VOLUME III

THE SUPREME COURT JUDGMENT
(16-11-1992)

JUDGMENT OF
R. M. SAHAI, KULDIP SINGH, T. K. THOMMEN, 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

With

W.P. (C) Nos. 97/91, 948/90, 966/90, 965/90, 953/90, 954/90, 971/90, 972/90, 949/90, 986/90, 1079/90, 1100/90, 1158/90, 1071/90, 1069/90, 1077/90, 1118/90, 1058/90, 1102/90, 1120/90, 1112/90, 1126/90, 1148/90, 1105/90, 974/90, 1114/89, 987/90, 1061/90, 1064/90, 1191/90, 1115/90, 1116/90, 1117/90, 1123/90, 1124/90, 11126/90, 1130/90, 1141/90, 1307/90, T.C. (C) Noc. 27/90, 28-31/90, 32-33/90, 34-35/90, 65/90, 1/91, W.P. (C) Nos. 1981/90, 343/91, 1362/90, 1094/91, 1087/90, 1128/90, 36/91, 3/91, I.A. No. 1-20 in T.C. (C) No. 27-35/90 and W.P. (C) No. 11/92, 111/92, 261/92.

Indra Sawhney etc. .....Petitioners

Versus

Union of India and Ors. .....Respondents

JUDGMENT

R.M. SAHAI, J.

Constitutional enigma of identifying 'backward classes' for 'protecting' or 'compensatory benefits' under constitutionally permissive discrimination visualised by Article 16(4) of the Constitution, except for scheduled castes and scheduled tribes, is as elusive today as it was when the issue was debated in the Constituent Assembly, or in Parliament in 1951, even after appointment of two commissions by the President under Article 340(1) of the Constitution, one, in 1953 known as Kaka Kalekar Commission and other in 1979 which became famous as Mandal Commission, and furnished basis for reservation of appointment and posts for socially and economically backward classes (SEBC) in services under the Union, by Office Memorandum dated 13th August,[1] 1990 amended further in September 1991[2] adding, yet, one more class of economically backward. Nature of these orders, their constitutional validity, principle of their issuance & legal informity, Mandal Commission Report, its basis and foundation, scope of reservation, its length, width

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1 Office Memorandum "Subject :Recommendations 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 regarding 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 weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows :—
(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC. (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation will be issued separately. (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.
3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.
Sd/- (Smt. Krishna Singh) Joint Secretary to the Govt. of India"

2 OFFICE MEMORANDUM "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 the 13th August, 1990, on the above mentioned subject and to say that in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said Memorandum with immediate effect as follows :—
(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 backward 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.) The O.M. of even number dated the 13th August, 1990, shall be deemed to have been amended to the extent specified above. Sd/- (A.K. Harit) Dy Secretary of the Government of India"

and depth were subject matters of intensive debate in these Public Interest Litigations by members of the bar, representatives of various associations, and numerous interveners. Range of controversy was, both wide and narrow touching various aspects sensible and sensitive. But before adverting to them it is imperative to thrash out, at the outset, if the issue of reservation of posts in services by the State is non-justiciable either because it is a political question or a matter of policy and even if justiciable then whether the rule of discretion requires to leave the field open for State activity to work it out by trial and error.

'A'

(1)

Today the 'political thicket' has been entered with *Baker* vs. *Carr*[3] and *Davis* vs. *Bandemer*,[4] even, in America where the English shadow of 'King can do no wrong' was most prominently reflected. The test now applied is if the controversy can be decided by 'judicially discernible and manageable standards'[4a] The political questions doctrine, however, does not mean, that any thing that is tinged with politics or even that any matter that might properly fall within the domain of the President or the Congress shall not be reviewable, for that would end the constitutional function of the court'[5]. Under our Constitution, the yardstick is not if it is a legislative act or an executive decision on policy matter but whether it violates any constitutional gurantee or has potential of constitutional repercussions as enforcement of an assured right, under Chapter III of the Constitution, by approaching courts is itself a fundamental right. The 'constitutional fiction' of political question, therefore, should not be permitted to stand in way of the court to, 'deny the Nation the guidance on basic democratic problems'.[6] Avoidance of entering into a political question may be desirable and may not be resorted to, 'not because of doctrine of separation of power or lack of rules but because of expediency'[7] in large interest for public good but legislatures, too, have, 'their authority measured by the Constitution' therefore absence of norms to examine political question has rarely any place in the Indian Constitutional jurisprudence. The, Constitution being, 'foremost a social document'[8] the courts cannot, 'retreat behind'[9] whenever they are called upon to discharge their constitutional obligation as 'if the judiciary bows to expediency and puts question in the political rather than in the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, then the judiciary has become a political instrument itself'.[10] Thus,

> Legislative or executive action reserving appointments or posts in services of the State is neither a political issue nor matter of policy.

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'B'

(1)

Mis-conception appears to be prevailing that the judiciary by exercising power of judicial review on matters which involve political considerations asserts superior capability thus violates the democratic mandate vested by the people in elected representatives. The judiciary derive their authority as much from 'the people' the ultimate sovereign as the legislature or the executive. Each wing is a delegate of the Constitution. Each stand committed to be ruled under and governed by it. A legislature is elected by people to enact law in accordance with the Constitution, to work under and for it. By being people representative the mandate is to act in furtherance of ideals of democracy in accordance with provisions of the Constitution. No legislature or executive can enact a law or frame a policy against the dictates of the Constitution. 'Popular support expressed through the ballot box cannot validate an ultra vires action'. Elected representatives are as much oath bound to uphold and obey the Constitution as the judges appointed by the President. Both derive their power and authority form, the same source. What the Constitution says, what it means, how it is to be understood and applied was entrusted to the judiciary as when, 'The People' of India resolved, to secure to all its citizens justice, social, economic and political, 'The judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force[11]. A declaration by a government to reserve posts in services may be a matter of policy or even a political issue but an order issued or a law made directing reservation can be sustained, only, if it is found to be constitutional. Judicial review in our Constitution has not 'grown' nor it has been 'assumed' or 'inferred'

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3 369 U.S. 186

4 and 4a) 54 USLW 4898 (1986)

5 Samuel Krislov—The Supreme Court in the Political Process p. 96

6 C. Herman Pritchett—The American Constitution P. 154 (quoted in 'The Judicial Review of Legislative Acts' by Dr. Chakradhar Jha p. 355)

7 Charless Gordon Post p. 129-130—The Supreme Court Questions (quoted in 'The Judicial Review of Legislative Acts' by Dr. Chakradhar Jha p. 351)

8 Granville Austin's 'The Indian Constitution Cornerstone of a Nation'

9 Tagore Law Lecture, From Marshall to Mukherjea 'Studies in American and Indian Constitutional Law' by William O. Douglas p. 38.

10 Ibid.

11 supra 8

or 'implied' nor 'acquired by force' or 'stealthily' but it was provided for by the founding fathers. The higher judiciary has been visualised as 'an arm of the social revolution'[12]. When our Constitution was framed the *Wednesbury principle*[13] evolved by the English Courts and the division of power adopted by American Constitution was fully known yet the country did not opt for vague resolutions as were adopted at Philadephia Convention of United States in 1787 but decided to place the apex court as custodian of the Constitution by declaring that any declaration of law by it was binding under Article 141 of the Constitution, its decree and orders were enforceable under Article 142 throughout the country, and all civil executive authorities are to act in furtherance of it under Article 144. 'The range of judicial review recognised by the superior judiciary in India is perhaps the widest and most extensive known in the world of law'[14]. Unlike England or America its sweep extends to all other organs functioning under the Constitution. The Court discharged its constitutional obligation in such sensitive but constitutional matters as President's pardoning power,[15] decision of speakers of legislative assemblies,[16] President's power of dissolution of state legislative assemblies etc.[17] Reliance on American decisions for very limited scope for interference was not of much assistance as judicial power of the United States Supreme Court to examine race conscious measures or affirmative action either in economic field or admission programme in educational institution was never doubted. The only difference was that the measures were tested either on what they described as 'close examination' or 'exacting judicial scrutiny'. For instance in *Bakke*[18] it was the latter test that was applied. It was observed, 'in order to justify the use of a suspect classification a State must show that its purpose of interest is both constitutionally permissible and substantial, and that its use of the classification is, 'necessary ..... to accomplishment of its purpose for the safeguarding of its interest'. Whereas in *Fullilove* it was observed that, 'programme that employs racial or ethical criteria ..... calls for closer examination'. It was explained that when a programme employing a benign racial classification was adopted by an administrative agency on the explicit direction of congress, the courts were 'bound to approach' the 'task with appropriate deference to the congress, to co-equal branch charged by the constitution with the power to provide for the "general welfare"[19].' In *Metro Broadcasting over Broadcasting Fullilove*[20] was reiterated and it was observed that, 'benign race conscious measure "mandated by the congress" even if these measures are not "remedial" in the sense of being designated to compensate victims of past-governmental or social discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of congress and are substantially related to achievement of those objectives'. Suffice it to say that the observations were made in different context for different purpose. The grant of broadcasting rights to minority was upheld by the majority as 'minority ownership programmes are critical means of promoting broadcasting diversity'. But even in this decision Justice Stevens who concurred with majority agreed with minority in Fullilove (supra) and observed, 'I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for desperate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate".'

(2)

The sweep and width of judicial power and authority exercised by this Court is much extensive and deep as the constitutional provisions mandate it to be so. Test for interference is constitutional violation. Due regard to legislative measures or executive action directed towards welfare measure has never been disputed but when they are overshadowed with extraneous compulsions or are arbitrary then, 'judicial interpretation gives better protection than the political branches'[21]. Even the most reactionaries of American President Thomas Jeferrson once said, 'The law of the land administered by upright judges would protect you from any exercise of power unauthorised by the Constitution of United States'. Faith in the judiciary is of prime importance. Ours is a free nation. Among such

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12 Ibid

13 'Wednesbury principles' is a convenient legal 'shorthand' used by lawyers to refer to the classical review by Lord Greene MR in the Wednesbury case of the circumstances in which the courts will intervene to quash as being illegal the exercise of administrative discretion. 'WADE—Administrative Law.

14 Kehar Singh and Anr. vs. Union of India and Anr. [1989 (1) SCC 204].

15 Supra (14)

16 Kihota Hollohon vs. Zachilhu [1992 (1) SCR 309]

17 State of Rajasthan and Ors. vs. Union of India [1977 (3) SCC 592]

18 University of Californnia Regents vs. Allan Bakke, 57 L.Ed 2d 750.

19 H. Earl Fullilove vs. Philip M. Klutznick, 65 L. Ed 2d 902

20 Metro Broadcasting, Inc. vs. Federal Communications Commission 58 LW 5053

21 The Court and the Constitution by A. Cox p. 372

people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism.

(3)

Article 16(1) is a right created constitutionally in favour of all citizens and anyone is entitled to approach the courts against violation of his right by the State and assail State's latitude in remedial measures or affirmative action to improve conditions of weaker sections or improve, lot of the backward class, if they are not so, 'tailored' as not to transgress the constitutional permissible limits. Any State action whether 'affirmative' or 'benign', 'protective' or 'competing' is constitutionally restricted first by operation of Article 16(4) and then by interplay of Articles 16(4) and 16(1). State has been empowered to invade the constitutional guarantee of 'all' citizens under Article 16(1) in favour of 'any backward class of citizens only if in the opinion of the government it is inadequately represented. Objective being to remove disparity and enable the unfortunate ones in the society to share the services to secure equality in, 'opportunity and status' any state action must be founded on firm evidence of clear and legitimate identification of such backward class and their inadequate representation. Absence of either renders the action suspect. Both must exist in fact to enable State to assume jurisdiction to enable it to take remedial measures. 'Power to make reservations as contemplated by Article 16(4) can be exercised only to make the inadequate representations in the services adequate'[22]. Use of expression, 'in the opinion of State' may result in greater latitude to State in determination of either backwardness or inadequacy of representation and sufficiency of material or mere error may not vitiate as State may be left in such filed to experiment and learn by trial and error with little interference from the court but if the principle of identification itself is invalid or it is in violation of constitutionally permissible limits or if instead of carefully identifying the characteristics which could clothe the State with remedial action it engages in analysis which is illegal and invalid and is adopted not for remedial purposes but due to extraneous considerations then the court would be shirking in the their constitutional obligation if they fail to apply the corrective. States' latitude is further narrowed when on existence of the two primary, basic or jurisdictional facts it proceeds to make reservation as the wisdom and legality of it has to be weighed in the balance of equality pledged and guaranteed to every citizen and tested on anvil of reasonableness to 'smoke out' any illegitimate use and restrict the State from crossing the clear constitutional limits. 'In framing a government which is to be administered by men over men, the great difficulty lies in this, you must first enable the government to control the governed, and in the next place oblige it to control itself'[23]. Judicial Review has come to be one of the ways of obliging government to control itself. A reservation for a class which is not backward wold be liable to be struck down. Similarly if the class is found to be backward but it is adequately represented the power cannot be exercised. Therefore, the exercise of power must precede the determination of these aspects each of which is mandatory. Since the exercise of power depends on existence of the two, its determination too must satisfy the basic requirement of being in accordance with Constitution, its belief and thought. Any determination of backward class in historical perspective may be legally valid and constitutionally permissible. But if in determination or identification of the backward class any constitutional provision is violated or it is contrary to basic feature of Constitution then the action is rendered vulnerable.

(4)

Reservation being negative in content to the right of equality guaranteed to every citizen by Article 16(1) it has to be tested against positive right of a citizen and a direct restriction in State power. Judicial review, thus, instead of being ruled out or restricted is imperative to maintain the balance. The court has a constitutional obligation to examine if the foundation for State's action was within constitutional periphery and even if it was, did the government prior to embarking upon solving the social, problem by raising, 'narrow bridge' under Article 16(4), to enable 'weaker sections of the people to cross the rubicon'[24] discharged its duty of a responsible government by constitutional method so as to put it beyond any scrutiny by the 'eye and ear' of the Constitution. What comes out of the preceding discussion can be reduced thus :

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

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

(ii) Reservation of appointments and posts under Article 16(4) can be challenged if it is constitutionally invalid or even if it disturbs the

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22 General Manager Southern Railway vs. Rangachari, [1962 (2) SCR 586]

23 Federalist No. 51 (extracted in American Constitutional Law by Alpheus T. Manson/D.G. Stephanson, Jr.

24 Chinnappa Reddy, J. in K.C. Vasantha Kumar vs. State of Karnataka [AIR 1985 SC 1495 at 1529]

balance of equality guaranteed under Article 16(1) for being unreasonable or arbitrary.

(iii) Burden to prove that reservation does not violate constitutional guarantee and is reasonable is on the State.

'C'

Our Constitution like many modern constitutions was also, 'a break with the past' and was framed with, 'a need for fresh look'. Centuries of deliberate and concerted effort to deface the society by creating caste consciousness, exploiting religious sentiments was attempted to be effaced by 'The People' when they resolved to constitute the country into a secular democratic republic. Preamble of the Constitution, echoing sentiments of nation, harassed for centuries by foreign domination, 'to secure, to all its citizens justice, social economic and political, Liberty of thought, expression, belief, faith and worship ; Eqality of status and opportunity and to promote among them all Fraternity assuring dignity of the individual' was not a mere flourish of words but was an ideal set-up for practice and observance as a matter of law through constitutional mechanism. Communal reservations were outlawed both from goverance and administration. States and governments were prohibited from practising race, religion or caste in any form by any Articles 15(1), 16(2) and 29(2). Classification made on religion, race and caste was held to be 'opposed to the Constitution and constitutes a clear violation of the fundamental rights'[25]. New beginning was made by abolishing untouchability, prohibiting exploitation and guaranteeing equality not only before law but in public services and employment both substantive and protective. Concern was shown for weaker sections of the society and backward class of citizens. Article 16(4) was in keeping with this philosophy. Reservation for 'any' backward class of citizens in services of the State was visualised as an integral part of equality of opportunity as plege during freedom struggle was, 'equality not only of opportunity to be given to all but special opportunities for educational, economic and cultural growth must be given to backward group so as to enable them to catch up to those who are ahead of[26] them'. Employment or appointment to an office in the State constituted a, 'new form of wealth' on the date the Constitution was enforced, therefore equal opportunity to all its citizens was constitutionally provided for without any discrimination on religion, race or caste etc. But it would have been mere illusion if no provision was made to ensure similar opportunity to those citizens who remained backward either because of historically social reasons or economic poverty or poor quality of education or any other reason which could be determinative of backwardness. How the doctrine of equality, claimed to be 'the core of American democratic aspiration' was twisted, 'to relegate, racial minorities to inferior status by denying them, 'equal access to the opportunity enjoyed by others' under, cover of, 'separate out equal' doctrine commented by Justice Harlton in his dissenting opinion in *Plessy* vs. *Ferguson*[27] as 'pernicious' was well known. The American myth that it was a 'nation of equal and a classless society'[28] had been exploded. Technically and even legally probably the interpretation could be within provision of constitutional guarantee of equality but it was abnoxious and destructive of social equality. 'The effort of the majority decision in Plessy (supra) was to subordinate them until then dominant anti-discrimination principle of the Fourteenth Amendment to the Court created doctrine of reasonable classification.'[29] Although the doctrine of Plessy was gradually abandoned finally but not before 1954 till Brown's case was decided. Therefore Article 16 while providing for equality of opportunity to all without any distinction and irrespective of forward or backward class of citizens took care to avoid recurrences or American experience by directing State to reserve posts for backward class if they were not adequately represented in services as, 'inequality does not harm only the unequals, it hurts the entire society'.

Thus Article 16(1) and (4) operate in same field. Both are directed towards achieving equality of opportunity in services under the State. One is broader in sweep and expansive in reach. Other is limited in approach and narrow in applicability. Former applies to 'all' citizens whereas latter is available to 'any' class of backward citizens. Use of words 'all' in 16(1) and 'any' in 16(4) read together indicate that they are part of same scheme. The one is substantive equality and other is protective equality. Article 16(1) is a fundamental right of a citizen whereas 16(4) is an obligation of the State. The former is enforceable in a court of law, whereas the latter is 'not constitutional compulsion' but an enabling provision. Whether Article 16(4) is 'in substance, an exception'[30] or 'a proviso'[31] or, 'emphatic way of putting the extent to which equality of

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25 The State of Madras vs. Shrimathi Champakam Dorairajan [1951 SCR 525]
26 Pt. Jawahar Lal Nehru
27 163 US 537 (1896)
28 Herbert J. Gans 'The New Egalitarianism' (The Inequality & Justice by Rainwater)
29 The Equal Protection of the Law by P.G. Bolyyiou p. 302.
30 CJ Ray in State of Kerala & Ors. vs. N.M. Thomas [1976(1) SCR 906]
31 Khanna, J , in Supra (28) p. 939

opportunity could be carried'[32] or 'presumed to exhaust all exception in favour of backward class'[33] or 'expressly designed as benign discrimination devoted to lifting of backward classes',[34] but if Article 16(1) is the, 'positive aspect of equality of opportunity' Article 16(4) is a complete code for reservation for backward class of citizens as it not only provides for exercise of power but also lays down the circumstances, in which the power can be exercised, and the purpose and extent of its exercise. One is mandatory and operates automatically whereas the other comes into play on identification of backward class of citizens and their inadequate representation.

(2)

. Compensatory or remedial measures for lesser fortunate are thus not, *ipso facto*, violative of equal opportunity as our society was founded not on abstract theory that all men are equal but on realism of societal differences created by human methodology resulting in existence of the weak and the strong, poor and the rich. Preamble, the basic feature of the Constitution, therefore, promises equal opportunity and status and dignity to every citizen the actuality of which has been ensured by empowering the State to take positive steps under Articles 15(4) and 16(4). Forty years of recount demonstrate flowering of principle of equal opportunity and encourage to intensify it for the deserving, past or present. Reverse discrimination, an expression coined by American courts and jurists commented upon, 'as sharpened edge of a sword'[35] as, 'it is as much as an evil as the discrimination it aims to overcome'[36] as it violates, (a) formal justice (b) consistency (c) equality of opportunity (d) due process of equality,[37] are expressions of one sided thinking without grip of the constitutional goal set out by founding fathers that, 'equality of opportunity must be transformed into equality of results'. An enlightened society is one which takes care of the poor, the backward, the retarded, the handicapped as much as of the rich, the forward, the healthy and the gifted. Formal equality transforms into real equality when the disadvantage arising out of social circumstances is levelled and the least and the best advantaged are so paired by the State activism that differences and distinctions arising out of ascribed identity get gradually lost. Various articles of the Constitution reflect this philosophy. Article 16 is a classic example, and probably unparallel in the constitutional history of the world, where individualism advocated by West in eighteenth and nineteenth century co-exist with States predominant role in bridging the gulf between the needy and the affluent, the backward and the forward. It reflects modern and progressive thinking on Equality. As observed by Laski, 'By adequate opportunity we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal'.[38] According to Ronald Dworkin, 'All human beings have a natural right to an equality of concern and respect, a right to an equality of concern and respect, a right they possess not by virtue of birth, but simply as human beings with the capacity to make plans and give justice.' Articles 39 and 46 are extension of this belief and thought. Any legislative measure or executive order reserving appointments or posts cannot be assailed as being beyond constitutional sanction. As far back as 1951 it was held by a Seven Judges' Constitution Bench, of this court 'Reservation of posts in favour of any backward class of citizens cannot therefore be regarded as unconstitutional[39]. Nor, did the Constitution makers restricted the period of its continuance as was done for Anglo-Indians by Article 336 as an enlightened and progressive state a responsible government of a welfare country must decide itself periodically on prevalent social and economic conditions and not on political consideration or extraneous compulsion if the protective umbrella has to be kept opened, for whom and for how long.

(3)

Before proceeding further it may be mentioned that many decisions were cited of American Courts dealing with affirmative action for Negroes and a parallel was attempted to be drawn from it for justifying reservation for other backward classes. But this ignores that unlike the United States our Constitution itself provides for reservation for backward classes, therefore, it is unnecessary to derive inspiration from decisions given by American court on equal protection clause. They may be relevant for classification and nexus test under Article 14 or even for judging if the provision by being arbitrary was violative of equality doctrine but they cannot furnish relevant guideline for interpreting Article 16(4). How equality was distorted and how

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32 Mathew J., in Supra (28) p. 956
33 Beg J., in Supra (28) p. 960
34 Krishna Iyer J., in Supra (28) p. 969 & 978
35 Reservation Policy & Practice in India, by Anirudh Prasad
36 Supra (34) p. 318
37 ??? Inequalities and the Law.
38 Liberty & Equality by Harold Laski (A Grammar of Politics published in 'Inequality and Justice' by Rainwater)
39 B. Venkataramana vs. The State of Madras & Anr. (A.I.R. 1951 SC 229)

Blacks were made to suffer by biased and narrow construction of the concept of equality for nearly hundred years is a matter of history. To derive parallel from classification developed by American courts to support reservation on any ground for other backward classes would be constitutionally unjust and legally unsure. Whether American Constitution was or is colour blind or not but when our Constitution was framed caste was in, 'bad odour'. Deliberate 'Divide and Rule' policy of Britishers by perpetuating caste was in full glare, therefore, the founding fathers while guaranting equality prohibited discrimination on the ground of religion, race or caste etc. Unfortunate American experience of, 'separate but equal' doctrine legitimatised in *Plessy* vs. *Ferguson* resulting in segregating negroes and keeping them at distance from American prosperity was avoided by making the State responsible both for ameliorative measures or affirmative action and protective steps. The doctrine of, 'compelling State interest' developed by American Courts to support classification for even race conscious measures particularly in economic field or business regulation have no relevance as the State has been constitutionally empowered to remedy the social imbalance. From 'separate but equal' in *Plessy* to, 'freedom of choice' developed by *Brown I*[40] and *Brown IV*[41] to 'just schools' without label of white or Negro in *Green*[42] to elimination of segregation 'root and branch' in *Swann*[43] may be a fascinating development for America but our constitutional provisions being more pragmatic and realistic to problem of equality in public employment it appears unnecessary and risky to derive any inspiration from American decision for interpreting, Article 16(4) as,

> 'In its Compensatory Programmes for depressed classes, India, has gone much further than the egalitarian western societies such as the United States'.[44]

The conclusion, thus, is that

(1) Articles 16(1) and 16(4) operate in the same field.

(2) Article 16(4) is exhaustive of reservation.

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

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'D'

(1)

Thus the real issue is not the reservation but identification. Who, then, are the, 'backward class of citizens' ? What is the meaning of the word 'backward', 'class' and 'citizens' individually and taken together. How are they to be identified. By their caste, occupation, status, economic condition etc. Although the issue of reservation has been agitated before this Court, time and again, the occasion never arose to lay down any principle or test for determination of other backward classes. *Rajendran*[45], Parimoo[46], Thomas[47], and *Soshit Karamchari*[48] were no doubt concerned with Article 16 but there were cases of SC/ST who are constitutionally recognised as, backward class of citizens, *Champakan* (Supra), *Tikku*[49], Trilokanath[50] and *Parriakaruppan*[51] were concerned with reservation based on caste or religion. *Balaji*[52], Janardhan[53], Rajendran[54], Sagar[55], Balram[56], Pradeep[57] Tandon, Chitralekha[58] and *Jayshree*[59] were concerned with reservation under Article 15(4). Except for *Vasantha Kumar*[60] no exercise was undertaken to lay down any principle for

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40 Brown vs. Director Board of Education, 347 US 483 (1954)
41 Brown vs. Director Board of Education 349 US 294 (1955)
42 Green vs. Country School Board, 391 US 430 (1968)
43 Swann vs. Charlotte, Mecklenburg Board of Education, 402 US 1 (1970)
44 Glen M. and Johnson Sipra Bose, 'Social Mobility Among Untouchables', in Cohesion and Conflict in Modern India
45 C.A. Rajendran vs. Union of India & Ors. [(1968) 1 SCR 721]
46 Janaki Prasad Parimoo vs. State of J & K [(1973) 3 SCR 236]
47 State of Kerala & Ors. vs. N.M. Thomas & Ors. [(1976) 1 SCR 906]
48 Karamchari Sangh vs. Union of India [(1981) 2 SCR 185]
49 Trilokinath Tikku vs. State of J & K [(1967) 2 SCR 265]
50 Trilokinath & Ors. vs. State of J & K [(1969 (1) SCR 103]
51 A. Perriakaruppan, etc. vs. State of Tamilnadu [1971 (2) SCR 430]
52 M.R. Balaji & Ors. vs. State of Mysore [1963 Supp. 1 SCR 439]
53 Heggade Janardhan Subbarye vs. State of Mysore [1963 Supp. 1 SCR 475]
54 P. Rajendran vs. State of Madras [(1968) 2 SCR 786]
55 State of Andhra Pradesh & Ors. vs. P. Sagar [1968 (3) SCR 595]
56 State of A.P. vs. U.S.V. Balaram 1972 (3) SCR 247
57 State of Uttar Pradesh vs. Pradeep Tandon [1975 (2) SCR 761]
58 R. Chitralekha vs. State of Mysore [(1964) 6 SCR 368]
59 Km. KS Jayshree vs. State of Kerala [(1977) 1 SCR 194]

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

(2)

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

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

Backward may be relative such as professional or occupational backwardness or it may be economic, social, educational or it may be racial such as in America or caste based as in Hindu social system or it may be natural such as physically handicapped or even of sex. Article 16 of the Constitution deals with equality of opportunity in services under the State. The meaning of the word 'backward' therefore, has to be understood with reference to opportunity in public employment. Since this is a constitutional issue it cannot be resolved by cliches founded on fictional mythological stories or misdirected philosophies or odious comparisons without any regard to social and economic conditions but on pragmatic, purposive and value oriented approach to the Constitution as it is the fundamental law which requires careful navigation by political set up of the country and any deflection or deviation disturbing or threatening the social balance has to be restored, as far as possible, by the judiciary. Backwardness in such a vast country with divergent religions, culture, language, habits social and economic conditions arising out of historical reasons, geographical locations, feudal system, rigidity of caste is bound to have regional flavour. For instance place of habitation and its environment was held in *Pradeep Tandon (supra)* to be determinative for social and educational backwardness in hills of U.P. Interaction of various forces have been responsible for backwardness in different parts of the country. A caste backward in one State may be advanced in another. That is why Dr. Ambedkar while quelling misgivings of members in the Constituent Assembly Debate had stated, that backwardness was being, 'left to be determined by the local government'[61], probably, with hope and belief that once the problem was tackled by the State and backward citizens were adequately represented in State services the problem at the National level shall sand resolved automatically.

Individual backwardness in social sense is primarily economic. Article 16(4), however, is concerned with class backwardness. In technical sense as explained by sociologists it is a problem of 'social stratification' arising out of, as said by Max Weber, due to political, social or economic order. Class or group backwardness may arise due to exclusion of the entire collectivity as a result of combined or individual operation of any of these reasons. For instance in America as slavery receded after Civil War it was succeeded, 'by a caste system embodying white supremacy. Various "Jim Crow" laws, or segregation statutes, lent the sanction of the law to a racial ostracism found in churches and schools, in housing facilities, in restaurants and hotels, in most forms of public transportation, on the job, in universities and colleges, and ultimately in morgues and cemeteries. In addition, black Americans were long denied the right to vote, to serve on juries, and to run for public office.'[62] The SC

60 Supra (24).

61 Constituent Assembly Debates Vol. VII p. 701 (1948-49)

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

(3)

Can the word 'class' be understood as caste ? What does the word 'class' mean ? According to distionary it means 'division of society according to status, rank, caste, merit, grace or quality'[63]. Burton defines it, as 'category, classification[64] breed, caste, group, order, rank'. In Webster it is defined as, 'member or body of persons with common characteristics, social rank or caste'[65]. Whereas Oxford defines caste as, 'race, leinage, pure stock or breed'. English historians have defined caste as, 'hereditary classes into which Hindu society is divided'. Sociologists describe it as, 'ascribed status'. Class is thus wider and may mean caste. Is it so for Article 16 ? In Hindi version of the Constitution the word is 'varg' that is group and not 'jati' that is caste or community. The word class cannot and was not used as caste as it was constitutionally considered to be destructive of secularism. In our country caste system is peculiar to Hindus. It is unknown to Muslims, Christians, Sikhs, Buddhists and Jains. The Constitution was framed not for Hindus only. Provision was made for a society hetregenous in character but seculiar in outlook. 'It was a compromistic formula', a positive effort to equalise one and all. Even among Hindus where caste system is an, 'institution most highly developed' the society is divided into large number of separate groups mostly functional or tribal in origin. By 20th Century the, 'lowest classes of Hindu society', came to be identified as depressed class' or 'untouchable a name of comparatively recent origin'. Rigidity developed over years was partly due to Hindu orthodoxy and partly due to British exploitation. Whatever reason but scheduled castes and scheduled tribes were undoubtedly, 'truly', 'relatively' or 'really backward'. When the Constitution was framed the framers were aware of preferential treatment on religion, race and caste. In Southern States communal reservation in services was in vogue. Yet Dr. Ambedkar while defending the use of word 'backward' by drafting committee explained that, 'it was to enable other communities to share the services which for historical reasons, has been controlled by one community or a few community'. The word 'community' has been defined in Webster Comprehensive Dictionary as, 'The people who reside in one locality and are subject to the same laws, have the same interests, the public or society at large'. And according to Oxford it means 'the quality of appertaining to all in common, common ownership, common character'. Class was thus used in a wider sense and not in the restricted sense of caste.

(4)

Both the words 'backward' and 'class' thus are of very wide import. Assuming the two words as one and reading it as, 'backward class' the question is can it be understood as cluster of backward Hindu caste ? Or in the broad and wide sense as extending and including 'any' backward class of citizens irrespective of race, religion or caste ? Which construction would be in keeping with the constitutional purpose ? Taking up the narrower construction, it may be stated that to interpret a constitutional provision its history, circumstances in which it was adopted as well as the events immediately surrounding its adoption are ??? the purpose and objective of its use. The word 'backward class' had started acquiring meaning at the end of 19th Century with commencement of enrolment on caste basis in 1981, recognition of special treatment to some and communal representation to some and communal representation to others in early 20th Century. The Fort St. George Gazette No. 40 of November 1985 mentions grants-in-aid to schools for the untouchable[66]. In 1921 backward community in Mysore meant, 'all other communities other than Brahmins'[67]. In Bombay in 1925 backward classes were all except, 'Brahmin, Prabhus, Marwaris, Parsis, Banias and Christians'[68]. Indian Statutory Commission (Hatlong Committee) defined Backward Classes in 1928, 'castes or classes which are educationally backward[69]. They include the depressed classes, aborginals, hill tribes and criminal tribes'. The

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62 'Equality Justice and Rectification' by Derek L. Phillips, P. 289-290

63 Oxford Dictionary

64 Legal Treasurer William C. Burton

65 Webster Dictionary

66 Exatracted in 'Competing Equalities' by Marc Galanter

67 Ibid

68 Ibid

United Province Hindu Backward Classes League founded in 1929 suggested Hindu Backward as, "all of the listed communities belonging to non-dwijya (that is twice born) or degenerate or Sudras classes of Hindus"[70]. Travancore in 1935 passed resolution on report of Justice Nokes on communal lines including all classes[71]. Madras Provincial Backward Classes League was founded in 1939 for securing separate treatment for 'forward non-brahmin communities'[72]. It thus did not have a definite meaning. Somewhere it was everyone except Brahmin and others for the so-called Sudras. All depending on social and economic conditions prevailing in a particular State. In any case it 'never acquired a definite meaning at the all India level. There has been no attempt to define it or employ it on the national level'[73]. The statement of Dr. Ambedkar in the Constituent Assembly for determination of backwardness at local or State-level was thus not causal but an outcome of practical reality and historical truth.

(5)

Historically, therefore, what started as social upliftment measure for the down-trodden amongst Hindus in some princely States gradually developed into formation of various associations in different States encouraged by the social caste consciousness created by the Britishers to demonstrate backwardness for claiming preferential treatment injected in the society by communal representation. The Constitution makers were aware of this background. It is vividly reflected in the Constituent Assembly Debates. Therefore a very vital, question arises if the expression, 'backward class' used in Article 16(4) has to be read and understood as extending or applying to backward Hindu Castes only. Meaning of the word 'backward' and 'class' have already been explained. Language of the expression does not warrant reading of the expression as backward caste. When two words one wider in import and broader in application and other narrower were available and the Constitution makers opted for one the other, on elementary principle of construction, should be deemed to have been rejected. What was avoided by the framers of the Constitution, for good reasons and, to achieve the objective they had set up for the governance of the country cannot be brought back either by government or courts by interpretation on construction unless the consequences of accepting the literal or the normal meaning appears to be so unreasonable that the Constitution makers would have never intended. 'Although the spirit of an instrument especially of a constitution is to be respected not less than its letter yet the spirit is to be collected chiefly from its words'[74]. For this reason alone any suggestion of accepting the expression as interchangeable as caste cannot be accepted. Even the spirit behind use of the expression was not to provide for cluster of castes, known as Sudras of the Hindu hierarchy before the Constitution, but for groups or class of different communities following different religions, as right fundamental or otherwise have been guaranteed to members of every community irrespective of religion, race, caste or birth. Article 340 empowers President to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. Such classes may belong to any community. Preferential treatment accorded to various communities before 1950 on basis of religion, race or caste was done away with. Promise was to take care of minorities as well. Article 335 ensured claim of SC/ST in services. Other backward citizens irrespective of race, religion were to be taken care of as, 'The Constitution was framed with grand compromise. A splendid compromise between formal equalitarian justice and compensatory justice through benign or protective discrimination was devised so beautifully that that was to serve the purpose of assimilation, integration and equal partnership in national building by making equal contribution in the main stream of life'[75]. If Article 16(4) is confined to backward classes of Hindu hierarchy by narrowing it down to caste it would be doing violence to the language of the provision and the spirit in which the expression was used leading to injustice. no provision in the Constitution indicates that the expression has to be understood in such narrow sense. Reading it otherwise may lead to contradiction. Normal and natural meaning of an expression can be, disregarded only if it is found that the framers of the Constitution did not intend to use it in that sense and 'absurdity and injustice of applying the provision would be so monstrous that all mankind would, without hesitation, unite in rejecting the application'[76]. When the Constitution was framed the founding fathers were aware of the meaning and understanding of the word 'backward'. They were also aware that hereinafter members of all community were to be treated alike. The state was made responsible, therefore, for 'any'

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69 Ibid
70 Ibid
71 Ibid
72 Ibid
73 Competing Equalities by Marc Galanter
74 Justice Marshall in sturges vs. Crowninshield (1819) quoted in Encyclopaedia of the American Constitution, Vol. 1 by Levy, Karst & Mahoney
75 Reservation Policy and Practice in India by Dr. Anirudh Prasad
76 Supra (73)

backward class of citizens coming from whatever community, caste or religion. State, therefore, cannot discriminate, while identifying backward class on race, religion, caste or birth.

(6)

True the discussions in the Constituent Assembly Debates centred round caste and community. Even Dr. Ambedkar said, 'what are called backward classes are . . . nothing but a collection of certain castes'. That however cannot be conclusive for construing the expression as, the historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed may be taken into account, 'but not to interpret the Constitution'[77]. What emerged out of shared understanding by consensus was not backward caste but backward class, an expression of elasticity capable of expanding depending on the nature and purpose of its use. Motivation for use of expression 'backward class' might have come from a feeling to accommodate and benefit those who were deprived of entering into services due to social and economic conditions amongst Hindus. But what is being interpreted is a Constitution, a document, an instrument which is good not for a season or a session but for centuries during the course of which even the most stable society may undergo social, economic, political and scientific changes resulting in transformation of values. Are the values in the society same today as they were in 1950 or 1900 ? Words or expressions remain the same but its meaning and application with passage of time changes. When the framers of the Constitution deliberately used an expression of expansive nature then as said by Justice Frenk Furter, 'they should be left to gather meaning from experience. For they relate to whole domain of social and economic fact and statesman who founded this nation knew too well that only a stagnant society remains unchanged'. This Court is being asked to interpret the provision in 1990. It cannot ignore the present by going into past.

"The law, even as sit honours the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right. Brown was 'law' in 1954, even though the 'separate but equal' doctrine had half a century of precedent and practice behind it. Continuity is essential to law as a whole, but the continuity must be creative."[78]

(7)

'Caste is a reality'. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services ? Is the State entitled to practice it in any form for any purpose ? Not under a constitution wedded to secularism. State responsibility is to protect religion of different communities and not to practice it. Uplifting the backward class of citizens, promoting them socially and educationally taking care of weaker sections of society by special programmes, and policies is the primary concern of the State. It was visualised so by framers of the Constitution. But any claim of achieving these objectives through race, conscious measures or religioulsy packed programmes would be uncharitable to the noble and pious spirit of the founding fathers, legally impermissible and constitutionally ultra vires. Deriving inspiration from the American philosophy that, 'just as the race of students must be considered in determining whether a constitutional violation has accrued so also must race be considered in formulating remedy' without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 16(2) and 29(2) would be plunging our Nation into disaster not by what was adopted and promised as principle for governance for our people on our soil but from what has been laid down in a country which is yet far away from, 'equality of result' or 'substantive equality' so far *Black* or *Brown* are concerned.

Brown vs. *Board of Education* (supra) which is considered as 'turning the clock back' on racial discrimination was given much after *Vankataramana.* Provisions like Article VI were introduced in America in 1964 only. When *Bakke* (supra) was delivered Justice Marshal lamented, 'this Court in the Civil Rights cases and *Plossy* vs. *Ferguson* destroyed the movement towards complete equality. For almost a century no action was taken, and thus non-action was with the approval of the Court. Then we had *Brown* vs. *Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programmes. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California'. The lament was because of failure to bring the Negroes in the mainstream, 'in light of the sorry history of discrimination and its devastating impact on the lives of Negroes is to ensure that America will forever remain a divided society'. But to avoid any risk of keeping ours as a divided society, the Constitution makers provided ample safeguards for Scheduled Castes and Scheduled Tribes (SC/ST) the only category of backward class which could be compared to the Negroes in America. American philosophy developed by courts that discrimination having arisen due to race consciousness the remedy too should be race based, appears to have been inspired by our constitutional provisions which takes every

77 I.C. Golak Nath vs. State of Punjab [AIR 1967 SC 1643]

78 A. Cox - The Court and the Constitution

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

"unique in the world both in the range of benefits involved and in the magnitude of the groups eligible for them."[79]

(8)

Caste has never been accepted by this Court as exclusive or sole criteria for determination or identification of backward class. That is why the communal Government Order in *Champakam* and reservation, except for SC/ST and Hindu backward, in *Venkatramana*[80] were invalidated. Caste based evil was so repugnant that even when communal Government Order issued by the State of Madras a legacy of caste based reservation practised in Madras since thirties and forties was struck down and the Constitution was amended and Article 15(4) was added the basic philosophy against the caste was neither eroded nor mitigated and ameliorative steps were made state-responsibility for socially and educationally backward castes. *Balaji* adopted test of, comparability of backward classes with Scheduled Caste and Scheduled tribe as a result of combined reading of Article 340(1) and Article 38(3). Two major drawbacks were noticed in identifying backward class with caste, one, 'it may not always be legal and may perhaps contain the vice of perpetuating the caste', and other 'if the caste of the group of citizens was made the sole basis for determining the social backwardness of the social group, the test would inevitably break down in relation to many sections of Indian society which do not recognised caste in the conventional sense known to Hindu society'. In *Chitralekha* the Court observed that 'caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court (Balaji) which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste'. *P. Rajendran* too did not differ with *Balaji* nor it carved out any new path. The Court accepted the determination of backward class as, the explanation given by the State of Madras had not been controverted by an rejoinder affidavit. The Court observed, 'that though the list shows certain caste the member of those castes are classes of educationally and socially backward citizens'. In *Sagar* the Court was concerned with the list where backwardness was determined amongst other on caste taking it as one of the relevant test for determination of backwardness. Therefore, the Court agreeing with *Balaji* observed, 'in determining whether a particular section forms a class caste cannot be excluded altogether. But in the determination of a class a test solely based upon caste or a community cannot also be accepted'. In *Perriakaruppan* it was observed that, 'a caste has always been recognised as a class'. Support for this was sought from *Rajendran* and it was observed that it was authority 'for the proposition that the classification of backward classes on the basis of caste is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. But *Rajendran* was decided as the caste included in the list were in fact socially and educationally backward. *Balram*, too, followed the same and relying on *Rajendran*, *Sagar* and *Perriakaruppan* upheld the test as entire caste was found to be socially and economically backward. 'Caste, *ipso facto*, is not class in secular state' was said in *Soshit Karamchari*. In *Jayshree* it was held that caste could not be made the sole basis for reservation. Ratio in *Rajendran*, *Sagar*, *Balram* and *Perriakaruppan* are wrongly understood and erroneously applied. All these decisions turned on facts as the Court in each case upheld the classification not because it was done on caste but those included in the list deserved the protection. Different streams of thought may appear from various decisions but none has accepted caste as the sole criteria for determination of backwardness.

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79 Duskin, Lelah, "Scheduled Caste Politics", Untouchables in India

80 B. Venkatramana vs. State of Madras [AIR 1951 SC 229]

(9)

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

Although dictionarily the word 'any' may mean one or few and even all yet the meaning of a word has to be understood in the context it has been used. In Article 16(4) it cannot mean all as it would render the whole article unworkable. The only reasonable, meaning that can be attributed to it is that it should be the States' discretion to pick out one or more than one from amongst numerous groups or collectivity identified or accepted as backward class for purposes of reservation. Whether such picking is reasonable and satisfies the test of judicial review is another matter. That explains the rationale for the *non-obstante* clause being discretionary and no mandatory. A State is not bound to grant reservation to every backward class. In one State or at one place or at one point of time it may be historical and social backwardness or geographical and habitational backwardness and at another it may be social and educational or backwardness arising out of natural cause.

(10)

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

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

A bare reading of the Article indicates that the avowed objective of this provision is to empower the President to appoint a Commission to as certain the difficulties and the problems of the socially and educationally backward classes and to make recommendations so that steps may be taken by the Union and the States to solve their problems, remove their difficulties and improve their conditions. Since backwardness has been qualified by the words 'social and educational' the ambit of the expression is not as wise as backward class in Article 16(4). What does it mean then ? A social class, 'is an aggregate of persons within a society possessing about the same status'.[81] How to determine backwardness of such a class. The yardstick of backwardness in any society is, primarily, economic. But Indian society, 'has made caste as the sole hierarchy of social ranking and uses the caste system as the basic frame of reference'.[82] Expert Panel of Mandal Commission described it as ascribed status, that is, status of a person determined by his birth. The social backwardness in pre-independence period, no doubt, arose because of caste stratification. Members of caste other than Brahmans, Thakurs and Vaishyas were socially backward. But with foreign domination, enlightened movements both social and religious,acquisition of wealth and power a gradual caste mobility took place not only to consolidate but even to asset a higher social status. 'The struggle launched by these backward castes as a subaltern in the pre-independence period, changed its course in the post independence period'[83] due to vested interest in reservation, 'It is well known that upto year 1931, the

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81 The New Encyclopaedia Britannica, Micropaedia Vol. 10 p. 919

82 'The Caste System in India' by Rajendra Pandy

83 Pradeep Kumar Bose - Mobility & Conflict putlished in Caste, Conflict and Reservation

last census year for which castes are recorded, there were several castes applying for changing their names to those indicative of higher caste status. In that period name indicated status. The trend now is to claim backwardness both among the Hindus and Muslims by claiming the same caste status by various devices as those who are legally considered as backward caste'[84] are beneficiaries of reservation. While determining social backwardness, therefore, one cannot loose sight of the type of society, the social mobility, the economic, conditions, the political power. Even the Expert Panel noticed few of these but then it got lost in ascribed status. The social backwardness in 1990 for purposes of employment in services cannot be status by birth but backwardness arising out of other elements such as class, power etc. Dr. Pandey in his book [The Caste System in India] after an elaborate study has concluded,

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

While explaining power he has observed in, 'past power was located in the dominant caste'. But it is now changing in two senses, 'first, power is shifting from one case (or group of castes) to another. Secondly, power is shifting from caste itself and comes to be located in more differentiated political organs and institutions. This has been empirically found by Beteille, and others on the basis of his studies of Kammas and Reddis of Andhra Pradesh. Harrison writes: "This picture of political competition between the two caste groups is only a modern recurrence of an historic pattern dating back to the fourteenth century. Srinivas' analysis of politics in Mysore gives a central place to rivalries between the dominant castes: "As in Andhra, the Congress is dominated by two leading peasant castes, one of which is Lingayat and the other Okkaliga. Lingayat Okkaliga rivalry is colouring every issue, whether it be appointment to government posts or reservation of seats in colleges, or election to local bodies and legislatures." BothHarrison's study in Andhra Pradesh and Srinivas' in Mysore depict the rise to power of the two pairs of non-Brahmans". Any determination of social backwardness, therefore, cannot be valid unless these important aspects are take into consideration.

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

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

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

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

> "The expression 'classes of citizens' indicates a homogenous section of the people whose are

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

grouped together because of (a) certain likeness and common traits and who are identified by some common attributes. The homogeneity of the class of citizen is social and educational backwardness. Neither caste nor religion nor place of birth will be uniform element or common attributes to make them a class of citizens'.

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

When Second Backward Class Commission was appointed by the President under Article 340 it was required, 'to determine the criteria for determining the socially and educationally backward classes' and,

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

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

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

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

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

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

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

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

"11.23 As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social ad 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 Kuccha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond 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 a 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 backwaredness. 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 was 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'.*

[Emphasis supplied]

In paragraph 12.2 of the Report the Commission observed,

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

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

(i) All untouchables converted to any non-Hindu religion ; and

(ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Example Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)

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

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

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

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

Rule of statutory construction explained by jurists is to adopt a construction which may not frustrate the objective of enactment and result in negation of the objective sought to be achieved. Rigour of its application is even more severe in constitutional interpretation as unlike statute its provisions cannot be amended or repealed easily. Accepting race, religion and caste as the remedy to undo the past evil would be against constitutional spirit, purpose and objectives. As stated earlier this remedy was adopted by the framers of the Constitution for SC/ST. What was not provided for others should be deemed, on principle of interpretation, not to have been approved and accepted. Even if two constructions of the provisions could have been possible, 'the Court must adopt that which will ensure

smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity and given rise to practical inconvenience'. Since acceptance of caste, race or religion would be destructive of the entire constitutional philosophy and would be contrary to the Preamble of the Constitution it cannot be accepted as legal method of identification of backward classes for Article 16(4).

Would the Consequences be different if race, religion or caste etc. are coupled with some other factors ? In other words, what is the effect of the word, 'only' in Article 16(2). In the context it has been used it operates, both, as permissive and prohibitive. It is permissive when State action, legislative or executive, is founded on any ground other than race, religion or caste. Whereas it is prohibitive if it is based exclusively on any of the grounds mentioned in Article 16(2). *Javed's*[85]

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

Backward used in Article 16(4) is wider than socially and educationally used in Article 15(4) and weaker sections used in Article 46. SC/ST are covered in either expression. But same cannot be said for others. Backward, cannot be defined as was, wisely, done by the Constitution makers. It has to emerge as a result of interaction of social and economic forces. It cannot be static. Many of these who were Sudras in 17th and 18th Centuries ceased to be so in 19th and 20th Century due to their educational advancement and social acceptability. Members of various backward communities, both, in South and North who were moving upwards even before 1950 compare no less in education, status, economic advancement or political achievement with any other class in society. The average lower middle classes of Muslim or Christian may not be better educationally or economically and in many cases even socially than the intermediate class of backward class of Sri Naik's list. For instance the bhisties (the water carriers in leather bags) among Muslims. Does Article 340 empowering President to ascertain educational and social backwardness of citizens of this country not include those poor socially degraded and educationally backward. Are they not citizens of this country ? Could backwardness of Muslims, Christians and Budhists be recognised for purposes of Article 16(4) only if they were converts from Hinduism or such backwardness for preferential treatment be recognised only if a group or class was Hindu at some time or was occupationally comparable to Hindus. That is if members of other community carry on occupation which is not practised by Hindus, for instance bhisties amongst Muslims, then they cannot be regarded as backward class even if it has been their hereditary occupation and they are socially, educationally and economically backward. Commission appointed under Article 340 by the President is not to identify Hindu backward only but the backward class within the territory of India which includes Hindu, Muslim, Sikh or Christian etc. born and residing in India within meaning of Article 5 of the Constitution. The expression is not only backward class but backward class of citizens. And citizen means all those who are mentioned in Articles 5 and 10 of the Constitution.

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

85 *Javed Niaz Beg & Anr.* vs. *Union of India & Anr.* (AIR 1981 SC 794) case furnishes best illustration of the former. A notification discriminating between candidates of North Eastern States, Tripura, Manipur etc. on the one hand and others for IAS examination and exempting them from offering language paper compulsory for everyone was upheld on linguistic concession. When it comes to any State action on race, religion or caste etc. the word, 'only' mitigates the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean ? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. Use of word, 'only' was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. For instance, in *State of Rajasthan* vs. *Pradeep Singh* (AIR 1960 SC 1208] where exemption granted to Muslims and Harijans from levy of cost for stationing additional police force was attempted to be defended because the notification was not based, 'only' on caste or religion but because persons belonging to these communities were found by the State not to have been guilty of the conduct which necessitated stationing of the police force it was struck down as discriminatory since it could not be shown by the State that there were no law abiding persons in other communities. Similarly identification of backward class by such factors as dependence of group collectivity on manual labour, lower age of marriage, poor schooling, living in kuccha house etc. and applying it to that would be violative of Article 16(2) not only for being caste based but also for violation of Article 14 because it, excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus, determined would not be caste coupled with other but on caste and caste alone.

(1) Backward class in Article 16(4) cannot be read as backward caste.

(2) Expression 'backward class' is of wider import and there being no ambiguity or danger of unintended injustice in giving its natural meaning it should be understood in its broader and normal sense.

(3) Backward class under Article 10(4) is not confined to erstwhile Sudras or depressed classes or intermediate backward classes amongst Hindus only.

(4) Width of the expression includes in its fold any community Hindu, Muslim, Chiristian, Sikh, Budha, or Jain etc. as the expression is 'backward class of citizens'.

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'E'

Reason for backwardness or inadequate representation in services of backward Hindus prior to 1950 were caste division, lack of education, poverty, feudalistic frame of society, and occupational helplessness. All these barriers are disappearing. Industrialisation has taken over. Education, though State effort and due to awareness of its importance, both, statistically and actually has improved. Feudalism died in fifties itself. Even the Mandal Commission accepts, this reality[86] Any identification of backward class for purposes of reservation, therefore, has to be tested keeping in view these factors as the exercise of power is in *presentii*. Importance of word 'is' in Article 16(4) should not be lost of. Backwardness and inadequancy should exist on the date the reservation is made. Reservation for a group which was educationally, economically and backward before 1950 shall not be valid unless the group continues to be backward today. The group should not have suffered only but it should be found to be suffering with such disabilities. If a class or community ceases to be economically and socially backward or even if it is so it is adequately represented then no reservation can be made as it no more continues to be backward even though it may not be adequately represented in service or it may be backward but adequately represented.

Ethical justification for reverse discrimination or protective benefits or ameliorative measures emanates from the moral of compensating such class or group for the past injustices inflicted on it and for promoting social values. Both these aspects are fully borne out from the Constitutional Assembly Debates. Anxiety was to uplift the backward classes by enabling them to participate in administration as they had been excluded by few who had monopolised the services. Objective was to change the social face as it shall advance public welfare, by demolishing rigidity of caste, promoting representation of those who till now were kept away thus providing status to them, restoring balance in the society, reducing poverty and increasing distribution of benefits and advantages to one and all. The compensatory principle implies that like individual a group or class that has remained backward, for whatever reason, should be provided every help to overcome the shortcomings but once disadvantage disappears the basis itself must go. For instance there may be four groups of different nature deserving such protection. Some of it may improve and come up in the social stream within short time. Can it be said that since they were kept excluded for hundred years the compensation by way of protective benefits should continue for hundred years. That would be mockery of protective discrimination. The compensation principle, 'makes little sense unless it is involved in connection with assertion that the malignant effects of prior deprivation are still continuing[87]. The social utility of preferential treatment extended to the disadvantage and weaker too should not be pushed too far on what happened in the past without looking to the present. Such construction of Article 16(4) arises not because of what has been said by some of the American judges but on plain and simple reading of the word, 'is' in the Article.

An egalitarian society or welfare state wedded to secularism does not and cannot mean a social order in which religion or caste ceases to exist. 'India is a secular but not an anti-religious[88] state. Article 25 is pride of our democracy. But that cannot be basis of state activities. May be caste is being exploited for political ends. Chinnappa Reddy, J. has very graphically described it in Karnataka Third Backward Class Commission (1990),

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

Even Mandal Commission observed that what, 'caste lost on ritual front it gained on political front'. In politics caste may or may not play an important role but politics and constitutional exercise are not the same. A

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86 "5.2 Caste restrictions have loosened considerably as a result of the rule of law introduced by the British, urbanisation, industrialisation, spread of mass education and, above all, the attainment of Independence and the introduction of adult franchise."

87 'Equal Protection of the Laws' by Polyvious G. Polyviou

88 Seervai – Constitutional Law of India p807

candidate may secure a ticket on caste considerations but if he or his agent or any person with his consent or his agent's consent appeals to vote or refrain from voting on ground of religion, race or caste then he is guilty of corrupt practice under Section 123(3) of the Representation of People Act and its election is liable to be set aside. Thus caste, race or religion are prohibited even in political process. What cannot furnish basis for exercise of electoral right and is constitutionally prohibited from being exercised by the State cannot furnish valid basis for constitutional functioning under Article 10(4). Utilization of caste as the basis for purpose of determination of backward class of citizens is thus constitutionally invalid and even ethically and morally not permissible. Existence of caste in the past and present, its continuance in future cannot be denied but insistence that since it is being practised or observed for political purpose even though unfortunately it should be the basis for identification of backwardness in services is not only robing the Constitution of its fresh look it promised and guaranteed but would result in perpetuating a system under ugly weight of which the society had bent earlier.

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

F

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

> "gives better protection than the political branches to the weak and outnumbered, to minorities and unpopular individuals, to the inadequately represented in the political process.[89]".

Before doing so it is necessary to be stated, at the outset, that identification of backward classes for purposes of different States may not furnish safe and sound basis for including all such group or collectivity for reservation in services under the Union. Reason is that local conditions play major part in such exercise. For instance habitation in hills of U.P. was upheld as valid basis for identifying backwardness. Same may not be true of residents of hills in other States. Otherwise entire population of Kashmir may have to be treated as backward. In Kerala State most of the Muslims are identified as backward. Can this be valid basis for other States. Even the Mandal Commission noticed that some castes backward in one state are forward in others. If State list of every State is adopted as valid for central services it is bound to create confusion. One of the apparent abuse inherent in such inclusion is that it is apt to encourage paper mobility of citizens from a State where such class or caste is not backward to the State where it is so identified. This apart, such inclusion may suffer from constitutional infirmity. Many groups or collectivity in different States are continuing or have been included in the State list due to various considerations political or otherwise. State of Karnataka is its best example. Commission after commission beginning from Gowda Commission, Venkataswamy Commission and Havanur Commission despite having found that some of the castes ceased to be backward they continue in the list due to their political pressure and economic power Ghanshyam Shah[90] in 'Social Backwardness and Politics of Reservations', has pointed out, 'Among the sudras there are peasant castes, artisan castes and nomadic castes. Subjective perception of one's position in the 'varna' system varies and changes from time to time, place to place and context to context. For instance, the Patidars of Gujarat were considered sudras a few decades ago, but now they call themselves vaishyas, and are acknowledged as such by others. It is

89 Cox–The Court and the Constitution

90 'Economic and Political Weekly' Vol. 26 (1991) p. 601

significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar' Yet these castes or group have been identified as backward class in their State. Whether such inclusion on political, economic and social condition is justified in State list or not but inclusion of a group or collectivity in list of socially and educationally backward classes, which is a term narrower and different than backward class for services under the Union without proper identification only on State list may not be valid. For services under the Union, therefore, some principle may have to be evolved which may be of universal application to members of every community and which may be adopted by States, as well, after adjusting it with prevalent local conditions.

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

> "All important communities, including the Muslims,. Christians, and Sikhs, have some sort of caste scheme. These Schemes are patterned after the Hindu system, since most of these people originally came from Hindu stock. The large-scale conversions that have been going on for centuries have modified Indian caste society. Thus traditional Hindu commensal and connubial rituals and emphasis on inherited social status or rank though generally rejected in the Islamic or Christian religious ethic, nevertheless operate on social plain in these societies in India. In India social rites and customs vary from region to region rather than from religion to religion. Among the Muslims, the Sayids, Sheikh, Pathan, and Momin, among others, function as exclusive endogamous caste groups. The Christians are divided into a number of groups, including the Chaldean Syrians, Jacobite Syrians, Latin Catholics, Marthom Syrians, Syrian Catholics and Protestants. Each of these groups practices endogomy. Among the Catholics, the Syrian Romans and the Latin Romans generally do not intermarry. The Christians have not wholly discarded the idea of food restrictions and pollution by lower caste members. When lower caste Hindus were converted to Christianity a generation or two ago, they were not allowed to sit with high caste Christians in church, and separate churches were erected for them."

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

> "According to Kroeber, castes are special form of social classes, 'which in tendency at least are present in every society. Castes differ from social classes, however, in that they have emerged into social consciousness to the point that custom and law attempt their rigid and permanent separation from one another' ....'The jatis which developed later and which continued to grow in number have their economic significance; they are for the most part occupational groups and, in the traditional village economy, the caste system largely provides the machinery for the exchange of goods and services'[91].

But these rigid stratifications are breaking today. The social *inter-se* barriers are rapidly disappearing. Values are fast changing. In fact many of the backward classes as observed by Sri Naik in his separate note to the Mandal Commission Report 'co-existed Since times immemorial with upper castes and had therefore some scope to imbibe better association and what all its connotes'. Take for instance the list of the 'Intermediate Backward Class' where traditional occupation, according to Sri Naik has been, 'agriculture, market gardening, beatle-leaves growers, pastoral activities, village industries like artisans, tailors, dyers and weavers, petty business-cum-agricultural activities, heralding, temple service, toddy selling, oil mongering, combating, astrology etc. etc. Their backwardness has been primarily economic or educational. Mobility, too, occupational or professional has not been very rigid. An agriculturist or an artisan, a dyer or weaver had the occupational freedom of moving in any direction. Consideration for marriage or social customs may be different. But that prevails in every strata of society. One sect of a caste or community Hindu or Muslim, or even

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91 The Caste System in India by Rajendra Pandey,

Christian, forward or backward does not prefer marrying in another sect what to say of caste. But these considerations are not. relevant for identifying backward class for public employment. Black of education, at least among so called intermediate backward classes, was more due to personal volition than social obstracisation. Historical social backwardness has already been taken care of by providing reservation to and confident to includes any occupation or collectivity found to be suffering from such disability. Same yardstick cannot be applied for socially and educationally backward class for whom the President has been empowered to appoint a Commission and who only after identification are to be deemed to be included as SC and ST by virtue of Article 338(10). From the preceding discussion it is clear that identification of such class cannot be caste based. Nor it can be founded, only, on economic considerations as 'Mere poverty'[92a] cannot be the test of backwardness. With these two negative considerations stemming out of constitutional constraints two positive considerations, equally important and basic in nature flow from principle of constitutional construction one that the effort should, primarily, be directed towards finding out a criteria which must apply uniformly to citizens of every community, second that the benefit should reach the needy. Various combinations excluding and including caste as relevant consideration have been discussed in different decisions which need not be mentioned as occasion to examine social and educational backwardness in public services and that also in union services never arose.

In Sub-paragraph (ii) of paragraph 12.8 extracted earlier the Mandal Commission recommended occupational identification for non-Hindus if the community was traditionally known to carry on the hereditary occupation of their counterpart amongst Hindu and included in the test of OBC. The Commission thus recognised occupational divide among Hindus. If occupation amongst Hindus can be basis for identification of backwardness among non-Hindus then why cannot it furnish basis for identification amongst Hindus itself.

Ideal and wise method, therefore, would be to mark out various occupations, which on the lower level in many cases amongst Hindu be the caste itself. Find out their social acceptability and educational standard. Weight them in balance of economic conditions. Result would be backward class of citizen needing genuine protective umbrella. Group or collectivity which may thus emerge may be members of one or the other community. Advantage of occupational based identification would be that it shall apply uniformly irrespective of race, religion and caste. Reason for accepting occupation based identification is that prior to 1950 Sudras amongst Hindus were all those who were not twice born. Amongst them there was vertical and occupational divisions. Similar hierarchy existed amongst Muslims.[92] Same is true of other communities.[93] Sri Naik narrated a list of, 'intermediate backward classes' and 'depressed backward classes'. It may not be exhaustive. But it is indicative that different categories of persons are, normally, known by occupation they carry. 'Castes, therefore, are special form of classes which in tendency are present in every society'.[94] It was said by Lord Bryce long back for America that classes may not be divided, for political purposes into upper and lower and richer and poorer, "but according to their respective occupation they follow'.[95] Class according to Tawney may get formed due to various reasons, 'war, the institution of private property, biological characteristic, the division of labour', And, 'Even today, indeed though less regularly than in the past class tends to determine occupation rather than occupational class'. So is the case in our society. It is immaterial if caste has given rise to occupation or vice versa. In either case occupation can be the best starting point constitutionally permissible and legally valid for determination of backwardness.

For instance, priests either in Hindus or Mullahs in Muslims or Bishops or Padris amongst Christians or Granthi in Sikhs are considered to be at the top of hierarchical system. They cannot be considered to be backward in any community not because of their religion but the nature of occupation. Similarly the untouchables became outcaste due to nature of the job they performed. On lower level whether it is barber or tailor, washerman or milkman, agricultural class or artisan they are a group or class who can be identified in any community. Identifying them by caste may mean that a Muslim or Christian who for generations has been carrying on same occupation as his counterpart amongst Hindus cannot be identified as backward class. And if it is done then for Hindus it would be caste based whereas for other occupational. How far that would be legal and constitutional is one matter but if the yardstick

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92a Supra (45)

92 "12.13 There is a notion o hierarchy among the Muslims, though it is hard to say how far the criterion of the ranking among them can be said to conform to the Hindu model ..... It is clear that castes exist as a basis of social relations amongst them (Muslims) but its form has been greatly weakened and modified as it differs from the Hindu model in certain details." - Dr. Imtiaz Ahmed.

93 "12.11 There is no doubt that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu communities. Though caste system is peculiar to Hindu society yet, in actual practice, it also pervades the non-Hindu communities in India in varying degrees."

94 Encyclopaedia of Social Sciences Vol. 3

95 'Equality' by R.H. Tawney.

of occupation is applied to every community the identification would be uniform without exclusions of any. For instance weavers or washerman. They may be both Hindus and Muslims. It would be unfair to include Hindu Washerman and exclude Muslim Washerman.

Having adopted occupation as the starting point next step should be to ascertain the social acceptability. A lawyer, a teacher and a doctor of any community whether he is a teacher of a primary school or University, a Vaid or Hakim practising in the village or a professor in Medical college always commands social respect. Similarly social status amongst those who perform lower job depends on the nature of occupation. A person carrying on scavenging became an untouchable whereas others who were as lower as untouchable in the order became depressed. For instance cobbler. Same did not apply to those who carried on better occupation. Person having landed property and carrying on agricultural occupation did not in social hierarchy command lesser respect than the one carrying on same occupation belonging to higher caste. But backwardness should be traditional. For instance only those washerman or tailor should be considered backward who have been carrying on this occupation for generations and not the modern dry cleaner or fashion tailors. If the collectivity satisfies both the test then apply the test of education. What standard of education should be adopted should be concern of the State. Existence of, both, that is social and educational backwardness for a group or collectivity is indicated by Article 15(4) itself. Use of such expression was purposive. Mere educational or social backwardness would not have been sufficient as it would have enlarged the field thus frustrating the very purpose of the amendment. That is why it was observed in *Balalji* that the concept of backwardness was intended, 'to be relative in the sense that any class who is backward in relation to the most advanced classes should be included in it. And the purpose of amendment could be achieved if backwardness under Article 15(4) was understood as comprising of social and educational backwardness. It is not their social or educational, but it is both social and educational;'. Reading the expression disjunctively and permitting inclusion of either socially or educationally backward class of citizens would defeat the very purpose. For instance some of the so called higher castes who by nature of their occupation or caste have been accepted by society to be socially advanced may enter because of the group or collectivity having been educationally backward. Many agricultural occupationalists both in South and North have chosen to remain educationally backward even though by virtue of their landed property they have always compared to any higher class. Can such persons be permitted to take benefit of such being measures. Not on the language, purpose and objective of these provisions.

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

Identification alone does not entitle a group or class to be entitled for protective benefits Such group or collectivity should be inadequately represented. Use of such words as adequate or inadequate are no doubt wide and vague and their meaning has to be gathered, 'largely on the point of view from which the facts may be proved are reconsidered'.[96] But from the purpose and objective of Article 16(4) a collectivity or group which is found to be backward cannot qualify for as well. If that itself ceases to exist the power cannot be continued to be exercised. Where power is coupled with duty the condition precedent must exist for valid exercise of power. Mere identification of collectivity or group by a Commission cannot clothe the government to exercise the power unless it further undertakes the exercise if such group or collectivity is adequately or inadequately represented. The exercise is Mandatory not in the larger sense alone but in the narrower sense as well.

'G'

(1)

More important than determination of backward class is the proportion in which reservation can be done as it is not only a social or economic problem or the question of empowering but a constitutional and legal issue which calls for serious deberation. Although political statesmanship of the framers of the constitution intended t confine it to 'minority of seats' the judicial pragmatism raised it to 'broadly and generally' to less

96 1909 Ch. Dn. Vol. II Re. Hatschek's Patents

than 50[99] in *Balaji* and not beyond that in *devadason.* [97] Being included if it is adequately represented. Word 'any' has great significance. In wider sense it extends and includes all group or collectivity, which is as much 'any' backward class as any singularity. In the larger sense comprising of entire plurality it continues and may continue but in the limited sense and group may keep on getting in and out depending on continuance of those conditions which entitled it to be determined as backward. Government of a state or the Central Government may on evaluation after five or ten years direct a group or collectivity to be excluded from the list of backward classes if it finds it adequately represented. What is adequate representation is of course the primary concern of the government. But the exercise should be objective. For instance in some states it was found by Commissions appointed by their governments that certain castes were adequately represented. Yet because of extraneous reasons the government had to bow and include them in the list of backward classes. Such inclusion is a fraud of constitutional power. Any citizen has a right to challenge and court has obligation to strike it down by directing exclusion of such group from the backward class. Inadequacy provides jurisdiction not only for exercise of power but its continuance effect of these two decisions was that the reserved and non-reserved seats both or purposes of admission in educational institution under Article 15(4) and for appointment and posts in Article 16(4) were divided in half and half. But once the reservation climate spread in the country's environment it took over the political set up of different states to provide for reservation for different groups for different reasons. And legal justification for such reservation was provided for by the courts, either on the touchstone of Article 14 being a reasonable classification or under Article 16(1) as preferential treatment for disadvantaged groups. If in *Chitra Ghosh* [98] the provision for government nominees in medical colleges was upheld, as the government which bears the financial burden of running medical colleges' could not be 'denied the right to decide from what source the admission will be made' then Chanchala [99] did not find it unreasonable to extend the principle of preferential treatment, of socially and educationally backward in Article 15(4), to children of political sufferers as 'it would not in any way be improper if that principle were to be applied to those who are handicapped but do not fail under Article 15(4)'. The reservation in favour of wards of defence personnel was upheld as a reasonable classification in Subhashini [100] as the reservation was in national interest. Result of such extensions and justification was multiplication of categories and withdrawal of more and more seats and posts from open competition. And when observations were made in *Thomas* that 50% was, "a rule of caution" and, 'percentage of reservation in proportion to population did not violate Article 16(4)', a virtual go by was given by various states to the balancing equality created by courts and reservations were made much beyond 50% and the High Courts had no option but to uphold them. Thus the combined effect of these principles, developed by *Balaji and devadason,* on the one hand and *Chitra Ghose, Chanchala* and *Thomas* on the other was the reservation upto 50% under Articles 15(4) and 16(4) and upto 'reasonable extent' under Article 16(1). Under one it became SC/ST and SC and under other wards of Military and Defence personnel, [101], political [102] Sufferers, Sportsman,[98] and DSIR. Dentenue etc. is this sound either constitutionally or legally or socially ?

(2)

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

"16. Equality of opportunity in matters of public employment.--

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

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

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

Originally this Article as introduced in the Constituent Assembly was Article 10 and its subarticle (3) identical to subarticle (4) of Article 16 provided for reservation, 'in favour of any class of citizens'. It was the Drafting Committee which qualified the expression, 'class of citizens' by adding the word 'backward' before it. Effect of this addition was that clause got narrowed and the reservation could be made only for those class

97 T. Devadason V. Union of India [(1964) 4 SCR 680]
98 Chitra Ghosh & Anr. V. union of India [AIR 1970 SC 35]
99 D.N. Chanchala V. State of Mysore [AIR 197] SC 1762]
100 Subhashini v. State of Mysore [AIR 1986 Mysore 40]
101 Jagdish Rai V. State of Haryana [AIR 1977 Haryana 56]
102 Supra (94)

of citizens who could grouped as backward. Putting it the other way the framers of the Constitution decided against expansive reservation which under original proposal could have extended to any class of citizens. What was thus consciously and deliberately given up by exercising the option in favour of only those class of citizens who could be identified as backward then reservation in favour of any other class of citizens cannot legitimately and legally be accepted as valid. Extending it to other class of citizens under cover of reasonable classification would be constitutional distortion. What should be deemed to be prohibited in the light of historical background cannot be brought back from the backdoor on principle developed by the American courts under Equal Protection Clause as they had to rise to the occasion due to absence of a provision like Article 16(4), and the fractured interpretation put in the slaughter house cases[103], which eroded the very foundation for Equal Protective clause 'mainly intended for the benefit of Negro freedom'.

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

> "Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 20 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 subclause (1) Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation."

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

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

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

In *Thomas*[104], Mathew, J., introduced concept of proportional equality from two American decisions *Griffin*[105] and *Harper*[106] None of the decisions were concerned with affirmative action. The one related to payment of charges for translation of manuscript in appeal and other with levy of poll tax at uniform rate indiscriminately. In view of clear phraseology and the background of enactment of Article 16(4) any interpretation of it on ratio of American decisions cannot be of any help. our constitution does not approve of proportional representation either in services or even in Parliament as is illustrated by Article 331 of the Constitution which empowers the President to nominate not more than two members of the Anglo Indian community to the House of People, irrespective of their population, if they are not adequately represented. Same is the theme of Dr. Ambedkar's speech, in Constituent Assembly, extracted earlier. For the same reasons the observation of Fazal Ali, J. in *Thomas* (supra),

> ".....Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceeded 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 162. The answer must necessarily be in the negative."

cannot be accepted as correct construction of Article 16(4). True as observed by Krishna *Iyer, J.*, in *Soshit Karamchari* (supra) and and Chinnappa Raddy, J., in *Vasanthakumar* (supra) that there is no constitutional provision restricting reservation to 50% but with profound respect, the debates in the Constituent Assembly, the provisions in the Constitution do not support the construction of Article 16(4) as empowering

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103 Slaughterhouse cases 16 Wall. (83 U.S.) 36. 21 L.Ed. 394 (1873)

104 Supra (46)

105 Griffin v. Illionois 351 US (12)

106 Harper v. Virginia Board of Educations 383 US 663 (1966).

government to reserve posts for backward class of citizens in proportion to their population. Any construction of Article 16(4) cannot be divorced without taking into account Article 16(1). Equality in services has been balanced by providing equal opportunity to every citizen at the same time empowering the State to take protective measure for the backward class of citizens who are not adequately represented. This balancing of equality cannot be lost sight of while interpreting these provisions. Since there is no clear indication either way the role of the courts become both important and responsible, by interpreting the provision reasonably and with common sense so as to carry out the objective of its enactment. And the purpose was to enable the backward class of citizens to share the power if they were not adequately represented but not to grant proportional representation, a typical British concept rejected by our Founding Fathers.

(4)

Equality has various shades. Its understanding and application have been shaped by social, economic and political conditions prevailing in the society. The reigning philosophy since 18th century has been the State's responsibility to reduce disparities amongst various sections of the population and promoting a just and social order in which benefits and advantages are evenly distributed. To achieve this basic objective various theories have been advanced from time to time. The formal equality advanced by Aristole that equal should be treated equally and unequals unequally was as much result of social and economic conditions as the Rawls theory of justice or the Dworkin's concepts of right of all to treatment as equals. Liberty and right to equality taken individually may appear to pull in different directions. But viewed as part of justice and fairness the two are the primary tenets of modern egalitarian society. The real difficulty is translating them into practical working. The American concept of 'equal but separate' doctrine is the est illustration of distance between theory and practice of equal protection. The recognition and realisation that neither all men are equal nor are the circumstances in which they are born or grow are same gave rise to classification and grouping of persons similarly situated and extending them equal or same treatment. But the classification has to be reasonable and rational bearing a just relation with the legislative purpose and should not be invidous or arbitrary. In our constitutional scheme the classification in matters of employment or Appointment in the services has ben done constitutionally. From the entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alike for purposes of employment except those who fall under Article 16(4) any further classification or grouping for reservation would be constitutionally invalid. No legislative exercise can transcedent the constitutional barrier. For valid classification legislature or executive measures must be co—related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only any further reservation being beyond constitutional purpose would be impermissible and *per se* invalid.

Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective.

Atoning for the past injustices on backward classes through Constitutional mechanism was normality raised to legal plain. Admonition to State not to deny equality before law or equal protection of laws found on sound public policy, is in reality the measure of fundamental right which every person enjoys. But, principle of the equal protection of law does not mean that, 'every law must have universal application to all persons who are not by nature, attainment or circumstance, in the same [107]position' and the varying needs of different classes of persons require special treatment. Principle of reasonable classification was developed by theorists and courts to enable State to function effectively by classifying reasonably but the theory developed by *Tussman* [108]and Breck that Equal Protection clause really dealt with the problem with the relation of two classes to each other one of individuals possessing the definite trait and the other of individuals trained by the mischief at which the law aims said to be, 'the first comprehensive analysis of the Equal Protection Clause' may be applicable while considering the scope of Article 14 but once the constitution makers treated employment in services separately by creating fundamental right in favour of all citizens in pursuance of the ideal of Preamble to secure to all its citizens equality in opportunity and status then it has to be understood in its own perspective. Various Sub—articles of Article 16 specially clause 4 indicates constitutional classification and creation of two classes one dealt in Article 16(1) and other in Article 16(4). Principle of reasonable classification for purposes of creating another class or planting one class in another would be constitutionally inform.

All the same the legislative anxiety of affirmative action by preferential treatment to disadvantaged group lagging behind may not be doubted. Difference between reservation and preferential treatment is that in one a group or class or collectivity is separately

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107 Dhirendra Kumar Mandal v. The Supdt.& Rememborance of Legal Affairs to the Govt. of West Bengal & Anr. [1955 (1) SCR 224

108 "The Equal Protection of the Laws" 37 California Rev. 341.

provided for and the competition is amongst them only. Whereas in preferential treatment the collectivity is part of the same group but it is permitted some weightage due to social, economic or any justifiable reason. For purposes of achieving equality by result Article 16 creates two compartments, one general and the other reserved and then both are paired together. But preference is available in the same compartment. Validity of one depends on constitutional sanction whereas the second has to stand on test of reasonableness. For instance the reservation of backward class cannot be assailed as being violative of constitutional guarantee whereas preferential treatment can be upheld only if it is reasonable with the nexus it seeks to achieve. Article 16 unlike Article 14 is a positive right of equal opportunity. Therefore, any preferential treatment shall have to be tested in the light of the constitutional objective the Article seeks to achieve. That is what is its natural, operation and effect. Reservation made for backward class of citizens achieves the constitutional goal of achieving equality of opportunity of all. Same cannot be said for others. Any reservation for any other class would be, as already explained, contrary to constitutional objective thus invalid. Wards of military personnel or political sufferers or any other class cannot be extended the benefit of benign discrimination as that would be violative of equality of opportunity. In absence of any objective or purpose discernible from the Contitution the State action would be liable to be struck down for a sence of necessary co-relation between constitutional purpose and its means. Nexus such as national purpose or principle contained in Article 15(4) would not justify such action. Even preferential treatment by way of weightage may be permissible in very limited cases and any such measure would be liable to strict judicial scrutiny. Principle of Article 14 of reasonable classification may be relevant only to a limited extent as to whether it is backed by reason and is justified but since it has to be tested further on touchstone on Article 16(1) the reasonable classification must be so tailored as not to contravene the right to equal opportunity.

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

> "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."

Since this Court has consistently held that the reservation under Article 15(4) and 16(1) should not exceed 50% and the States and the Union have by and large accepted this as correct it should be held as constitutional prohibition and any reservation beyond 50% would liable to be struck down. Therefore,

(*i*) Reservation under Article 16(4) should in no case exceed 50%.

(*ii*) No reservation can be made for any class other than backward class either under Article 16(1) or 16(4).

(*iii*) Preferential treatment in shape of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive.

'R'

Promotion is the most sensitive branch of service jurisprudence. Although its purpose is manifold but the principal objective is, 'to secure the past possible incumbents for the higher positions while maintaining the morale of the whole organisation[109] as it not only, 'serves the public interest'[110] but is founded on the inherent principle that the higher one moves the greater is the responsibility he assumes.

Manner and method of promotion is usually linked with the nature of posts, if it is selection or non-selection. Reservation, for SC/ST, has been extended, to both, by this Court in *Rangachari* and *Soshit Karamchari* respectively reiterated in *Hira Lal*[111] and *Jagannathan*[112].

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109 Introduction to the Study of Public Administration by Leonard D. White page 380.

110 Ibid

111 State of Punjab vs Hira Lal [1971 (3) SCR 267]

112 Comptroller and Auditor General of India, Gian Prakash vs K.S. Jagannathan & Anr. [1988 (2) SCR 17]

In *Rangachari* it was held, 'The condition precedent may refer either to numerical inadequacy of *representation* in the services or even to the qualitative inadequacy of representation'. In the context the expression, 'adequately represented imports consideration of size as well as values, numbers as well as the nature of appointments'[113].

But, inadequacy of representation is creative of jurisdiction only. It is not measure of backwardness. That is why less rigorous test or lesser marks and competition amongst the class of unequals at the point of entry has been approved both by this Court and American courts. But a student admitted to a medical or engineering college is further not granted relaxation in passing the examinations. In fact this has been explained as valid basis in American decisions furnishing justification for racial admissions on lower percentage. Rationale appears to be that every one irrespective of the source of entry being subjected to same test neither efficiency is effected nor the equality is disturbed. After entry in service the class is one that of employees. If the social scar of backwardness is carried even, thereafter the entire object of equalisation stands frustrated. No further classification amongst employees would be justified as is not done amongst students.

Constitutional, legal or moral basis for protective discrimination is redressing identifiable backward class for historical injustice. That is they are today, what they would not have been but for the victimisation. Remedying this and to balance the unfair advantage gained by others is the constitutional responsibility. But once the advantaged and disadvantaged the so-called forward and backward, enter into the same stream then the past injustice stands removed. 'And the length of service, the seniorty in cadre of one group to be specific the forward group is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimisation.

Equality either as propagated by theorists or as applied by courts seeks to remove inequality by, 'parity of treatment under parity of condition'[114]. But once in 'order to treat some persons equally, we must treat them differently'[115] has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating, effects of past discrimination but perpetuating it.

Constitutional sanction is to reserve for backward class of persons. That is class or group interest has been preferred over individual. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against other. No forward class versus backward class or majority against minority. It would, thus, be contrary to the Constitution. Brother Kuldip Singh ; for good and sound reasons has rightly opined, that, Rangachari cannot be held to be laying down good law.

'I'

Reservation, for, 'economically backward sections of the people who are not covered by any of the existing schemes of reservation', again, raises an important issue. *De facto* difficulties in determining such backwardness stands established by failure of the government to evolve any workable criteria even after lapse of one year since, 25th September, 1991, the date on which the order dated 23rd August 1990 directing reservation for backward class was amended and it was announced that, 'the criteria for determining the poorer sections of the SEECs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.' But the *de jure* hurdles appear, even, greater. Any reservation resulting in curtailing right of equal opportunity is to withstand the test of equal protection or benign discrimination. Latter has been permitted for a class which had suffered injustices in the past and is suffering even now. It is an atonement of past segregation and discrimination such as Negroes in America and SC/ST of our country. And is being extended even to those who could legitimately be considered to be backward class. Since Article 16(4) has a constitutional purpose and is to operate only so long the goal is not achieved economic backwardness does not qualify for such protective measure. As even if such a class or collectivity is held to fall in the broader concept of the expression backword class of citizens it would not be eligible for the benefit as it would be incapable of satisfying the other mandatory requirement of being inadequately represented in services without which the State cannot have any jurisdiction to exercise the power. Art. 16(4) thus by its nature, and purpose cannot be applicable to economically backwards, except probably when a proper methodology is worked out to determine inadequacy of representation of such class.

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113 Rangachari (supra)

114 C.J. Ray in Thomas (supra)

115 Justice Black Burn in Bakke (supra) page 844

Is it possible to reserve under Art. 16(1) ? Detailed reasons have been given, earlier, against any reservation under cover of doctrine of reasonable classification. Eradication of poverty which, 'is not to be exalted or praised, but is an evil thing which must be fought and stamped out'[116] is one of the ideals set out in the Preamble of the Constitution as it postulates to achieve economic justice and exhorts the State under Article 38(2) to, 'minimise the inequality of income'. All the same can the State for this purpose reserve posts for economically backward in service. Right to equal protection of laws or equality before law in, 'benefits, and burdens' by operation of law, equally, amongst equals and unequally amongst unequals is firmly rooted in concept of equality developed by courts in this country and in America. But any reservation or affirmative faction on economic criteria or wealth discrimination cannot be upheld under doctrine of reasonable classification. Reservation for backward class seeks to achieve the social purpose of sharing in services which had been monopolised by few of the forward classes. To bridge the gap, thus, created the affirmative actions have been upheld as the social and educational difference between the two classes furnished reasonable basis for classification. Same cannot be said for rich and poor. Indigence cannot be rational basis for classification for public employment.

Any legislative measure or executive action operating unequally between rich and poor has been held to be suspect. A provision requiring a person to pay for trial manuscript before filing criminal appeal was struck down in Griggin[117] as it amounted to denial of right of appeal to poor persons. In Harper[118] poll tax for voting was invalidated as, 'wealth, like race, creed or colour, is not germane to one's ability to participate intelligently in the electoral process.' Protection was given to the appellants on effect or consequence of equal protection clause. Duty of State to protect against depreviation due to poverty should not be confused with States obligation to treat everyone uniformly and equally without discrimination. Protection against application of law due to difference in economic condition, cannot be equated with classification based on disproportion in wealth. Former is in realm of justice and fairplay whereas latter is equal protection to which every one is entitled. In the former unjust application of law may be cured by removing the offending part thus apply the law uniformly to rich and poor. Whereas in latter the classification has to be justified on the nexus test. Poverty may have relevance and may furnish valid justification while dealing with social and economic measure. Any legislation or executive measure undertaken to remove disparity in wealth cannot be suspect but a classification based on economic conditions for purposes of Article 16(1) would be violative of equality doctrine.

More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation,. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation by the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class.

(1) No reservation can be made on economic criteria.

(2) It may be under Article 16(4) if such class satisfied the test of inadequate representation.

(3) Exclusion of creamy layer is a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

'J'

Various infirmities were highlighted in the report of the Second Backward Class Commission and the consequent invalidity of the government orders issued on it. Attack on the report varied from the reference being beyond Article 340 to manner and method of ascertaining backwardness by issuing questionnaire to hardly one percent of the population, interviewing interested and biased persons only, relying on obsolete material such as caste census of 1931, importing personal knowledge, re-writing Hindu Varna by adding intermediate or middle caste between twice born and sudra, working out backward population erroneously as in 1931 only 67% of the population was Hindu and if 22% were SC and 43% backward then the remaining were 2.7, inflating backward class by

116 Jawaharlal Nehru, quoted from, Dorothy, Norman (ed.) Nehru.

117 Griffin vs Illinois 351 US 12 (195)

118 Harper vs Virginia Board of Elections

conjectures and assumptions as First Commission identified 2399 whereas the Second determined it at 3743 and the Anthropological Survey of India published a project report identifying only 1057 backward classes, and adopting caste as the sole and the only criteria for identifying backwardness etc. Action of the Govt. in accepting the report and issuing the Government order was challenged for exhibition of sudden alarcity not on objective consideration but for extraneous reasons, acceptance of the report without any discussion or debate in the Parliament which was the least considering the far-reaching consequences of such report, acting by executive order instead of legislative measure, when reservation for backward class was being made in Union services for the first time, propriety of basing the action on a report rendered 10 years earlier without any regard to social and economic changes in the meantime when such period is normally considered sufficient for review and re-assessment of continuance of such actions, etc.

Many of these challenges appear to be well founded but any discussion on it is unnecessary for two reasons, one failure of any objective consideration of the report by the Government before issuing the orders and other some of the basic infirmities have been dealt with while dealing with the issue of identification of backward classes. Above all what is not provided in the Constitution, what was not accepted by the Government in 1956 what has not been approved by this Court even for backward classes in Article 16(4) was adopted by the Commission as the basis in its report submitted in 1978 for 'socially and educationally backward classes', an expression narrower and different than 'backward classes' and implemented in 1990 by the Government without even placing it before the Parliament or any objective consideration by it. An order reserving posts can no doubt be made even by the executive but the decision being of utmost importance as reservation was being made in services under the Union for the first time the propriety demanded that it should have been placed before the Parliament. For growth and development of healthy conventions and traditions no provision in the Constitution or statute is needed. It may, however, not be out of place to mention that where rules framed under rule 309 exist no executive order in violation of it can be passed.

Vital issues, by agreement of both sides, relating to reservation and preferential treatment in services have been discussed. On many of these this Court, to use the words of the Constitution Bench, has not spoken with, 'one voice'. Therefore, these public interest petitions, filed in unfortunate circumstances which are not necessary to be narrated, were referred to be heard by a larger bench of nine judges, 'to finally settle the legal positions relating to reservations'.

Finality, is necessary not only for courts or tribunal but for the guidance of the affirmative action ameliorative or preferential by the Legislature or the Executive. What should not be lost sight of is if history of discrimination and segregations of the SC/ST and the socially, educationally and economically backward is the darkest chapter of our social history, with no parallel any where in the world, then constitutional therapy to eradicate it root and branch too is unparalleled and even most developed and democratically advanced democracies, cannot match the socially oriented effort to achieve an egalitarian society. Practical equality or equality by result is the approach. Effort is to usher in a progressive society by bridging the gap between the forward and backward by demolishing the social barriers and enabling the lowest to share the power to remove inferiority and infuse feeling of equality. But without sacrificing efficiency and disturbing the equality eqalibrium by confining it to minority of posts and treating them preferentially for such length of time, as a self operating mechanism, coming to an end once the constitutional objective of enabling them to stand on their own is fulfilled. Why reservation policy in services or the benefits of welfare measures pursued by different States for the weaker sections of the society have not percolated to the needy and deserving at the rock bottom is more a political issue than constitutional or legal. But no effort can succeed unless the policy makers eschew extraneous considerations and tackle the problem sincerely and with understanding. So long the identification of the backward class is not made properly and practically it would serve the vested interest only. And the 'haves' among Sudra or the intermediate backward classes shall not permit it to reach the have-nots the real and genuine backward classes.

No exception can be taken to the recommendations of the Mandal Commission for reservation for backward class of citizens in services by the Union. But commissions are only fact finding bodies. The constitutional responsibility of deserving posts rests with the government. Unfortunately neither in 1990 nor in 1991 this duty was discharged constitutionally or even legally. Whether the report was within the term of reference and if the Commission in identifying socially and educationally backward class repeated the same mistake as was done by the first Commission and if the Commission could adopt two different yardsticks for determining backwardness among Hindus and non-Hindus were aspects which were required to be gone into by the Government before issuing any order. The exercise of power to reserve is coupled with duty to determine backward class of citizens and if they were adequately represented. If the Government failed to discharge its duty then the exercise of power stands vitiated. No further need be said except to extract following words of William O. Douglas—

"Judicial Review gives time for the sober second thought"

Conclusions

Both the impugned orders issued by the respective governments in 1990 and 1991 reserving appointments and posts for socially and educationally backward class of citizens, without discharging their constitutional obligation of examining if the identification of backward class by the Commission was in consonance with constitutional principle and philosophy of the basic feature of the constitution and if the group or collectivity so identified was adequately represented or not which is the *sine qua non* for the exercise of the power under Article 16(4), are declared to be unforceable.

(1) Reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher courts in the country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions.

(2) (*a*) Constitutional bar under Article 16(2) against State for not discriminating on race, religion or caste is as much applicable to Article 16(4) as to Article 16(1) as they are part of the same scheme and serve same constitutional purpose of ensuring equality. Identification of backward class by caste is against the Constitution.

(*b*) The prohibition is not mitigated by using the word, 'only' in Article 16(2) as a cover and evolving certain socio-economic indicators and then applying it to caste as the identification then suffers from the same vice. Such identification is apt to become arbitrary as well as the indicators evolved and applied to one community may be equally applicable to other community which is excluded and the backward class of which is denied similar benefit.

Identification of a group or collectivity by any criteria other than caste, such as, occupation cum social cum educational cum economic criteria ending in caste may not be invalid.

(*c*) Social and educational backward class under Article 340 being narrower in import than backward class in Article 16(4) it has to be construed in restricted manner. And the words educationally backward in this Article cannot be disregarded while determining backwardness.

(3) Reservation under Article 16(4) being for any class of citizens and citizen having been defined in Chapter II of the Constitution includes not only Hindus but Muslims, Christians, Sikhs, Budhs, Jains etc. the principle of identification has to be of universal application so as to extend to every community and not only to those who are either converts from Hinduism or some of whom to carry same occupation as some of the Hindus.

(4) Reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50%.

(5) Article 16(4) being part of the scheme of equality doctrine it is exhaustive of reservation, therefore, no reservation can be made under Article 16(1).

(6) Reservation in promotion is constitutionally impermissible as, once the advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating,, effects of past discrimination but perpetuating it.

(7) Economic backwardness may give jurisdiction to state to reserve provided it can find out mechanism to ascertain inadequacy of representation of such class. But such group or collectivity does not fall under Article 16(1).

(8) Creamy layer amongst backward class of citizens must be excluded by fixation of proper income, properly or status criteria.

Reservation by executive order may not be invalid but since it was being made for the first time in services under the Union, propriety demanded that it should have been laid before Parliament not only to lay down healthy convention but also to consider the change in social, economic and political conditions of the country as nearly ten years had elapsed from the date of submission of the report, a period considered sufficient for evaluation if the reservation may be continued or not.

Valuable assistance was rendered by Shri K.K. Venugopal and Shri H.A. Palkhiwala, the learned senior counsel, who led the arguments and placed one view. They were ably supported by Shri P.P. Rao and Smt. Shyamala Pappu, senior advocates. Arguments were also advanced by Smt. Hingorani, Mr. Mehta, Mr. K.L. Sharma, Mr. S.M. Ashri, Mr. Vishal Jeet. Shri K.N. Rao and Col. Dr. D.M. Khanna appeared in person as interveners and were of assistance.

Shri Ram Jethmalani, the learned senior advocate appearing for the State of Bihar was equally helpful in projecting the other view. Shri K. Parasaran, the learned senior counsel for the Union of India while supporting Shri Jethmalani placed a very dispassionate view of the entire matter. Shri Rajiv Dhawan was also very helpful. Shri. R.K. Garg, Shri Shiv Pujan Singh,. Shri S. Siva Subramaniam, Shri Poui, Smt. Rani Jethmalani also made submissions. Shri Avadhesh Narain Singh argued in person,.

.....Sd/.....J.

(R. M. SAHAI)

New Delhi

November 16, 1992.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 930 of 1990

With

W.P. (C) Nos. 997/91, 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, 1114/90, 987/90, 1061/90, 1064/90, 1101/90, 1115/90, 1116/90, 1117/90, 1123/90, 1124/90, 1126/90, 130/90, 1141/90, 1307/90. T.C. (C) Nos. 27/90, 28-31/90, 32-33/90, 34-35/90, 65/90, 1/91. W.P. (C) Nos. 1081/90, 343/91, 1362/90, 1094/91, 1087/90, 1128/90, 36/91, 3/91. I.A. Nos. 1-20 in T.C. (C) Nos. 27-35/90 & W.P. (C) Nos. 11/92, 111/92, 261/92.

Indra Sawhney Etc. Etc. .....Petitioners

Versus

Union of India through Cabinet Secretary & Ors. Etc Etc .....Respondents

JUDGMENT

KULDIP SINGH, J.

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

I propose to deal with the following issues in seriatim :

A. Whether "class" in Article 16(4) of the Constitution means "caste"? Can caste be adopted as a collectivity to identify the backward classes for the purposes of Article 16(4) ?

B. Whether the expression "any backward class of citizens" in Article 16(4) means "socially and educationally backward classes" as it is in Article 15(4) ?

C. What is meant by the expression "any backward class of citizens..... not adequately represented in the Services under the State" in Article 16(4) ?

D. Whether Article 16(4) permits reservation of appointments or posts at the stage of initial entry into Government Services or even in the process of promotion ?

E. Whether Article 16(4) is exhaustive of the State-power to provide job-reservations ?

F. If Article 16(1) does not permit job-reservations, can protective discrimination as a compensatory measure permissible, in any other form under Article 16(1) ?

G. To what extent reservations are permissible under Article 16(4) ? Below 50% or to any extent ?

H. When a "backward class" has been identified, can a means-test be applied to skim-off the affluent section of the "backward class" ?

I. Can poverty be the sole criterion for identifying the "backward class" under Article 16(4).

J. Is it mandatory to provide reservations by a legislative Act or it can be done by the State in exercise of its executive power ?

K. Whether the identification of 3743 castes as a "backward classes" by Mandal Commission is constitutionally valid ?

A

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

a closed door. It is not a path-even if it is-it is a prohibited path under the Constitution.

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

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

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

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

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

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

The Hindu did not learn lesson from the invasions of the Turks and continued to perpetuate the caste system. In the middle of 15th century major part of north India including Delhi came to be occupied by the Afghans of Lodi. Ultimately Babar established the Moghul rule in India in 1526. After the Mughals the Britishers came and ruled their country till 1947.

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

It was only in the later part of 19th century that the national movement took birth in this country. With the advent of the 20th century Mahatma Gandhi, Jawahar Lal Nehru alongwith other leaders infused national and secular spirit among the people of India. For the first time in the history of India caste, creed and religion were forgotten and people came together under one banner to fight the British rule. The caste-system was thrown to the winds and people from all walks of life marched together under the slogan of 'Quit-India'. It was not the

Kshatriyas alone who were the freedom fighters–whole of the country fought for freedom. It was the unity and the integrity of the people of India which brought freedom to them after thousand years of slavery. The Constitution of India was drafted in the background of the freedom struggle.

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

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

Caste and class are different etymologically. When you talk of caste you never mean class or the vice-versa. Caste is an iron-frame into which people keep on falling by birth. M. Weber in his book 'The Religion of India' has described India as the land of 'the most inviolable organisation by birth'. Except the aura of caste there may not be any common thread among the caste-fellows to give them the characteristic of a class. On the other had a class is a homogeneous group which must have some live and visible common traits and attributes.

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

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

Article 16(2) of the Constitution of India in clear terms states that "no citizen shall, on grounds only of religion, race, caste, sex-descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State." In Juxtaposition Article 16(4) states that "nothing in this Article shall prevent the State from making any provisions for the reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State". On a bare reading of the two sub-clauses of Article 16 it is obvious that the Constitution forbids classification on the ground of caste. No backward class can, therefore, be identified on the basis of caste.

We may refer to some of the judgement of this Court on the subject.

In *R. Chitralekha & Anr.* Vs. *State of Mysore & Ors.* (1964) 6 SCR 368 this Court observed as under :

> "The important factor to be noticed in Art. 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used in cl. (4) of Art. 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution from using the expression "backward classes or castes". the juxtaposition of the expression "backward class' and "Scheduled Castes" in Art. 15(4) also leads to a reasonable inference that they expression "classes" is not synonymous with castes..... This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles. .....If we interpret the expression "classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise

if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution. .....But what we intend to emphasize is that under no circumstance a "class" can be equated to a "caste", though the caste of an individual or a group or 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."

In *Triloki Nath and Anr.* Vs. *State of Jammu & Kashmir* Vs. (1969) 1 SCR 103 this Court observed as under :

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

In *State of Uttar Pradesh* Vs. *Pradip Tandon & Ors.* (1975) 2 SCR 761 the following observations of this Court are relevant :

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

Finally in *Kumari K.S. Jayasree & Anr.* Vs. *The State of Kerala & Anr.* (1977) 1 SCR 194 this Court held as under:

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

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

Secular feature of the Constitution is its basic structure. Hinduism, from which the caste-system flows, is not the only religion in India. Caste is an anathema to Muslim, Christians, Sikhs, Buddhists and Jains. Even Arya Smajis, Brahmo Smajis, Lingyats and various other denominations in this country do not believe in caste-system. If all these religions have to co-exist in India can class under Article 16(4) mean 'caste' ? Can a caste be given a gloss of a 'class'? Can even the process of identifying a 'class' begin and end with 'caste'? One may interpret the Constitution from any angle the answer to these questions has to be in the negative. To say that in practice caste-system is being followed by Muslim, Christians, Sikhs and Buddhists in this country, is to be obvious to the basic tenets of these religions. The prophets of these religions fought against casteism and founded these religions. Imputing caste-system in any form to these religions is impious and sacrilegious. This Court in *M.R. Balaji & Ors.* Vs. *State of Mysore* (1963) Supp. 1 SCR 439 held as under :

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

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

"backward classes". Caste-collectivity is unconstitutional and as such not permitted.

B

The expression "any backward class of citizens" in Article 16(4) of the Constitution as understood till- date means 'socially and educationally backward class'. In *Janki Prasad parimoo & Ors. etc. etc.* Vs. *State of Jammu & Kashmir* (1973) 3 SCR 236 Palekar,J observed as under :-

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

Mr. N.A. Palkiwala contended that the above quoted assumption by Palekar, J was without any basis and wholly unjustified. According to him it was not settled by any judgment of this Court that the two expressions in Articles 15(4) and 16(4) mean the same thing. Far from being "settled", no judgment of this Court had even suggested prior to 1973 that the expressions in the two Articles meant the same thing. He further contended that unfortunately, in subsequent cases it was not pointed out to this Court that the assumption of Palekar, J was not correct and the wrong assumption of the learned Judge passed as correct. According to him an erroneous assumption, even by a Judge of this Court, cannot and does not make the law. This Court in *M.R. Balaji & Ors.* Vs. *State of Mysore* (1963) Supp. 1 SCR 439 speaking through Gajendra Gadkar, J observed as under :-

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

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

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

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

Articles 340 and 15(4) are part of the same Constitutional-Scheme. Socially and educationally backward classes may be identified by a commission appointed under Article 340 and the said commission after investigation may make recommendations, including the sanctioning of grants, for the uplift of the backward classes. Article 15(4) makes it possible to implement the recommendations of the commission and for that purpose permits protective discrimination by the State. Since there is identity of purpose between the two Articles the 'backward class' in the context of these Articles has been defined identically. But that is not true of Article 15(4) and 16(4). When these two

Articles of Constitution in juxtaposition–enacted in consecutive years- use markedly different phraseology, well established canons of interpretation dictate that such meanings should be assigned to the words as are indicated by the difference in phraseology. Article 16(4) has different purpose than Article 15(4). The subject matter of Article 16(4) is the service under the State. It is a special provision enabling the State to make any provision for the reservation of appointments or posts in favour of the backward section of any class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The expression "backward" in the context of Article 16(4) is entirely different than the expression "socially and educationally backward class" in Article 15(4). Under Article 16(4) the backward class has to be culled-out from amongst the classes which are not adequately represented in the State Services. Any species of backwardness is relevant in the context of Article 16(4). By contrast, any special provisions to be made under Article 15(4)–e.g. grants out of the public exchequer can only be made for "socially and educationally backward classes". What is to be identified under Article 16(4) is not the "backward class" but a "class of citizens" which is inadequately represented in the State-services. On the other hand it is the "backward class" which is to be identified under Article 15(4). When the two classes to be identified in the two articles are different the question of giving them the same meaning does not arise.

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

(1) The original draft Article 10(3) did not contain the word 'backward'. The original Article only contained the expression "any class of citizens". The word "backward" was inserted by the Drafting Committee at a later stage.

(2) The opinion of the members of the Constituent Assembly was that the word "backward" is vague, has not been defined and is liable to different interpretations. It was even suggested that ultimately the Supreme Court would interpret the same. Mr. T.T. Krishnamachari even stated in lighter-tone that the loose drafting of the chapter on fundamental rights would be a paradise for the lawyers.

(3) Not a single member including Dr. Ambedkar gave even a suggestion that "backward class" in the said Article meant "socially and educationally backward".

(4) The purpose of Article 10(3) according to Dr. Ambedkar was that "there must at the same time be a provision made for the entry of certain communities which have so far been outside the Administration..... that there shall be reservations in favour of certain communities which have not so far had a proper "look-in" so to say into the Administration".

(5) According to Dr. Ambedkar the said Article was enacted to safe guard two things namely the principle of equality of opportunity and to make provision for the entry of certain communities which have so far been outside the Administration. Dr. Ambedkar further stated :–

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

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

I, therefore, hold that the expression "backward class of citizens" under Article 16(4) does not mean the same thing as the expression "any socially and educationally backward classes of citizens" in Article 15(4). The judgments of this Court wherein it is assumed that the two expressions in Articles 15(4) and 16(4) mean

the same thing do not lay down correct law and are overruled to such extent.

C

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

A layman's look at Article 16(4) gathers the impression that the reservation under the said Article is permissible for the *backward classes* of citizens who are not adequately represented in the services under the State. But on closer scrutiny and examination it is clear that the reservations under Article 16(4) are provided for *classes of citizens* which are not adequately represented in the State Services. The original draft article 10(3) [corresponding to Article 16(4)] was as under:

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

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

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

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

and effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly." (Constituent Assembly Debates, Vol. 7, 1948-49 pages 701-702).

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

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

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

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

Yet another way to examine. Scheduled castes and scheduled tribes are a 'class' by themselves and the Constitution permits protective discrimination to compensate them. Reservation of seats in the House of People and the Legislative Assemblies have been provided for them. Article 335 is special provision for

taking into consideration their claims in the appointments to State-services. Had there been an intention to provide job-reservations in favour of weaker sections of society or for the 'socially and educationally backward classes' then scheduled caste and scheduled tribes would have been the first to be provided for by specific mention in Article 16(4). It is idle to say that the expression 'backward class of citizens' would include them. Article 15(4) uses the expression "...any special provision for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes". Similarly Article 46 provides "The State shall promote...weaker section of the people, and, in particular, of the scheduled castes and scheduled tribes...". thus where ever in the Constitution special protection has been provided for socially and educationally backward classes the scheduled castes and scheduled tribes have been specifically mentioned along with. Article 16(4) does not give protection to either of the two, it only provides for those who are inadequately represented in the State services. If the 'scheduled caste and scheduled tribes' and "socially and educationally backward classes" qualify the test of inadequacy they are eligible for the reserved seats under Article 16(4). The scheduled castes and scheduled tribes being the weakest of the weak per-se satisfy the test.

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

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

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

Before parting with the subject I may say that the successive Governments, whether in the States or at the Centre, have been re-miss in the discharge of their obligations, under the Constitution, towards the poor and backward people of the country. Job-reservations as a dole, has been the vote-catching platter. Neither the job-reservations nor the reservation of seats in the educational institutions are of material help. Unless illiteracy and poverty are removed, the backward classes cannot be benefited by the reservations alone. Affirmative-Action Programme on war footing is needed to uplift the backwards. Liberal grants and subsidised schemes under Article 340 read with Articles 15(4) and 46 are needed to remove illiteracy and poverty. Housing, sanitation and other necessities of life are to be provided. Illiteracy is the root cause of backwardness. "Free and compulsory education" is nowhere within reach even 45 years after the independence. The legislations enabling free education are only on paper. A poor father, whose child is earning and contributing towards the family income, may not send the child to school even if the education is free. The State may consider compensating the father for the loss in income due to child's stopping work for going to school. It is not for this Court to suggest what the Government should do, we only say that the State has not done what it is required to do under the Constitution. Job-reservation is not the answer to the problem. Prof. Andre Beteille in his book (supra) has summed up the issue in the following words :

> "What has gone wrong with our thinking on the backward classes is that we have allowed the problem to be reduced largely to that of job reservation. The problems of the backward classes are too varied, too large and too acute to be solved by job reservation alone. The point is not that job reservation has contributed so little to the solution of these problems but, rather, that it has diverted attention from the masses of Harijans and Adivasis who are too poor and too lowly even to be candidates for the jobs that are reserved in their names. Job reservation can attend only to the problems of middle class Harijans and Adivasis : the overwhelming majority of Adivasis and Harijans, like the majority of the Indian people, are outside t his class and will remain outside it for the next

several generations. Today, job reservation is less a way of solving age-old problems than one of buying peace for the moment. It would be foolish to blame only the government for wanting to buy peace in a country in which everyone wants to buy peace. It would be foolish also to recommend an intransigent attitude to a government which has neither the will to impose its power nor the imagination to think of alternatives. But unless it is able to offer something better to the backward classes than it has done so far, reservation will continue to bedevil it.... In assessing any scheme of reservations today, we have to keep in mind the distinction between those schemes that are directed towards advancing social and economic equality, and those that are directed towards advancing social and economic equality, and those that are directed towards maintaining a balance of power. Reservations for the Scheduled Castes and Scheduled Tribes are, for all their limitations, directed basically towards the goal of greater equality overall. Reservations for the Other Backward Classes and for religious minorities, whatever advantages they may have, are directed basically towards a balance of power. The former are in tune which the spirit of the Constitution; the latter must lead sooner or later to what Justice Gajendragadkar has called a "fraud on the Constitution/"

D

The next question for consideration is whether Article 16(4) provides reservation of appointments or posts at the stage of initial entry to Government services or even in the process of promotion. As at present the question is not res-integra. A Constitution-Bench of this Court, in *The General Manager, Southern Railway* vs *Rangachari* (1962) 2 SCR 586 by a majority of three to two, has held that promotion to a selection post is covered by Article 16(4) of the Constitution of India. *Rangachari's* case has been followed by this Court in *State of Punjab* vs *Hiralal & Ors.* (1971) 3 S.C,.R. 267f and *Akhil Bharatitya Soshit Karamchari Sangh (Railway)* vs *Union of India & Ors.* (1981) 2 S.C.R. 185. This Court has also referred to *Rangachari's* case in various other judgments. The reasoning of the majority in *Rangachari's* case has, however, been followed in the subsequent judgments of this Court without adding any further reason. Mr. Venugopal and Ms. Shyamla Pappu, learned counsel for the petitioners have contended that majority judgment in *Rangachari's* case does not lay-down correct law.

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

(1)The matters relating to employment must include all matters in relation to employment both prior and subsequent to the appointment which are incidental to the employment and form part of the terms and conditions of such employment. Thus promotion to selection posts is included both under Article 16(1) and (2).

(2) Article 16(4) does not cover the entire field covered by Article 16(1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Article 16(1) and (2) do not fall within the mischief of Article 16(4). For instance the conditions of service relating to employment such as salary, increment, gratuity, pension and the age of supernuation are matters relating to employment and as such they do not form the subject matter of Article 16(4).

(3)Both "appointments" and "posts" to which the operative part of Article 16(4) refers to and in respect of which the power to make reservation has been conferred on the State must necessarily be appointments and posts in the service. The word "posts" in Article 6(4) cannot mean ex-cadre posts in the context.

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

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

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

There is no doubt that the backward classes should not only have adequate representation in the lowest cadres of services but they should also aspire to secure adequate representation in the higher services as well. Article 16(4) permits reservation for backward classes by way of direct recruitment to any of the cadres in the State services. Reservation can be made in direct recruitment to any cadre or service from Class-IV to

Class-I of the State services. The majority in *Rangachari's* case has read in Article 16(4), what is not there, to support the element of qualitative representation.

The reservation permissible under Article 16(4) can only be "in favour of any backward class of citizens" and not for individuals. Article 16(1) guarantees a right to an individual citizen whereas Article 16(4) permits protective discrimination in favour of a class. It is, therefore, mandatory that the opportunity to compete for the reserve posts has to be given to a class and not to the individuals. When direct recruitment to a service is made the 'backward class' as a whole is given an opportunity to be considered for the reserve posts. Every member of the said class has a right to compete. But that is not true of the process of promotion. The backward class as a collectivity is nowhere in the picture; only the individuals, who have already entered the service against reserve-posts, are considered. In the higher echelons of State services–cadre strength being small–there may be very few or even a single 'backward class' candidate to be considered for promotion to the reserve post. An individual citizen's right guaranteed under Article 16(1) can only be curtailed by providing reservations for a 'backward class and not for backward individuals. The promotion posts are not offered to the backward class. Only the individuals are benefited. The object, context and the plain language of Article 16(4) make it clear that the job-reservation can be done only in the direct recruitment and not when the higher posts are filled by way of promotion.

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

It has been rightly held in *Rangachari's* case that Article 16 (4) does not cover the entire field covered by Article 16(1) and (2). The conditions of service which are matters relating to employment are protected by the doctrine of equality of opportunity and do not from the subject matter of Article 16(4). It is settled proposition of law that right to promotion is a condition of service. Once a person is appointed he is governed by the conditions of service applicable thereto. Appointment and conditions of service are two separate incidents of service. Conditions of service exclusively come within the expression "matters relating to employment" and are covered by Article 16(1) and not by 16(4). When all other conditions of service fall out-side the purview of Article 16(4) and are exclusively covered by Article 16(1) then where is the justification to bring promotion within Article 16(4) by giving strained-meaning to the expression 'posts'. The only conclusion by reading Articles 16(1), 16(2) and 16(4) which can be drawn is that all conditions of service including promotion are protected under Articles 16(1) and (2). Article 16(4) makes a departure only to the extent that it permits the State Government to make any provision for the reservation of appointments or posts at the initial stage of appointment and not in the process of promotion.

Constitution of India aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. If members of backward classes can maintain minimum necessary requirement of administrative efficiency not only representation but also preference in the shape of reservation may be given to them to achieve the goal of equality enshrined under the Constitution. Article 16(4) is a special provision for reservation of appointments and posts for them in Government services to secure their adequate representation. The entry of backward class candidates to the State services through an easier ladder is, therefore, within the concept of equality. When two persons one belonging to the backward class and another to the general category enter the same service through their respective channels then they are brought at par in the cadre of the service. A backward class entrant cannot be given less privileges because he has entered through easier-ladder and similarly a general class candidates cannot claim better rights because he has come through a tougher-ladder. After entering the service through their respective sources they are placed on equal footing and thereafter there cannot be any discrimination in the matter of promotion. Both must be treated equally in the matters of employment after they have been recruited to the service. Any further reservation for the backward class candidate in the process of promotion is not protected by Article 16(4) and would be violative of Article 16(1).

Although there is no factual material before us but it would not be hypothetical to assume that the reservation in promotion–based on roster points–can lead to various anomalies such as the person getting the benefit of the reservation may jump over the heads of several of his seniors not only in his basic cadre but even in the higher cadres to which he is promoted out of turn. Even otherwise when once a member of the backward class has entered service via reserve post it would not

be fair to keep on providing him easier ladders to climb the higher rungs of the State services in preference to the general category. Instead of reserving the higher posts for in-service members of the backward class the same should be filled by direct recruitment so that those members of backward class who are not in the State services may get an opportunity to enter the same.

For the reasons indicated above I hold that the interpretation given by the majority in *Rangachari's* case to Article 16(4), to the effect that it permits reservations in the process of promotion, is not permissible and as such cannot be sustained. *Rangachari's* case to that extent is over ruled . I hold that Article 16(4) permits reservation of appointments or posts in favour of any backward class of citizens only at the initial stage of entry into the State services. Article 16(4) does not permit reservation either to the selection posts or in any other manner in the process of promotion.

E & F

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

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

1. Article 16(1) and 16(4) operate in the same field.

2. Article 16(4) is exhaustive of the State–power to provide reservations in State Services.

3. Protective discrimination, short of reservations, which satisfy the tests of reasonableness, is permitted under Article 16(1).

G

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

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

(*ii*) It is for the State to adopt the methodology of providing reservations below 50%. The State may provide the said reservation in respect of the substantive vacancies arising in a year or in the cadre or service. It would be permissible to carry forward the reserve vacancies of one year to the next year. It is reiterated that the vacancies reserved in a year including those which are carried forward shall not exceed 50%. .

(*iii*) No reservation of any kind can be made for any class or category whether backward or non-backward under Article 16(1).

H

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

I

Whether a group of citizens living below poverty line or under povertyconditions can be considered backward class under Article 16(4)? In other words can a class of citizens be identified as backward solely on the basis of economic criterion? Emphatic yes, is my answer.

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

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

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

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

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

subcategorised and thereafter the backward sections can be identified for the purposes of Article 16(4). It is high time that we leave the dogmatic approach of making reservation in public services on the basis of caste as a symbol of social backwardness. We must adopt a practical measure to confining it only to low income groups of people having unremunerative occupations whose talents and abilities are subdued under the weight of poverty. I, therefore, hold that a backward class for the purposes of Article 16(4) can be identified solely on the basis of economic criteria.

J

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

K

Legal aspects arising out of Article 16(4) have been discussed and decided. Finally we have to examine the process of identification of the backward classes and test the same at the anvil of Article 16(4) as interpreted by us. Mandal Commission was set up on January 1, 1979 under Article 340 to identify the classes for the purpose of Article 16(4). The Commission identified 3743 backward castes and submitted its report on December 31, 1980. No action was taken on the Mandal Report by the successive Governments for a decade. The Mandal report was finally lifted from the Morgue by the government of the day which accepted the report and issued Memorandum dated August 13, 1990 providing reservations for 3743 backward castes identified by the Mandal Commission. Later on the successor government amended the reservation - policy by the Memorandum dated September 25, 1991. These Memoranda have been reproduced in the judgements proposed by brother Judges. Both the Memoranda are based on the Mandal Report. The reservations provided under the two Memoranda are to be extended to 3743 castes identified by the Mandal Commission. It is therefore, necessary to find out whether the backward classes to which reservations under the Memoranda are being extended, have been constitutionally and validly identified. I do not agree with the theory - apparently without logic - that the Memoranda can be adjudicated de-hors Mandal Report. Elaborate arguments were addressed before us challenging the validity of Mandal Report by M/s Palkhiwala, Venugopal, Shyamala Pappu and other learned counsel appearing for the petitioners. Agreeing with the learned counsel, I hold that the identification of 3743 castes as the 'beneficiary-class' for job reservations under Article 16(4), is wholly unconstitutional; invalid and cannot be acted upon. My reasons for holding so are as under :-

(i) The term of reference require the Commission "to determine the criteria for defining the socially and educationally backward classes". Assume that Mandal has done so. The reference and the Mandal Commission's investigation is based on the legal fallacy that the expression "backward class of citizens" means the same thing as "socially and educationally backward classes of citizens" in article 15(4). That is why the Commission was asked to identify socially and educationally backward classes. We have held two expressions in Article 16(4) and 15(4) do not mean the same thing. The classes to be identified under article 16(4) cannot be confined only to social and educational backwardness. The definition therein is much wider and is not limited as under Article 15(4). It is thus, evident that the identification of the "backward classes" under Article 16(4) cannot be based only on the criteria of social and educational backwardness. Other classes which could have been identified on the basis of occupation, economic standards, environments, backward area residence, etc. etc. have been left out of consideration. The identification done by Mandal is thus violative of Article 16(4) and as such cannot be sustained.

(ii) It has been held by me that the backward classes for the purpose of Article 16(4) are the backward sections of the classes who are inadequately represented in the State-services. Admittedly, this exercise was not done. Mandal identified the castes on the criteria of social and educational backwardness.

(iii) The Terms of Reference further required the Commission "to examine the desirability or otherwise of making provision for the reservation of appointments or tests.....in pubic services". This most vital part of the Terms of Reference was wholly ignored by the Commission. Before making its recommendations the Commission was bound, by the Terms of Reference, to determine the desirability or otherwise of such reservatiions. The Commission did not at all investigate this essential part of the Terms of Reference.

(iv) Mandal has not done any survey to find out as to whether 3743 castes which accroding to him are the backward classes, under article 16(4), had inadequate representation in the State services. There is no

materiial on the record to show that 3743 castes identified by Mandal are not adequately represented in the State services. The condiition of inadequacy is a condiition precedent under Article 16(4) of the Constitution. This having not been established, the identification of the so called "backward classes" is wholly unconstitutional and inoperative.

(v) Para 2.7 of the report indicates that the list of backward castes was prepared from the following sources:-

1. Socio-educational field survey;

2. Census report of 1961;

3. Personal knowledge gained through extensiive touring and from the evidence;and

4. Lists of other backward classes notified by various State Governments.

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

Large number of castes were picked up by the Mandal Commission from the state lists. It was illustrated before us that out of 260 castes identified from the Union Terriotory of Pondichery only 14 were subjected to socio-educatiional survey. One was identiified on personal assessment of the Commission and the remaining 245 castes were picked up from the State list. These facts are not denied by the Union of India in the affidavit filed in writ petititon 930/90. Similarly large number of castes were taken from the lists of other backward classes operating in the States. It was wholly illegal for the Commission to adopt the State lists without any investigation and survey. It is not disputed that no Commission was ever set-up in Pondicherry to identify the backward classes. There is nothing in the Mandal Report to show that the State lists which were adopted were prepared as a result of any survey, investigation or scrutiny. Mandal Report in paras 2.63 and 2.64 specfically states that Haryana, Himachal Pradesh, Assam, Pondicherry, Rajasthan, Orissa, Meghalaya and Delhi have notified lists of Other Backward Classes without their being any enquiry into their conditions. In para 2.65 it is mentioned that Andaman and Nicobar, Arunachal Pradesh, Chandigarh, Dadra and Nagar Haveli, Goa, Daman and Diu, Lakshadweep, Madhya Pradesh, Manipur, Mizoram, Nagaland, Sikkim, Tripura and West Bengal have never prepared a list of OBC's. If the State lists were to be declared as Other Backward Classes by the Central Government then no Commission under Article 340 was required - an Administrator could do the job. When 90% of the Castes selected were not subjected to the socio-educational survey it is impermissible to treat the said castes as backward classes.

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

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

(vi) The Mandal report virtually re-writes Article 16(4) by substituting caste for class. The caste has been made the sole and exclusive test for determining the backward classes. Every other test-economic or non-economic has been wholly rejected . Para 1.21 of Mandal report states "the substitution of caste by economic tests will amount to ignoring the genesis of social backwardness in the Indian society". Paras 11.5 and 11.25 of the Mandal report indicate that the caste was taken as a collectivity for the purposes of socio-educational survey. The "indicators" for determining social and educational backwardness were also applied to the castes alone. Every single piece of evidence and other material adverted to by the Commission was only for the purpose of determining whether a caste was backward. There was no investigation at all to find out whether a member or family in the caste was backward. The "indicators" invoked to determine backwardness were invariably applied to the castes and not to the individuals. What emerges is that in the first instance only a caste was taken as a collectivity. Thereafter no individual or a

family of that caste was subjected to the "indicators". Only the castes were tested through the "indicators" and the result obtained. Thus the Caste has been made the sole, paramount, overriding and decisive factor. The methodology based on caste alone is unconstitutional as it violates Articles 16(2) and 16(4) of the Constitution of India.

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

(viii) The Mandal Commission has estimated the population of other backward classes in the country as 52%. To say the least the exercise to reach the figure of 52% is wholly imaginary. It is in the realm of conjecture. The conclusion arrived at in para 12.22 of the Mandal Report to the effect that backward classes constitute nearly 52% of the Indian population is based on 1931 census. It is wholly arbitrary to count the population of backward classes in the country on the basis of census which took place fifty years before the report was submitted. In order to reach the conclusion of 52% Mandal has added up the population of scheduled castes, scheduled tribes, non-Hindu communities (Muslims, Christiians, Sikhs, Buddhists, Jains) and the forward Hindu castes and communities (Brahamans, Rajputs, Marathas, Jats, Vashya-Baniya etc, Kayastha, other forward Hindu caste/groups) which make 56.30% of the total population. Mandal has assumed that the residual population of 43.70% (100 minus 56.30% equivalent to 43.70%) consists of backward classes. It is difficult to imagine how anybody can accept such an illusory and wholly arbitrary calculatiions. It is pity that half of the country is being deprived of their fundamental right under Article 16(1) on the basis of the census exhumed from a sixty year old grave and the calculations which are unknown to logic and fair-play. Mandal further assumed erroneously, that relative population growth of various communities at the time of Mandal report was the same as at the time of 1931 census. It is absurd to think that there was no change in their population growth during the long period of 50 years. It is pertinent to observe that India of 1931 comprised of present India, Pakistan, Bangladesh, Burma, and Sri Lanka and as such it would be wholly erroneous to relate the caste-based population situation of 1931 to that of 1980.

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

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

(i) The identification of 3743 castes as a "backward class" by Mandal Commission is constitutionally invalid and cannot be acted upon.

(ii) Office Memorandum dated August 13, 1990 issued by the Government of India is unconstitutional non-est and as such cannot be enforced.

(iii) Para 2(i) of the Office Memorandum dated September 25, 1991 adopts the means test. The adoption of means test by the Government of India in principle is upheld. Since para 2(i) is applicable to the 3743 castes identified by the Mandal Commission the said para shall not operate till the time 'backward classes" for the purposes of Article 16(4) are identified by the Government of India in accordance with the law laid-down in this judgement.

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

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

.....Sd/.....J
(KULDIP SINGH)

New Delhi
November 16,1992.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 930 of 1990

With

W.P.(C) 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, T.C. (C) Nos. 27/90, 28-31/90, 32-33/90, 34-35/90, 65/90, 1/91, W.P. (C) Nos. 1081/90, 343/91, 1362/90, 1094/91, 1087/90, 1128/90, 28/91, 3/91, & W.P. (C) No. 11/92, 111/92, 261/92.

Indra Sawhney Etc. Etc. .... Petitioners

Versus

Union of India & Ors. Etc. Etc. ..... Respondents

JUDGMENT

THOMMEN, J.,

The petitioners challenge O.M. No. 36012/31/90-Estt (SCT) dated 13th August, 1990 as amended by O.M. No. 36012/31/90-Estt (SCT) dated 25th September, 1991 providing in civil posts and services under the Government of India for reservation of 27% of the vacancies for the Socially and Educationally Backward Classes (SEBCs) and 10% of the vacancies for other economically backward sections of the people. The Office Memorandum dated 13th August, 1990, in so far as it is material, reads:-

"....

2(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.....

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standard 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 caste/communities is being issued separately.

(v).....

....."

The amended Office Memorandum dated 25th September, 1991 provides:-

.....

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 backward 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.

.....".

The reservation postulated in these orders for the socially and educationally backward classes and also for the economically backward sections of the people in the Central Government services to the extent of 27% and 10% respectively is in addition to the reservation already made for the Scheduled Castes and the Scheduled Tribes to the extent of 22.5%.

These orders are made pursuant to the Report submitted by the Backward Classes Commission appointed by the President of India under Article 340 of the Constitution. This Report is generally known by the name of the Chairman of the Commission, the Late B.P. Mandal. The petitioners submit that the Report leading to the impugned Government Orders is not based on any scientific or objective study of backwardness in the country, and any attempt to make reservation on the basis of the data supplied in the Report is irrational, unconstitutional and invalid. They say that the Report is conceived in caste prejudices and motivated by caste hatred. The Report does not address itself to a proper identification of true backwardness for the redressal of which the Constitution permits reservation by quota for the backward classes of citizens to the exclusion of all other persons. On the other hand, the sole criterion on the basis of which backwardness is purportedly identified is caste and nothing but caste. Any order resulting in reservation or other affirmative action on the basis of the wrong conclusions drawn by the Commission is bound to be the very antithesis of equality.

The respondents, supporting the impugned Government orders, contend that the Constitution guarantees liberty, equality and fraternity for all classes of people irrespective of their religion, community, caste occupation, residence or the like. Every citizen is entitled to equal opportunities. For centuries, large sections of out countrymen have been discriminated against on account of their birth. As a result of such inequity, they have been steeped in poverty, ignorance and squalor. To alleviate their misery and elevate them to positions of equality with the more fortunate, affluent and enlightened sections of our countrymen, the Founding Fathers of the Constitution made special provisions for their uplift. These provisions are meant to protect the truly backward people of this country, namely, members of the Scheduled Castes and the Scheduled Tribes and other backward classes. They contend that the Mandal Report is a scientific and serious study rationally addressed to the problem of backwardness by identifying it where it is most acutely felt and loudly present, namely, amongst the lowest of the lowly citizens of this country. Those are the members of the low castes as traditionally recognised and identified by the State and Central Governments. The various classes of people belonging to such castes are identified as socially, educationally and economically backward and it is in respect of those people that the Government have made the impugned reservations.

The 'indicators' or 'criteria' adopted in the Mandal Report are broadly grouped as social, educational and economic on the basis of castes/classes. The commission has identified classes with castes and backwardness with particular castes. Castes which are socially, educationally and economically backward are characterised as backward classes entitled to the benefit of reservation. Persons are grouped on the basis of caste either because they are members of it by reason of their being Hindus or because they were members of it in the past prior to their conversion to other religions. Identification of backwardness is thus made with reference to the present or past caste affiliations of the people. The Report says:-

"12.4. In fact, caste being the basic unit of social organisation of Hindu Society, castes are the only readily and clearly 'recognizable and persistent collectivities' ".

"12.6. . . . the Commission has also applied some other tests like stigmas of low occupation, criminality, nomads, beggary and untouchability to identify social backwardness. Inadequate representation in public services was taken as another important test".

In regard to non-Hindus, the Report says:-

"12.11 There is no doubt that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu communities. Though caste system is peculiar to Hindu society yet, in actual practice, it also pervades the non-Hindu communities in India in varying degrees . . . . even after conversion, the ex-Hindus carried with them their deeply ingrained ideas of social hierarchy and stratification . . . .".

"12.14. . . .even after conversion the lower castes converts were continued to be treated as Harijans by all sections of the society ..."

"12.18. . . .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.)".

The Report has thus treated all persons who belong, or who had once belonged, to what had been regarded as untouchable or other traditionally backward castes or communities or who belong to certain low occupations as socially, educationally and economically backward.

The particulars of the Mandal Report and other material relied on by the Government in making the impugned orders do not directly arise for our consideration at this juncture as this Bench has been constituted to examine the concept of equality of opportunity in matters of public employment, as enshrined in Article 16 and other provisions of the Constitutions, and settle the legal position relating to reservation and thus lay down the guidelines by which the validity and the reasonableness of Government Orders on reservation can be tested in appropriate cases.

The Concept of Reservation:

The fundamental question is, what is the raison d'etre of reservation and what are its limits. The Constitution permits the State to adopt such affirmative action as it deems necessary to uplift the backward classes of citizens to levels of equality with the rest of our countrymen. The backward classes of citizens have been in the past denied access to Government services on account of their inability to compete effectively in open selections on the basis of merits. It is, therefore, open to the Government to reserve a certain number of seats in places of learning and public services in favour of the Scheduled Castes and the Scheduled Tribes and other backward classes to the exclusion of all others, irrespective of merits. The impugned Government orders have made reservation by setting aside quotas in Government services exclusively for backward classes of candidates.

Referring to the concept of equality of opportunity in public employment, as embodied in Article 10 of the draft Constitution, which finally emerged as Article 16 of the Constitution, and the conflicting claims of various communities for representation in public administration, Dr. Ambedkar emphatically declared that reservation should be confined to 'a minority of seats', lest the very concept of equality should be destroyed. In view of its great importance, the full text of his speech delivered in the Constituent Assembly on the point is appended to this judgment. But I shall now read a few passages from it. Dr. Ambedkar stated:

> "... 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..... 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..... 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..... 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....". *Constituent Assembly Debates*. Col. 7, pp. 701-702 (1948-49).

(emphasis supplied)

These words embody the raison d'etre of reservation and its limitations. Reservation is one of the measures adopted by the Constitution to remedy the continuing evil effects of prior inequities stemming from discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness. Reservation is meant to be addressed to the present social, educational and economic backwardness cause by purposeful societal discrimination. To attack the continuing ill effects and perpetuation of such injustice, the Constitution permits and empowers the State to adopt corrective devices even when they have discriminatory and exclusionary effects. Any such measure, in so far as one group is preferred to the exclusion of another, must necessarily be narrowly tailored to the achievement of the fundamental constitutional goal.

What the Constitution permits is the adoption of suitable and appropriate remedial measures to correct the continuing evil effects of prior discrimination. Over-inclusiveness in such measures by unduly widening the net of reservation to unjustifiably protect the ill deserved at the expense of the others would result in invidious discrimination offending the Constitutional objective. Benign classification for affirmative action by reservation must stay strictly within the narrow bounds of remedial actions. Any such programme must be consistent with the fundamental objective of equality. Classes of people saddled with disabilities rooted in history of purposeful unequal treatment and consequently relegated to social, educational, economic and political powerlessness particularly qualify to demand the extraordinary and special protection of reservation.

Reservation is meant to remedy the handicap of prior discrimination impeding the access of classes of people to public administration. It is for the State to determine whether the evil effects of inequities stemming from prior discrimination against classes of people have resulted in their being reduced to positions of backwardness and consequent under representation

in public administration. Reservation is a remedy or a cure for the ill effects of historical discrimination.

While affirmative action programmes by preferential treatment short of reservation in favour of disadvantaged classes of citizens may be justified as benign redressal measures based on valid classification, the more positive affirmative action adopting reservation by quota or other 'set aside' measures or goals in favour of certain classes of citizens to the exclusion of others must be narrowly tailored and strictly addressed to the problem which is sought to be remedied by the Constitution. Any such action by the State must necessarily be subjected to periodic administrative review by specially constituted authorities so as to guarantee that such policies and actions are applied correctly and strictly to permitted constitutional ends.

Reservation is not an end in itself. It is a means to achieve equality. The policy of reservation adopted to achieve that end must, therefore, be consistent with the objective in view. Reservation must not outlast its constitutional object and must not allow a vested interest to develop and perpetuate itself. There will be no need for reservation or preferential treatment once equality is achieved. Achievement and preservation of equality for all classes of people, irrespective of their birth, creed, faith or language is one of the noble ends to which the Constitution is dedicated. Every reservation founded on benign discrimination, and justifiably adopted to achieve the constitutional mandate of equality, must necessarily be a transient passage to that end. It is temporary in concept, limited in duration, conditional in application and specific in object. Reservation must contain within itself the seeds of its termination. Any attempt to perpetuate reservation and upset the constitutional mandate of equality is destructive of liberty and fraternity and all the basic values enshrined in the Constitution. A balance has to be maintained between the competing values and the rival claims and interests so as to achieve equality and freedom for all.

The makers of the Constitution were fully conscious of the unfortunate position of the Scheduled Castes and the Scheduled Tribes. To them equality, liberty and fraternity are but a dream ; an ideal guaranteed by the law, but far too distant to reach ; far too illusory to touch. These backward people and others in like positions of helplessness are the favoured children of the Constitution. It is for them that ameliorative and remedial measures are adopted to achieve the end of equality. To permit those who are not intended to be so specially protected to compete for reservation is to dilute the protection and defeat the very constitutional aim.

The victims of prior injustice are the special favourites of the laws. Their plight is a shameful scar on the national conscience. It is a constitutional command that prompt measures are adopted by the State for the promotion of these unfortunate classes of people specially to positions of comparative enlightenment, culture, knowledge, influence, affluence and prestige so as to place them on levels of equality with the more fortunate of our countrymen.

Reservation must one day become unnecessary and a relic of an unfortunate past. Every such action must be a transient self-liquidating programme. That is the hope and dream cherished by the Constitution Makers and that is the end to which the State has to address itself in making special provisions for the chosen classes of people for special constitutional protection, so that "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us" ; *Per* Justice T. Marshall, *Regents of the University of California* vs. *Alan Bakke*. 438 US 265, 57 L Ed. 2d 750. See also *H. Earl Fullilove* vs. *Philip M. Klutznick*, 448 US 448, 65 L Ed. 2d 902; *Metro Broadcasting, Inc.* vs. *Federal Communications Commission*, 58 I.W. 5053 (Decided on 27.6.1990); *Oliver Brown* vs. *Board of Education of Topeka*, 347 US 483, 98 L Ed. 2d 873 ; *City of Richmond* vs. *J.A. Croson Co.*, 488 US 469; *Wendy Wygant* vs. *Jackson Board of Education*, 476 US 267, 90 L Ed. 2d 260.

Reservation under the Constitution:

The Constitution seeks to secure to all its citizens Justice, Liberty, Equality and Fraternity. These are the basic pillars on which the grand concept of India as a Sovereign Socialist Secular Democratic Republic rests. This splendor that is India rests on these magnificent concepts, each of which, supporting the other, upholds the dignity and freedom of the individual and secures the integrity and unity of the nation.

Equality is one of the magnificent cornerstones of Indian democracy : *Smt. Indira Nehru Gandhi* vs. *Shri Raj Narain*. (1976) 2 SCR 347, 659 ; *Minerva Mills Ltd. & Ors.* vs. *Union of India & Ors.*, (1981) 1 SCR 206, 241 ; *Waman Rao & Ors.* vs. *Union of India & Ors.*, (1981) 2 SCR 1, 19. Articles 14, 15 and 16 embody facets of the many-sided grandeur of equality : *The General Manager, Southern Railway* vs. *Rangachari*, (1962) 2 SCR 586, 597 ; *State of Kerala & Anr.* vs. *N.M. Thomas & Ors.*, (1976) 1 SCR 906, 956. Article 14 prohibits the State from denying to any person within the territory of India equality before the law or the equal protection of the laws. All persons in like circumstances must be treated equally. Equality is between equals. It is parity of treatment under parity of conditions. The Constitution permits valid classification founded on an intelligible differentia distinguishing persons or things grouped together from others left out

of the group. And such differentia must have a rational relation to the object sought to be achieved by the law : *State of Kerala & Anr.* vs. *N.M. Thomas & Ors.*, (1976) 1 SCR 906. See also *Shri Ram Krishna Dalmia* vs. *Shri Justice S.R. Tendolkar & Ors.*, (1959) SCR 279.

Any State action distinguishing classes of persons is liable to be condemned as invidious and unconstitutional unless justified as a benign classification rationally addressed to the legitimate aim of qualitative and relative equality by means of affirmative action programmes of protective measures with a view to uplifting identified disadvantaged groups. All such measures must bear a reasonable proportion between their aim and the means adopted and must terminate on accomplishment of their object. Any legitimate affirmative action rationally and reasonably administered is an aid to the attainment of equality.

In the words of Judge Tanka of International Court of Justice :

> "....The principle is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference. This is what was indicated by Aristotle as *justitia commutativa and justitia distributiva*".
>
> ".....the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal".
>
> "....To treat unequal matters differently according to their inequality is not only permitted but required .....".
>
> *South West Africa Cases* (Second Phase), ICJ Rep. p. 6, 305-6

While Article 14 prohibits the State from denying equality to any person, Articles 15 and 16 are specially concerned with citizens. Article 15(1) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (4) of Article 15 provides that despite the prohibition contained in Article 29(2) against denial of admission to any citizen into any educational institution maintained or aided by the State on grounds only of religion, race, caste, language or any of them, the State is nevertheless free to make 'any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'.

These provisions of Article 15 have been construed by this Court in a number of decisions. It is no longer in doubt that, in order to receive, the protection of clause (4), the classes of people in favour of whom special provisions are made should necessarily be *both* socially and educationally backward (and not either socially or educationally backward) or should have been notified by the President as the Scheduled Castes or the Scheduled Tribes in terms of Article 341 or 342. *M.R. Balaji & Ors.* vs. *State of Mysore*, 1963 Supp. (1) SCR 439.

Apart from the Scheduled Castes and the Scheduled Tribes to whom the special provisions, once notified by the President under Articles 341 and 342, undoubtedly apply, the other 'backward classes' of citizens to whom the special provisions can be extended are not merely backward but are socially and educationally so backward as to comparable to the Scheduled Castes and the Scheduled Tribes. As stated by this Court in *M.R. Balaji & Ors.* vs. *State of Mysore*, (1963) Supp. 1 SCR 439 at 458 :-

> "...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".

See also *Kumari K.S. Jayasree & Anr.* vs. *State of Kerala & Anr.*, (1977) 1 SCR 1944, 198 *Janaki Prasad Parimoo & Ors.* vs. *State of Jammu & Kashmir & Ors.*, (1973) 3 SCR 236, 252 ; *State of Uttar Pradesh* vs. *Pradip Tandon & Ors.*, (1975) 2 SCR 761, 766 ; *State of Kerala & Anr.* vs. *N.M. Thomas & Ors.*, (1976) 1 SCR 906, 997 ; *State of Andhra Pradesh & Anr.* vs. *P.Sagar*, (1968) 3 SCR 595, 600 ; *K.C. Vasanth Kumar & Anr.* vs. *State of Karnataka*, (1985) Suppl. 1 SCR 352, 376.

In the Constituent Assembly during the discussions on draft 10 (Article 16), several members belonging to the Scheduled Castes or the Scheduled Tribes expressed serious apprehension that the expression 'backward' was not precise and large sections of people who did not belong to the Scheduled Castes or the Scheduled Tribes are likely to claim the benefit of reservation at the expenses of the truly backward classes of people. They sought clarification that the expression 'backward' applied only to the scheduled Castes and the Scheduled Tribes. (See B. Shiva Rao, *The Framing of India's Constitution–A Study*, (1968) pp. 198-199). K.M. Munshi, in his reply to this criticism, pointed out :

> ".....What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State–*highest efficiency* which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing

in several provinces, we want to see that backward classes, *classes who are really backward*, should be given scope in the State services ; for it is realised that State services give a *status and an opportunity to serve the country*, and this opportunity should be extended to every community, even among the backward people. That being so, we have to find out some generic term and the word 'backward class' was the best possible term. When it is read with article 301 it is perfectly clear that the word 'backward' signifies that class of people does not matter whether you call them untouchables, belonging to this community or that, *a class of people who are so backward that special protection is required* in the services and I see no reason why any member should be apprehensive of regard to the word 'backward'."

(emphasis is supplied)

Constituent Assembly Debates, Vol. 7, (1948-49), p. 697

Dr. Ambedkar, in his general reply to the debate on the point, stated thus :

"..... 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 ..."

(emphasis supplied)

Constituent Assembly Debates, Vol. 7, (1948-49), p. 702.

The President of India issued the Constitution (Scheduled Castes) Order, 1950 relating to the states, and the Constitution (Scheduled Castes) Union Territories Order, 1951 relating to the Union Territories. Para (2) of the 1950 Order speaks of 'castes, races or tribes which are to be deemed Scheduled Castes in the territories of the States mentioned in the Order". Para (3) of the Order (as amended by Act 108 of 1976 w.e.f. 27.7.1977) provides "notwithstanding anything contained in para (2), no person professing a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of the Scheduled Castes". See *Manual of Election Law*, Vol. I (1991), p. 141.[1]

The 1950 Order of the President (as amended) shows that in the territories of the states mentioned in the Order no person who is not a Hindu or a Sikh or a Buddhist can be regarded as a member of the Scheduled Castes. Article 15(4) speaks of 'socially and educationally backward classes of citizens' and 'the Scheduled Castes and the Scheduled Tribes' while Article 16(4) speaks only of 'any backward class of citizens'. The 'backward class' mentioned in Article 16(4) is a synonym for the classes mentioned in Article 15(4) ; *M.R. Balaji* (supra) ; *Janki Prasad Parimoo & Ors.* (supra). These two provisions read with the President's Order of 1950 (as amended in 1976) show that the benefit of Article 15(4) and Article 16(4) extends to the Scheduled Castes (which expression is confined to those professing the Hindu, the Sikh or the Buddhist religion) and the Scheduled Tribe as well as the backward classes of citizens who must necessarily be such backward classes of citizens who would have, but for their not professing the Hindu, the Sikh or the Buddhist religion, qualified to be notified as members of the Scheduled castes. This means, all those depressed classes of citizens who suffered the odium and isolation of untouchability prior to their conversion to other religions and whose backwardness continued despite their conversion come within the expression 'backward classes of citizens' in Articles 15(4) and 16(4). Untouchability is a humiliating and shameful malady caused by deep-rooted prejudice which does not disappear with the change of faith. To say that it does would imply that faith is the ultimate cause of untouchability. This is of course, not true. If backwardness caused by historical discrimination and its consequential disadvantages are the reasons for reservation, the Constitution mandates that all backward classes of citizens, who are the victims of the continuing ill effects of prior discrimination, whatever be their faith or religion, or whether or not they profess any religion, receive the same benefits which are accorded to the Scheduled Castes and the Scheduled Tribes. Backward class is composed of persons whose backwardness is in degree and nature comparable to that of the scheduled Castes and the Scheduled Tribes, whatever be their religion. There can be no doubt about the identity of the scheduled Castes and the Scheduled Tribes. Nor can there be any doubt about the identity of backward classes other than the Scheduled Castes and the Scheduled Tribes, if this identifying characteristic, bearing the stamp of prior discrimination and its continuing ill effects, is borne in mind. *M.R. Balaji & Ors.* vs. *State of Mysore*, (1963) Supp. 1 SCR 439, 458 ; *State of Uttar Pradesh* vs. *Pradip Tandon & Ors.* (1975) 2 SCR 761, 766 ; *Janki Prasad Parimoo & Ors.* vs. *State of Jammu & Kashmir & Ors.* (1973) 3 SCR 236, 252.

1 The 1951 Order relating to the Union Territories, however, regards only persons professing Hindu or Sikh religion as members of the Scheduled Caste, and does not include those professing Buddhist or any other religion.

What is sought to be identified is not caste, religion and the like, but social and educational backwardness, generally menifested by disabilities such as illiteracy, humiliating isolation, poverty, physical and mental degeneration, incurable diseases, etc. Living in abject poverty and squalor, engaged in demeaning occupations to keep body and soul together, and benefit of sanitation, medical aid and other facilities, these unfortunate classes of citizens bearing the badges of historical discrimination and naked exploitation are generally traceable in the midst of the lowest of the low classes euphemistically described as Harijans and in fact treated as untouchables. To dehy them the constitutional protection of reservation solely by reason of change of faith or religion is to endanger the very concept of secularism and the raison d'etre of reservation.

No class of citizens can be classified as backward solely by reason of religion, race, caste, sex, descent, place of birth, residence or any of them. But any one or all of these factors mentioned in article 15(1) or Article 16(2) can be taken into account along with other relevant factors in identifying classes of citizens who are socially and educationally backward. What is significant is that such identification should not be made solely with reference to the criteria specified in Article 15(1) or Article 16(2), but with reference to the social and educational backwardness of classes of citizens. Referring to the words "socially and educationally backward classes of citizens" appearing in Article 15(4), this Court stated in *State of Uttar Pradesh* vs. *Pradip Tandon & Ors.*, (1975) 2 SCR 761 at 767 :

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

It may, however, be true that backwardness is associated specially with people of a particular religion or race or caste or place of birth or residence or any other category mentioned in Article 15(1) or Article 16(2). In that event, any one or more of such criteria, along with other relevant factors, may be taken into consideration to reach the conclusion as to social and educational backwardness. Hard and primitive living conditions in remote and inaccessible areas, where the inhabitants have neither the means of livelihood nor facilities for education, health service or other civic amenities, are some such relevant criteria. *Janki Prasad Parimoo & Ors.* vs. *State of Jammu & Kashmir & Ors.*, (1973) 3 SCR 236, 259 ; *State of Andhra Pradesh & Anr.* vs. *P. Sagar*, (1968) 3 SCR 595, 600.

The city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases by diseases like leprosy, caught in the vicious grip of grinding penury, and making a meagre living by begging besides the towering mansions of affluence, transcend all barriers of religion, caste, race, etc. in their degradation, suffering and humiliation. They are the living monument of backwardness and a shameful reminder of our national indifference, a cruel betrayal of what the preamble to the Constitution proclaims. No matter what caste or religion they may claim, their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars–a common painful sight in our metropolis–entitles them to every kind of affirmative action to redeem themselves from the inequities of past and continuing discrimination. Rehabilitation and resettlement of these unfortunate victims of societal indifference and Governmental neglect and appropriate and urgent measures for State aided health care, education and special technical training for their progeny with a view to their employment in public services are the primary responsibility of a welfare State. These are the classes of people specially chosen by the law for prompt and effective affirmative action, not by reason of their caste or religion, but solely by reason of their backwardness in tracing which any relevant criterion is a useful tool.

In identifying backwardness, caste, religion, residence etc. are of course relevant factors, but none of them is a dominant or much less an indispensable factor. What is of ultimate relevance is the social and educational backwardness of a class of citizens, whatever be their caste, religion, etc.

Identification of the backward classes for the purpose of reservation must be with reference to their social and educational backwardness resulting from the continuing ill effects of prior discrimination or exploitation ; and not solely with reference to any one or more of the prohibited criteria mentioned in Article 15(1) or Article 16(2), although any one or more of such criteria may have been the ultimate cause of such discrimination or exploitation and the resultant poverty and backwardness. As stated by this Court in *R. Chitralekha & Anr.* vs. *State of Mysore & Ors.*, (1964) 6 SCR 368 at 388 :

> "... the expression 'classes' is not synomous with castes ..... caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong".

What is sought to be identified for the purpose of Article 15(4) or Article 16(4) is a socially and

educationally backward class of citizens. A class means 'a homogeneous section of the people grouped together because of certain likeliness or common traits, and who are identifiable by some common attributes'. *Triloki Nath & Anr.* vs. *State of Jammu & Kashmir & Ors.*, (1969) 1 SCR 103, 105. They must be a class of people held together by the common link of backwardness and consequential disabilities. What binds them together is their social and educational backwardness, and not any one of the prohibited factors like religion, race or caste. What chains them, what incapacitates them, what distinguishes them, what qualifies them for favoured treatment of the law is their backwardness : their badges of poverty, disease, misery, ignorance and humiliation. It is conceivable that the entire caste is a backward class. In that event, they form a class of people for the special protection of Articles 15(4) and 16(4), not by reason of their caste, which is merely incidental, but by reason of their social and educational backwardness which is identified to be the result of prior or continuing discrimination and its ill effects and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. It is also conceivable that a class of people may be identified as backward without regard to their caste, provided backwardness of the nature and degree mentioned above binds them as a class. *M.R. Balaji* (supra) at pp. 458, 474; *Minor P. Rajendran* vs. *State of Madras & Ors.* (1968) 2 SCR 786; *State of Andhra, Pradesh & Anr.* vs. *P. Sagar.* (1968) 3 SCR 595 ; *A. Peeriakaruppan. etc.* vs. *State of Tamil Nadu & Ors.*, (1971) 2 SCR 430 ; *State of Andhra Pradesh & Ors.* vs. *U.S.V. Balram Etc.*, (1972) 3 SCR 247, 280, 285 *Triloki Nath & Anr.* vs. *State of Jammu & Kashmir & Ors.* (1969) 1 SCR 103; *State of Uttar Pradesh* vs. *Pradip Tandon & Ors.*, (1975) 2 SCR 761 ; *Kumari K.S. Jayasree & Anr.* vs. *State of Kerala & Anr.*, (1977) 1 SCR 194 ; *Akhil Bhartiya Soshit Karamchari Sangh (Railway)* vs. *Union of India & Ors.*, (1981) 2 SCR 185 ; *R. Chitralekha & Anr.* vs. *State of Mysore & Ors.*, (1964) 6 SCR 368 :

Historically, backwardness has been the curse of people most of whom are characterised as the Scheduled Castes and the Scheduled Tribes. These are not castes as such, but classes of people composed of castes, races or tribes or tribal communities or parts or groups thereof and classified as such by means of presidential notifications owing to their extreme backwardness and other disadvantages (see Articles 341 and 342): *State of Kerala & Anr.* vs. *N.M. Thomas & Ors.*, (1976) 1 SCR 906, 932 ; *Akhil Bhartiya Soshit Karamchari Sangh (Railway)* vs. *Union of India & Ors.*, (1981) 2 SCR 185, 234. There are many other persons falling outside these groups, but comparable to them in their backwardness.

Any identification made for the purpose of Article 15 or Article 16 solely with reference to caste or religion, and without regard to the real issue of backwardness, will be an impermissible classification resulting in invidious reverse discrimination. The fact that identification of backwardness may involve a reference to religion, race, caste, occupation, place of residence or the like in respect of classes of people does not mean that any one of these factors is the sole or the dominant or the indispensable criterion. Backwardness may be the result of a combination of two or more of these factors. Persons of a particular place or occupation may have been enslaved as bonded labourers, or otherwise held in serfdom and exploited and discriminated against, and may have over a period of time degenerated to such social educational backwardness as to qualify for the special protection of the Constitution. No matter to what caste or community or religion they belonged or from what place they came, their present plight stemming from prior inequities and continuing over a period of time and thus placing them in a state of total helplessness qualifies them for the special protection of reservation.

Historically, backwardness, as stated above, has been most acute at the lowest levels of our society and it has been invariably identified with low castes and demeaning occupations. But if, as a matter of fact, classes of citizens of higher castes have suffered continuously by reason of discrimination or exploitation by persons having authority and power over them, and have consequently been reduced to poverty, ignorance and isolation resulting in social and educational backwardness, whatever be the caste of the exploiters or of the victims, the constitutional protection has to be extended to such classes of victims. They must be helped out of their present plight resulting from prior or continuing discrimination or exploitation. Proof of their backwardness is not in their caste or religion, but in their poverty, ignorance and consequential disabilities.

It is generally a combination of factors such as low birth and demeaning occupation, or lack of any occupation, that has historically subjected classes of people to invidious discrimination and humiliating isolation and consequential poverty and social and educational backwardness. These are questions of fact which must be ascertained before the qualifying backwardness is identified. To disregard any one of these factors, particularly the most compelling reality of Indian life originating in low castes and demeaning occupations generally associated with them, such as that of scavenger, sweeper, fisherman, dhobi, barber and the like and resulting in abject poverty, is to ignore the relevant criteria in identifying backwardness warranting reservation. What is sought to be identified for the purpose of reservation is not caste or religion, but poverty and backwardness caused by historical discrimination and its continuing evil effects. Caste may

be a guide in this search, just as occupation or residence may be a guide, but what is sought to be identified is none but backwardness stemming from historical discrimination. If caste is more often than not a guide in the search for backwardness and if the lowest of the low castes has for historical reasons become the indicium of backwardness of the kind attracting reservation, caste in the absence of any better guide is a factor to be taken into account along with other factors such as poverty, illiteracy, physical and mental disabilities and other diseases caused by malnutrition, unhygienic conditions and the like. What the constitution prohibits is not caste or non-discriminatory and inoffensive customs and practices based on castes; or ameliorative measures to uplift the downtrodden poverty stricken members of low castes ; what it prohibits is exclusionary discrimination based solely on caste or any other criterion enumerated in Article 15(1) or Article 16(2). Any one or all of such criteria along with any other relevant criterion, such as poverty, illiteracy, disease, etc. may be legitimately used to identify backwardness for the purpose of reservation.

To contend that caste, and caste alone, is the criterion for identification of backwardness is to disregard the innumerable reasons for backwardness. At the same time, to ignore caste as a factor in identifying backwardness for the purpose of reservation is to shut one's eyes to the realities and ignore the cause of injustice from which large sections of people in this country have for generations suffered and still suffer, namely, naked exploitation and discrimination by those in positions of power and affluence. The realities of life in India militate against total exclusion of consideration based on caste or total concentration on caste in identifying backwardness caused by past inequities.

The Constitution is neither caste-blind nor caste-prejudiced nor caste-overcharged, but fully alive to caste as one of the relevant criteria to be reckoned in the process of identification of backward classes of citizens. India is not a nation of castes but of people with roots in divergent castes. What the Constitution seeks to identify is not the backward caste, but the backward class of citizens who may in many cases be partly or in some cases predominantly or even solely identified with particular castes. See *Minor P. Rajendran* vs. *State of Madras and Ors.* (1968) 2 SCR 786, 790.

The question is not whether the Constitution is caste-blind or caste-prejudiced ; the question really is who are the backward classes of citizens intended to be protected by reservation under Article 15 or Article 16. If reservation is limited solely to the Scheduled Castes and the Scheduled Tribes and other comparably backward classes of citizens, as it must be under the Constitution, then the Harijans, the Girijans, the Adivasis, the Dalits, and other like backward classes of citizens, once known as the "untouchables" or the "outcastes" or the "depressed classes" by reason of their "low" birth and "demeaning" occupation, or any other class of citizens afflicted by like degree of degeneration and deprivation caused by prior and continuing discrimination, exploitation, neglect, poverty, disease, isolation, bondage and humiliation, whatever be their caste, religion or place of origin, will alone qualify for reservation. Call them a class or a caste or a race or a tribe or whatever nomenclature is appropriate, they are the only legitimately intended beneficiaries of reservation. Their roots of origin in the lowest of the low segments of society ; their affiliation with what is traditionally regarded as demeaning occupations ; their humiliating and inescapable segregation and chronic isolation from the rest of the population ; their social and educational deprivation and helplessness ; their abysmal poverty and degenerating backwardness ; all this and more most humiliatingly branded them in the past as "outcastes" or "untouchables" or "depressed classes" or whatever other nomenclature one might ascribe to describe them. It is their present plight of continuing poverty and backwardness stemming from identified historical discrimination, whatever be the religion or faith they presently profess, that the Constitution entitled them to the special protection of reservation. The fact that the search to identify backwardness for the purpose of reservation will invariably lead one to these so called outcastes or the lowest of the low castes or untouchables does not vitiate identification so long as what is sought to be identified is not caste but backwardness.

Poverty by itself is not the test of backwardness, for if it were so, most people in this country would be in a position to claim reservation, *Janki Prasad Parimoo and Ors.* vs. *State of Jammu and Kashmir and Ors.* (1973) 3 SCR 236, 285. Reservation for all would be reservation for none, and that would be an ideal condition if affluence, and not poverty, was its basis. But unfortunately the vast majority of our people are not blesses by affluence but afflicted by poverty. Poverty is a disgrace to any nation and the resultant backwardness is a shame. But the Constitution envisages reservation for those persons who are backward because of identified prior victimisation and the consequential poverty. Poverty invariably results in social and educational backwardness. In all such cases the question to be asked, for the purpose of reservation, is whether such poverty is the result of identified historical or continuing discrimination. No matter what caused the discrimination and exploitation ; the question is, did such inequality and injustice result in poverty and backwardness.

It is possible that poverty to which classes of citizens are reduced making them socially and educationally

backward is the ultimate result of prior discrimination and continuing exploitation on account of their religion, race, caste, sex, descent, place of birth or residence. Identification of their social and educational backwardness with reference to their poverty is valid, if the ultimate cause of poverty is prior discrimination and its continuing evil effects, albeit, by reason of their religion, race, caste etc. Members of religious minorities or low castes or persons converted from amongst tribals or harijans to other religions, but still suffering from the stigma of their origin, or persons of particular areas or occupations subjected to discrimination rooted in religious or caste prejudices and the like or to economic exploitation, forced labour, social isolation or other victimisation may find themselves sinking deeply into inescapable and abysmal poverty, disease, bondage and helplessness. 'The classes of citizens who are deplorably poor automatically become socially backward'. *M.R. Balaji and Ors.* vs. *State of Mysore,* (1963) Supp. 1 SCR 439 at 460. In all these cases, if classes of victims afflicted by poverty and disease are identified as socially and educationally backward, as in the case of the Scheduled Castes and the Scheduled Tribes, by reason of past societal or Governmental or any other kind of discrimination or exploitation, they qualify for reservation. See *Janki Prasad Parimoo and Ors.* vs. *State of Jammu and Kashmir and Ors.* (1973) 3 SCR 236, 299.

Poverty reduces a man to a state of helplessness and ignorance. The poor have no social status. They have no access to learning. Over the years they invariably become socially and educationally backward. They may have no place in society and no education to improve their conditions. For them, employment in services on the basis of merits is a far cry. All these persons, along with other disadvantaged groups of citizens, are the favourites of the law for affirmative action without recourse to reservation. What is required for the further step of reservation is proof of prior discrimination resulting in poverty and social and educational backwardness. It is not every class of poverty stricken persons that is chosen for reservation, but only those whose poverty and the resultant backwardness are traceable to prior discrimination, and whose backwardness, furthermore, is comparable to that of the Scheduled Castes and the Scheduled Tribes. This is a fair and equitable adjustment of constitutional values without placing any undue burden on particular classes of citizens. *State of Uttar Pradesh* vs. *Pradip Tandon and Ors.* (1975) 2 SCR 761 ; *State of Kerala and Anr.* vs. *N.M. Thomas and Ors.*, (1976) 1 SCR 906, 960, 997 ; *Kumari K.S. Jayasree and Anr.* vs. *State of Kerala and Anr.* (1977) 1 SCR 194 ; *K.C. Vasanth Kumar* vs. *State of Karnataka,* (1985) Supp. 1 SCR 352, 399, 400.

Article 16 deals with equality of opportunity in matters of public employment. The kind of backwardness which is required to attract the special provisions protecting the backward classes of citizens under Article 16 in respect of public employment is identical to the social and educational backwardness mentioned in Article 15(4). *M.R. Balaji and Ors.* vs. *State of Mysore,* (1963) Supp. 1 SCR, 439, 474 ; *Janki Prasad Parimoo and Ors.* vs. *State of Jammu and Kashmir and Ors.* (1973) 3 SCR 236. These two Articles are facets of equality specially guaranteed to citizens, while Article 14 prohibits the State from denying to any person equality before the law or the equal protection of the laws. *State of Kerala and Anr.* vs. *N.M. Thomas and Ors.* (1976) 1 SCR 906, 956. Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preferences in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens. Clause (2) prohibits discrimination against any citizen in respect of any public employment 'on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them'. Article 16 thus guarantees equality of opportunity and prohibits discrimination of any kind solely on any one or more of the grounds mentioned in clause (2). Nevertheless, clause (4) of this Article provides that it is open to 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, is not adequately represented in the services under the State'. It is an enabling provision conferring a discretionary power on the State : an ameliorative harmonisation of conflicting norms to stretch to the utmost extent the frontiers of equality ; an emphatic assertion of equality between equals and inequality between unequals so as to achieve the maximum degree of qualitative and relative equality by means of affirmative action even to the point of reservation. It is in the nature of an exception or a proviso to the general rule of equality : *The General Manager, Southern Railway* vs. *Rangachhari,* (1962) 2 SCR 586, 599 ; *M.R. Balaji* (supra) at p. 473 ; *State of Andhra Pradesh and Anr.* vs. *P. Sagar,* (1968) 3 SCR 595 ; *State of Kerala and Anr.* vs. *N.M. Thomas and Ors.* (1976) 1 SCR 906 ; *Akhil Bhartiya Soshit Karamchari Sangh (Railway)* vs. *Union of India and Ors.,* (1981) 2 SCR 185 ; *Triloki Nath and Anr.* vs. *State of Jammu and Kashmir and Ors.,* (1969) 1 SCR 103, 104 ; *C.A. Rajendran* vs. *Union of India and Ors.,* (1968) 1 SCR 721, 730, 733 ; *State of Punjab* vs. *Hiralal and Ors.,* (1971) 3 SCR 267, 272, *T. Devadasan* vs. *The Union of India and Anr.,* (1964) 4 SCR 680. Dr. Ambedkar called it an exception ; see *Constituent Assembly Debates,* Vol. 7 (1948-49) p. 702 (quoted above).

The twin conditions to warrant reservation under Article 16(4) are : backwardness of the chosen classes of

citizens and their inadequate representation in the public services. The backwardness of the classes of citizens mentioned in Article 16(4) is, as stated earlier, of the same degree and kind of social and educational backwardness as postulated in Article 15(4). Article 16(4) is meant for the protection of the Scheduled Castes and the Scheduled Tribes and other comparably backward classes of citizens who are the unfortunate victims of continuing ill effects of identified prior discrimination.

Whether the conditions postulated for reservation are satisfied or not is a matter on which the State has to form an opinion. But the opinion of the State must be founded on reason. The satisfaction on the basis of which an opinion has been formed by the State must be rationally supported by an objective consideration. The State must take into account all relevant matters and eschew from its mind all irrelevant matters, and make a proper assessment of the competing claims of classes of citizens and evaluate their respective backwardness before it comes to the conclusion that particular classes of citizens are so backward and so inadequately represented in the public services as to be worthy of special protection by means of reservation. This must be an objective evaluation of the competing claims for reservation. Any such conclusion must be subject to periodic administrative review by a permanent body of experts with a view to adjustment and readjustment of the State action in accordance with the changing circumstances of the beneficiaries of such action. The conclusion thus periodically arrived at by such administrative reviewing body must necessarily pass the test of judicial review whenever challenged. A *Peeriakaruppan, etc.* vs. *State of Tamil Nadu and Ors.*, (1971) 2 SCR 430. No matter whether such orders are regarded as legislative or executive or which ever nomenclature one may ascribe to it, the test for judicial review laid down in *Shri Sitaram Sugar Company Ltd. and Anr. Etc.* vs. *Union of India and Ors.*, (1990) 1 SCR 909 must necessarily govern consideration of such questions. After an exhaustive review of authorities on the point, a Constitution Bench of this Court stated :

> "The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict, with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it". p. 946.

See also the principle discussed in *Supreme Court Employees' Welfare Association* vs. *Union of India and Anr.* (1989) 4 SCC 187.

Identification of backwardness is an ever continuing process of inclusion and exclusion. Classes of citizens entitled to the constitutional protection of reservation must be constantly and periodically identified for their inclusion and for the exclusion of those who do not qualify. To allow the undeserved to benefit by reservation is to deny protection to those who are meant to be protected. As stated by this Court in *A. Peeriakaruppan etc.* vs. *State of Tamil Nadu and Ors.* (1971) 2 SCR 430 at 444 :

> "... But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest..... It must be remembered that the Government's decision in this regard is open to judicial review."

Any affirmative action must be supported by a valid classification and must have a rational nexus with the object of redressing backwardness. It is much more so where such programmes totally exclude from consideration persons outside the chosen classes without regard to merits because of the set aside quotas. It does not matter whether clause (4) of Article 16, like clause (4) of Article 15, is seen as a proviso or an exception or, in the words of Mathew, J., a legislative device to emphasise the 'extent to which equality of opportunity could be carried, viz., even up to the point of making reservation'. *State of Kerala and Anr.* vs. *N.M. Thomas and Ors.* (1976) 1 SCR 906, 956. *N.M. Thomas* apart, this Court has generally treated clause (4) as an exception or a proviso to the general rule of equality enshrined in Article 16(1). *Rangachari* (supra) ; *M.R. Balaji* (supra) at p. 473 ; *P. Sagar*, (supra) ; *Akhil Bhartiya Soshit Karamchari Sangh (Railway)* (supra) ; *Triloki Nath* (supra) ; *C.A. Rajendran* (supra) ; *Hiralal*, (supra) ; *T. Devandasan* (supra) ; Dr. Ambedkar called it an exception ; see *Constituent Assembly Debates*, Vol. 7 (1948-49) p. 702 (quoted above). Call it what one will–an exception or proviso or what–and semantics apart, reservation by reason of its exclusion of the generality of candidates competing solely on merits must be narrowly tailored and strictly construed so as to be consistent with the fundamental constitutional

objectives. Clause (4), seen in whatever colour, is a very powerful and potent weapon which causes lasting ill effects and damage unless justly and appropriately used. It is not a remedy for all kinks of disadvantages and disabilities and for all classes of people. It is a special and powerful weapon to wield which with less than the very special care and caution and otherwise than in the most exceptional situations, peculiar to extreme cases of backwardness, that the Constitution envisages is to give rise to invidious reverse discrimination exceeding the strict bounds of Article 16(4) and to create hateful caste-prejudices and divisions between classes of people.

Articles 15(4) and 16(4) refer to the same classes of backward citizens. But they do not refer to identical remedies. While Article 15(4) speaks of special provisions for the advancement of backward classes, Article 16(4) expressly permits the State to make reservation of appointments or posts in public services in favour of such classes. It is true that both are enabling provisions allowing the State to adopt such affirmative action programmes as are necessary including reservation of seats or posts. But, unlike Article 16(4), Article 15(4) is not so worded as to suggest that it is exclusionary in character. The 'special provision' contemplated in Article 15(4) is an emphatic reference to the affirmative action which the State may adopt to improve the conditions of the disadvantaged members of the backward classes of citizens. Significantly, Article 15(4) does not specifically speak of reservation, but it has been generally understood to include that power. *M.R. Balaji and Ors.* vs. *State of Mysore*, (1963) Supp. SCR 439. While the State may adopt all such affirmative action programmes as it deems necessary for all disadvantaged persons, any special provision amounting to reservation and consequent exclusion from consideration of all the others in respect of the reserved quota in matters falling outside Article 16(4) must be subjected to even greater scrutiny than in the case of those falling under it.

The concept of equality is not inconsistent with reservation in public services because the Constitution specially says so, but in view of its exclusion of others irrespective of merits, it can be resorted to only where warranted by compelling State interests postulated in Article 16. The State must be satisfied that in order to achieve equality in given cases, reservation is unavoidable by reason of the nature and degree of backwardness. Reservation must be narrowly tailored to that end, and subjected to strict scrutiny.

Affirmative action to redress the conditions of backward classes of citizens may be adopted either by a programme of preferential treatment extending certain special advantages to them or by reservation of quotas in their favour to the total exclusion of everybody outside the favoured groups. The validity of both these measures depends on classification founded on intelligible differentia having rational and substantial nexus with the object sought to be achieved, *i.e.*, the redressal of backwardness. And such differentiation or classification for special preference must not be unduly unfair to the persons left out of the favoured groups.

While preferential treatment without reservation merely aids the backward classes of citizens to compete more effectively with the more meritorious and forward class of citizens, the more drastic measure of reservation totally excludes all classes of people falling outside the backward classes of citizens from competing in the reserved quota of seats or posts. No matter what qualifications they possess and how superior are their merits, these persons not belonging to the preferred groups are prevented from competing with those of the preferred groups in respect of the reserved seats or posts, while candidates belonging to the preferred groups are entitled to compete for any seat or post, whether in the general category or in the reserved quota.

Preference without reservation may be adopted in favour of the chosen classes of citizens by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation to age or other minimum requirements. (See the preferential treatment in *State of Kerala and Anr.* vs. *N.M. Thomas and Ors.*, (1976) 1 SCR 906). Furthermore, it would be within the discretion of the State to provide financial assistance to such persons by way of grant, scholarships, fee concessions etc. Such preferences or advantages are like temporary crutches for additional support to enable the members of the backward and other disadvantaged classes to march forward and compete with the rest of the people. These preferences are extended to them because of their inability otherwise to compete effectively in open selections on the basis of merits for appointment to posts in public services and the like or for selection to academic courses. Such preferences can be extended to all disadvantaged classes of citizens, whether or not they are victims of prior discrimination. What qualifies persons for preference is backwardness or disadvantage of any kind which the State has a responsibility to ameliorate. The blind and the deaf, the dumb and the maimed, and other handicapped persons qualify for preference. So do all other classes of citizens who are at a comparative disadvantage for whatever reason, and whether or not they are victims of prior discrimination. All these persons may be beneficiaries of preference short of reservation. Any such preference, although discriminatory on its face, may be justified as a benign classification for affirmative action warranted by a compelling state interest.

In addition to such preferences, quotas may be provided exclusively reserving posts in public services or seats in academic institutions for backward people entitled to such protection. Reservation is intended to redress backwardness of a higher degree. Reservation prima facie is the very antithesis of a free and open selection. It is a discriminatory exclusion of the disfavored classes of meritorious candidates : *M.R. Balaji* (supra). It is not a case of merely providing an advantage or a concession or preference in favour of the backward classes and other disadvantaged groups. It is not even a handicap to disadvantaged groups. It is not even a handicap to disadvantage the forward classes so as to attain a measure of qualitative or relative equality between the two groups. Reservation which excludes from consideration all those persons falling outside the specially favoured groups, irrespective of merits and qualifications, is much more positive and drastic a discrimination—albeit to achieve the same end of qualitative equality—but unless strictly and narrowly tailored to a compelling constitutional mandate, it is unlikely to qualify as a benign discrimination. Unlike in the case of other affirmative action programmes, backwardness by itself is not sufficient to warrant reservation. What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. Reservation is a remedial action specially addressed to the ill effects stemming from historical discrimination. To ignore this vital distinction between affirmative action short of reservation and reservation by a predetermined quota as a remedy for past inequities is to ignore the special characteristic of the constitutional grant of power specially addressed to the constitutionally recognised backwardness.

The object of the special protection guaranteed by Articles 15(4) and 16(4) is promotion of the backward class. Only those classes of citizens who are incapable of uplifting themselves in order to join the mainstream of upward mobility in society are intended to be protected. The wealthy and the powerful, however socially and adjucationally backward they may be by reason of their ignorance, do not require to be protected, for they have the necessary strength to lift themselves out of backwardness. The rich and the powerful are not the special favourites of the Constitution. Backward they may be socially and educationally, but that is a shame which they have the steam to remove and the Constitution does not extend to them the special protection of reservation. It is not sufficient that the persons meant to be protected are backward merely by reason of illiteracy, ignorance, and social backwardness. If they have, inspite of such handicaps, the necessary financial strength to raise themselves, the Constitution does not extend to them the protection of reservation. The chosen classes of persons for whom reservation is meant are those who are totally unable to join the mainstream of upward mobility because of their utter helplessness arising from social and educational backwardness and aggravated by economic disability.

Any State action resulting in reservation must, therefore, be so tailored as to weed out and exclude all persons who have attained a certain predetermined economic level. Only persons falling below that level must qualify for reservation. This economic level has of course to be varied from time to time in accordance with the changing value of money. See the Government Order upheld by this Court in *Kumari K.S. Jayasree and Anr.* vs. *State of Kerala and Anr.* (1971) 1 SCR 194.

The directive principle contained in Article 46 emphasises the overriding responsibility and compelling interest of the State to promote the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes. They have to be protected from social injustice and all forms of exploitation. This principle must necessarily guide the construction of Articles 15 and 16. All affirmative action programmes must be inspired by that principle and addressed to that end. Whether such action should be in the nature of preferences or by recourse to reservation is a matter on which the State must, by an objective evaluation of the degree and nature of backwardness and with reference to other constitutional principles, come to a conclusion.

The State has a vital interest to uphold the efficiency of administration. To ignore efficiency is to fail the nation. Any step taken by the State in considering the claims of members of the Scheduled Castes and the Scheduled Tribes for appointment to public services and posts must be consistent with the maintenance of efficiency of administration. This principle, as stated in Article 335, must necessarily guide all affirmative action programmes for backward and other disadvantaged classes of people in matters of appointment to public service and posts. Likewise, efficiency being a compelling State interest, it must strictly guide affirmative action in matters of admission to academic institutions, and more so in specialised institutions of higher learning, for in the final analysis efficiency of public administration is governed by the quality of education and the skill of the scholars. To weaken efficiency is to injure the nation. Any reservation made without due regard to the command of Article 335 is invidious and impermissible. *The General Manager, Southern Railway* vs. *Rangachari.* (1962) 2 SCR 586 ; *Akhil Bhartiya Soshit Karamchari Sangh (Railway)* vs. *Union of India and Ors.,* (1981) 2 SCR 185.

Dr. Ambedkar was unequivocal when he declared that reservation must be confined to a minority of the available posts, lest it should destroy the very concept of equality and thus undermine democracy. Any excessive reservation or any unnecessarily prolonged reservation will result in invidious discrimination. What exactly is the total percentage of reservation at a given time is a matter for the State to decide, dependent on the need of the time. But in no case shall reservation overstep the strict boundaries of minority of seats or posts or outlast the reason for it. It must remain well below 50% of available seats or posts. Every reservation must be made with a view to its early termination on the successful accomplishment of its object.

It has been contended that reservation can be made not only at the time of initial appointment to a service, but also at the time of promotion to a higher post. Although this point does not directly arise from the impugned orders, it is too vital an aspect of the concept of reservation under Article 16(4) to be overlooked, and it requires, therefore, to be dealt with, albeit briefly, and particularly in deference to the submissions at the bar. This important question must be considered with reference to the overriding principle of fairness and efficiency of administration.

To be overlooked at the time of promotion in favour of a person who is junior in service and having no claim to superior merits is to cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees. Any such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency.

Article 335 requires that "in the making of appointments to services and posts in connection with the affairs of the Union or of a State" the claims of the members of the Scheduled Castes and the Scheduled Tribes must be considered 'consistently with the maintenance of efficiency of administration'. If that is the constitutional mandate with regard to the Scheduled Castes and the Scheduled Tribes, the same principle must necessarily hold good in respect of all backward classes of citizens. The requirement of efficiency is an overriding mandate of the Constitution. An inefficient administration betrays the present as well as the future of the nation.

'Reservation of appointments or posts' mentioned in Article 16(4) is with reference to appointments 'in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State'. The condition precedent to making any such reservation is the satisfaction of the State as to the inadequate representation of any backward class of citizens in the services under the State. In respect of any such class, it is open to the State to make 'any provision for the reservation of appointments or posts'.

An appointment is necessarily to a post, but every appointment need not necessarily be to a post in a service. An appointment to an ex-cadre post is as much an appointment to a post as it is in the case of a cadre post. The words 'appointments or posts' used in the alternative, and in respect of which reservation can be made, indicate that the appointment contemplated in Article 16(4) is not necessarily confined to posts in the services, but can be made to any post whether or not borne on the cadre of a service. Inadequate representation of any backward class of citizens enables the State to make provisions for the reservation of appointments or posts'.

The word 'post' is often used in the Constitution in the wider sense for various purposes (see for example, Articles 309, 310 (1) and 335). It is in that sense that the words 'appointments or posts' in Article 16(4) should be understood. The reasoning to the contrary in *The General Manager, Southern Railway* vs. *Rangachari*, (1962) 2 SCR 586 was partly influenced by certain concessions made by the respondents' counsel as to the nature of the post contemplated in Article 16(4) and the applicability of reservation to selection posts.

The object of reservation is to maintain numerical and qualitative or relative equality by ensuring sufficient representation for all classes of citizens. In whichever service a backward class of citizens is inadequately represented, it is open to the State to create sufficient number of posts for direct appointments. No matter whether the appointment is made to a cadre post or an ex-cadre post, the State action is beyond reproach so long as the constitutional objective of numerical and qualitative equality of opportunity is maintained by making direct appointments at the appropriate levels whenever inadequate representation of any backward class in the services is noticed by the State.

The initial appointments may be made at various levels or grades of the hierarchy in the service. There is no warrant in Article 16(4) to conclude from the expression 'reservation of appointments or posts' that reservation extends not merely to the initial appointment, but to every stage of promotion. Once appointed in a service, any further discrimination in matters relating to conditions of service, such as salary, increments, promotions, retirement benefits, etc. is constitutionally impermissible, it being the very negation of equality, fairness and justice.

To construe the expression 'post' so as to make reservation applicable at the stage of a promotion by selection or otherwise is to unduly and unfairly discriminate against persons who are already in the

service and are senior and no less meritorious in comparison to the reserved candidates. Promotion by selection, though based on merits, is ultimately governed by seniority, for the concerned rules generally provide that, where merits are equal, officers will be ranked according to their seniority. In the case of promotion by seniority subject to fitness, merits are not entirely disregarded, for even a senior officer can be overlooked in favour of a junior officer, if the former is found to be unfit for promotion. In all promotions, whether by selection or otherwise, merits and seniority are both significantly relevant and reservation of such posts in disregard of these two elements will result in invidious discrimination.

In whichever post that a member of a backward class is appointed, reservation provisions are attracted at the stage of his initial appointment and not subsequently. Further promotions must be governed by common rules applicable to all employees of the respective grades. Reasoning to the contrary in decisions, such as *The General Manager, Southern Railway* vs. *Rangachari*, (1962) 2 SCR 586; *State of Punjab* vs. *Hiralal & Ors.*, (1971) 3 SCR 267; *Akhil Bharatiya Soshit Karmachari Sang (Railway)* vs. *Union of India & Ors.* (1981) 2 SCR 185, is not warranted by the language of the Constitution.

The Constitution does not permit any citizen to be treated unfairly or unequally. To maintain numerical and qualitative equality and thus ensure adequately effective representation of the backward classes in the services, it is open to the State to make direct appointments at various levels or grades of the service, and make appropriate provisions for reservation in respect of such initial appointments. Once appointed to a post, any further discrimination by reservation in regard to conditions of serve including promotion is impermissible. Any deviation from this golden rule of justice and equality is unconstitutional.

Reservation is the extreme limit to which the doctrine of affirmative action can be extended. Beyond the strict confines of clause (4) of Article 16, reservation in public employment has no warrant in the law for it then becomes the very antithesis of equality. While reservation is impermissible for appointment to higher posts by promotion from lower posts, any other legitimate affirmative action in favour of disadvantage classes of citizens by means of valid classification is perfectly in accordance with the mandate of Article 16(1). It is within the discretion of the State to extend to all disadvantaged groups, including any backward class of candidates, preferences or concessions such as longer period of minimum time to pass qualifying tests etc. [see *N.M. Thomas* (supra)].

Reservation affords backward classes of citizens a golden opportunity to serve the nation and thus gain security, status, comparative affluence and influence in decision making process. But it is wrong to see it as a mere weapon to capture power, as suggested at the bar. In a democracy, real power lies in the ballot and it is exercised by the majority. Any attempt to project the concept of reservation under clause (4) as a weapon of aggrandisement to gain power will result in the creation of a meaningless myth and a dangerous illusion which will ultimately distort the constitutional values.

It is possible that large segments of population enjoying well entrenched political advantages by reason of numerical strength may claim "backward class" status, when, on correct principles, they may not qualify to be so regarded. If such claims were to be conceded on extraneous consideration, motivated by pressures of expediency, and without due regard to the nature and degree of backwardness, the very evil of discrimination which is sought to be remedied by the Constitution would be in danger of being perpetuated in the reverse at the expense of merit and efficiency and contrary to the interests of the truly backward classes of citizens who are the constitutionally intended beneficiaries of reservation. In the words of Krishna Iyer, J.:

"....To lend immortality to the reservation policy is to defeat its raison d'tre to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Art. 16(1)....".

Akhil Bharatiya Soshit Karamchari Sangh (Railway) vs. *Union of India & Ors.* (1981) 2 SCR 185 at 203.

The sooner the need for reservation is brought to an end, the better it would be for the nation as a whole. The sooner we redressed all disabilities and wiped out all traces of historical discrimination and stopped identifying classes of citizens by the stereotyped, stigmatised and ignominious label of backwardness, the stronger, healthier and better united we would have emerged as a nation founded on diverse customs, practices, religions and languages but knitted together by innumerable binding strands of common culture and tradition.

GENERAL OBSERVATIONS

It is wrong and unwise to see affirmative action merely as a penance or an atonement for the sins of past discrimination. It is not retributive justice on wrong doers. It is corrective and remedial justice to compensate the victims of prior injustice. It is not merely focussed on reparation for past inequities. It is a forward looking balancing act of reformative social engineering; an architecture of a better future of harmonious relationship amongst all classes of citizens; an equitable

redistribution of community resources with a view to the greatest happiness of the greatest number of people.

It is true that an important aspect of State interest in initiating affirmative action is to correct or remedy the evil effect of inequities stemming from prior discrimination, but the focus in any such action must be on the victims and not on the wrong doers. The constitutional mandate is to rescue the victims of prior discrimination and not to punish the wrong doers. The sins of the past shall not visit upon the present either by allowing its ill effects to continue or by taking retributive action as retaliation upon the wrong doers. The task of nation building is not to open up the wounds of the past, but to allow them to heal by negativing its ill effects and wiping off injustice stemming from it. Any present or continuing discrimination is, of course, remediable or punishable under the law. Removal of inequities is the raison d'etre of any affirmative action.

Discrimination in any form hurts as there is an element of deprivation of the legitimate expectations of classes of people upon whom the inevitable consequences of any such action must necessarily fall. Any unfair and undue deprivation of any class of people is constitutionally impermissible.

Reservation of posts or seats for the benefit of some and to the exclusion of others is inherently unjust and unfair unless strictly brought within reasonable limits. The only legitimate object of excluding the generality of people and conferring a special benefit upon the chosen classes is to redeem the latter from their backwardness.

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

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

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

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

SUMMARY

(1) It is open to the State to adopt valid classification and make special provisions for the protection of classes of citizens whose comparative backwardness the State has a mandate to redress by affirmative action programmes. Any such programme must be strictly tailored to the constitutional requirement that no citizen shall be excluded from being considered on the basis of merits for any public employment except to the extent that a valid reservation has been made in favour of backward classes of citizens.

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

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

(4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as backward classes. To be accepted as backward classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notification, presumed to be satisfied. In the case of the other backward classes of citizens qualified for reservation, the burden is on the State to show that these classes have been subjected to such discrimination in the past that they are reduced to a state of helplessness, poverty and the consequential social and educational backwardness as in the case of the Scheduled Castes and the Scheduled Tribes. In other words, reservation is meant exclusively for the Harijans, the Girijans, the Adivasis, the Dalits or other like "depressed" classes or races or tribes most unfortunately referred to in the past as the "untouchables" or the "outcastes" by reason of their being born in what wrongly regarded as low castes and associated with what was equally wrongly treated as demeaning occupations, or any other class of citizens afflicted by like degree of poverty and degradation caused by prior and continuing discrimination and exploitation, whatever be their professed faith, religion or caste. These classes of citizens, segregated in slums and ghettos, and afflicted by grinding poverty, disease, ignorance, ill health and backwardness, and haunted by fear and anxiety, are the constitutionally intended beneficiaries of reservation, not because of their castes or occupations, which are merely incidental facts of history, but because of their backwardness and disabilities stemming from identified past or continuing inequities and discrimination.

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

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

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

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

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

(10) Once reservation is strictly confined to the constitutionally intended beneficiaries, as aforesaid, there will probably be no need to disappoint any deserving candidate legitimately seeking the benefit of reservation, for there will then be sufficient room well within the 50% limit for all candidates belonging to the backward classes as properly determined on correct principles. In that event, questions such as caste or religion will become merely academic and the competing maddening rush for "backward" label will vanish.

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

(12) Whenever and wherever poverty and backwardness are identified, it is the constitutional responsibility of the State to initiate economic and other measures to ameliorate the conditions of the people

residing in those regions. But economic backwardness without more does not justify reservation.

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

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

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

(16) In the final analysis, poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness has to be eradicated not merely by reservation as aforesaid, but by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self - employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of the law-enforcing machinery, industralisation, construction of roads, bridges, culverts, canals, markets, introduction of transport, free supply of water, electricity and other ameliorative measures particularly in areas densely populated by backward classes of citizens.

CONCLUSIONS:

A. The validity of the impugned Government Orders providing for reservation of posts depends on convincing proof of proper identification of backward classes of citizens by recourse to relevant criteria, such as poverty, illiteracy, disease, unhygienic living conditions, low caste and consequential isolation, and in accordance with correct principles, i.e., with reference to the continuing ill effects of historical discrimination resulting in social and educational backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, and inadequate representation of such classes of citizens in the services under the State, but subject to the overriding condition that all those persons whose means have exceeded a predetermined economic level shall be denied reservation. Amongst the aforementioned backward classes of citizens correctly identified to be qualified for reservation, preference may be legitimately extended to the comparatively poorer or more disadvantaged sections.

B. Reservation of seats or posts solely on the basis of economic backwardness, i.e., without regard to evidence of historical discrimination, as aforesaid, finds no justification in the Constitution.

C. Reservation of seats or posts for backward classes of citizens, including those for the Scheduled Castes and the Scheduled Tribes, must remain well below 50% of the total seats or posts.

D. Reservation is confined to initial appointment to a post and has no application to promotion.

E. It is open to the State to adopt any valid affirmative action programme, otherwise than by reservation, for amelioration of the disabilities of all disadvantaged persons, including backward classes of citizens.

Neither the impugned orders of the Government of India (O.M. No. 36012/31/90-Estt (SCT) dated 13th August, 1990 and O.M. No. 36012/31/90-Estt (SCT) dated 25th September, 1991) nor the material relied upon by it nor the affidavits filed in support of the said orders disclose proper application of mind by the concerned authorities to the principles stated above for valid identification of the backward classes of citizens qualified for reservation in terms of Article 16 of the Constitution of India. The impugned orders are, therefore, unsustainable. The respondent-Government is accordingly directed to reconsider the question of reservation contemplated by Article 16(4) in the light of the aforesaid principles and pass appropriate orders.

.....Sd/.....J.
(T. K. THOMMEN.)
New Delhi,
November 16, 1992.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Civil Writ Petition No. 930 Of 1990

With

W. P. (C) 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 T.C. (C) Nos. 27/90, 82-31/90, 32-33/90, 34-35/90, 65/90, 1/91, W.P. (C) Nos. 1081/90, 343/91, 1362/90, 1094/91, 1087/90, 1128/90, 36/91, 3/91, & W. P. (C) No. 11/92, 111/92, 261/92.

Indra Sawhney Etc. Etc. ... Petitioners

vs.

Union of India & Ors. Etc. Etc. ... Respondents

ORDER

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

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

.....J.
(T.K. THOMMEN)
.....J.
(KULDIP SINGH)
.....J.
(R. M. SAHAI)

New Delhi

November 16, 1992.

ANNEXURE

DR. AMBEDKAR'S SPEECH IN THE CONSTITUENT ASSEMBLY ON 30.11.1948

Now, Sir, to come to the other question which has been agitating the members of this House, viz., the use of the word "backward" in clause (3) of article 10, I should like to begin by making some general observations so that members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity.

Another view mostly shared by a section of the House is that, if this principle is to be operative — and it ought to be operative in their judgment to its fullest extent — there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in

favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind — the three principles, we had to reconcile, — they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of article 10 of the Constitution 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 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity ? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think honourable Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large that it left no room for the rule to operate. I think this is sufficient to justify why the word "backward" has been used.

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

CONSTITUENT ASSEMBLY DEBATES, VOL. 7 (1948-49). PP. 701-702.