.

18) I am also of the same view of my learned brother, B.P. Jeevan Reddy, J that it is not necessary to send the matters back to the Constitution Bench of five-Judges.

In the result, for the reasons mentioned in my judgement and the conclusions drawn in the summation, the writ petition No. 1094 of 1991 is partly allowed to the extent indicated above and all other Writ Petitions, Transferred Cases and Interlocutory Applications are disposed of accordingly. No costs.

New Delhi .....sd/.....J
November 16, 1992 (S. RATNAVAEL PANDIAN)