

F. No. CBIC-10A60/7/2022-Ad.IIB
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs

Room no. 243E, 2nd Floor, North Block
New Delhi, 12th July, 2022

MINUTES OF THE CADRE CONTROL WORKSHOP HELD ON 20.06.2022 & 21.06.2022
AT IIC, MAX MULLER MARG, NEW DELHI

A cadre control workshop to discuss HR issues of Central Board of Indirect Tax and Customs was held on 20.06.2022 and 21.06.2022 at Indian International Centre, Max Muller Marg, New Delhi. The workshop was inaugurated by the Chairman, CBIC, Shri Vivek Johri, who was the Chief Guest. Smt. Sungita Sharma, Member (Administration), CBIC, presided over the two-day proceedings of the workshop. The meeting was attended by the following officers and representative:

S. No.	Name of the Officer (Shri /Ms.)	Designation
1.	Neeta Lall Butalia	Director General, DGHRD
2.	D.B. Singh	Joint Secretary (SSC)
3.	V. Rama Mathew	Pr. Chief Commissioner, CGST Kolkata
4.	Mallika Arya	Pr. Chief Commissioner, CGST Delhi
5.	S. Kannan	Pr. Chief Commissioner, CGST Lucknow
6.	Ashok Kumar Mehta	Pr. Chief Commissioner, CGST Mumbai
7.	Ranjana Jha	Pr. Chief Commissioner, CGST Bengaluru
8.	Pramod Kumar Agarwal	Pr. Chief Commissioner, Customs Mumbai
9.	Mandalika Srinivas	Pr. Chief Commissioner, CGST Chennai
10.	Srinivas Murty Tata	Chief Commissioner, CGST Pune
11.	Shyam Raj Prasad	Chief Commissioner, CGST Thiruvananthapuram
12.	Ajay Ganesh Ubale	Chief Commissioner, Customs Ahmedabad
13.	Navneet Goel	Chief Commissioner, CGST Bhopal
14.	Suresh Krishnani	Chief Commissioner, Bhubaneswar
15.	Rajesh Sodhi	Chief Commissioner, Chandigarh
16.	Anil Kumar Gupta	Chief Commissioner, Customs Kolkata
17.	B. V. Sivanga Kumari	Chief Commissioner, CGST Hyderabad
18.	Pramod Kumar	Director General, DGPM
19.	Chandra Prakash Goyal	Pr. Commissioner, CGST Jaipur
20.	Manmohan Singh	Pr. Commissioner, CGST Ranchi
21.	G. Ravindranath	Pr. Commissioner, Customs Chennai
22.	Sanjay Mahendru	Pr. Commissioner, CGST Hyderabad
23.	Sunil Jain	Pr. Commissioner, Customs Mumbai
24.	Rimjhim Prasad	Pr. Commissioner, CGST Delhi
25.	Sunil Kumar Sinha	Commissioner Coordination, CBIC
26.	Himabindu Mudumbai	Joint Secretary (Admin.), CBIC
27.	Maneesh kumar	Commissioner, CGST Thiruvananthapuram
28.	Hardeep Batra	Commissioner, CGST Chandigarh
29.	Sucheta Sreejesh	ADG, HRM-I
30.	Shailesh Kumar	ADG, HRM-II
31.	Ruchita Vij	Director, Ad.II, CBIC
32.	Manish Kumar	Additional Commissioner, CGST Delhi
33.	Rajendra Jatav	Deputy Secretary, Ad. II (A&B), CBIC

34.	Sachin Kumar Jain	Under Secretary, Ad. II B, CBIC
35.	Ravish Kumar	Under Secretary, Ad. III A, CBIC

2. At the outset, Chairman CBIC, welcomed all the participants to the workshop of Cadre Controlling Authorities, first of its kind to be held in CBIC. The Chairman laid stress on the need for a vibrant contended workforce, which requires continuous effort on sufficient recruitment at all levels, proper determination of seniority, timely promotion, filling up of vacancies, training, rotation, matters pertaining to vigilance, welfare and Infrastructure. CCAs play a vital role in carrying out the first four functions viz recruitment, fixation of seniority, promotion & filling of vacancies. He informed that there are certain challenges such as lack of clarity in the Recruitment Rules/DOPT instructions, spate of litigation and often conflicting case law, Lack of uniformity among CCAs, insufficient training etc which comes in the way while delivering on these objectives.

3. The Chairman further emphasised that Group B and Group C cadre Officers provides continuity, institutional memory in critical functionality and that, the purpose of this workshop is to get all the CCAs on the same page on most pestering issues, and to prepare an Action Plan and an Annual Calendar for HR issues after the workshop.

4. Member (Admin.), CBIC, in her opening remarks, echoed the sentiments of Chairman CBIC on the purpose and intent of two day workshop and highlighted the importance of the first ever deep-dive initiative into the HR issues. She encouraged the participants to engage in constructive dialogue to build a much-required synergy between the CCAs and the Board. She requested all the participants to make best use of this opportunity to address, discuss and resolve pending HR issues in respective CCAs.

5. Direct Recruitment

JS (Admn) started the workshop with a presentation on Direct Recruitment through SSC. She focused on the number of vacancies in posts which are predominantly or completely DR posts. She highlighted the declining trend of projection of vacancies for CGLE over last four years and requested all CCAs to correlate the DR vacancies in their jurisdiction with vacancies being projected. Outlining the steps taken by the Board to fill the DR vacancies, she informed as follows:

- Board has been maintaining a very close liaison with SSC Headquarters
- DGHRD developed a module for collection and collation of preferences from candidates allocated to CBIC by SSC. The module is already being used for CGLE 2019. Zonal allocation for CGLE 2019 is expected to be completed by mid-July 2022.
- Amendment has been initiated in Recruitment Rules of Executive Assistant to facilitate Direct Recruit in Executive Assistant post through CGLE.
- After much persuasion by the Board, 2940 of the 7000 plus deemed abolished posts in the Grade of Havaldar have been revived and SSC agreed to club examination for this grade with that of MTS. Proposal for revival of remaining Havaldar posts is under consideration.

There was also a discussion on considering recruitment of the proposed Agniveers into suitable posts under CBIC.

JS (Admn) conveyed the following expectations from CCAs to facilitate Direct Recruitment:

- Accurate and timely projection of vacancies:
 - Correlation of Direct Recruit vacancies with vacancies being projected
 - Initial projections to be accurate as SSC does not accept any revision

- Break up of vacancies – horizontal and vertical reservation
- Timely response to DGHRD requests for data
- Steps to speed up joining process, including medical examination and testing physical standards.
- Arrangements to ensure timely completion of Physical Standards Testing for candidates to be shortlisted by SSC for Havaladar post, for which DGHRD has already circulated draft SoP.

(Action: All CCAs, Nodal Section in Board : AD III B)

6. Expectations of SSC from the user Department

The Staff Selection Commission (SSC) was represented by Shri D.B. Singh, Joint Secretary and Shri M.L. Hirwal, Director EDP. While indicating the recruitment of Havaladars clubbed with MTS as one of the biggest challenge CBIC have at hand currently, they highlighted the expectations of SSC from CCAs. They informed that the exam is computer based followed by Physical Standard Test (PST), which will be conducted by the concerned CCAs. The results of the PST will have to be uploaded on the Web-tool of SSC. The representative of SSC informed that the data should be carefully verified before uploading. They indicated the tentative timeline for each activity of the recruitment process and asked CCAs to be ready to carry out PST in Nov-Dec 2022. Further, for document verification which is a critical part of the entire recruitment process, it was advised to constitute specific teams who will check the documents of the candidates. JS (Admn) requested SSC to conduct training on the Webtool, to which JS (SSC) agreed.

(Action: All CCAs, Nodal Section in Board : AD III B)

7. Data Collection by DGHRD

ADG (HRM-II), DGHRD informed the house that collection of data pertaining to Group B and Group C cadres, in matter of vacancy/DPC, has been automated and every CCA should ensure that data in every field of the report in the module is sanitized before being fed into the module. He expressed concern over the fact that there have been instances where incomplete data has been uploaded. He reiterated the fact that the data collection has been automated centrally so that the CCAs are not burdened with reports. Therefore, it becomes all the more imperative and responsibility of the CCAs to upload correct data.

(Action: All CCAs)

8. PWD Reservation

Mr. Yogpal Singh (Pr. ADG, NACIN) made a presentation and informed the house that earlier, reservation in PwD was there in direct recruitment only and now, this has been made applicable in promotions as well vide DoPT OM issued in May 2022. He informed the CCAs to follow the notification of Jan 2021 regarding eligibility of Persons with Benchmark Disabilities (PwBDs) for various posts, along with notifications issued by the Board from time to time.

(Action: All CCAs)

9. Compassionate Appointments

JS (Admn), while briefing on compassionate appointments, stated that every CCA should review the status of pending applications for compassionate appointment and ensure that the work in this regard is up to date. The updated information is essential for Board to examine the need of seeking special dispensation for accommodating compassionate appointments, applicants received due to covid-related deaths. She requested all CCAs to share updated data with Board.

(Action : All CCAs, Nodal Section in Board : AD III B)

10. Probation and Confirmation

JS (Admn) informed the house that maximum permissible probation period is double the normal prescribed period of probation. The officer will be deemed to have successfully completed the probation period if no order confirming, discharging or reverting the officer is issued within prescribed period, which is eight weeks after expiry of double the normal period of prescribed probation. She informed about cases of deemed confirmation which came to the notice of the Board and that there are Inspectors who joined in 2018 and are required to clear the exam, to get confirmed in 2022. Inputs have already been sought in this regard from all CCAs vide letter dated 17th Jan 2022

JS (Admn) requested all CCAs to review the status of probation and confirmation of officers and issue notices / advisories/ warnings in time to candidates wherever required, to ensure timely action, so that there are no officers working in the Department without being confirmed into the service and to avoid cases of deemed confirmation.

(Action : All CCAs, Nodal Section in Board : AD III A)

11. Casual Labourers and Related Issues

JS (Admn) informed the house that the engagement of Casual Labourers (CLs) has been banned since 1988. Regularization of CLs is governed by DoPT OM of 1993 and 2006. CBIC has conducted pan-India exercises to examine cases of CLs eligible under these two OM as well Scheme for regularisation of Part Time CLs (PTCLs). She also informed that Hon'ble High Court of Madras vide Order dated 22.12.2020, directed to regularise 36 PTCLs, relaxing education qualification to VIII standard. The Special Leave Petition filed challenging this order is presently *sub-judice* in Supreme Court.

With regard to litigations, she informed the CCAs to issue detailed speaking orders and also that there is no provision for regularisation of retired / expired CLs. Regarding court directions in some cases to regularise those CLs considered ineligible by Department as per DoPT guidelines, she informed that specific approval of DoP&T and DoE is required on a case-to-case basis. She further informed that no outsourced employee can be regularized as there are no such instructions issued by DoP&T.

(Action: All CCAs)

12. Reservation in Promotion

Commissioner (Coordination) gave an overview of the pending court cases on the issue of reservation in promotion including catch-up rule and own-merit in promotions. He briefed the house about all the past judgments on the issue of reservation in promotion, including that of M. Nagaraj and Jarnail Singh case. He also discussed the various O.M.s issued on the issue of reservation in promotion from time to time. Further, DoPT O.M. dated 12.04.2022, an outcome of recent judgment in Jarnail Singh case, was also discussed. He requested all CCAs to following the conditions enumerated in O.M. dated 12.04.2022, while implementing the policy of reservation in promotions. This was a knowledge transfer session.

There was a discussion with the CCAs on grant of Catch Up Rule and Own Merit in promotions in Group-B and Group-C cadres.

13. Presentation by ISTM

Introduction on 'Roster and Register' was given by the representatives of ISTM. They informed that Roster is drawn for small cadres, where cadre strength is below 13 and for large cadres where the strength is 14 or more, register is drawn. Further, it was clarified that method of recruitment determines the preparation of Roster/Register. For both Direct Recruits and Promotion Recruits, separate Rosters/Registers have to be maintained. They have explained that 'UR' means Unreserved which includes both General category officers and officers of any reserved category who are in the final list on Own Merit. The definition of Horizontal Roster (drawn for Persons with Benchmark Disability and Ex- serviceman vacancy) and L-shape Roster was also explained in brief. The ISTM team offered training to Departmental officers, if required by any CCA.

Consequent to the session by the ISTM team, all CCAs were advised to have the Rosters/Registers in place at the earliest, if not done yet and also have a recruitment plan for all cadres, ready by the 1st of January, each year.

(Action: All CCAs)

14. On completion of presentation by ISTM representatives, it was the time for open house discussions, to cover-up minor HR issues, not covered under Agenda. There was discussion on 2 specific issues:

(i) Manpower allocation to SEZ (Mumbai): Mumbai Customs, General raised the issue about posting of Officers to SEZ. DGHRD informed that these posts fall under the purview of Ministry of Commerce, which were earlier being filled from the Officers of other departments also. However, the job profile of these posts deals exclusively in Customs related work; these posts are presently being filled from the Customs Officers of CBIC. Mumbai Customs inquired that whether these posts can be treated as in-cadre posts and regular recruitment can be taken up against these posts. It was further enlightened that divergent practices are being followed by different CCAs when it comes to posting of Officers for the intended work. DGHRD suggested calling for data from the respective CCAs regarding divergent practices being followed, so that same can be analyzed in order to arrive at the final decision.

(Action: DGHRD)

(ii) Irregularities in Proforma Promotions: The issue of divergent practices being followed by different zones in granting Proforma promotion from Inspector to Superintendent when the officer is on deputation was also discussed. In order to ensure uniformity across CCAs, Board was requested to issue a general circular in this regard.

(Action: Board)

(iii) JS (Admn) discussed that as per DoPT OM on EWS quota, the unfilled EWS quota vacancies of a year should not be carried forward. She informed that clarification was sought by a zone on what should be done if EWS quota remains unfilled due to non-availability of eligible candidate. She stated that as EWS point in reservation register is drawn out of Un-reserved posts, in case an EWS quota vacancy remains unfilled due to non-availability of eligible candidate, the same has to be treated as unreserved vacancy and filled up accordingly, as the same cannot be carried forward.

(Action: All CCAs)

15. Recruitment Drive

JS (Admn) mentioned that Direct Recruit vacancies reported to SSC and details of joining of candidates allotted by SSC are already being sought by Board. She requested CCAs to provide information in relation to the recruitment drive, taking vacancies as on 1st Jan 2022 (As per DGHRD Half yearly Brochure) as the basis for following provisions.

- To map Direct Recruit vacancies with vacancy reported to SSC
- To provide details of other modes of local recruitment, including post wise number of vacancies earmarked for each of the following modes of recruitments, recruitments done till end of June 2022, planned for rest of the year and vacancies advertised / conveyed to local recruiting agency
 - Compassionate Appointments
 - Sports Quota recruitments
 - Local Direct Recruit – Eg. Driver, canteen posts
- To plan for/ account for balance / gap in DR vacancies, if any
- Monthly report on promotions:
 - Vacancies in PR quota
 - Promotions made to various PR quota posts during the month
 - Progressive figure up to the end of that month and
 - Balance planned during the year

(Action : All CCAs, DGHRD, Nodal Officer in Board : JS (Admn))

16. Promotion in Group B Non- Gazetted and Group C

JS (Admn) made a presentation on the inter-se seniority and discussed the DoP&T OM of 1986, judgments of N.R Parmar (dated 27.11.2012) and Meghachandra (dated 19.11.2019) in detail. She informed the house that while drawing the seniority of cadres, broadly, the following DoPT OM's need to be applied for the different timelines.

- a. 01.03.1986 to 27.11.2012 : {DoP&T OM No. 22011/7/86-Estt(D) dated 03.07.1986, DoPT O.M. No.35014/2/80-Estt.(D) dated 7.2.1986 read with OM No. 9/11/55-RPS of 1959}
- b. 27.11.2012 to 19.11.2019 : {DoP&T OM No. 20011/1/2012-Estt. (D) dated 04.03.2014}
- c. 19.11.2019 onwards: {DoP&T OM No. 20011/2/2019-Estt. (D) dated 13.08.2021} will apply

She informed the house that DoPT OM of 2021 provides a very clear formulation regarding the applicability of the above listed DoPT OM's in different periods and scenarios. There should not be any deviation from the relevant instructions inherent in the DoPT OM's.

Regarding Seniority of DRs of CGLE joining in subsequent years, she invited attention of CCAs towards Board letter No. 32022/110/2019-Ad.IIIA dated 22.11.2021, which communicated the principles laid down to fix seniority in such cases, in consultation with DoP&T.

Regarding seniority of ICT officers, it was informed that officers joining on ICT are to be placed below all officers appointed regularly to the grade on the date of his / her appointment on transfer basis. In this regard, Board instructions to be read together with DoP&T OM's applicable to the relevant years. For instance, in 2014 OM of DoPT on inter se seniority, there is a provision that the initiation of recruitment process for DR / PR would be deemed to be the initiation of recruitment process for the other mode as well. Hence, the date to be reckoned for determining seniority of DR and PR to be correlated with date of joining of ICT transferees.

She informed that in one case relating to Delhi zone (Amit Kumar / Yash Rattan), involving seniority of ICT officials, SLP has been filed in Hon'ble Supreme Court of India and pending currently.

(Action: All CCAs)

17. D Raghu Judgement

JS (Admn) referred to Board's letter issued on 2nd June, 2022 regarding implementation of D Raghu judgement which relates to date of effect of Cadre Restructuring 2001 and applicability of RRs of STA, 2003 and Inspector, 2002. She invited attention of CCAs to the discussion portion of D Raghu judgement, wherein Hon'ble Supreme Court analysed various letters relating to CR 2001 and stated that a conscious decision was taken by the Department not to fill up vacancies based on restructuring and to effect promotion to Inspector post, based on new RRs. From this discussion, it can be seen that Hon'ble Apex Court's reliance was on intent of Govt. She, therefore, stated that the same analogy may not apply to CR 2013 wherein it was clearly stated that pending notification of RRs, newly created /redesignated posts are to be filled up based on DoPT guidelines on RRs.

(Action: All CCAs)

18. Executive Assistants- One Time Relaxation (OTR)

JS (Admn) discussed about the 72% vacancies in EA grade and how increase in qualifying service from 3 years to 10 years in RR of EA, 2015, without protection clause, led to this situation. She informed that Board's efforts to incorporate protection clause in the RR of EA did not fructify, however, a proposal for One Time Relaxation was sent to DoP&T with approval of Revenue Secretary. DoP&T agreed to provide relaxation to all such TAs who were in position as on 28.09.2015 (date on which the new RR of EA was notified) subject to consultation with UPSC. UPSC has sought further data which the CCAs were requested to provide urgently.

She invited attention of all CCAs to the following important points regarding OTR for EA:

- For method of recruitment, in col 10 of RR of EA 2015, English version has % of posts, Hindi version has % of vacancies. DoP&T guidelines prescribe % of vacancies. Hence, all CCAs should adopt % of vacancies and consider 60% of vacancies arising after 28.09.2015 as Promote Recruit vacancies.
- As EA became a 40% Direct Recruit and 60% Promote Recruit post w.e.f. 28.09.2015, all vacancies as on 27.09.2015, can be considered Promote Recruit vacancies

Following details sought by UPSC, through DGHRD to Board, shall be provided within a week

- Vacancy year for which relaxation is required
- Exact amount of relaxation required
- List of officers for whom relaxation is required, with seniority list
- No. of live vacancies (Year-wise vacancies, if applicable)

(Action: All CCAs, DGHRD, Nodal section in Board : AD III B)

19. All India Seniority List of Inspectors

Commissioner (Coordination) made a presentation on the subject. While informing the house about disparity in Group B cadres, he floated an idea of All-India Seniority List of Inspectors

from 2003 onwards. The house discussed the idea and it was decided that a Committee may be constituted to understand the feasibility of this proposal.

(Action: DGHRD, Nodal Section in Board: O/o Commissioner (Coord))

20. E-Seva Vivad Portal

ADG, DG Systems elaborated the effective utilization of the portal through a presentation. He indicated that all the CCAs should use this module for services related to CAT/court cases (which also includes vigilance cases). He suggested nominating two Nodal officers (one main Nodal and the other Link officer) from every CCA.

(Action: All CCAs, DG Systems)

21. Group B HR issues, Familiarization Session

A hand out on Pankaj Nayan Case, Zone of Consideration clarification, issue related to P. Ayamperumal and M Subramaniam, stepping up of pay, 3 months relaxation in service criteria for promotion, as per DoP&T O.M. dated 12.08.2021 and MACP issues was circulated to all the delegates by Deputy Secretary, Ad.II (A&B). While giving stepwise detailed background of all these HR issues, the current scenario in these cases was discussed in depth. During the session, all CCAs were advised to complete the exercise as advised and envisaged in the Board letters dated (i) 11.03.2022 on DoP&T O.M. dated 12.08.2021 and (ii) letter dated 24.03.2022 on in-rem extension of benefit of Pankaj Nayan Case to all similarly situated persons urgently, followed by reports to Board.

(Action: All CCAs, Nodal section in Board : Ad.IIA&B)

22. Presentation by Designated Groups

(a) A presentation was given by the Designated Study Group on the issue of Cadre Controlling Authority in Nagpur, Aurangabad and Nasik Commissionerates. The present establishment vis-à-vis Cadre Controlling Authorities were discussed and found that Group B Officers of Nagpur are under the administrative control of Bhopal CCA, while Mumbai is CCA for Group B Officers of Aurangabad and Nasik Commissionerates. For Group C (Ministerial post) of Nagpur, Pune is the CCA. It was further informed that though Aurangabad Commissionerate is not CCA but Havaldars which is now a Group C Post is being handled by them. In order to remove these anomalies, it was proposed to designate Nagpur as CCA for these Commissionerates, however, in view of the challenges in seniority lists and promotions, it was felt appropriate to set up a Committee, to examine and chalk out the impact analysis for feasibility of creation of Nagpur as CCA & related issues. The report of Committee shall be shared with the Board within a month, for taking a final call in the matter.

(b) A presentation on the issues arising on promotion to Steno Grade in the intervening period between date of order restructuring Steno grades of 2010 and date of notification of RRs for revised grades was given by CGST Bengaluru Zone. The following points were discussed

1. Which RR to follow
2. Qualifying Service
3. Effective date of promotion
4. Status of Stenographers who joined between 2010-2015

It was evident from the discussion that variant practices were being followed by the CCAs. A suggestion for OTR in the lines of promotion to EA was suggested. It was decided that the group

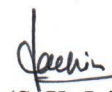
will compile the various practices being followed across zones and share with Board along with solutions suggested by the group.

(c) Presentation was made by DGPM on promotion to Executive Assistant after Cadre Restructuring 2013 in Directorates. It was decided that DGPM would collect data from other Directorates and prepare a comprehensive proposal, with impact assessment, for Board's perusal.

(Action: Designated Study Groups, Nodal section in Board: Ad.III B)

23. The workshop was concluded with the vote of thanks by ADG, DGHRD (HRM-II). Respective sections that have to take actions are directed to send their compliance report to the nodal section within a period of one month for timely action on the pending issues.

24. This issues with the approval of competent authority.



(S. K. Jain)

Under Secretary to the Govt. of India

Tele: 23095584

Copy to:

- (i) The PPS, Chairman, CBIC, North Block, New Delhi
- (ii) The PPS, Member (Admin), North Block, New Delhi
- (iii) The Joint Secretary (Admin), CBIC, North Block, New Delhi
- (iv) All Cadre Controlling Authorities of CGST and Customs zone, CBIC
- (v) The ADG, Directorate General of Human Resource Development (HRD)
- (vi) The ADG, Directorate General of Systems & Data Management – CBIC

Copy also to:

- (i) The Web Master, with a request to upload this letter on official website of CBIC.



(S. K. Jain)

Under Secretary to the Govt. of India

Direct Recruitment (SSC related)

By

Himabindu Mudumbai

JS Admn.

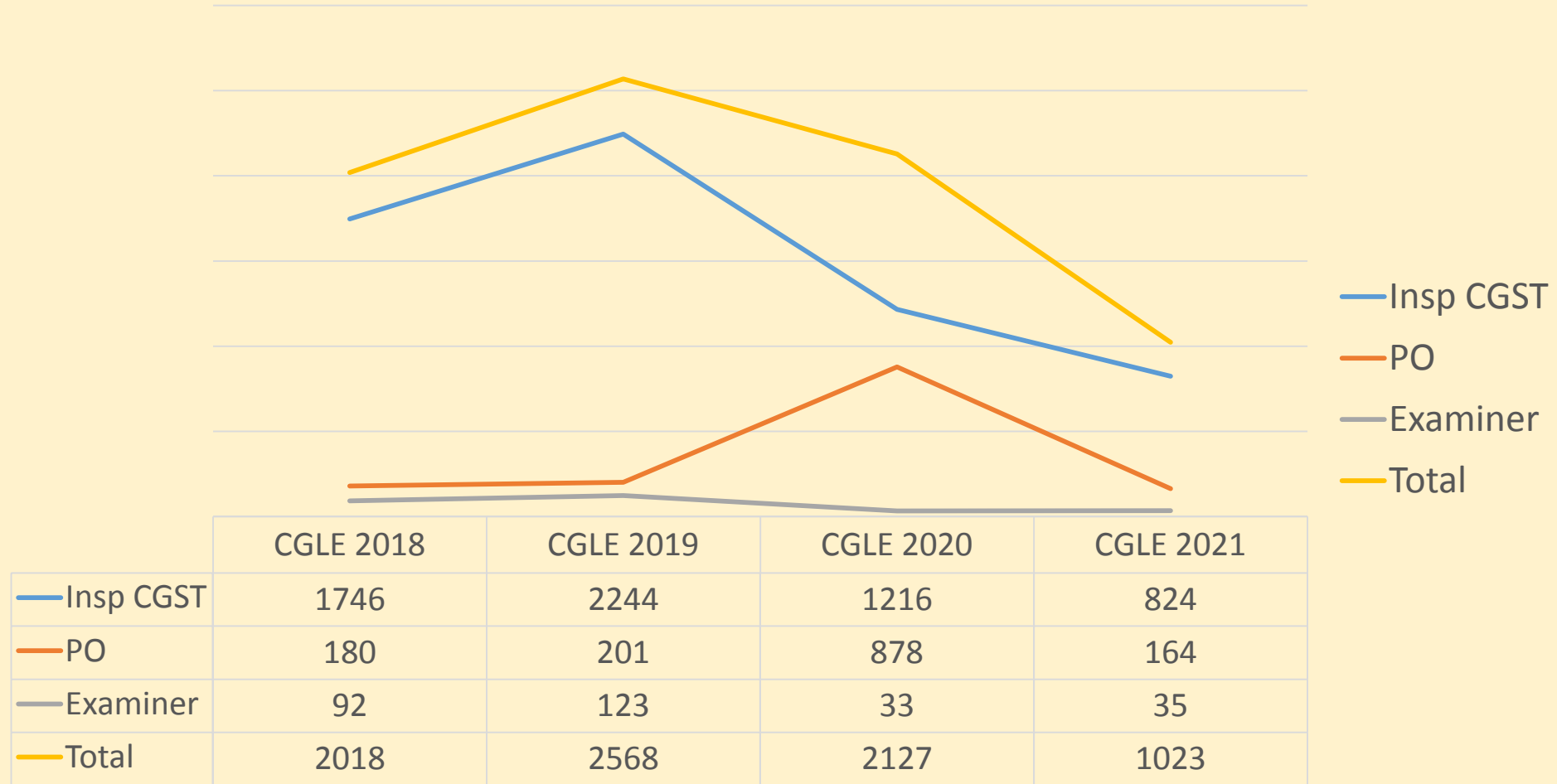
DR Vacancies : A perspective

- Group B Non-Gazetted and Group C vacancies as on 1.1.2022 are app. 33K (57% of SS)

Post	SS	WS	Vacancy
Group B Non Gazetted	31313	14206	17107
Inspector	25203	12432	12771
Executive Assistant	4850	1322	3528
Others	1260	452	808
Group C	26342	10573	15769
Havaladar	8690	704	7986
Tax Assistant	6432	3778	2654
Driver (Grade-I, II and III)	1299	510	789

DR Vacancies : A perspective

A declining trend in projection of vacancies



DR Vacancies : A perspective

Post	Vacancies (As on 1.1.22)	CGLE 2018	CGLE 2019	CGLE 2020	CGLE 2021	Total Vacancy projection	DR Vacancy (Vacancies - 10 % of SS)	DR Vacancy (Vacancies -10% of vacancies)
Insp CGST	9403	1746	2244	1216	824	6030	7339	8463
PO	2230	180	201	878	164	1423	1936	2007
Examiner	1138	92	123	33	35	283	979	1024
Total	12771	2018	2568	2127	1023	7736	10254	11494

Gap between vacancies and vacancy projection, even presuming 10% of SS represents PR quota and all PR posts are vacant, taking only balance as DR vacancies

Steps taken by Board for DR

- **Recruitment through SSC : Role of Board**

- Communication of Vacancies projected by CCAs (through DGHRD) to SSC
 - Inspector (GST, PO and Examiner), TA, Steno, Hindi Translators
 - Havalgars - centrally by Board to SSC
 - MTS - by CCAs to Regional offices ***State / UT wise***
 - SSC opens a very small window at a short notice to collect and upload vacancies
 - [SSC Calendar for 2022](#)
- NOC from Surplus Cell of DoPT (For above posts, as well as other posts recruited locally like those of Canteen staff)
- Zonal Allocation and handing over dossiers

Steps taken by Board for DR

- Close liaison with SSC Headquarters
- Zonal allocation
 - Automated module of DGHRD for collection and collation of preferences
 - CGLE 2019 :Final preferences by candidates ready within a month of declaration of result
 - Zonal allocation expected to be completed by Mid-July 2022
- Amendment in RR of EA to facilitate DR through CGLE

Steps taken by Board for DR

Havalдар Recruitment

- No DR to Havalдар post after merger of Sepoy with Havalдар in CR 2013
 - 7986 vacancies against SS of 8690, as on 1.1.2022
 - 7000 deemed abolished posts
 - Earlier proposal of MoU to conduct Havalдар exam on payment basis, involved an annual recurring expenditure of Rs. 150 cr.
- SSC agreed to our proposal to club Havalдар exam with that of MTS
 - Similar eligibility criteria in RRs except physical standards for Havalдарs
 - **3603 vacancies** advertised for 2021 Exam
 - CBIC to conduct Physical Standards Test for 6 times the vacancies
- Proposal to revive posts of Havalдарs in a phased manner
 - **2940 posts revived** in first phase prioritizing requirements of DGGI, DRI and Customs
 - Revival of balance posts under consideration

Expectations from CCAs

- Accurate and timely projection of vacancies:
 - Correlation of DR vacancies with vacancies being projected
 - Initial projections to be accurate as SSC does not accept any revision
 - Break up of vacancies – horizontal and vertical reservation
 - Timely response to DGHRD requests for data
- Pre-appointment formalities
 - Board and DGHRD efforts resulted in reduction of time taken for zonal allocation
 - CCAs requested to speed up joining process, including medical examination and testing physical standards

Expectations from CCAs

- Physical Standard Test (PST) for Havaladar posts
 - SSC would allot 6 times the vacancies for PST, based on first level of Exam (Computer Based Examination)
 - Final result would be declared based on result of PST shared by CBIC field formations
 - First time that CBIC is involved in selection process, before final result
 - Arrangements to ensure timely completion of PST
 - Min. one location in each state and more than one location in states such as UP, Delhi and Bihar, from where more candidates are expected
 - While candidates can be called to any location from anywhere for PST, endeavour is to call them for PST to the nearest possible location
 - SOP under finalisation – uniform and transparent process

To be continued...

SSC Calendar for 2022

Name of Exam	Date of Advertisement	Date of receipt of SSC Letter seeking vacancies (Actual / Projected)	Due date for conveying vacancies
CGLE 2021	23.12.2021	21.12.2021	22.12.2021 to 12.01.2022
MTS and Havaladar, 2021	22.03.2022	29.03.2022	07.04.2022 (For MTS to Regional Offices)
Jr and Sr Hindi Translators Exam 2021	22.08.2022	Aug 2022	---
Steno Grade I and II Exam 2021	05.12.2022	Dec 2022	---



Direct Recruitment

By

Himabindu Mudumbai

JS Admn.

Scheme of Presentation

- Compassionate Appointments
- Probation and Confirmation
- Casual Labour related issues

Compassionate Appointment

- Data collected to examine need for special dispensation in view of covid.
 - Pending applications
 - Unfilled vacancies
 - No compassionate appointments carried out in a few zones
- Updated data required to examine need for spl. dispensation in view of covid
- System in place to comply with DoPT OM of Aug 2021
 - URN
 - Likely vacancies
 - Point based merit system

Confirmation on completion of probation



Confirmation on completion of Probation

- Probation should not be extended for more than one year
- Maximum permissible probation period is double the normal prescribed period of probation.
- The officer will be **deemed to have successfully completed** the probation period if no order confirming, discharging or reverting the officer is issued within prescribed period
 - Such order to be issued within eight weeks after expiry of double the normal period of prescribed probation

Confirmation on completion of Probation

- DR Inspectors in seven zones have been working for a period of more than 4 years and are yet to clear departmental exam
- DR Inspectors deemed confirmed in two zones
- Those who joined between 2018 and 2021 and still have option to avail additional chances.
 - If timely action not taken for those who joined in 2018 – would avail undue benefit of deemed confirmation without clearing dept exams

Confirmation on completion of Probation

- Inputs sought vide letter dated 17th Jan 2022 :
 - Verification of two sets of data furnished to DGHRD
 - One reporting compliance with DoPT OM
 - Another reporting Inspectors deemed confirmed / continuing on probation without clearing departmental exam
 - Comments on how DOP&T OM dated 11.03.2019 is fully complied with when Inspectors have been continued on probation beyond 4 years without clearing the mandatory departmental exam.
- Lapses identified & action taken / proposed to avoid recurrence of such lapses and to ensure better monitoring.

Casual Labourers

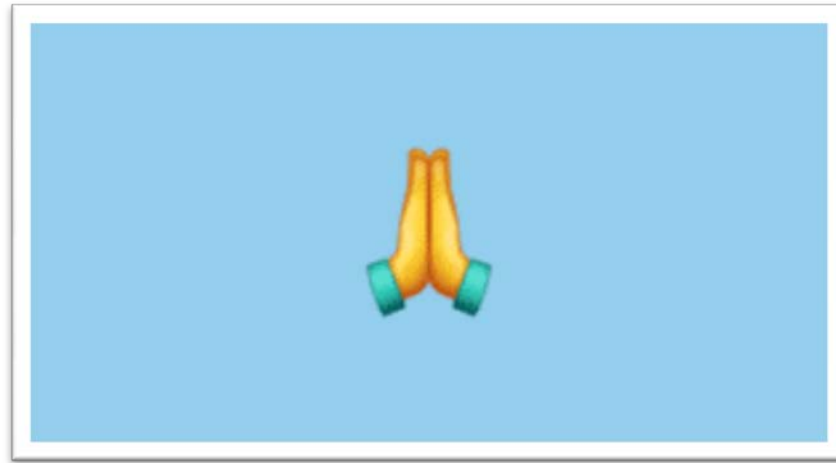
- Engagement of CLs on daily wages [banned](#) in 1988
- [Regularisation of CLs](#)- DoPT OM of 1993 and 2006
- [Scheme](#) for regularisation of Part Time CLs in CBIC
- Expectations from CCAs:
 - Detailed and reasoned speaking orders
 - Case-to-case DoPT/ DoE approval to be sought through Board, despite precedence, in case of finalized court orders to grant TS / regularise CLs, otherwise ineligible as per DoPT guidelines

CL related litigations : Some observations

- Non-issue of speaking orders on representations
- Speaking orders not being detailed and reasoned
- Appeal in higher courts when CAT order was just to issue speaking order based on applicable law and rules
- Applying Board directions in one particular case to another case by CCAs, considering the same similarly placed
 - Consultation with DoPT is a must when directions, given to regularise a CL, are not in line with DoPT guidelines
- Outsourced employees- There is no guideline for grant of temporary status/ regularisation to outsourced employees



Thank You



Ban on Engagement of CLs

- The engagement of casual workers on daily wages was banned in 1988
 - Persons on daily wages **should not be** recruited for work of regular nature
- Board reiterated the same in 2002
 - work for which no regular posts have been created/ sanctioned may be outsourced through service providers/ contractors.



Regularisation of CLs- DoPT OM's of 1993 and 2006

- Two proposals of CBIC for regularisation under 1993 scheme
 - 152 CLTS (in 2015) and 64 CLTS (in July 2020)
 - Approvals conveyed to CCAs
- No CL under CBIC found eligible for 2006 scheme
- CL-TS, eligible for regularization, but retired/ expired
 - No provision exists for regularization of retired/expired CL-TS
 - CCAs requested to indicate reasons for not considering regularisation of such eligible CL-TS before their death/ superannuation
- CLs **considered ineligible** for regularisation, approaching legal fora
 - wherever department was directed to regularise such ineligible CLs, action to taken in consultation with DoLA, DoPT and DoE



Scheme for regularisation of Part Time CLs in CBIC

- In Rita Mary and Others case, Madras HC ordered CBIC to formulate a scheme to regularise PT-CLs
- A scheme formulated in 2020 with the following eligibility conditions :
 - 10 years continuous engagement as PTCLs as on 19.07.2011
 - Educational and other qualifications as per RRs of Group "C" post considered for regularisation
 - Should not exceed the age prescribed in RR of the post, on the date of initial engagement
- Scheme extended to 135 CLs covered in the 23 WPs of Madras HC order

Scheme for regularisation of Part Time CLs in CBIC

- Extension of scheme to similarly placed CLs:
 - Based on data collected from CCAs, a proposal moved to DoPT to regularise 54 PTCLs found eligible (Out of 144 claims sent by CCAs).
- The regularisation under the scheme is subject to Education Qualification as per RRs – viz. 10th pass
 - HC of Madras (Order dt 22.12.2020) directed to regularise 36 PTCLs relaxing education qualification to VIII standard.
 - Above order challenged in SC by filing SLP and stay obtained on order dated 22.12.2020. Currently sub-judice



Multi Tasking (Non-Technical)
Staff, and Havaladar (CBIC &
CBN) Examination, 2021

MTS and Havaladar Examination, 2021

- ❖ Notice of Examination: 22-Mar-2022
- ❖ Online Applications: Up to 30-Apr-2022
- ❖ Number of applicants: About 39 Lakh
- ❖ Vacancies
 - ❖ MTS: 3698
 - ❖ Havaladar in CBIC and CBN: 3603
 - ❖ Total Vacancies: 7301
- ❖ Age Limit1: 18-25 years
- ❖ Age Limit2: 18-27 years
- ❖ Educational Qualification: Matriculation

MTS and Havaladar Examination, 2021

- ❖ Scheme of Examination:
 - ❖ Computer Based Examination (Stage-1)
 - ❖ PET/ PST for Havaladar (Stage-2 by CBIC/ CBN)
 - ❖ Paper-II (Descriptive: Stage-3)
 - ❖ Document Verification (Stage-4)
- ❖ Number of candidates to be shortlisted for PET/ PST:
6 times the number of vacancies.
- ❖ Region-wise count of candidates will be informed to CBIC.
- ❖ CBIC need to schedule PET/ PST and inform Centre-wise/ day-wise/ gender-wise count of candidates scheduled in various PET/ PST Centres.
- ❖ SSC will allocate PET/ PST Centre to candidates and issue Admit Cards on its website.
- ❖ CBIC will conduct PET/ PST.

MTS and Havaladar Examination, 2021

- ❖ Result of PET/ PST will be updated on the [Web-tool](#) provided by SSC.
- ❖ Approximate timelines:
 - ❖ CBE: Scheduled from 05-Jul-2022 to 26-Jul-2022
 - ❖ Result of CBE: 2-3 months from the exam completion.
 - ❖ PET/ PST can be scheduled in Nov-22.
 - ❖ Paper-II: Nov-22
 - ❖ Result of Paper-II: 2-3 months
 - ❖ DV/ Final result: Mar/ Apr-2023
- ❖ Special focus on:
 - ❖ Candidates exempted from PET.
 - ❖ Relaxation in Height/ Chest.
 - ❖ Temporary unfit candidates.
- ❖ Dossiers of PET/ PST to be handled by CBIC.

Thank You



भारत सरकार,
कार्मिक, लोक शिकायत तथा पेंशन मंत्रालय,
कार्मिक एवं प्रशिक्षण विभाग,
कर्मचारी चयन आयोग,
ब्लॉक सं-12, केन्द्रीय कार्यालय परिसर,
लोधी रोड, नई दिल्ली -110003.

Government of India,
Ministry of Personnel, Public
Grievances & Pensions,
Department of Personnel and Training,
Staff Selection Commission,
Block No. 12, CGO Complex, Lodhi
Road, New Delhi - 110003.

Important Notice

Multi Tasking (NT) Staff, and Havaladar (CBIC & CBN) Examination-2021

F.No. 3-2/2021-P&P-I(Vol. I): Commission had published a Notice for **Multi Tasking (Non – Technical) Staff, and Havaladar (CBIC & CBN) Examination, 2021** on 22.03.2022. The following exemptions are admissible to PwD Candidates from certain PET/ PST conditions for the permissible disabilities for the post of Havaladar.

S. No.	Suitable category for benchmark disability for post of Havaladar	Exemption in PET/PST
1.	HH	No exemption
2.	OA	May be exempted for Cycling only
3.	OL	May be exempted from both Walking & Cycling
4.	OAL	May be exempted from both Walking & Cycling
5.	LC	May be exempted from both Walking & Cycling
6.	AAV	No exemption However. If due to acid attack the candidates suffer from orthopaedic disability i.e. OA, OL, OAL, then above exemption for OA , OL and OAL will apply
7.	MD involving above categories	Above exemption for HH ,OA , OL , OAL , LC , and AAV will apply
Abbreviations used: HH = Hard of Hearing, OA= One Arm, OL= One Leg, OAL= One Arm & One Leg, LC= Leprosy Cured, AAV = Acid Attack Victim, MD = Multiple Disabilities.		

2. Exemptions as mentioned are subject to the production of medical Certificate by PWD candidates from a Government Medical Officer / Medical Board certifying that candidate is not able to walk or cycle.

Under Secretary (P&P-I)
02.06.2022

PET/ PST Module of Constable (GD) Examination, 2021

Constable (GD) in CAPFs, NIA, SSF and Rifleman (GD) in Assam Rifles Examination, 2021

STAFF SELECTION COMMISSION
(Government of India)

HOME NOTICES APPLY ADMIT CARD ANSWER KEY RESULT

WELCOME MOHAN LAL HIRWAL Change Password Logout

Biometric Collection/Verification
Constable GD
PET/ PST - Constable GD, 2021
New User
Constable GD, 2018
Debarred
Document Verification
Dossier Tracking System
Master Data Management
MIS Report
Portal Management
Reports
RHQ Selection Post
Statistical Report
User Management
Vacancy Management

Constable (GD) in CAPFs, NIA, SSF and Rifleman (GD) in Assam Rifles Examination, 2021

Roll No. * 5102000028

Submit Reset

Start Date * End Date *

PET /PST Center * --Select PET /PST Center--

Export To Excel Close

Summary Report * ☐ Female ☐ Male Generate Summary Report

State/ LT	Total Candidates (Present + Absent)	Absent	Present (Qualified + Not Qualified)	Qualified (Present)	Not Qualified (Present)

Constable (GD) in CAPFs, NIA, SSF and Rifleman (GD) in Assam Rifles Examination, 2021

STAFF SELECTION COMMISSION
(Government of India)

HOME NOTICES APPLY ADMIT CARD ANSWER KEY RESULT

WELCOME MOHAN LAL HIRWAL Change Password Logout

Constable (GD) in CAPFs, NIA, SSF and Rifleman (GD) in Assam Rifles Examination, 2021

1.1 Photograph

Application Photo Examination Photo

02/08/2021

1.2 Attendance * ☒ Present ☐ Absent ☐ Rejected ☐ Temporary Unfit

1.3 Biometric (LTI/Photo) Status ☒ Matched ☐ Not Matched ☐ Suspected

1.4 Roll No. 5102000028

1.5 Name ABOH SINGPHO

1.6 Father's Name RIPON SINGPHO

1.7 Mother's Name PEABOW SINGPHO

Constable (GD) in CAPFs, NIA, SI: x

sscnic.in/PhysicalTest/CandidateDtIsNew?rollNo=5102000028&btnsubmit=Submit

2. Physical Standard Test

Height Measurement

2.1 Height (in cms.)

Verify Height (in cms.)*

2.2 Height Relaxation Available ☒ Yes ☐ No

2.3 Height Relaxation Code

Chest Measurement (For male candidates only)

2.4 Chest Measurement in cms. (Not Expanded)

Verify Chest Measurement in cms. (Not Expanded)*

2.5 Chest Measurement in cms. (Expanded)

Verify Chest Measurement in cms. (Expanded)*

2.6 Chest Relaxation Available ☒ Yes ☐ No

2.7 Chest Relaxation Code

2.8 Status of Physical Measurement Test ☐ Qualified ☐ Not Qualified

2.9 Weight (in Kgs)

3. Physical Efficiency Test

Constable (GD) in CAPFs, NIA, SI: x

sscnic.in/PhysicalTest/CandidateDtIsNew?rollNo=5102000028&btnsubmit=Submit

2.6 Chest Relaxation Available ☒ Yes ☐ No

2.7 Chest Relaxation Code

2.8 Status of Physical Measurement Test ☐ Qualified ☐ Not Qualified

2.9 Weight (in Kgs)

3. Physical Efficiency Test

Race(Male)

3.1 5 km in 24 min ☐ Qualified ☒ Not Qualified ☐ Not Applicable

3.2 1.6 km in 6.30 min (For candidates of Ladakh Region) ☐ Qualified ☐ Not Qualified ☐ Not Applicable

Race(Female)

3.3 1.6 km in 8.30 min ☐ Qualified ☐ Not Qualified ☐ Not Applicable

3.4 800 meter in 4 min (For candidates of Ladakh Region) ☐ Qualified ☐ Not Qualified ☐ Not Applicable

Final Status

4.1 Final Status ☐ Qualified ☒ Not Qualified ☐ Temporary Unfit

4.2 Remarks*

CBIC-30A12(12)/7/2021-Ad-IIIB Section-CBEC
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes & Customs

Gr. Floor, Hudco Vishal Building,
Bhikaji Cama Place, RK Puram, New Delhi-66,

To

All the Cadre Controlling Authorities
under Central Board of Indirect Taxes & Customs

(Through e-mail)

**Subject: - Instructions regarding data collection on pending
compassionate appointment-regarding**

Sir/Madam,

The undersigned is directed to refer to Board's letter of even no. dated 05.08.2021 on the aforesaid subject and to say that the competent authority has noted, from the data furnished by CCAs on compassionate appointment cases, that data is not up to date. Therefore, the compassionate appointments data furnished by CCAs needs to be updated.

2. It is further requested to confirm if arrangements are in place in the zone, in relation to the procedure for compassionate appointments, in compliance with DoPT's O.M. dated 23.08.2021.

3. In view of the above, you are requested to ensure compliance and accordingly send a report to Board on the issue at the earliest.

Yours faithfully,

(Mohammad Ashif)
Under Secretary to the Govt. of India
(: 011 26162780

Promotion in Group B Non-Gaz. and Group C

By

Himabindu Mudumbai

JS Admn.

Scheme of Presentation

- Inter se Seniority
- Executive Assistant – One Time Relaxation proposal
- D Raghu judgement

Inter se Seniority of Direct
Recruitees and Promotees

Chronology

Year	DoPT OM / Judgement	Key points
1959	GoI, MHA OM No. 9/11/55-RPS dt. 22.12.1959	<u>Relative seniority:</u> For DRs: order of merit of selection by recruiting agency For PRs: order of selection for promotion <u>Inter se Seniority between DRs and PRs:</u> Rotation between DR and PR based on quota fixed in RRs (Rota Quota)
1986	DoPT OM No. 35014/2/1980- Estt. (D) dt. 07.02.1986 & No. 22011/7/1986- Estt. (D) dt. 03.07.1986	Recognised • Difficulty in determining seniority due to delay in either DR or PR • Problem mostly due to delay in DR - DR slots left vacant, filled up by later recruited DRs and they became senior to PRs promoted earlier Additional criteria added in case of non-availability of adequate no. of DRs or PRs: • Rota Quota to the extent DR/PR available • Bunching of balance at the end

Illustration (Only indicative)

- Presumptions:
 - DR:PR – 50:50
 - 10 vacancies in Year 1, 10 vacancies in Year 2(viz. 5 DR and 5 PR in each year)
 - Two DR vacancies of Year 1 remained unfilled in Year 1, were filled in Year 2

Inter se seniority as per 1959 OM

Year 1	Year 2
1. P1	7. P4 (Promoted in Year 1)
2. D1	8. D4
3. P2	9. P5 (Promoted in Year 1)
4. D2	10. D5
5. P3	11. P6
6. D3	12. D6
	13. P7
	14. D7
	15. P8
	16. D8
	17. P9
	18. D9
	19. P10
	20. D10

Inter se seniority as per 1986 OM

Year 1	Year 2
1. P1	9. P6
2. D1	10. D4
3. P2	11. P7
4. D2	12. D5
5. P3	13. P8
6. D3	14. D6
7. P4	15. P9
8. P5	16. D7
	17. P10
	18. D8
	19. D9
	20. D10

Seniority before 1986 OM

2. While the above mentioned principle was working satisfactorily in cases where direct recruitment and promotion kept pace with each other and recruitment could also be made to the full extent of the quotas as prescribed, in cases where there was delay in direct recruitment or promotion, or where enough number of direct recruits or promotees did not become available, there was difficulty in determining seniority. In such cases, the practice followed at present is that the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees became available through later examinations or selections, such persons occupied the vacant slots, thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was short-fall in direct recruitment in two or more consecutive years, this resulted in direct recruits of later years taking seniority over some of the promotees with fairly long years of regular service already to their credit. This matter had also come up for consideration in various Court cases both before the High Courts and the Supreme Court and in several cases the relevant judgement had brought out the inappropriateness of direct recruits

.....2/-

Extract from DoPT OM dt 7th Feb 1986, explaining how seniority was being fixed as per practice being followed (viz 1959 OM).

Chronology

Year	DoPT OM / Judgement	Key points
2008	DoPT OM No. 20011/1/2006-Estt. (D) dt. 03.03.2008	Clarified that “year of availability” for both DR and PR, is “actual year of appointment”. The year of availability is the vacancy year in which DR or Promotee joins.
2012	N.R. Paramar Judgement (27.11.2012)	For all intents and purposes, the OM dated 3.3.2008, must be deemed to be non-est. The OMs dated 7.2.1986 and 3.7.1986 would have an overriding effect over the OM dated 3.3.2008 (to the extent of conflict between them).

Chronology

Year	DoPT OM / Judgement	Key points
2014	DoPT OM No. 20011/1/2012-Estt. (D) dt. 04.03.2014	• OM dated 3.3.2008 is treated as non-existent/ withdrawn ab initio • Recruitment Year would be the year of initiating the recruitment process against a vacancy year • Initiation of recruitment process against a vacancy year: • DR - date of sending of requisition to fill up of vacancies to the recruiting agency • PR - the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up the vacancies • The initiation of recruitment process for DR / PR would be deemed to be the initiation of recruitment process for the other mode as well • Effective from 27.11.2012

Chronology

Year	DoPT OM / Judgement	Key points
2019	Meghachandra judgement (19.11.2019)	Decision in N.R. Paramar is overruled. Year to be reckoned for inter se seniority is <i>year of appointment.</i> This decision will not affect the inter-se seniority already based on N.R. Parmar and the same is protected. This decision will apply prospectively except where seniority is to be fixed under the relevant Rules from the date of vacancy / adv.
2021	DoPT OM No. 20011/2/2019-Estt. (D) dt. 13 th August 2021	Very clear formulation regarding which OM will apply to which period and which scenario

Litigation on seniority

- Issues relating to seniority were kept in abeyance in view of contradictory court judgements and pending further instructions from DoPT. Status quo withdrawn after DoPT OM of Aug 2021
- The main problem faced by CBIC related to prospective application of NR Paramar Judgement (as prescribed in DoPT OM of 2014) and courts ruling for retrospective application of NR Paramar judgement
- DoPT and Board instructions were always to implement NR Paramar judgement prospectively only, ***except in case of P. Bhartan***
 - In P. Bhartan case, on losing case up to Supreme Court, implemented NR Paramar ratio retrospectively only for applicants in P. Bhartan case, duly in consultation with DoPT
- DoPT OM issued post Meghachandra judgement clarified principles to be followed for seniority during various scenarios for various periods.

Seniority of DRs of a CGLE joining in subsequent years

Issue :

- SSC allots a few candidates subsequently, based on outcome of court cases
- No vacancies of earlier vacancy year are kept reserved
 - SSC allots candidates for entire vacancies initially

Principles laid down to fix seniority in such cases, in consultation with DoPT

- The relative seniority of DRs will be according to their ranking in the exam.
- The DRs appointed in the subsequent year shall be junior to the DRs appointed for an earlier year.
- If a DR appointee joins the Department in a later year, seniority will be considered only in that vacancy year against which finally adjusted, if no vacancy is kept reserved for such candidate(s).

(Board Ir No. 32022/110/2019-Ad. IIIA dt 22.11.2021)

Seniority of ICT officers

- The officers on ICT were appointed against the vacancies of DR.
- ICT was subject to undertaking on seniority.
 - “... I am willing to forego my seniority and consequently, I shall be junior to all regularly appointed officer in the new commissionerate / zone at the time of my transfer”
- Officers joining on ICT to be placed below all officers appointed regularly to the grade on the date of his / her appointment on transfer basis.
- For seniority, Board instructions to be read together with DoPT OM's applicable to the relevant years.
 - Eg. 2014 OM : The initiation of recruitment process for DR / PR would be deemed to be the initiation of recruitment process for the other mode as well
- Date to be reckoned for determining seniority of DR and PR to be correlated with date of joining of ICT transferees
- In one case relating to Delhi (Amit Kumar / Yash Rattan)– SLP filed in SC and pending currently.

EA- One Time Relaxation (OTR) proposal

OTR - EA

- 72% vacancies in EA cadre as on 1.1.2022
 - Increase in QS for promotion of TA to EA from 3 years to 10 years in 2015 RR, without protection clause
 - Protection clause proposed by CBIC, initially in 2015 as well as later in 2020 and 2021, not agreed to by DoPT
 - Non-initiation of DR (40%) due to amendment required in RRs
 - Amendment approved by DoPT and currently with UPSC
- DoPT accorded relaxation in respect of those TAs, who were in position as on 28.9.2015. Subject to
 - Consultation with UPSC
 - Revival of deemed abolished posts of EA (viz lying vacant for more than 2 years)

OTR - EA

- UPSC sought details of
 - Vacancy year for which relaxation is required
 - Exact amount of relaxation required
 - List of officers for whom relaxation is required, with seniority list
 - No. of live vacancies (Year-wise vacancies, if applicable)
- Proposal for revival of 2378 deemed abolished posts under process

OTR-EA

- Important points to be noted:
 - For method of recruitment, in col 10 of RR of EA 2015, English version has % of posts, Hindi version has % of vacancies (रिक्तियां). DoPT guidelines prescribe % of vacancies
 - All CCAs to adopt % of vacancies and consider 60% of vacancies arising after 28.09.2015 as PR vacancies
 - As EA became a 40% DR and 60% PR post w.e.f. 28.09.2015, all vacancies as on 27.09.2015, can be considered PR vacancies

D Raghu judgement

D Raghu judgement (CA No. 1970-1975 of 2009)

- In this judgement, SC mainly discussed three broad issues
 - Effective date of cadre restructuring, 2001
 - Filling of pre-cadre and post-cadre restructuring vacancies
 - Status of upgraded posts.
- SC analysed various letters relating to CR 2001 and stated that a conscious decision was taken by dept. not to fill up vacancies based on restructuring and to effect promotion to Inspector post based on new RRs.
 - It can be seen that SC's reliance here was on intent of Govt.

D Raghu judgement (CA No. 1970-1975 of 2009)

- The effective date of CR 2001 : the date of issuing of RRs for the concerned posts
- The vacancies which arose in the cadre before issuing of new RRs will be filled with the extant RRs of the concerned posts.
 - SC, while stating that HC was in error in holding as above, decided not to disturb directions to fill up vacancies which arose prior to 07.12.2002(new inspector RR), using 1979 Inspector RRs
- The upgraded post in the CR will be filled after issuance of new RRs for the concerned post as the CR will be effective from the date of issuance of respective RRs.

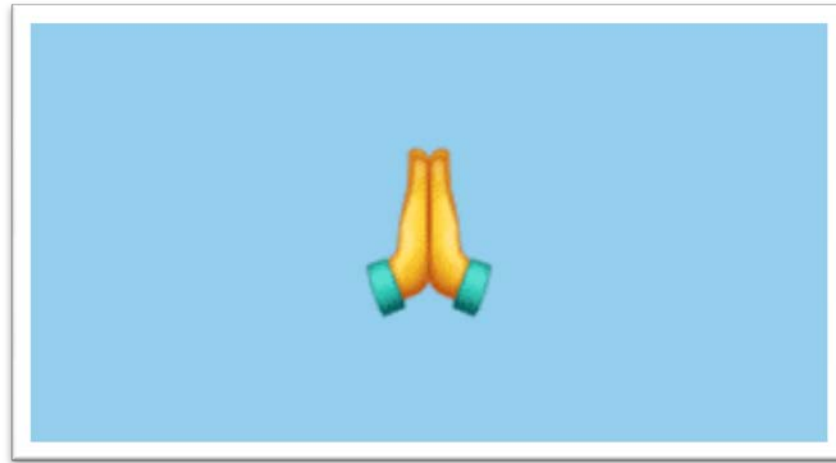
D Raghu judgement (CA No. 1970-1975 of 2009)

- The persons in clause (a) of Column 12 of the Recruitment Rules, 2002 who were also in the feeder categories for promotion under 1979 Rules, **do not have** an exclusive right to be considered for promotion for a period of two years.
 - TA, UDC, Steno, Women Searcher and Draftsmen
- STAs, who were erstwhile DEO Grade 'B',
 - eligible to be considered for promotion from 20.01.2003.
 - entitled to add their service as DEO Grade 'B' for the purpose of the 2002 Inspector RRs and considered for vacancies to be filled by promotion, which arose after 07.12.2002.
- The posts of Inspectors, upgraded to the grade of Superintendent in 2001 CR, are ***not available for filling up in the grade of inspectors***

Recruitment Drive

- DR vacancies to SSC and details of joining – already being sought by Board
- To map DR vacancies with vacancy reporting to SSC and other modes of local recruitment
 - *Compassionate Appointments and Sports Quota recruitments*
 - *Local DR – Eg. Driver, canteen posts*
- *To plan for/ account for balance / gap in DR vacancies, if any*
- *Monthly report on promotions:*
 - *Vacancies in PR quota*
 - *Promotions made to various PR quota posts during the month*
 - *Progressive figure up to the end of that month and*
 - *Balance planned during the year*

Thank You



All India Seniority List (AISL) of Inspectors

Mirage or Reality

Inspector grade-Fact finder

- Streams- Inspector (C Ex), Preventive Officer and Examiner
- Classification of posts: Group C up to April 2004
Group B from April 2004 onwards
(based on CAT Chennai order)
- Method of recruitment: Recruited as per separate RRs for the 3 streams to cadres of each CCA (15 CCA for Inspector C Ex, 5 CCA for Preventive Officer and 3 CCA for Examiner)
 - (a) 66 ²/₃% DR and 33 ¹/₃% PR up to 25.12.2016
 - (b) 90% DR and 10% PR from 26.12.2016

Inspector grade- Fact finder

- Recruiting authority:
 - (a) Prior to 1976 by respective jurisdictional Collectors
 - (b) 1977 to 2002 by Regional Merit of Staff Selection Commission for Central Excise and All India Merit for Preventive Officer and Examiner
 - (c) 2003 onwards by All India Merit of Staff Selection Commission (consequent to Hon'ble Supreme Court's decision in Civil Appeal No. 5112/1995 and W.P. 224/95 and 395/95 in the case of Radhey Shyam Singh vs UOI dt. 09.12.1996). This was conveyed to SSC by DoPT vide resolution dated 13.11.2003.

Disparity at a Glance

Intra stream inter cadre /Zonal disparities in promotion

Stream	Batch year of Inspector being promoted to Superintendent	Batch year of Superintendent being promoted to Assistant Commissioner
Central Excise	*2006-2017	2002-2003
Preventive Officer	2011-2016	2003-2005
Examiner	2013-2016	2007-2009

*2001 and 2003 batch onwards are awaiting promotions in 2 CCAs due to litigation (Lucknow & Kolkata)

This leads to a situation where same batch of Inspectors work as subordinates under their batch mates who got promoted faster.

Efforts made till date

S. K. Bhardwaj committee (2004-05)

- Recommended merger of cadres into a unified cadre of Customs & Excise Officer prospectively.
- Maintenance of All India Seniority List in Group B and Group C cadres w.e.f. 01.07.2005.

Chitra Gauri Lal committee (2008)

- Creation of separate service for Group-B Gazetted and Non-Gazetted officers, by merging cadres of Inspectors and Superintendents (Preventive) respectively (Examiners/ Appraisers not included).

Efforts made till date

Balesh Kumar committee (2017)

- Continuation of 2118 temporary posts of Assistant Commissioners.
- Equalizing promotional prospects by moving the vacant post from one CCA to another.
- Merger of cadres of Group –B non--gazetted.

➤ **Cadre Restructuring Proposal**

- Cadre Restructuring proposal 2019 envisages unification of Inspector grade posts into an all India cadre.
- CR Proposal will, thus, lead to a unified seniority list in the Gr b non-Gazetted grade..

Efforts ----- continuing

- Proposal for creation of All India Seniority List of Inspector grade from 2003
- Basis for the proposition:
 - ✓ Hon'ble Supreme Court's judgment in the case of Meera Sen, Junior Hindi Translator
 - ✓ Appointment through All India Merit List for the grade of Inspector of Central Excise from 2003.
 - ✓ Persistent demand of the Associations.

Proposal in a Nut-shell

- AISL w.e.f. SSC-2003 Batch onwards.
- Pooling of vacancies arising in different zones.
- A unified CCA, say DGHRD, for all Group-B cadres.
- Granting Notional Promotion to senior Inspectors, whose juniors have been promoted as Superintendents.
- No financial benefit on notional promotion.
- Own-request transfers/ ICTs across all cadres

Pros and Cons of the proposal

- Pros

- (1) Boost to the demoralised cadre by removing stagnation.
- (2) Existing inter cadre and inter stream disparities will be regularised.
- (3) All India transfers on request will become possible.
- (4) Will resolve ICT issues.

Pros and Cons of the proposal

- Cons
 - (1) Legality of merging appointments retrospectively made to three different streams having three separate Recruitment rules
 - (2) Resistance from members of the streams / CCA zones which are favourably placed.

An Alternative

- RR of AC to be amended for promotion based on length of service rendered by feeder cadres in Group B gazetted and non-gazetted posts.

Pros

- (1) Inter-cadre disparity will be removed.
- (2) Boost to the demoralised cadre.
- (3) Existing vacancies can be filled according to new RRs, as per recent Supreme Court judgment in C.A. No. 9746 of 2011 titled State of Himachal Pradesh Vs Raj Kumar & ors..

Amendment in Recruitment Rules

- Cons
 - (1) Inter-zonal disparity in promotions from Group 'B' non-gazetted to Group 'B' gazetted posts will not be resolved.
 - (2) No own-request transfers/ICT in Group 'B' cadres.

Way forward

- Formation of a Committee headed by DGHRD to look into the alternative proposal along with feedback/suggestion /comments received from the stakeholders.
- Working papers will be provided to the Committee to look into the suggestions proposed.
- Based on the Committee's report, if required, opinion of DoP&T / Ministry of Law can be obtained.

Way forward

- Appointment of a Cadre Controlling Authority for handling of unified cadre on Inspectors.
- Alignment of seniority list of other Group 'B' and Group 'C' cadres.



THANK YOU

No. 22011/7/86-Estt(D)
Government of India
Ministry of Personnel, Public Grievances
and Pensions
(Department of Personnel & Training)

dated 3-7-86

OFFICE MEMORANDUM

Subject: SENIORITY- Consolidated orders on

The undersigned is directed to say that instructions have been issued by this Department from time to time laying down the principles for determining seniority of persons appointed to services and posts under the Central Government. For facility of reference, the important orders on the subject have been consolidated in this Office Memorandum. The number and date of the original communication has been quoted in the margin so that the users may refer to it to understand fully the context in which the order in question was issued.

SENIORITY OF DIRECT RECRUITS AND PROMOTEES

MA OM
No. 9/11/
55-RPS
A. 22.12.59

2.1 The relative seniority of all direct recruits is determined by the order of merit in which they are selected for such appointment on the recommendations of the U.P.S.C or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of a subsequent selection.

2.2 Where promotions are made on the basis of selection by a D.P.C., the seniority of such promotees shall be in the order in which they are recommended for such promotion by the Committee. Where promotions are made on the basis of seniority, subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior such persons shall not, if he is subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him.

2.3 Where persons recruited or promoted initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.

2.4.1 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees.

In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

ILLUSTRATION: Where the Recruitment Rules provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the year 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

	<u>1986</u>		<u>1987</u>
1.	P1	9.	P1
2.	D1	10.	D1
3.	P2	11.	P2
4.	D2	12.	D2
5.	P3	13.	P3
6.	D3	14.	D3
7.	P4	15.	P4
8.	P5	16.	D4
		17.	P5
		18.	D5
		19.	D6
		20.	D7

2.4.3 In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the proforma enclosed.

2.4.4 With a view to curbing any tendency of under-reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees.

MHA OM No.

9/11/55-

RPS dt.

22.12.1959

SENIORITY OF TRANSFEREES

3.1 The relative seniority of persons appointed by transfer to a Central service from the subordinate offices of the Central Government or other departments of the Central or a State Government shall be determined in accordance with the order of their selection for such transfer.

3.2 Where such transfers are effected against specific quotas prescribed in the Recruitment Rules, the relative seniority of such transferees vis-a-vis direct recruits or promotees shall be determined according to the rotation of vacancies which shall be based on the quotas reserved for transfer, direct recruitment and promotion respectively in the Recruitment Rules. Where the vacancies in any quota or quotas are carried forward, the principles stated in para 2.4.2 will apply, mutatis mutandis in determining inter-se seniority of the appointees.

3.3 Where a person is appointed by transfer in accordance with the provisions in the Recruitment Rules providing for such transfer in the event of non-availability of suitable candidate by direct recruitment or promotion, such transferee shall be grouped with direct recruits or promotees, as the case may be. He shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion.

DMT OM No

20020/7/80

- Estt(D)

- dated

29.5.1986.

3.4.1 In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "Transfer on deputation/Transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from-

- the date he has been holding the post on deputation, (or)
 - the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department.,
- whichever is later.

3.4.2 The fixation of seniority of a transferee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words, it will be operative only in filling up of vacancies in higher grade taking place after such absorption.

3.5 In cases in which transfers are not strictly in public interest, the transferred officers will be placed below all officers appointed regularly to the grade on the date of absorption.

SENIORITY IN SPECIAL TYPES OF CASES

- MHA OM No.37/1/52-DGS dated 10.7.54, OM No. 13/4/56-RPS dt. 29.9.56 & No.13/4/57-RPS dt. 14.7.58 MHA OM No. 9/13/82-Estt.D dt. 10.10.52 & OM No. 9/30/63-Estt(0) dt. 7.2.64.
- 4.1 In the case of such ex-T.B. or ex-Pleurisy ex-Leprosy patients, as have been declared non-infective and medically fit for Government service, on re-employment in the same posts from which they were discharged the actual previous service rendered by them should be counted for seniority. The seniority of such persons re-employed in other posts will be fixed in consultation with the Department of Pers. & Trg.
- 4.2.1 An order imposing the penalty of reduction to a lower service, grade or post or to a lower time-scale should invariably specify:-
- (i) the period of reduction, unless the clear intension is that the reduction should be permanent or for an indefinite period;
 - (ii) Whether on such repromotion, the Govt. servant will regain his original seniority in the higher service, grade or post or higher time-scale which had been assigned to him prior to the imposition of the penalty.
- 4.2.2 In cases where the reduction is for a specified period and is not to operate to postpone future increments, the seniority of the Govt. servant may, unless the terms of the order of punishment provide otherwise, be fixed in the higher service, grade or post or the higher time scale at what it would have been but for his reduction.
- 4.2.3 Where the reduction is for a specified period and is to operate to postpone future increments, the seniority of the Govt. servant on repromotion may, unless the terms of the order of punishment provide otherwise, be fixed by giving credit for the period of service rendered by him in the higher service, grade or post or higher time-scale.

.....5/-

MHA OM
No. 3/27/
65-68. II
dt. 25.2.66
& OM No.
9/22/68-
Estt(D) dt.
6.2.69.

4.3.1. The surplus employees are not entitled for benefit of the past service rendered in the previous organisation for the purpose of their seniority in the new organisation. Such employees are to be treated as fresh entrants in the matter of their seniority, promotions etc.

4.3.2 When two or more surplus employees of a particular grade in an office are selected on different dates for absorption in a grade in another office, their inter-se seniority in the latter office will be same as in their previous office provided that-

- (i) no direct recruit has been selected for appointment to that grade in between these dates; and
- (ii) if there are no fixed quotas for direct recruitment and promotion to the grade in question in the new office no promotee has been approved for appointment to that grade in between these dates.

4.3.3 When two or more surplus employees of a particular grade in an office are simultaneously selected for redeployment in another office in a grade, their inter-se seniority in the particular grade, on redeployment in the latter office, would be the same as it was in their previous office.

4.3.4 The above orders would not be applicable in respect of personnel who are appointed on the recommendations of the U.P.S.C. to posts/services recruitment to which is made through the Commission. Seniority of surplus officers appointed on the recommendations of the Commission will be decided on merits in consultation with the Commission.

5. It is requested that these instructions may be brought to the notice of all administrative authorities for information, guidance and compliance.

(Hindi version will follow soon).

Sd/-

(K. S. R. KRISHNA RAO)
DEPUTY SECRETARY TO THE GOVT. OF IND.
TELE: 301 12 25

To
1. All Ministries/Departments of the Govt. of India.
etc. etc.

No. 20011/1/2012-Estt. (D)
Government of India
Ministry of Personnel, Public Grievances & Pension
Department of Personnel & Training

North Block, New Delhi,
Dated the 4th March, 2014

OFFICE MEMORANDUM

Subject: Inter se seniority of direct recruits and promotees - instructions thereof

The undersigned is directed to refer to the subject mentioned above and to say that the fundamental principles of inter se seniority of direct recruits and promotees in Central Civil Services/posts were laid down in the Department of Personnel & Training (DOPT) O.M. No. 9/11/55-RPS dated 29.12.1959 which provided, inter alia, that the relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively, in the Recruitment Rules.

2. The carrying forward of unfilled slots of a vacancy year, for being filled up by direct recruits of later years, was dispensed with through modified instructions contained in DoPT O.M. No.35014/2/80-Estt.(D) dated 7.2.1986 which provides that rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. The unfilled direct recruitment/promotion quota vacancies would be carried forward and added to the corresponding direct recruitment/promotion quota vacancies of the next year (and to subsequent years where necessary) for taking action for the total number of direct recruitment/promotion according to the usual practice. Thereafter, in that year, while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees, as determined according to the quota for that year, the additional direct recruits/promotees selected against the carried forward vacancies of the previous year, would be placed en-bloc below the last promotee/direct recruit, as the case may be, in the seniority list, based on the rotation of vacancies for that year.

3. All the existing instructions on seniority were consolidated by DoPT through a single O.M. No. 22011/7/86-Estt(D) dated 03.07.1986.

4. In view of divergent stance taken by different Ministries/Departments on interpretation of 'available direct recruits and promotees' in the context of OM dated 7.2.86, the DoPT had issued O.M. No. 20011/1/2006-Estt.(D) dated 3.3.2008 which provided that the actual year of appointment, both in the case of direct

recruits and promotees, would be reckoned as the year of availability for the purpose of rotation and fixation of inter se seniority.

5. The matter has been examined in pursuance of Hon'ble Supreme Court Judgment on 27.11.2012, in Civil Appeal No. 7514-7515/2005 in the case of N.R. Parmar vs. UOI & Ors in consultation with the Department of Legal Affairs and it has been decided, that the manner of determination of inter-se-seniority of direct recruits and promotes would be as under:

- a) DoPT OM No. 20011/1/2006-Estt.(D) dated 3.3.2008 is treated as non-existent/withdrawn *ab initio*;
- b) The rotation of quota based on the available direct recruits and promotees appointed against the vacancies of a Recruitment Year, as provided in DOPT O.M. dated 7.2.1986/3.07.1986, would continue to operate for determination of *inter se* seniority between direct recruits and promotees;
- c) The available direct recruits and promotees, for assignment of *inter se* seniority, would refer to the direct recruits and promotees who are appointed against the vacancies of a Recruitment Year;
- d) Recruitment Year would be the year of initiating the recruitment process against a vacancy year;
- e) Initiation of recruitment process against a vacancy year would be the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits; in the case of promotees the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up the vacancies through promotion would be the relevant date.
- f) The initiation of recruitment process for any of the modes viz. direct recruitment or promotion would be deemed to be the initiation of recruitment process for the other mode as well;
- g) Carry forward of vacancies against direct recruitment or promotion quota would be determined from the appointments made against the first attempt for filling up of the vacancies for a Recruitment Year;
- h) The above principles for determination of *inter se* seniority of direct recruits and promotees would be effective from 27.11.2012, the date of Supreme Court Judgment in Civil Appeal No. 7514-7515/2005 in the case of N.R. Parmar Vs. UOI & Ors

- i) The cases of seniority already settled with reference to the applicable interpretation of the term availability, as contained in DoPT O.M. dated 7.2.86/3.7.86 may not be reopened.

7. As the conferment of seniority would be against the Recruitment Year in which the recruitment process is initiated for filling up of the vacancies, it is incumbent upon all administrative authorities to ensure that the recruitment process is initiated during the vacancy year itself. While requisition for filling up the vacancies for direct recruitment should be sent to the recruiting agency, complete in all respects, during the vacancy year itself, the timelines specified in the Model Calendar for DPCs contained in DoPT O.M. No.22011/9/98-Estt(D) dated 8.9.98 and the Consolidated Instructions on DPCs contained in O.M. No.22011/S/86-Estt(D) dated April 10, 1989 should be scrupulously adhered to, for filling up the vacancies against promotion quota.



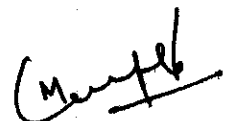
(Mukta Goel)
Director

Tele: No. 23092479

All Ministries/Departments of the Government of India

Copy to:-

1. The President's Secretariat, New Delhi.
2. The Vice-President's Sectt, New Delhi
3. The Prime Minister's Office, New Delhi.
4. The Cabinet Secretariat, New Delhi.
5. The Rajya Sabha Secretariat, New Delhi.
6. The Lok Sabha Secretariat, New Delhi.
7. The Comptroller and Audit General of India, New Delhi.
8. The Secretary, Union Public Service Commission, New Delhi
9. The Secretary, Staff Selection Commission, New Delhi.
10. All attached offices under the Ministry of Personnel, Public Grievances and Pensions.
11. All Officers and Sections in the Department of Personnel and Training.
12. Establishment(D) Section, DoP&T (10 copies)
13. NIC for updation on the website.



(Mukta Goel)
Director

Tele: No. 23092479

-9-

No.9/11/55-RPS
Government of India
Ministry of Home Affairs

-.-.-

New Delhi, the 22nd December, 1959.
1st Pusa. 1981

OFFICE MEMORANDUM

**Subject:—GENERAL PRINCIPLES FOR DETERMINING SENIORITY
OF VARIOUS CATEGORIES OF PERSONS EMPLOYED IN
CENTRAL SERVICES.**

!!!

As the Ministries of the Government are aware, instructions have been issued from time to time regarding the principles to be observed in and the method of determining seniority vide Office Memoranda cited below—

- (i) Office Memorandum No.30/44/48-Appts., dated the 22nd June, 1949;
- (ii) Office Memorandum No.65/28/49-DGS(Appts.) dated the 3rd February, 1950 and other subsequent Office Memoranda regarding fixation of seniority of ex-employees of the Government of Burma;
- (iii) Office Memorandum No.31/223/50-DGS, dated the 27th April, 1951 and other subsequent Office Memoranda regarding fixation of seniority of displaced Government Servants;
- (iv) Office Memorandum No.9/59/56-RPS dated 4th August, 1956.

The instructions contained in this Ministry's Office Memorandum No. 30/44/43-Appts., dated the 22nd June, 1949, were issued in order to safeguard the interests of displaced Government servants appointed to the Central Services after partition. As it was not possible to regulate the seniority of only displaced Government servants by giving them credit for previous service, the instructions were made applicable to all categories of persons appointed to Central Services. The principles contained in the 22nd June, 1949 orders were extended to.

- (i) ex-Government servants of Burma appointed to Central Services; and
- (ii) the employees of former Part 'B' States taken over to the Centre as a result of Federal Financial Integration.

The instructions contained in this Ministry's Office Memorandum No. 32/10/49-CS, dated the 31st March, 1950 and No. 32/49/CS(C) dated the 20th September 1952 similarly regulate Central Service.

2. The question has been raised whether it is necessary to continue to apply the instructions contained in the Office Memoranda cited above. Displaced Government servants have by and large been absorbed in the various Central Services and their seniority has been fixed with reference to the previous service rendered by them. Similarly, the seniority of ex-employees of the Government of Burma and Part 'B' States as well as of candidates with war service has already been determined in accordance with the instructions cited above. As the specific objects underlying the instructions cited above have been achieved, there is no longer any reason to apply these instructions in preference to the normal principles for determination of seniority. It has, therefore, been decided in consultation with the UPSC. that hereafter the seniority of all persons appointed to the various Central Services after the date of these instructions should be determined in accordance with the General Principles annexed hereto.

3. The instructions contained in the various Office Memorandum cited in para 1 above are hereby cancelled, except in regard to determination of seniority of persons appointed to the various Central Services prior to the date of this Office Memorandum. The revised General Principles embodied in the Annexure will not apply with retrospective effect, but will come into force with effect from the date of issue of these orders; unless a different date in respect of any particular service/grade from which these revised principles are to be adopted for purposes of determining seniority has already been or is hereafter agreed to by this Ministry.

Sd/-

(V. VISWANATHAN)

Special Secretary to the Government of India.

To

All Ministries of the Government of India etc. etc.

ANNEXURE

GENERAL PRINCIPLES FOR DETERMINATION OF SENIORITY IN THE CENTRAL SERVICES

1. (1) These principles shall apply to the determination of seniority in Central Civil Services and Civil posts except such services and posts for which separate principles have already been issued or may be issued hereafter by Government.

Ministries or Departments which have made separate rules or issued instructions on the basis of instructions contained in the Ministry of Home Affairs, O.M.No.30/44/48-App'tts. dated the 22nd June, 1949, are requested to consider modification of those rules or instructions on the basis of those general principles. However, whenever, it is considered necessary to follow principles different from those laid down in this Memorandum, a specific reference should be made to the Ministry of Home Affairs will consult the UPSC. As regards individual cases, the Ministry of Home Affairs.

Will decide the cases on which the advice of the Commission should be obtained.

- (ii) Notwithstanding anything contained in these General Principles, the seniority of persons belonging to the following categories will, on their appointment to a Central Civil Service, or a Civil posts, continue to be determined by the instructions noted against each such category:-

(a) Ex-Government servants penalised for their patriotic activities	M.H.A.O.M.No. 6/4/52-S&NG dated 29.5.57.
(b) Central Government employees discharged on account of affliction with T.B., Pleurisy or Leprosy.	OM No.37/1/52-DGS, dated 10.7.54 (subsequently extended to ex-Pleurisy/Leprosy patients vide OM.No. 13/4/56-RPS dated 29.9.56 and 13.4.57-RPS dt. 14.7.58.
(c) Permanent displaced Government servants nominated by the Transfer Bureau to purely temporary Organisations, who consequent on their retrenchment, were absorbed in other offices.	OM.No.30/44/48-App'tts. dated 22.6.49.

2. Subject to the provision of para 3 below, persons appointed in a substantive or officiating capacity to a grade prior to the issue of these general principles shall retain the relative seniority already assigned to them or such seniority as may hereafter be assigned to them under the existing orders applicable to their cases and shall en-bloc be senior to all others in that grade.

Explanations:-For the purpose of these principles (a) persons who are confirmed retrospectively with effect from a date earlier than the issue of these general principles; substantively vacant in a grade prior to the issue of these general principles, shall be considered to be permanent officers of the grade.

3. Subject to the provisions of para 4 below, permanent officers of each grade shall be ranked senior to persons who are of ficiating in that grade.

4. Direct Recruits:

Notwithstanding the provisions of para 3 above, the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendations of the U.B.S.C. or other selecting authority, persons appointed as a result of subsequent selection;

5. Provided that where persons recruited initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.

5. Promotions:

(1) The relative seniority of persons promoted to the various grades shall be determined in the order of their selection for such promotion;

Provide that where persons promoted initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their promotion, seniority shall follow the order of confirmation and not the original order of merit.

(11) Where promotions to a grade are made from more than one grade, the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades. hereafter, the Departmental Promotion Committee shall select persons for promotion from each list upto the prescribed quota and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade.

NOTE:- Separate quotas for promotion have not already been prescribed in the relevant recruitment rules, the Ministries/Departments may do so now, in consultation with the Commission wherever necessary.

6. Relative seniority of Direct & Recruits and Promotees.

The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

7. Transferees:-

(i) The relative seniority of persons appointed by transfer to a Central Service from the Subordinate Offices of the Central Government or other Departments, of the Central or State Governments shall be determined in accordance with the order of their selection for such transfer.

(ii) Where such transfers are effected against specific quotas prescribed in the recruitment rules therefore, the relative seniority of such transferees vis-a-vis direct recruits and promotees shall be determined according to the rotation of vacancies which shall be based on the quotas reserved for transfer, direct recruitment and promotion respectively in the recruitment rules.

(iii) Where a person is appointed by transfer in accordance with a provision in the recruitment rules providing for such transfer in the event of non-availability of a suitable candidate by direct recruitment or promotion, as the case may be, for the purpose of para 6 above, he shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion.

8. Persons appointed on adhoc basis to a grade without consultation with the UPSC under Regulation 4 of the U.P.S.C. (Exemption from Consultation) Regulations, 1958, are to be replaced by persons approved for regular appointment by direct recruitment, promotion or transfer, as the case may be. Until they are replaced, such persons will be shown in the order of their adhoc appointments and below all persons regularly appointed to the grade.

14
-14-

EXPLANATORY MEMORANDUM

General Principle 4 : The Union Public Service Commission invariably indicate the order of preference at the time of selection and it will not, therefore, be difficult to determine the relative seniority of persons recruited through the Commission. In order to obviate difficulties in determining the relative seniority of direct recruits recruited otherwise than through the U.P.S.C., the selecting authority should indicate the order of merit at the time of selection.

General Principle 5(1) : Where promotions are made on the basis of selection by a D.P.C., the seniority of such promotees shall be in the order in which they are recommended for such promotion by the Committee. Where promotions are made on the basis of seniority subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior, such persons shall not if he is subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him.

General Principle 5(1) : Illustration: Where 75% of the vacancies in the grade of Head Clerk are reserved for promotion from the grade of Upper Division Clerk and 25% from the grade of Store-Keeper, the eligible Upper Division Clerks and Store-Keepers shall be arranged in separate lists with reference to their relative seniority in those grades. The D.P.C. will make selection of three candidates from the list of U.D.C. and 1 from the list of Store-Keepers. Thereafter the selected persons from each list shall be arranged in a single list in a consolidated order of merit assessed by the D.P.C. which will determine the seniority of the persons on promotion to the higher grade.

General Principle 6 : A roster should be maintained based on the reservation for direct recruitment and promotion in the Recruitment Rules. Where the reservation for each method is 50% the roster will run as follows:-

(1) Promotion, (2) Direct recruitment, (3) Promotion, (4) Direct Recruitment and so on. Appointment should be made in accordance with this roster and seniority determined accordingly.

Illustration : Where 75% of the vacancies are reserved for promotion and 25% for direct recruitment, each direct recruit shall be ranked in seniority below 3 promotees. Where the quotas are 50% each, every direct recruit shall be ranked below a promotee. If for any reason, a direct recruit or a promotee ceases to hold the appointment in the grade, the seniority list shall not be re-arranged merely for the purpose of ensuring the promotion referred to above.

.....

General Principle 7 (1): The principle laid down in para 7(1) will not present any difficulty where recruitment by transfer is made singly and at intervals but it will be from different sources on the same occasion and the selection is spread over a number of days. It will, therefore, be necessary for the authorities responsible for approving appointments by transfer to indicate the inter se order of merit of the selected persons in such cases.

General Principle 8: While the seniority of persons appointed on an ad-hoc basis will be determined as indicated in para 8 of the Annexure, the seniority list should clearly show that such persons are not eligible for promotion or confirmation.

found wanting in cases where two or more persons are selected

F.No.A.23024/01/2007-Ad.IIIA(Pt.)
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes & Customs

5th Floor, Hudco Vishala Building
Bhikaji Cama Place, R K Puram
New Delhi, the 18 August, 2021

To

All the CCAs including DGPM under CBIC
DGHRD

Subject:- Judgement of the Hon'ble Supreme Court of India in Civil Appeal No. 8833-8835 of 2019 of K. Meghachandra Singh & Ors. Vs. Ningam Siro & Ors - revised instructions on seniority of direct recruits and promotees and inter-se seniority thereof- reg.

Sir,

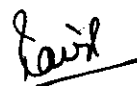
I am directed to invite your attention to the issue of fundamental principles of determining the inter-se seniority of direct recruits and promotees to various grades and instructions issued on the subject from time to time and state as follows:

2. In this regard, the DoPT, has issued the guidelines vide OM No. 20011/2/2019-Estt. (D) dated 13.08.2021 (**copy enclosed**) post

K. Meghchandra Judgement of Hon'ble Supreme Court of India for fixation of seniority of Direct Recruits and Promotee including *inter se* seniority thereof.

3. Now, in supersession of all instructions issued on the subject, henceforth, all the cases of seniority of Direct Recruits and Promotee officers of Group 'B' (Non-Gazetted) and Group 'C' [i.e. upto the grade of Inspector CGST/ Examiner / PO) including *inter se* seniority thereof, shall be decided in terms of DoPT O.M dated 13.08.2021.

4. Further, as per data collected from the CCAs concerned (copy of list attached), cases on inter se seniority are pending in various courts/CATs involving 776 officials at the level of Inspector and below. It is directed to revisit the cases (listed in the copy of pending cases or otherwise) pending before any Court/Tribunal and to file MAs, if required, bringing the DoPT OM of 13.08.2021



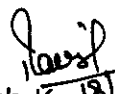
to the notice of legal fora where cases are pending and seek permission to finalise seniority in compliance to this OM. The details of MAs so filed should be uploaded on e-vivad portal with the subject " MAs filed on pending cases post DoPT OM dated 13.08.2021".

5. DGHRD is requested to conduct a survey covering all CCAs, to assess the impact of implementation of this OM, for which DGHRD may devise a format and circulate to all CCAs.

6. This issues with the approval of competent authority.

Yours faithfully,

Encl.: a/a


(Ravish Kumar) 18/8/2021
Under Secretary to the Govt. of India
Tel.No.26162675
usad3-rev@gov.in

Copy to: -

1. DG, HRD with specific reference to para 4 of this letter.
2. PPS to Chairman – For information
3. PS to Member (A) – For information
4. Commissioner Coordination – For information
5. Webmaster/CBIC for uploading on the official website of CBIC.


(Ravish Kumar) 18/8/2021
Under Secretary to the Govt. of India

No. 20011/2/2019-Estt. (D)
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training

North Block, New Delhi
Dated: 13th August, 2021.

OFFICE MEMORANDUM

Subject: Judgement of the Hon'ble Supreme Court of India in Civil Appeal No. 8833-8835 of 2019 of K. Meghachandra Singh & Ors. Vs Ningam Siro & Ors – revised instructions relating to seniority of direct recruits and promotees and inter-se seniority thereof – reg.

The undersigned is directed to say that the fundamental principles of determining *inter se* seniority of direct recruits and promotees in Central Civil Services/posts were laid down in the Department of Personnel & Training (DOPT) O.M. No. 9/11/55-RPS dated 29.12.1959, which inter alia provided that, the *inter se* seniority of direct recruits and promotees shall be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quotas of vacancies, provided in the Recruitment Rules for direct recruitment and promotion respectively.

2. The carry forward of unfilled slots of a vacancy year, to be filled up by direct recruits of later years, was dispensed with through modified instructions contained in DoPT O.M. No. 35014/2/80-Estt.(D) dated 7.2.1986 which provides that rotation of quotas for purpose of determining seniority would take place only to the extent of available direct recruits and the promotees. The unfilled direct recruitment/promotion quota vacancies would be carried forward and added to the corresponding direct recruitment/promotion quota vacancies of the next year (and to subsequent years where necessary) for determining the total number of direct recruitment or promotion vacancies to filled up as per usual practice. For determining *inter-se* seniority between direct recruits and promotees, it would be done as per rotation of quota to the extent of number of vacancies for direct recruits and promotees, as determined according to the quota for that year and the additional direct recruits/promotees selected against the carried forward vacancies of the previous year, to be placed en-bloc below the last promotee/direct recruit, as the case may be, in the seniority list. All the existing instructions on seniority were consolidated by DoPT through a single O.M. No. 22011/7/86-Estt(D) dated 03.07.1986.

3. Subsequently, vide O.M. No. 20011/1/2006-Estt.(D) dated 3.3.2008, the term 'available' as provided in OMs dated 7.2.1986/3.7.1986 was sought to be clarified, wherein it was clarified that the actual year of appointment, both in the case of direct recruits and promotees, would be reckoned as the year of availability for the purpose of rotation and fixation of inter se seniority. This was, however, challenged before the Hon'ble Supreme Court of India in Civil Appeal No. 7514-7515/2005 in the case of N.R. Parmar v/s Union of India & Others. In its judgement dated 27.11.2012 in the said case, the Hon'ble Apex Court held that the available direct recruits and promotees, for assignment of *inter se* seniority, would refer to the direct recruits and promotees who are appointed against the vacancies of a particular recruitment year, where the recruitment year shall be the year in which the recruitment process for either of the modes of recruitment (direct recruitment or promotion) for a

Pradeep Kumar

particular vacancy year is initiated viz. initiation of recruitment process against a vacancy year would mean the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits or the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up vacancies earmarked for promotion.

4. The law laid down in the N.R. Parmar case relating to determination of *inter se* seniority between direct recruits and promotees in a grade/post was reviewed by the Hon'ble Supreme Court of India in Civil Appeal No. 8833-8835 of 2019 [arising out of SLP(C) Nos.19565-19567 of 2019] in the matter of K. Meghachandra Singh & Ors. Vs Ningam Siro & Ors. In its Order dated 19.11.2019 in CA No. 8833-35/2019 of K. Meghachandra Singh & Ors. Vs Ningam Siro & Ors, the Hon'ble Supreme Court of India has overruled the decision of the Court in NR Parmar case.

5. In para 40 of the Order dated 19.11.2019, the Hon'ble Court *inter-alia* held that ***"the law on the issue is correctly declared in J.C. Patnaik (Supra). Consequently, we disapprove the norms on assessment of inter-se seniority, suggested in N. R. Parmar (Supra). Accordingly, the decision in N.R. Parmar is overruled. However, it is made clear that this decision will not affect the inter-se seniority already based on N.R. Parmar and the same is protected. This decision will apply prospectively except where seniority is to be fixed under the relevant Rules from the date of vacancy/the date of advertisement."*** Further, in para 38, the Hon'ble Court had held as under:

"38. When we carefully read the judgment in N. R. Parmar (Supra), it appears to us that the referred OMs (dated 07.02.1986 and 03.07.1986) were not properly construed in the judgment. Contrary to the eventual finding, the said two OMs had made it clear that seniority of the direct recruits be declared only from the date of appointment and not from the date of initiation of recruitment process. But surprisingly, the judgment while referring to the illustration given in the OM in fact overlooks the effect of the said illustration. According to us, the illustration extracted in the N.R. Parmar (Supra) itself, makes it clear that the vacancies which were intended for direct recruitment in a particular year (1986) which were filled in the next year (1987) could be taken into consideration only in the subsequent year's seniority list but not in the seniority list of 1986. In fact, this was indicated in the two OMs dated 07.02.1986 and 03.07.1986 and that is why the Government issued the subsequent OM on 03.03.2008 by way of clarification of the two earlier OMs."

6. The determination of *inter se* seniority of direct recruits and promotees, as laid down by the Hon'ble Supreme Court of India, in its Order dated 19.11.2019 in K. Meghachandra Singh case, has been carefully examined in consultation with the Department of Legal Affairs, and the following principles have emerged:-

- (i) The rotation of quota, based on the percentage of vacancies allocated to direct recruitment and promotion in the notified recruitment rules/service rules, shall continue to operate for determining vacancies to be filled by the respective quotas in a recruitment year. The term 'recruitment year' shall mean the year in which the vacancy arises. However, *inter se* seniority between direct recruits and promotees, who are appointed against the vacancies of respective quota, would be reckoned with reference to the year in which they are appointed i.e. year in which they are borne in the cadre or formal appointment order is issued.
- (ii) The terms 'recruitment' and 'appointment' have to be read harmoniously and the determination of seniority for recruitees would depend on their actual appointment and

not the initiation of recruitment process itself. It thus follows that the seniority of direct recruits and promotees henceforth stands delinked from the vacancy/year of vacancy.

- (iii) The source of legitimacy of determination of seniority would be with reference to the date of joining of a person against a vacancy, irrespective of the fact that it may have arisen in the previous year(s) and not being a carried forward vacancy of any quota.
- (iv) If adequate number of direct recruits (or promotees) do not become available, "rotation of quotas" for the purpose of determining seniority, would stop after the available direct recruits and promotees are assigned their slots on joining in a particular year.
- (v) The term 'available', both in the case of direct recruits as well as promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed.
- (vi) Thus, appointees who join in the concerned recruitment year and those who join in subsequent year(s), would figure in the seniority list of the respective years of their being appointed. To that extent it may not be necessary to go into the question of quota meant for direct recruits and promotees to find out as to the year in which the vacancy arose against which the recruitment is made.

7. Based on the above, it has been decided to modify the instructions relating to determination of *inter se* seniority between promotees and direct recruits as under:

- (i) DoPT's O.M. No. 20011/1/2012-Estt.(D) dated 4.3.2014, issued in pursuance of Order dated 27.11.2012 in N.R. Parmar case, is treated as non-est/withdrawn w.e.f. 19.11.2019.
- (ii) As the Order dated 19.11.2019 is prospective, cases of *inter se* seniority of direct recruits and promotees, already decided in terms of O.M. No. 20011/1/2012-Estt.(D) dated 4.3.2014, shall not be disturbed, i.e. old cases are not to be reopened.
- (iii) In case of direct recruits and promotees appointed/joined during the period between 27.11.2012 and 18.11.2019 and in which case *inter se* seniority could not be finalised by 18.11.2019, shall also be governed by the provisions of O.Ms. dated 7.2.1986/3.7.1986 read with OM dated 4.3.2014, unless where a different formulation/manner of determination of seniority has been decided by any Tribunal or Court.
- (iv) For cases where the recruitment process has been initiated by the administrative Department/Cadre Authority before 19.11.2019 and where some appointments have been made before 19.11.2019 and remaining on or after 19.11.2019, the *inter se* seniority of direct recruits and promotees, shall also be governed by the provisions of O.Ms. dated 7.2.1986/3.7.1986 read with OM dated 4.3.2014 to ensure equal treatment of such appointees.

Pradeep Kumar

- (v) For recruitments initiated on or after 19.11.2019 as well as for future recruitments, in addition to cases where the recruitment process has been initiated by the administrative Department/ Cadre Authority before 19.11.2019, but where all appointments, subsequent to the initiation of recruitment process, could be made only on or after 19.11.2019 i.e. date of order of Apex Court, the *inter se* seniority of direct recruits and promotes shall be determined in the following manner-
- (a) The rotation of quota based on the percentage of vacancies allocated to direct recruitment and promotion in the notified recruitment rules/service rules, shall continue to operate for determination of vacancies to be filled by the respective quotas in a recruitment year.
 - (b) Determination of inter-se seniority between direct recruits and promotees, who are appointed against the vacancies of respective quota, would, however, be reckoned with reference to the year in which they are appointed i.e. year in which they are borne in the cadre or formal appointment order is issued. In case, where the recruitment year is the same as the year of appointment, the appointees shall be given seniority of that year.
 - (c) Where in case of promotees or direct recruits, the year of appointment is the next year or any year subsequent to the recruitment year, the seniority of such promotees and direct recruits would be determined with reference to the year of their actual joining/appointment to the post, since they were not able to join in the said recruitment year in which the vacancy arose. Thus, they would get seniority of the year in which they actually join i.e. year in which formal appointment order is issued or they are borne in the service/cadre and that they shall not get seniority of any earlier year (viz. year of Vacancy/panel or year in which recruitment process is initiated).
 - (d) In terms of OMs dated 7.2.1986/3.7.1986, rotation between promotees and direct recruits for the purpose of determination of inter-se seniority, would be undertaken only to the extent of available direct recruits and promotees in a particular year. The term 'available direct recruits or promotees' appearing in these OMs dated 7.2.1986/3.7.1986, for the purpose of rotation of quota in fixation of inter-se seniority, shall mean the actual number of direct recruits and promotees appointed during the year after declaration of results/selection and completion of pre-appointment formalities as prescribed.
 - (e) As per (d) above, if adequate number of direct recruits (or promotees) do not become available in a particular year, the "rotation of quotas" for the purpose of determining inter-se seniority, would stop after the available direct recruits and promotes are assigned their slots on their appointment/joining in that year.
 - (f) If no direct recruit is available in a particular year, available promotees would be bunched together in accordance with their position in the panel approved for promotion. Similarly, if no promotee is available in that year, available direct recruits would be bunched together, as per their position obtained in the selection process.

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(g) In case, where direct recruits or promotees, as the case may be, belonging to two more selections/panel approved for promotion, join in the same year, then those who have been appointed/joined as a result of earlier selection/panel would be placed senior in the seniority list to those been appointed/joined as a result of a subsequent selection/panel.

(h) Instructions contained in OMs dated 7.2.1986 and 3.7.1986, stand modified to the extent indicated in above paragraphs.

8. These provisions shall come into effect from 19.11.2019 onwards.

9. All Ministries/Departments are requested to bring these instructions to the notice of all concerned.

Pradeep Kumar

(Pradeep Kumar)

Under Secretary to the Govt of India

To

All Ministries/Departments of the Government of India

Copy to :-

1. President's Secretariat/Vice President's Secretariat/Prime Minister's Office/ Supreme Court/ Rajya Sabha Secretariat/ Lok Sabha Secretariat/ Cabinet Secretariat /UPSC/ CVC/ C&AG/ Central Administrative Tribunal (Principal Bench), New Delhi.
2. All attached/subordinate offices of the Ministry of Personnel, Public Grievances and Pensions.
3. Secretary, National Commission for Minorities.
4. Secretary, National Commission for Scheduled Castes/Scheduled Tribes.
5. Secretary, Staff Side, National Council (JCM), 13-C, Ferozeshah Road, New Delhi.
6. PS to MOS(PP) for information to Hon'ble MoS(PP).
7. All Staff Side Members of the National Council (JCM).
8. NIC [for uploading this OM on the website of DOPT (Seniority)].
9. Hindi Section, DoPT for Hindi Translation.

Pradeep Kumar

(Pradeep Kumar)

Under Secretary to the Government of India

RESERVATION IN PROMOTION – EMERGING SCENARIO

CONSTITUTIONAL AND LEGAL PROVISIONS ON RESERVATION IN SERVICES AND POSTS

[Article 16\(4\)](#) is the enabler permitting reservation in appointments to posts for backward classes if the state is of the opinion that they are not adequately represented in the services. However, reservation in promotion was being granted by the Government without any express provision.

- [Indira Sawhney Judgment \(16/11/1992\) \(WP\(c\) No. 930/1990\)](#)
- There is no provision in the Constitution to provide for reservation in promotions.
- Continued the provision of reservation in promotion to Scheduled Castes and Scheduled Tribes for five years, from pronouncement of the judgment i.e. upto 15.11.1997.

77TH (SEVENTY SEVENTH) AMENDMENT – INTRODUCTION OF RESERVATION IN PROMOTION

- Incorporation of clause (4A) in Article 16 of the Constitution.
 - [DoP&T OM dated 13.08.1997](#) conveyed the decision of the Government to continue the policy of reservation in promotion beyond 15.11.1997.
- Article 16 (4A) : Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, to any class or classes of posts in the services under the State in favor of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State

R. K. SABHARWAL JUDGMENT-IMPLEMENTATION OF POST BASED ROSTER

- **Till 01.07.1997:** Reservation was computed on the **basis of number of vacancies to be filled** and there was a provision of exchange of reserved posts between SCs and STs.
- Supreme Court in R.K. Sabharwal case held that, reservation should be determined on the basis of number of posts in the cadre and not on the basis of vacancies.
- Subsequently, post based roster was introduced in promotions w.e.f. 02.07.1997.
- **Post Based Roster:** A roster that operates on total sanctioned posts in the cadre, for calculation of the share of different methods of recruitment, as per the Recruitment Rules.

VIRPAL SINGH CHAUHAN JUDGMENT

- After 77th constitutional amendment (Article 16(4A)), the Hon'ble Supreme Court introduced **catch-up rule** and concept of consequential seniority

- **CATCH-UP RULE:** If a candidate belonging to Scheduled Caste or Scheduled Tribe is promoted to an immediate higher post/ grade against a reserved vacancy, earlier than his senior general/OBC candidate who is promoted later to the said immediate higher post/ grade, the general/ OBC candidate will regain his seniority over such earlier promoted candidate of the Scheduled Caste and the Scheduled Tribe in the immediate higher post/ grade.

85TH (EIGHTY FIFTH) AMENDMENT – INTRODUCTION OF CONSEQUENTIAL SENIORITY

- In order to dilute & repeal the catch up principle, 85th amendment to the Constitution of India [**85th Amendment**] was introduced whereby the term consequential seniority was added in Article 16(4A).
- Amended Article 16(4A): Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, **with consequential seniority**, to any class or classes of posts in the services under the State in favor of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
- DoP&T O.M. dated 21.01.2002, allowing reserved category promoted officers to retain seniority.

➤ **DoPT OM No. 36028/17/2001-Estt (Res), dated 11.07.2002- Own Merit**

- Introduced the concept of own merit.
- **Own Merit:** If, the SC/ ST/OBC candidate satisfy the same standard as set for general candidates in recruitment, then such SC/ST candidate will be adjusted against the unreserved vacancy. For eg: during promotions, if SC/ST candidates falls under the normal zone of consideration, as drawn for the general candidates, then SC/ST candidate will be adjusted against the unreserved roster. Similarly, during direct recruitment, if SC/ST/OBC candidate satisfy the same standard as set for general candidates, then SC/ST/OBC candidate will be adjusted against the general vacancy.

APEX COURT JUDGMENT, DATED 19.10.2006, IN CASE OF [M.NAGARAJ & ORS VS. UoI](#)

- The Apex Court upheld the earlier amendments.
- States, in each case, will have to show the existence of compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation.
- Article 16(4A) is only an enabling provisions and State not bound to make reservation for SC/ST in matter of promotions.
- If States wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335.
- [DoP&T O.M. dated 10.08.2010](#)
The O.M. further reiterated to 2002 instruction for giving the own merit benefit.

PUNJAB & HIGH COURT'S DECISION ON OWN MERIT IN JARNAIL SINGH AND ORS. VS. LACHMI CHAND GUPRA & ORS.

- The O.M, dated 10.08.2010 (Supra), was challenged in the Hon'ble High Court of Punjab & Haryana, in CWP No. 13218/2009 and the same got quashed vide order dated 15.07.2011.
- Department filed an SLP (C) No. 6915/2014 against the High Court orders.
- Hon'ble Supreme Court vide [interim order](#) directed UoI for taking steps for the purpose of promotion from 'reserved to reserved' and 'unreserved to unreserved' and also in the matter of promotion on merits.

SUPREME COURT JUDGMENT DATED 27.8.2015 AND 9.2.2017 IN THE CASE OF S.PANEERSELVAM AND B.K.PAVITRA - CONSEQUENTIAL SENIORITY ISSUE

- Both the judgements of the Supreme court, are based on the law laid down by the Supreme Court in M. Nagaraj.
- The State has to collect quantifiable data indicating 'backwardness of the class', 'inadequacy of representation' and 'overall efficiency of the State administration under Article 335.
- In the absence of quantifiable data, State cannot provide 'consequential seniority' to those who are promoted against reservation/roster points.

B.K. PAVITRA AND ORS VS. THE UNION OF INDIA AND ORS (PAVITRA -2)

- The constitutional validity of Reservation Act, 2018 was upheld as the State carried out the exercise as per triple test laid down in M. Nagaraj Case.
- The triple test was carried out by the Karnataka Govt. by collecting data on the basis of groups and not cadres.

THE HON'BLE SUPREME COURT JUDGEMENT DATED 28.01.2022 IN [JARNAIL SINGH CASE](#):

- No yardstick can be laid down for determining the adequacy of representation of SCs and STs in promotional posts for the purpose of providing reservation.
- Cadre should be the unit for the purpose of collection of quantifiable data in relation to the promotional post(s).
- Data collected to determine inadequacy of representation for the purpose of providing reservation in promotions needs to be reviewed periodically.
- M. Nagaraj to have prospective effect.
- The conclusion of this Court in B.K. Pavitra II approving the collection of data on the basis of 'groups' and not cadres is contrary to the law laid down by this Court in M. Nagaraj (supra) and Jarnail Singh.

➤ **DoPT O.M. No. 36012/16/2019-Estt. (Res.) dated 12.04.2022**

- DoP&T laid down the conditions to comply with, before implementing policy of reservation :
 - (i) Collection of quantifiable data;
 - (ii) Application of this data to each cadre separately; and
 - (iii) If a roster exists, the unit for operation of the roster would be the cadre for which the quantifiable data would have to be collected and applied in regard to the filling up of vacancies in the roster.

- Further, the following also needs to be complied with, while conducting DPCs:
 - (i) The reservation rosters are strictly maintained.
 - (ii) To ensure maintenance of efficiency of administration, DPC shall carefully assess the suitability of the Officers, being considered for promotion

- All promotions order issued will be subject to outcome of Supreme Court judgment in Jarnail Singh batch of cases.

Present Scenario

- The DoP&T O.M. of 21.01.2002, on non-implementation of catch-up rule, still holds the fort and has not been modified by the recent O.M. of 12.04.2022.
- The issue of Own Merit in reservation in promotion and catch-up rule is tagged with Jarnail Singh Batch of cases in Hon'ble Supreme Court and will be taken up for disposal one by one. In other words, jury is still not out on these twin issues.
- Any future DPC shall be subject to compliance of conditions laid down in DoP&T instructions dated 21.04.2022 and outcome of Supreme Court judgment in Jarnail Singh batch of cases.

THANK YOU

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Central Government Act

Article 16(4) in The Constitution Of India 1949

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

Supreme Court of India

Indra Sawhney Etc. Etc vs Union Of India And Others, Etc. ... on 16 November, 1992

Equivalent citations: AIR 1993 SC 477, 1992 Supp 2 SCR 454

Author: B J Reddy

Bench: M Kania, M Venkatachaliah, S R Pandian, . T Ahmadi, K Singh, P Sawant, R Sahai, B J Reddy

ORDER

1. Judgment of The Chief Justice, M.N. Venkatachallah, A.M. Ahmadi and B.P. Jeevan Reddy, JJ. Delivered by B.P. Jeevan Reddy, J.

B.P. Jeevan Reddy, J.

Forty and three years ago was founded this republic with the fourfold objective of securing to its citizens justice, liberty, equality and fraternity. Statesmen of the highest order the like of which this country has not seen since - belonging to the fields of law, politics and public life came together to fashion the instrument of change - the Constitution of India. They did not rest content with evolving the framework of the State; they also pointed out the goal-and the methodology for reaching that goal. In the preamble, they spelt out the goal and in parts III and IV, they elaborated the methodology to be followed for reaching that goal.

2. The Constituent Assembly, though elected on the basis of a limited franchise, was yet representative of all sections of society. Above all, it was composed of men of vision, conscious of the historic but difficult task of carving an egalitarian society from out of a bewildering mass of religions, communities, castes, races, languages, beliefs and practices. They knew their country well. They understood their society perfectly. They were aware of the historic injustices and inequities afflicting the society. They realised the imperative of redressing them by constitutional means, as early as possible - for the alternative was frightening. Ignorance, illiteracy and above all, mass poverty, they took note of. They were conscious of the fact that the Hindu religion - the religion of the overwhelming majority - as it was being practiced, was not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this fourtier system (chaturvarnya) were the outcastes (Panchamas), the lowliest. They did not even believed all the caste system - ugly as its face was. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, unconnected with their deeds. There was to be no deliverance for them from this social stigma, except perhaps death. They were condemned to be inferior. All lowly, menial and unsavoury occupations were assigned to them. In the rural life, they had no alternative but to follow these occupations, generation after generation, century after century. It was their 'karma', they were told, the penalty for the sins they allegedly committed in their previous birth. Pity is, they believed all this. They were conditioned to believe it. This mental blindfold had to be removed first. This was a phenomenon peculiar to this country. Poverty there has been - and there is - in every country. But none had the misfortune of having this social division - or as some call it, degradation - super-imposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted - and do still constitute - a vicious circle. The founding fathers were aware of

all this - and more.

3. 'Liberty, equality and fraternity' was the battle cry of the French Revolution. It is also the motto of our Constitution, with the concept of 'Justice-Social Economic and Political' - the sum-total of modern political thought - super-added to it. Equality has been and is the single greatest craving of all human beings at all points of time. It has inspired many a great thinker and philosopher. All religious and political schools of thought swear by it, including the Hindu religious thought, if one looks to it ignoring the later crudities and distortions. Liberty of thought, expression, belief, faith and worship has equally been an abiding faith with all human beings, and at all times in this country in particular. Fraternity assuring the dignity of the individual has a special relevance in the Indian context, as this Judgment will illustrate in due course.

4. The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets, relevant to Indian Society, have been referred to in the preamble and the articles under the sub-heading "Right to equality"-(Articles 14 to 18). In short, the goal is "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several articles in Part IV (Directive Principles of State Policy). "Justice, Social, Economic and Political", is the sum total of the aspirations incorporated in part IV.

5. Article 14 enjoins upon the state not to deny to any person "equality before the law" or "the equal protection of the laws" within the territory of India. Most constitutions speak of either "equality before the law" or "the equal protection of the laws", but very few of both. Section 1 of the XIV. Amendment to the U.S. Constitution uses only the latter expression while the Austrian Constitution (1920), the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equal before the law". (Article 7 of the Universal Declaration of Human Rights, 1948, of course, declares that "all are equal before the law and are entitled without any discrimination to equal protection of the law".) The content and sweep of these two concepts is not the same though there may be much in common. The content of the expression "equality before the law" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39A, 41 and 46. Among others, the concept of equality before the law contemplates minimising the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation. Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality - either equality before law or equality in any other respect.

6. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18. Through Article 15 they declared in positive terms that the state shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. With a view to eradicate certain prevalent undesirable practices it was declared in Clause

(2) of Article 15 that no citizen shall on the grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to shops, public restaurants, hotels and place of public entertainment or to the use of well, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of state funds or dedicated to the use of general public. At the same time, with a view to ameliorate the conditions of women and children a provision was made in Clause (3) that nothing in the said Article shall prevent the state from making any special provision for women and children.

7. In as much as public employment always gave a certain status and power - it has always been the repository of State power - besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1) expressly declares that in the matter of public employment or appointment to any office under the state, citizens of this country shall have equal opportunity while Clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to declare in Clause (4) that nothing in the said Article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizen which in the opinion of the state is not adequately represented in the services under the state. Article 17 abolishes the untouchability while Article 18 prohibits conferring of any titles (not representing military or academic distinction). It also prohibits the citizens of this country from accepting any title from a foreign state.

8. Article 16 has remained unamended, except for a minor amendment in Clause (3) whereas Article 15 had Clause (4) inserted in it by the First Amendment Act, 1951. As amended, they read as follows:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

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

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(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.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

The other provisions of the Constitution having a bearing on Article 16 are Articles 38, 46 and the set of articles in Part XVI. Clause (1) of Article 38 obligates the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Clause (2) of Article 38, added by the 44th Amendment Act says, "the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

Article 46 contains a very significant directive to the State. It says:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. - The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

It is evident that "the weaker sections of the people" do include the "backward class of citizens" contemplated by Article 16(4).

Part XVI of the Constitution contains "special provisions relating to certain classes". The "classes" for which special provisions are made are, Scheduled Castes, Scheduled Tribes and the Anglo-Indian

Community. It also provides for appointment of a Commission to investigate the conditions of and the difficulties faced by the socially and educationally backward classes and to make appropriate recommendations. Article 340 reads as follows:

340. Appointment of a Commission to investigate the conditions of backward classes. - (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

Article 338, which has been extensively amended by the Sixty-fifth Amendment Act, provides for establishment of a Commission for the Scheduled Castes and Scheduled Tribes to be known as 'the National Commission for the Scheduled Castes and Scheduled Tribes'. Clause (5) prescribes the duties of the Commission. They are:

(5) It shall be duty of the Commission-

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled castes and Scheduled Tribes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socioeconomic development of the Scheduled Castes and Scheduled Tribes;

and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

Clause (6) provides that "the President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations."

Clause (7) being relevant may also be read here. It reads, "where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations."

Clause (10) [Clause (3) prior to 65th Amendment Act] brings in socially and educationally backward classes identified by the Government on the basis of the report of the Commission appointed under Article 340 and Anglo-Indians within the purview of the expressions "Scheduled Castes and Scheduled Tribes". It reads as follows:

10. In this article references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under Clause (1) of Article 340, by order specify and also to the Anglo-Indian community.

Article 335 provides that "the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State." It is obvious that if the claims of even Scheduled Castes and Scheduled Tribes are to be taken into consideration consistently with the maintenance of efficiency of administration, the said admonition has to be respected equally while taking into consideration the claims of other backward classes and other weaker sections.

THE FIRST BACKWARD CLASSES COMMISSION (KALELKAR COMMISSION):

9. The proceedings of the Constituent Assembly on draft Article (10) disclose a persistent and strident demand from certain sections of the society for providing reservations in their favour in the matter of public employment. While speaking on the draft Article 10(3) [corresponding to Article 16(4)] Dr. Ambedkar had stated, "then we have quite a massive opinion which insists that although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been

outside the administration." It was this demand which was mainly responsible for the incorporation of Clause (4) in Article 16. As matter of fact, in some of the southern States, reservations in favour of O.B.Cs. were in vogue since quite a number of years prior to the Constitution. There was a demand for similar reservations at the center. In response to this demand and also in realisation of its obligation to provide for such reservations in favour of backward sections of the society, the Central Government appointed a Backward Class Commission under Article 340 of the Constitution on January 29, 1953. The Commission, popularly known as Kaka Kalelkar Commission, was required "to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove difficulties and to improve their conditions". The Commission submitted its report on March 30, 1955. According to it, the relevant factors to consider while classifying backward classes would be their traditional occupation and profession, the percentage of literacy or the general educational advancement made by them; the estimated population of the community and the distribution of the various communities throughout the state or their concentration in certain areas. The Commission was also of the opinion that the social position which a community occupies in the caste hierarchy would also have to be considered as well as its representation in Government service or in the Industrial sphere. According to the Commission, the causes of educational backwardness amongst the educationally and backward communities were (i) traditional apathy for education on account of social and environmental conditions or occupational handicaps: (ii) poverty and lack of educational institutions in rural areas and (iii) living in inaccessible areas. The Chairman of the commission, Kaka Kalelkar, however, had second thoughts after signing the report. In the enclosing letter addressed to the President he virtually pleaded for the rejection of the report on the ground that the reservations and other remedies recommended on the basis of caste would not be in the interest of society and country. He opined that the principle of caste should be eschewed altogether. Then alone, he said, would it be possible to help the extremely poor and deserving members of all the communities. At the same time, he added, preference ought to be given to those who come from traditionally neglected social classes.

10. The report made by the Commission was considered by the Central Government, which apparently was not satisfied with the approach adopted by the Commission in determining the criteria for identifying the backward classes under Article 15(4). The Memorandum of action appended to the Report of the Commission while placing it on the table of the Parliament [as required by Clause (3) of Article 340] on September 3, 1956, pointed out that the caste system is the greatest hindrance in the way of our progress to egalitarian society and that in such a situation recognition of certain specified castes as backward may serve to maintain and perpetuate the existing distinctions on the basis of caste. The Memorandum also found fault with certain tests adopted by the Commission for identifying the backward classes. It expressed the opinion that a more systematic and elaborate basis has to be evolved for identifying backward classes. Be that as it may, the Report was never discussed by the Parliament.

11. No meaningful action was taken after 1956 either for constituting another Commission or for evolving a better criteria. Ultimately, on August 14, 1961, the Central Government wrote to ail the State Governments stating inter alia that "while the State Governments have the discretion to

choose their own criteria for defining backwardness, in the view of the Government of India it would be better to apply economic tests than to go by caste." The letter stated further, rather inexplicably, that "even if the Central Government were to specify under Article 338(3) certain groups of people as belonging to 'other backward classes', it will still be open to every State Government to draw up its own lists for the purposes of Articles 15 and 16. As, therefore, the State Governments may adhere to their own lists, any All-India list drawn up by the Central Government would have no practical utility." Various State Governments thereupon appointed Commissions for identifying backward classes and issued orders identifying the socially and educationally backward classes and reserving certain percentage of posts in their favour. So far as the Central services are concerned, no reservations were ever made in favour of other backward classes though made in favour of Scheduled Castes and Scheduled Tribes.

THE SECOND BACKWARD CLASSES COMMISSION (COMMISSION):

12. By an Order made by the President of India, in the year 1979, under Article 340 of the Constitution, a Backward Class Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India, which Commission is popularly known as Mandal Commission. The terms of reference of the Commission were:

The terms of reference of the Commission were:-

- (i) to determine the criteria for defining the socially and educationally backward classes;
- (ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;
- (iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and
- (iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

The Commission was empowered to:-

- (a) obtain such information as they may consider necessary or relevant for their purpose in such form and such manner as they may think appropriate, from the Central Government, the State Government, the Union Territory Administrations and such other authorities, organisations or individuals as may in the opinion of the Commission, be of assistance to them: and
- (b) hold their sittings or the sittings of such sub-committees as they may appoint from amongst their own members of such times and such places as may be determined by, or under the authority of the Chairman.

13. The report of the Commission was required to be submitted not later than 31st December, 1979, which date was later extended upto December 31, 1980. It was so submitted.

Chapter-I of the Report deals with the Constitution of First Backward Classes Commission (Kaka Kalelkar Commission), its report, the letter of Kaka Kalelkar to the President, the lack of follow-up action and the letter of the Central Government referred to hereinbefore to State Governments to draw up their own lists. It also points out certain "internal contradictions" in the Report. Chapter-II deals with the "Status of other backward classes in some States". It sets out the several provisions relating to reservation in favour of O.B.Cs. obtaining in several States and the history of such reservations. Chapter-III is entitled 'methodology and data base'. It sets out the procedure followed by the Commission and the material gathered by them. Paras 3.1 and 3.2 read thus:

3.1. One important reason as to why the Central Government could not accept the recommendations of Kaka Kalelkar Commission was that it had not worked out objective tests and criteria for the proper classification of socially and educationally backward classes. In several petitions filed against reservation orders issued by some State Governments, the Supreme Court and various High Courts have also emphasised the imperative need for an empirical approach to the defining of socially and educationally backwardness or identification of Other Backward Classes.

3.2 The Commission has constantly kept the above requirements in view in planning the scope of its activities. It was to serve this very purpose that the Commission made special efforts to associate the leading Sociologists, Research Organisations and Specialised Agencies of the country with every important facet of its activity. Instead of relying on one or two established techniques of enquiry, we tried to caste our net far and wide so as to collect facts and get feed-back from as large an area as possible. A brief account of this activity is given below.

It then refers to the Seminar held by Department of Anthropology of Delhi University in March 1979, to the questionnaire issued to all departments of Central Government and to the State Governments (the proforma are compiled in Vol. II of the Report) the country-wide touring undertaken by the Commission, the evidence recorded by it, the socio-educational field survey conducted by it and other studies and Reports involved in its work. In Chapter-IV the Commission deals with the interrelationship between social backwardness and caste. It describes how the fourth caste, Shudras, were kept in a state of intellectual and physical subjugation and the historical injustices perpetrated on them. In para 4.5 the Commission states: "The real triumph of the caste system lies not in upholding the supremacy of the Brahmin, but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as a part of the natural order of things.... It was through an elaborate, complex and subtle scheme of scripture, mythology and ritual that Brahminism succeeded in investing the caste system with a moral authority that has been seldom effectively challenged even by the most ardent social reformers."

14. Chapter-V deals with 'social dynamics of caste'. In this chapter, the Commission emphasises the fact that notwithstanding public declarations condemning the caste, it has remained a significant basis of action in politics and public life. Reference is made to several caste associations, which have come into being after the Constitution. The concluding part in this Chapter, para 5.17, reads:

The above account should serve as a warning against any hasty conclusion about the weakening of caste as the basis of social organisation of the Hindu society. The pace of social mobility is no doubt increasing and some traditional features of the caste system have inevitably weakened. But what caste has lost on the ritual front, it has more than gained on the political front. This has also led to some adjustments in the power equation between the high and low castes and thereby accentuated social tensions. Whether these tensions rent the social fabric or the country is able to resolve them by internal adjustments will depend on how understandingly the ruling high castes handle the legitimate aspirations and demands of the historically suppressed and backward classes.

Chapter-VI deals with 'Social Justice, Merit and Privilege'. It attempts to establish, that merit in a elitist society is not something inherent but is the consequence of environmental privileges enjoyed by the members of higher castes. This is sought to be illustrated by giving an example of two boys - Lallu and Mohan. Lallu is a village boy belonging to a backward class occupying a low social position in the village caste hierarchy. He comes from a poor illiterate family and studies at a village school, where the level of instruction is woeful. On the other hand, Mohan comes from a fairly well-off middle class and educated family, attends one of the good public schools in the city, has assistance at home besides the means of acquiring knowledge through television, radio, magazines and so on. Even though both Lallu and Mohan possess the same level of intelligence, Lallu can never compete with Mohan in any open competition because of the several environmental disadvantages suffered by him.

15. Chapter-VII deals with 'Social justice. Constitution and the law'. It refers to the relevant provisions of the Constitution, to the decision in *M.R. Balaji and Ors. v. State of Mysore* [1963] Suppl. 1 S.C.R. 439 and various subsequent decisions of this Court and discusses the principles flowing from the said decisions. It notes that the subsequent decisions of this Court in *C.A. Rajendran v. Union of India* ; *State of Andhra Pradesh and Ors. v. P. Sugar and State of Andhra Pradesh and Ors. v. U.S.V. Balram etc.* show a marked shift from the original position taken in *Balaji* on several important points. In particular, it refers to the observations in *Rajendran* to the effect that "caste is also a class of citizens and if the class as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it was socially and educationally backward class of citizens within the meaning of Article 15(4)". It refers to the statement in *A. Peeriakaruppan etc. v. State of Tamil Nadu* , to the effect that "a caste has always been recognised as a class." It also commends the dissenting view of Subba Rao, J. in *T. Devadasan v. Union of India* , (wrongly referred to as *Rangachari*) - General Manager, Southern Railway v. *Rangahari* .

Chapter-VIII deals with 'North-South Comparison of other Backward Classes Welfare'. It is a case study of provisions in force in two Southern States namely Tamil Nadu and Karnataka and the two Northern States, Bihar and Uttar Pradesh. The conclusions drawn from the discussion are stated in para 8.45 in the following words:

"In view of the foregoing account, the reasons for much stronger reaction in the North than South to reservations, etc. for other Backward Classes may be summarised as below:-

(1) Tamil Nadu and Karnataka had a long history of Backward Classes movements and various measures for their welfare were taken in a phased manner. In Uttar Pradesh and Bihar such measures did not mark the culmination of a mass movement.

(2) In the South "the forward communities have been divided either by the classification schemes or politically or both.... In Bihar and U.P. the G.Os. have not divided the forward castes.

(3) In the South, clashes between Scheduled Castes and Backward peasant castes have been rather mild. In the North these cleavages have been much sharper, often resulting in acts of violence. This has further weakened the backward classes solidarity in the North.

(4) in the non-Sanskritic South, the basic Varna cleavage was between Brahmins and non-Brahmins and Brahmins constituted only about 3 per cent of the population. In the Sanskritic North, there was no sharp cleavage between the forward castes and together they constituted nearly 20 per cent of the population. In view of this the higher castes in U.P. and Bihar were in a stronger position to mobilise opposition to backward class movement.

(5) Owing to the longer history and better organisation of Other Backward castes in the South, they were able to acquire considerable political clout. Despite the lead given by the Yadavas and other peasant castes, a unified and strong OBC movement has not emerged in the North so far.

(6) The traditions of semi-feudalism in Uttar Pradesh and Bihar have enabled the forward castes to keep tight control over smaller backward castes and prevent them from joining the mainstream of backward classes movement. This is not so in the south.

(7) "The economies of Tamil Nadu and Karnataka have been expanding relatively faster. The private tertiary sector appears to be growing. It can shelter many forward caste youths. Also, they are prepared to migrate outside the State. The private tertiary sectors in Bihar and U.P. are stagnant. The forward caste youths in these two States have to depend heavily on Government jobs. Driven to desperation, they have reacted violently."

16. Chapter-IX sets out the evidence tendered by Central and State Governments while Chapter-X deals with the evidence tendered by the Public. Chapter-XI is quite important inasmuch as it deals with the "Socio-Educational Field Survey and Criteria of Backwardness". In this Chapter, the Commission says that it decided to tap a of number of sources for the collection of data, keeping in mind the criticism against the Kaka Kalelkar Commission as also the several Judgments of this Court. It says that Socio-Educational Field Survey was the most comprehensive inquiry made by the Commission in this behalf. Right from the beginning, this Survey was designed with the help of top social scientists and specialists in the country. Experts from a number of disciplines were associated with different phases of its progress. It refers to the work of Research Planning Team of Sociologists and the work done by a panel of experts led by Prof. M.N. Srinivas. It refers to the fact that both of them concurred that "in the Indian context such collectivities can be castes or other hereditary groups traditionally associated with specific occupations which are considered to be low and impure and with which educational backwardness and low income are found to be associated." The

Commission says further that with a view to providing continuous guidance at the operational level, a Technical Advisory Committee was set up under Dr. K.C. Seal. Director General, Central Statistical Organisation with the Chief Executive, National Sample Survey Organisation and representatives of Directors of State Bureau of Economics and Statistics as Members. The Commission sets out the Methodology evolved by the Experts' panel and states that survey operations were entrusted to the State Statistical Organisations of the concerned States/Union Territories. It refers to the training imparted to the survey staff and to the fact that the entire data so collected was fed into a computer for electronic processing of such data. Out of the 406 districts in the country, the survey covered 405 districts. In every district, two villages and one urban block was selected and in each of these villages and urban blocks, every single household was surveyed. The entire data collected was tabulated with the aid and National Informatics center of Electronics Commission of India. The Technical Committee constituted a Sub-Committee of Experts to help the Commission prepare "Indicators of Backwardness" for analysing the data contained in the computerised tables. In para 11.23 (page 52) the Commission sets out the eleven Indicators/Criteria evolved by it for determining social and educational backwardness. Paras 11.23, 11.24 and 11.25 are relevant and may be set out in full:-

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

A. Social:

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

B. Educational:

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.
- (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 3 points each. Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

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

It will also be useful to set out the observations of the Commission in para 11.27:-

11.27. In the end it may be emphasised that this survey has no pretensions to being a piece of academic research. It has been conducted by the administrative machinery of the Government and used as a rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time. All these factors obviously militate against the requirements of a technically sophisticated and academically satisfying operation.

17. Chapter-XII deals with 'Identification of OBCs'. In the first instance, the Commission deals with OBCs among Hindu Communities. It says that it applied several tests for determining the SEBCs like stigmas of low-occupation, criminality, nomadism, beggary and untouchability besides inadequate representation in public services. The multiple approach adopted by the Commission is set out in para 12.7 which reads:-

12.7. Thus, the Commission has adopted a multiple approach for the preparation of comprehensive lists of Other Backward Classes for all the States and Union Territories. The main sources examined for the preparation of these lists are:-

- (i) Socio-educational field survey;
- (ii) Census Report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes);
- (iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described in Chapter X of this Report; and
- (iv) Lists of OBCs notified by various State Governments.

The Commission next deals with OBCs among Non-Hindu Communities. In paragraphs 12.11 to 12.16 the Commission refers to the fact that even among Christian, Muslim and Sikh religions, which do not recognise caste, the caste system is prevailing though without religious sanction. After giving a good deal of thought to several difficulties in the way of identifying OBCs among Non-Hindus, the Commission says, it has evolved a rough and ready criteria viz., (1) all untouchables converted to any Non-Hindu religion and (2) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counter-parts have been included in the list of Hindu OBCs - ought to be treated as SEBCs. The Commission then sought to work out the estimated population of the OBCs in the country and arrived at the figure of 52 per cent. Paras 12.19, 12.22 may be set out in full in view of their relevancy:

12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of castewise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes communities and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country.

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

Percentage Distribution of Indian Population by Caste and Religious Groups

S.No.	Group Name	Percentage of total population
I.	Scheduled Castes and Scheduled Tribes	15.05
A--1	Scheduled Castes	02.56
A--2	Scheduled Tribes	7.51
II.	Non-Hindu Communities, Religious Groups, etc.	16.16
B--1	Muslims (other than STs)	11.19 (0.02)*
B--2	Christians (other than STs)	2.16 (0.44)*
B--3	Sikhs (other than SCs & STs)	1.67 (0.22)*
B--4	Buddhists (other than STs)	0.67 (0.03)*
B--5	Jains	0.47
III.	Forward Hindu Castes & Communities	36.84
C--1	Brahmins (including Bhumidars)	5.52
C--2	Rajputs	3.90
C--3	Marathas	2.21
C--4	Jats	1.00
C--5	Vaishyas-Bania, etc.	1.88
C--6	Kayasthas	1.07
C--7	Other forward Hindu castes groups	2.00
IV.	Backward Hindu Castes & Communities	56.30
D.	Remaining Hindu castes/ groups which come	

in the category of "Other Backward Classes" 43.70@ V. Backward Non-Hindu Communities E. 52% of religious groups under Section B may also be treated as OBCs. 8.40 F. The approximate derived population of Other Backward Classes including non-Hindu Communities 52% (Aggregate of D& E, rounded) @ This is a derived figure. * Figures in brackets give the population of S.C. & S.T. among these non-Hindu Communities."

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18. Chapter-XIII contains various recommendations including reservations in services. In view of the decisions of the Supreme Court limiting the total reservation to 50 per cent, the Commission recommended 27 per cent reservation in favour of OBCs (in addition to 22.5 per cent already existing in favour of SCs and STs). It recommended several measures for improving the condition of these backward classes. Chapter-XIV contains a summary of the report.

19. Volumes 2 to 9 of the Report contain and set out the material and the data on the basis of which the Commission made its recommendations. Vol. II contains the State-wise lists of Backward Classes, as identified by the Commission. (It may be remembered that both the Scheduled Castes order and Scheduled Tribes order notified by the President contain State-wise lists of Scheduled Castes and Scheduled Tribes). Volume II inter alia contains the questionnaire issued to the State Governments/Union Territories, the questionnaire issued to the Central Government Ministries/Departments, the questionnaire issued to the general public, the list of M.Ps. and other experts who appeared and gave evidence before the Commission, the criteria furnished to Central Government offices for identifying OBC employees for both Hindu and non-Hindu Communities, report of the Research Planning Team of the Sociologists and the proformas employed in conducting the Socio-Education Survey.

20. The Report of the Mandal Commission was laid before each House of Parliament and discussed on two occasions - once in 1982 and again in the year 1983. The proceedings of the Lok Sabha placed before us contain the statement of Sri R. Venkataraman, the then Minister for Defence and Home Affairs. He expressed the view that "the debate has cut across party lines and a number of people on this side have supported the recommendations of the Mandal Commission. A large number of people on the other side have also supported it. If one goes through the entire debate one will be impressed with a fairly unanimous desire on the part of all sections of the House to find a satisfactory solution to this social evil of backwardness of Scheduled Castes/Scheduled Tribes etc. which is a festering sore in our body politic," The Hon'ble Minister then proceeded to state, "the Members generally said that the recommendations should be accepted. Some Members said that it should be accepted in toto. Some Members have said that it should be accepted with certain reservations. Some Members said, there should be other criteria than only social and educational backwardness. But all these are ideas which Government will take into account. The problem that confronts Government today is to arrive at a satisfactory definition of backward classes and bring about an acceptance of the same by all the state concerned." The Hon'ble Minister referred to certain difficulties the Government was facing in implementing the recommendations of the Commission on account of the large number of castes identified and on account of the variance in the State lists and the Mandal Commission lists and stated that consultation with various

departments and State Governments was in progress in this behalf. He stated that a meeting of the Chief Ministers would be convened shortly to take decisions in the matter.

The Report was again discussed in the year 1983. The then Hon'ble Minister for Home Sri P.C. Sethi, while replying to the debate stated: "While referring to the Commission whose report has been discussed today, I would like to remind the House that although this Commission had been appointed by our predecessor Government, we now desire to continue with this Commission and implement its recommendations."

The Office Memorandum dated 13th August, 1990:

21. No action was, however, taken on the basis of the Mandal Commission Report until the issuance of the Office Memorandum on 25th September, 1991. On that day, the then Prime Minister Sri V.P. Singh made a statement in the Parliament in which he stated inter alia as follows:

After all, if you take the strength of the whole of the Government employees as a proportion of the population, it will be 1% or 1-1/2. I do not know exactly, it may be less than 1%. We are under no illusion that this 1% of the population, or a fraction of it will resolve the economic problems of the whole section of 52%. No. We consciously want to give them a position in the decision-making of the country, a share in the power structure. We talk about merit. What is the merit of the system itself? That the section which has 52% of the population gets 12.55% in Government employment. What is the merit of the system? That in Class I employees of the Government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power structure it hardly 4.69. I want to challenge first the merit of the system itself before we come and question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consciously, with open eyes. And I know when changing the structures comes, there will be resistance....

What I want to convey is that treating unequals as equals is the greatest injustice.

And, correction of this injustice is very important and that is what I want to convey. Here, the National Front Government's Commitment for not only change of Government, but also change of the social order, is something of great significance to all of us; it is a matter of great significance. Merely making programmes of economic benefit to various sections of the society will not do....

There is a very big force in the argument to involve the poorest in the power structure. For a lot of time we have acted on behalf of the poor. We represent the poor....

Let us forget that the poor are begging for some crumbs. They have suffered it for thousands of years. Now they are fighting for their honour as a human being....

A point was made by Mahajan ji that if there are different lists in different States how will the Union List harmonise? It is so today in the case of the Scheduled Castes and the Scheduled Tribes, That has not caused a problem. On the same pattern, this will be there and there will be no problem.

22. The Office Memorandum dated 13th August, 1990 reads as follows:

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 be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:-

(i) 27% 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

23. Soon after the issuance of the said Memorandum there was wide-spread protest in certain Northern States against it. There occurred serious disturbance to law and order involving damage to private and public property. Some young people lost their lives by self-immolation. Writ Petitions were filed in this Court questioning the said Memorandum along with applications for staying the operation of the Memorandum. It was stayed by this Court.

The Office Memorandum dated 25th September, 1991:

24. After the change of the Government at the center following the general election held in the first half of 1991, another Office Memorandum was issued on 25th September, 1991 modifying the earlier Memorandum dated 13th August, 1990. The later Momorandum reads as follows:

OFFICE MEMORANDUM Subject : Recommendations 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 TO THE GOVERNMENT OF INDIA

25. Till now, the Central Government has not evolved the economic criteria as contemplated by the later Memorandum, though the hearing of these writ petitions was adjourned on more than one occasion for the purpose. Some of the writ petitions have meanwhile been amended challenging the later Memorandum as well. Let us notice at this stage what do the two memorandums say, read together. The first provision made is: 27% of vacancies to be filled up by direct recruitment in civil posts and services under the Government of India are reserved for backward classes. Among the members of the backward classes preference has to be given to candidates belonging to the poorer sections. Only in case, sufficient number of such candidates are not available, will the unfilled vacancies be filled by other backward class candidates. The second provision made is: backward class candidates recruited on the basis of merit in open competition along with general candidates shall not be adjusted against the quota of 27% reserved for them. Thirdly, it is provided that backward classes shall mean those castes and communities which are common to the list in the report of the Mandal Commission and the respective State Government's list. It may be remembered that Mandal Commission has prepared the list of backward classes State-wise, Lastly, it is provided that 10% of the vacancies shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations. As stated above, the criteria for determining the poorer sections among the backward classes or for determining other economically backward sections among the non-reserved category has so far not been evolved. Though the first Memorandum stated that the orders made therein shall take effect from 7.8.1990, they were not in fact acted upon on account of the orders made by this Court.

Issues for consideration:

26. These writ petitions were heard in the first instance by a Constitution Bench presided over by the then Chief Justice Sri Ranganath Misra. After hearing them for some time, the Constitution Bench referred them to a Special Bench of Nine Judges, "to finally settle the legal position relating to reservations." The reason for the reference being, "that the several Judgments of this Court have, not spoken in the same voice on this issue and a final look by a larger Bench in our opinion should settle the law in an authoritative way.

We have, accordingly, heard all the parties and interveners who wished to be heard in the matter. Written submissions have been filed by almost all the parties and interveners. Together, they run into several hundreds of pages.

At the inception of arguments, counsel for both sides put their heads together and framed eight questions arising for our discussion. They read as follows:

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

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

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

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

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

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

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

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

For the sake of convenient discussion and in the interest of clarity, we found it necessary to elaborate them. Accordingly, we have re-framed the questions. We shall proceed to answer them in the same order. The reframed questions are:

1(a) Whether the 'provision' contemplated by Article 16(4) must necessarily be made by the legislative wing of the State?

(b) If the answer to Clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Article 309?

2(a) Whether Clause (4) of Article 16 is an exception to Clause (1) of Article 16?

(b) Whether Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of 'backward class of citizens'? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes or groups?

(c) Whether reservations can be made under Clause (1) of Article 16 or whether it permits only extending of preferences/concessions?

- 3(a) What does the expression 'backward class of citizens' in Article 16(4) means?
- (b) Whether backward classes can be identified on the basis and with reference to caste alone?
- (c) Whether a class, to be designated as a backward class, should be situated similarly to the S.Cs./S.Ts.?
- (d) Whether the 'means' test can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?
- 4(a). Whether the backward classes can be identified only and exclusively with reference to economic criteria?
- (b) Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes?
5. Whether the backward classes can be further categorised into backward and more backward categories?
6. To what extent can the reservation be made?
- (a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?
- (b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?
- (c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to?
- (d) Whether Devadasan was correctly decided?
7. Whether Article 16 permits reservations being provided in the matter of promotions?
8. Whether reservations are anti-meritian? To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?
9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?
10. Whether the distinction made in the Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?

11. Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Article 16?

26A. Before we proceed to deal with the question, we may be permitted to make a few observations: The questions arising herein are not only of great moment and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian Society, wrapped and presented to us as constitutional and legal questions. On some of these questions, the decisions of this Court have not been uniform. They speak with more than one voice. Several opposing points of view have been pressed upon us with equal force and passion and quite often with great emotion. We recognize that these view-points are held genuinely by the respective exponents. Each of them feels his own point of view is the only right one. We cannot, however, agree with all of them. We have to find and we have tried our best to find - answers which according to us are the right ones constitutionally and legally. Though, we are sitting in a larger Bench, we have kept in mind the relevance and significance of the principle of Stare, decisis. We are conscious of the fact that in law certainty, consistency and continuity are highly desirable features. Where a decision has stood the test of time and has never been doubted, we have respected it unless, of course, there are compelling and strong reasons to depart from it. Where, however, such uniformity is not found, we have tried to answer the question on principle keeping in mind the scheme and goal of our Constitution and the material placed before us.

There are occasions when the obvious needs to be stated and, we think, this is one such occasion. We are dealing with complex social, constitutional and legal questions upon which there has been a sharp division of opinion in the Society, which could have been settled more satisfactorily through political processes. But that was not to be. The issues have been relegated to the judiciary - Which shows both the disinclination of the executive to grapple with these sensitive issues as also the confidence reposed in this organ of the State. We are reminded of what Sir Anthony Mason, Chief Justice of Australia once said:

Society exhibits more signs of conflict and disagreement today than it did before.... Governments have always had the option of leaving questions to be determined by the courts according to law....

There are other reasons, of course - that cause governments to leave decisions to be made by Courts. They are of expedient political character. The community may be so divided on a particular issue that a government feels that the safe course for it to pursue is to leave the issue to be resolved by the Courts, thereby diminishing the risk it will alienate significant sections of the Community.

But then answering a question as to the legitimacy of the Court to decide such crucial issues, the learned Chief Justice says:

....my own feeling is that the people accept the Courts as the appropriate means of resolving disputes when governments decide not to attempt to solve the disputes by the political process.

(Judging the World: Law and Politics in the Worlds Leading Courts - page 343) We hope and trust that our people too are mature enough to appreciate our endeavour in the same spirit. They may well remember that "the law is not an abstract concept removed from the society it serves, and that Judges, as safe-guarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality."

PART - II Before we proceed to answer the questions aforementioned, it would be helpful to notice (a) the debates in the Constituent Assembly on Article 16 (draft Article 10); (b) the decisions of this Court on Articles 16 and 15; and (c) a few decisions of the U.S. Supreme Court considering the validity of race-conscious programmes.

The Framing of Article 16: Debates in the Constituent Assembly

25. Draft Article 10 corresponds to Article 16. The debate in the Constituent Assembly on draft Article 10 and particularly Clause (3), thereof [corresponding to Clause (4) of Article 16] helps us to appreciate the background and understand the objective underlying Article 16, and in particular, Clause (4) thereof. The original intent comes out clear and loud from these debates.

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

10(1). There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them by ineligible for any office under the State.

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

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

Before we start the general discussion, i would like to place a particular matter before the Honourable Members. The clause which has so long been under discussion affects particularly certain sections of our population sections which have in the past been treated very cruelly and

although we are today prepared to make reparation for the evil deeds of our ancestors, still the old story continues, at least here and there, and capital is made out of it outside India.... I would therefore very much appreciate the permission of the House so that I might give full discussion on this particular matter to our brethren of the backward classes. Do I have that permission?

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

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

The backward classes of people as understood in South India, are those classes of people who are educationally backward, it is those classes that require adequate representation in the services. There are other classes of people who are socially backward; they also require adequate representation in the service.

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

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

Sri Munshi proceeded to state:

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

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

...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 or opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative-and it ought to be operative in their judgment to its fullest extent-there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind-the-three principles we had to reconcile,-they will see that no better formula could be produced than the one that is embodied in Sub-clause (3) of Article 10 of the Constitution. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now-for historical reasons-been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 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....

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.

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

Decisions of this Court on Articles 16 and 15:

28. Soon after the enforcement of the Constitution two cases reached this Court from the State of Madras - one under Article 15 and the other under Article 16. Both the cases were decided on the same date and by the same Bench. The one arising under Article 15 is *State of Madras v. Champakam Dorairajan* [1951] S.C.R. 525, and the other arising under Article 16 is *Venkataraman v. State of Madras* A.I.R. 1951 S.C. 229. By virtue of certain orders issued prior to coming into force of the Constitution, -popularly known as 'Communal G.O.' - seats in the Medical and Engineering Colleges in the State of Madras were apportioned in the following manner: Non-Brahmin (Hindus)-6, Backward Hindus-2, Brahmin-2, Harijan-2, Anglo Indians and Indian Christians-1, Muslims-1. Even after the advent of the Constitution, the G.O. was being acted upon which was challenged by Smt. Champakam as violative of the fundamental rights guaranteed to her by Articles 15(1) and 29(2) of the Constitution of India. A Full Bench of Madras High Court declared the said G.O. as void and un-enforceable with the advent of the Constitution. The State of Madras brought the matter in appeal to this Court. A Special Bench of Seven Judges heard the matter and came to the unanimous conclusion that the allocation of seats in the manner aforesaid is violative of Articles 15(1) and 29(2) inasmuch as the refusal to admit the respondent (writ petitioner) notwithstanding her higher marks, was based only on the ground of caste. The State of Madras sought to sustain the G.O. with reference to Article 46 of the Constitution. Indeed the argument was that Article 46 over-rides Article 29(2). This argument was rejected. The Court pointed out that while in the case of employment under the State, Clause (4) of Article 16 provides for reservations in favour of backward class of citizens, no such provision was made in Article 15.

29. In the matter of appointment to public services too, a similar communal G.O. was in force in the State of Madras since prior to the Constitution. In December, 1949, the Madras Public Service Commission invited applications for 83 posts of District Munsifs, specifying at the same time that the selection of the candidates would be made from the various castes, religions and communities as specified in the communal G.C. The 83 vacancies were distributed in the following manner: Harijans-19, Muslims-5, Christians-6, Backward Hindus-10, Non-Brahmin (Hindus)-32 and Brahmins-11. The petitioner Venkataraman (it was a petition under Article 32 of the Constitution) applied for and appeared at the interview and the admitted position was that if the provisions of the

communal G.O. were to be disregarded, he would have been selected. Because of the CO., he was not selected (he belonged to Brahmin community). Whereupon he approached this Court. S.R.Das, J. speaking for the Special Bench referred to Article 16 and in particular to Clause (4) thereof and observed: "Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional". He proceeded to hold:

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

30. Sri Ram Jethmalani, the learned Counsel appearing for the Respondent-State of Bihar placed strong reliance on the above passage. He placed before us an extract of the Schedule of the backward classes appended to the Madras Provincial and Subordinate Service Rules, 1942. He pointed out that Clause (3)(a) in Rule 2 defined the expression backward classes to mean "the communities mentioned in Schedule III to this part", and that Schedule III is exclusively based upon caste. The Schedule describes the communities mentioned therein under the heading 'Race, Tribe or Caste'. It is pointed out that when the said Schedule was substituted in 1947, the basis of classification still remained the caste, though the heading "Races, Tribes and Castes" was removed. Mr. Jethmalani points out that the Special Bench took note of the fact that Schedule III was nothing but a collection of certain 'communities', notified as backward classes and yet upheld the reservation in their favour. According to him, the decision in Venkataraman clearly supports the identification of backward classes on the basis of caste. The Communal G.O. was struck down, he submits, only in so far as it apportioned the remaining vacancies between sections other than Harijans and backward classes. It

is rather curious, says the counsel, that the decision in Venkataraman has not attracted the importance it deserves all these years; All the subsequent decisions of this Court refer to Champakam. Hardly any decision refers to Venkataraman notwithstanding the fact that Venkataraman was a decision rendered with reference to Article 16.

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

Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

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

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

After the enactment of the First Amendment the first case that came up before this Court is Balaji v. The State of Mysore. (In the year 1961, this Court decided the General Manager, Southern Railway v. Rasngachari, but that related to reservations in favour of the Scheduled Castes and Scheduled Tribes in the matter of promotion in the Railways. Rangachari will be referred to at an appropriate stage later.) In the State of Karnataka, reservations were in force since a few decades prior to the advent of the Constitution and were being continued even thereafter. On July 26, 1958 the State of Mysore issued an order under Article 15(4) of the Constitution declaring all the communities excepting the Brahmin community as socially and educationally backward and reserving a total of 75 per cent seats in Educational Institutions in favour of SEBCs and SCs/STs. Such orders were being issued every year, with minor variation in the percentage of reservations. On 13th of July, 1972, a similar order was issued wherein 68 per cent of the seats in all Engineering and Medical Colleges and Technical Institutions in the State were reserved in the favour of the SEBCs, SCs and STs. SEBCs were again divided into two categories-backward classes and more backward classes. The validity of this order was questioned under Article 32 of the Constitution. While striking down the said order this Court enunciated the following principles:-

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

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

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

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

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

It must be remembered that Balaji was a decision rendered under and with reference to Article 15 though it contains certain observations with respect to Article 16 as well.

33. Soon after the decision in Balaji this Court was confronted with a case arising under Article 16 - Devadasan v. Union of India. This was also a petition under Article 32 of the Constitution. It related to the validity of the 'carry-forward' rule obtaining in Central Secretariat Service. The reservation in favour of Scheduled Castes was twelve and half per cent while the reservation in favour of Scheduled Tribes was five per cent. The 'carry-forward' rule considered in the said decision was in the following terms: "If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies, thus, treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quotas, a corresponding addition should be made to the number of reserved vacancies in the second following year." Because sufficient number of SC/ST candidates were not available during the earlier years the unfilled vacancies meant for them were carried forward as contemplated by the said rule and filled up in the third year - that is in the year 1961. Out of 45 appointments made, 29 went to Scheduled Castes and Scheduled Tribes. In other words, the extent of reservation in the third year came to 65 per cent. The rule was declared unconstitutional by the Constitution Bench, with Subba Rao, J. dissenting. The majority held that the carry forward rule which resulted in more than 50 per cent of the vacancies being reserved in a particular year, is bad. The principle enunciated in Balaji regarding 50 percent was followed. Subba Rao, J. in his dissenting opinion, however, upheld the said rule. The learned Judge observed: "The expression, 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a

power untrammelled by the other provisions of the Article." The learned Judge opined that once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the State and is not a matter for this Court to prescribe.

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

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

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

The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that person belonging to these castes are also not a class of socially and educationally backward citizens.... As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4) In view however of the explanation given by the State of Madras, which has not been controverted by and rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not

violative of Article 15. The challenge to Rule 5 must therefore fail.

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

37. Another Constitution Bench took a similar view in *Triloki Nath* [1969] 1 S.C.R. 103.

Rajendran was expressly referred to and followed in *Peeriakaruppun v. State of Tamil Nadu*, a decision rendered by a Bench of three Judges (J.C.Shah, K.S.Hegde and A.N.Grover, JJ.). This was a Petition under Article 32 of the Constitution and one arising under Article 15. The argument was that identification of SEBCs having been done on the basis of caste alone is bad. Repelling the argument, Hegde, J. held:-

There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence, we are unable to uphold the contention that impugned reservation is not in accordance with Article 15(4).

38. Again, in *State of Andhra Pradesh v. Balram*, a case arising from Andhra Pradesh, a Division Bench (Vaidyalingam and Mathew, JJ.) adopted the same approach and upheld the identification made by Andhra Pradesh Government on the basis of caste. Answering the criticism that the Backward Classes Commission appointed by the State Government did not do a scientific and thorough job, the Bench observed:

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

We respectfully agree with these observations.

Answering the main criticism that the list of SEBCs was wholly based upon caste, the Bench observed:-

To conclude, though *prima facie* the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of Backward Classes is warranted by Article 15(4). The groups mentioned therein have been included in the list of Backward classes as they satisfy the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class.

39. In certain cases including *Janaki Prasad Parimoo v. State of Jammu & Kashmir* and *State of Uttar Pradesh v. Pradip Tandon*, it was held that poverty alone cannot be the basis for determining or identifying the social and educational backwardness. It was emphasised that Article 15(4) - or for that matter Article 16(4) - is not an instance of poverty alleviation programme. They were directed mainly towards removal of social and educational backwardness, it was pointed out. In *Pradip Tandon*, a decision under Article 15(4), Ray, C.J. speaking for the Division Bench of three Judges opined:

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

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

40. Thomas marks the beginning of a new thinking on Article 16, though the seed of this thought is to be found in the dissenting opinion of Subba Rao, J. in *Devadasan*. The Kerala Government had, by amending Kerala State and Subordinate Service Rules empowered the Government to exempt, by order, for a specified period, any member or members belonging to Scheduled Castes or Scheduled

Tribes and already in service, from passing the test which an employee had to pass as a precondition for promotion to next higher post. Exercising the said power, the Government of Kerala issued a notification granting "temporary exemption to members already in service belonging to any of the Scheduled Castes or Scheduled Tribes from passing all tests (unified, special or departmental test) for a period of two years". On the basis of the said exemption, a large number of employees belonging to Scheduled Castes and Scheduled Tribes, who had been stagnating in their respective posts for want of passing the departmental tests, were promoted. They were now required to pass the tests within the period of exemption. Out of 51 vacancies which arose in the category of Upper Division Clerks in the year 1972, 34 were filled up by members of Scheduled Castes leaving only 17 for others. This was questioned by Thomas, a member belonging to non-reserved category. His grievance was: but for the said concession/exemption given to members of Scheduled Castes/Scheduled Tribes he would have been promoted to one of those posts in view of his passing the relevant tests. He contended that Article 16(4) permits only reservations in favour of backward classes but not such an exemption. This argument was accepted by the Kerala High Court. It also upheld the further contention that inasmuch as more than 50% vacancies in the year had gone to the members of Scheduled Castes as a result of the said exemption, it is bed for violating the 50% rule in Balaji. The Stats of Kerala carried the matter in appeal to this Court which was allowed by a majority of 5:2. All the Seven Judges wrote separate opinions. The head-note to the decision in Supreme Court Reports succinctly sets out the principles enunciated in each of the judgments. We do not wish to burden this judgment by reproducing them here. We would rest content with delineating the broad features emerging from these opinions. Ray, C.J. held that Article 16(1), being a facet of Article 14, permits reasonable classification. Article 16(4) clarifies and explains that classification on the basis of backwardness. Classification of Scheduled Castes does not fall within the mischief of Article 16(2) since Scheduled Castes historically oppressed and backward, are not castes. The concession granted to them is permissible under and legitimate for the purposes of Article 16(1). The rule giving preference to an un-represented or under-represented backward community does not contravene Articles 14, 16(1) or 16(2). Any doubt on this score is removed by Article 16(4). He opined further that for determining whether a reservation is excessive or not one must have to look to the total number of posts in a given unit or department, as the case may be. Mathew, J. agreed that Article 16(4) is not an exception to Article 16(1), that. Article 16(1) permits reasonable classification and that Scheduled Castes are not 'castes' within the meaning of Article 16(2). He espoused the theory of 'proportional equality' evolved in certain American decisions. He does not refer to the decisions in Balaji or Devadasan in his opinion nor does he express any opinion the extent of permissible reservation. Beg, J. adopted a different reasoning. According to him, the rule and the orders issued thereunder was "a kind of reservation" falling under Article 16(4) itself. Krishna Iyer, J. was also of the opinion that Article 16(1) being a facet of Article 16 permits reasonable classification, that Article 16(4) is not an exception but an emphatic statement of what is inherent in Article 16(1) and further that Scheduled Castes are not 'castes' within the meaning of Article 16(2) but a collection of castes, races and groups. Article 16(4) is one made of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to, held the learned Judge. He approved the dissenting opinion of Subba Rao, J. in Devadasan. Fazal Ali, J. too adopted a similar approach. The learned Judge pointed out "if we read Article 16(4) as an exception to Article 16(1) then the inescapable conclusion would be that Article 16(1) does not permit any classification at all because an express provision has been made for this in Clause (4). This, however, is contrary

to the basic concept of equality contained in Article 14 which implicitly permits classification in any form provided certain conditions are fulfilled. Furthermore, if no classification can be made under Article 16(1) except reservation contained in Clause (4) then the mandate contained in Article 335 would be defeated." He held that the Rule and the orders impugned are referable to and sustainable under Article 16. The learned Judge went further and held that the rule of 50% evolved in Balaji is a mere rule of caution and was not meant to be exhaustive of all categories. He expressed the opinion that the extent of reservation depends upon the proportion of the backward classes to the total population and their representation in public services. He expressed a doubt as to the correctness of the majority view in Devadasan. Among the minority Khanna, J. preferred the view taken in Balaji and other cases to the effect that Article 16(4) is an exception to Article 16(1). He opined that no preference can be provided in favour of backward classes outside Clause (4). A.C.Gupta, J. concurred with this view.

41. The last decision of this Court on this subject is in K.C.Vasant Kumar and Anr. v. State of Karnataka [1985] Suppl. 1 S.C.R. 352. The Five Judges constituting the Bench wrote separate opinions, each treading a path of his own. Chandrachud, C.J. opined that the present reservations should continue for a further period of 15 years making a total of 50 years from the date of commencement of the Constitution. He added that the means test must be applied to ensure that the benefit of reservations actually reaches the deserving sections. Desai, J. was of the opinion that the only basis upon which backward classes should be identified is the economic one and that a time has come to discard all other bases. Chinnappa Raddy, J. was of the; view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class. Caste, the learned Judge said, is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. If it is found in the case of a given caste that a few members have progressed far enough so as to compare favourably with the forward classes in social, economic and educational fields, an upper income ceiling can perhaps be prescribed to ensure that the benefit of reservation reaches the really deserving. He opined that identification of SEBCs in the Indian milieu is a difficult and complex exercise, which does not admit of any rigid or universal tests. It is not a matter for the courts. The "backward class of citizens", he held, are the very same SEBCs referred to in Article 15(4). The learned Judge condemned the argument that reservations are likely to lead to deterioration in efficiency or that they are anti-merit. He disagreed with the view that for being identified as SEBCs, the relevant groups should be comparable to SCs/STs in social and educational backwardness. The learned Judge agreed with the opinion of Fazal Ali, J. in Thomas that the rule of 50% in Balaji is a rule of caution and not an inflexible rule. At any rate, he said, it is not for the court to lay down any such hard and fast rule. A.P.Sen, J. was of the opinion that the predominant and only factor for making special provision under Article 15(4) or 16(4) should be poverty and that caste should be used only for the purpose of identification of groups comparable to Scheduled Castes/Scheduled Tribes. The reservation should continue only till such time as the backward classes attain a state of enlightenment. Venkataramiah, J. agreed with Chinnappa Reddy, J. that identification of backward classes can be made on the basis of caste. He cited the Constituent Assembly and Parliamentary debates in support of this view. According to the learned Judge, equality of opportunity revolves around two dominant principles viz., (i) the traditional value of equality of opportunity and (ii) the newly appreciated - though not newly conceived idea of equality of results. He too did not agree with

the argument of 'merit'. Application of the principle of individual merit, un-mitigated by other consideration, may quite often lead to inhuman results, he pointed out. He supported the imposition of the 'means' test but disagreed with the view that the extent of reservations can exceed 50%. Periodic review of this list of SEBCs and extension of other facilities to them is stressed.

Decisions of U.S. Supreme Court

42. At this stage, it would be interesting to notice the development of law on the subject in the U.S.A. The problem of blacks (Negroes) - holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in U.S.A. the problem is just about 200 years' old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters [Dred Scott v. Sanford [1857] 15 L.E. 691]. In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. World War II and its aftermath, however, brought about a radical change in this situation, the culmination of which was the celebrated decisions in Brown v. Board of Education [1954] 98 L.E. 591 and Boiling v. Shrarpe [1954] 98 L.E. 583 over-ruling the 'separate but equal' doctrine evolved in Plessey v. Ferguson [1986] 41 L.E. 256. In quick succession followed several decisions which effectively out-looked all discrimination against blacks in all walks of life. But the ground-realities remained. Socially, educationally and economically, blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their mark. They were still unable to compete with their white counterparts. Similar was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of 'persisting effects of past-discrimination'. The Congress, the State Universities and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally, these measures were challenged in Courts-with varying results. The four decisions examined hereinafter, rendered during the period 1974-1990 mirror the conflict and disclose the judicial thinking in that country.

43. The first decision is in Defunis v. Charles Odegaard [1974] 40 L.Ed. 2nd. 164. The University of Washington Law School - a school operated by the State - evolved, in December 1973, an admissions policy whereunder certain percentage of seats in the Law School were reserved for minority racial groups. Para 6 of the programme stated, "because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under-representation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognises a special obligation in its admissions policy to contribute to the solution of the problem." (emphasis added) Procedure for admission for the minority students was different and of a lesser standard than the one adopted for all others. Defunis, a non-minority student was denied admission while granting it to minority applicants with lower evaluation. He commenced an action challenging the validity of the programme. According to him, the special admissions programme was violative of the Equal Protection Clause in the Fourteenth Amendment. The Trial Court granted the requested relief including admission to the plaintiff. On Appeal, the Supreme Court of

Washington reversed the Trial Court's Judgment. It upheld the constitutionality of the Admissions Policy. The matter was brought by Defunis to United States Supreme Court by way of certiorari. The Judgment of the Washington Supreme Court was stayed pending the decision. By the time the matter reached the stage of final hearing, Defunis had arrived in the final quarter of the last term. In view of this circumstance, five Members of the Court held that the Constitutional question raised has become 'moot' (academic) and, therefore, it is unnecessary to go into the same. Four of the Judges Brennan, Douglas, White and Marshall, JJ., however, did not agree with that view. Of them, only Douglas, J. recorded his reasons for upholding the Special Admissions' Programme. The learned Judge was of the opinion that the Equal Protection Clause did not require that law schools employ an admissions formula based solely upon testing results and under-graduate grades nor does it prohibit Law Schools from evaluating an applicant's prior achievements in the light of the barriers that he had to overcome. It would be appropriate to quote certain observations of the learned Judge to the above affect which inter alia emphasise the importance of looking to the promise and potential of a candidate rather than to mere scores obtained in the relevant tests. He said:

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

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

44. The next case is in *Regents of the University of California v. Allan Bakke* [1978] 57 L.Ed. 2nd 750. The Medical School of the University of California at Davis had been following two admissions programmes, one in respect of the 84 seats (general) and the other, a special admissions programme under which only disadvantaged members of certain minority races were considered for the remaining 16 seats - the total seats available being 100 a year. For these 16 seats, none except the members of the minority races were considered and evaluated. The respondent, Bakke, a white, could not obtain admission for two consecutive years, in view of his evaluation scores, while

admission was given to members of minority races who had obtained lesser scores than him. He questioned the validity of special admissions programme on the ground that it violated the equal protection clause in the Fourteenth Amendment to the Constitution and also Title VI of the Civil Rights Act, 1964. The Trial Court upheld the plea on the ground that the programme excluded members of non-minority races from the 16 reserved seats only on the basis of race and thus operated as a racial quota. It, however, refused to direct the plaintiff to be admitted inasmuch as he failed to establish that he would have been admitted but for the existence of the special admissions programme. The matter was carried in direct appeal to Supreme Court of California, which not only affirmed the Trial Court's Judgment in so far as it held the special admission programme to be invalid but also granted admission to the plaintiff-respondent into the Medical School. It was of the view that the University had failed to prove that in the absence of special admissions programme the respondent would not have been admitted. The matter was then carried to the United States Supreme Court, where three distinct view-points emerged. Brennan, White, Marshall and Blackmun, JJ. were of the opinion that the special admissions programme was a valid one and is not violative of the Federal or State Constitutions or of Title VI of the Civil Rights Act, 1964. They were of the opinion that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University's remedial use of race. Since the Judgment of the Supreme Court of California prohibited the use of race as a factor in University admissions, they reversed that Judgment. Chief Justice Warren Burger, Stevens, Stewart and Rehnquist, JJ. took the other view. They affirmed the judgment of the California Supreme Court. They based their judgment mainly on Title VI of Civile Rights Act, 1964, which provided that "no person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any programme or activity receiving Federal Financial assistance." They opined that Bakke was the victim of, what may be called, reverse discrimination and that his exclusion from consideration in respect of the 16 seats being solely based on race, is impermissible. Powell, J. took the third view in his separate opinion, partly agreeing and partly disagreeing with the other view-points. He based his decision on Fourteenth Amendment alone. He did not take into consideration the 1964 Act. The learned Judge held that though racial and ethnic classifications of any kind are inherently suspect and call for the most exacting judicial scrutiny, the goal of achieving a racially balanced student body is sufficiently compelling to justify consideration of race in admissions decisions under certain circumstances. He was of the opinion that while preference can be provided in favour of minority races in the matter of admission, setting up of quotas (which have the effect of foreclosing consideration of all others in respect thereof) is not necessary for achieving the said compelling goal. He was of the opinion that impugned programme is bad since it set apart a quota for minority races. He sustained the admission granted to Bakke on the ground that the University failed to establish that even without the quota, he would not have been admitted.

45. It would be useful to notice the three points of view in a little more detail. Brennan, J. (with whom Marshall, White and Blackmun, JJ. agreed) observed that though the U.S. Constitution was founded on the principle that "all men are created equal", the truth is that it is not so in fact. Racial discrimination still persists in the society. In such a situation the claim that the law must be "colour-blind" is more an aspiration rather than a description of reality. The context and the reasons for which Title VI of the Civil Rights Act, 1964 was enacted leads to the conclusion that the

prohibition contained in Title VI was intended to be consistent with the commands of the Constitution and no more. Therefore, "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." On the contrary, said the learned Judge, prior decisions of the court strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible.

Dealing with the equal protection clause in the Fourteenth Amendment, the learned Judge observed:

The assertion of human equality is closely associated with the proposition that differences in colour or creed, birth or status, are neither significant nor relevant to the way in which person should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance" summed up by the shorthand phrase "our Constitution is colour-blind" has never been adopted by this Court as the proper meaning of the Equal Protection clause. We conclude, therefore, that racial classifications are not per se invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

(emphasis added) After examining a large number of decided cases, the learned Judge held:

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

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

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

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

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

(1) It is not necessary to consider the impact or the scope of Title VI of the Civil Rights Act inasmuch as the said question was not raised or considered in the courts below. The matter had to be examined only with reference to the Fourteenth Amendment;

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

(3) Since the special admissions program of the University totally excluded some individual (non-minorities) from enjoying the State provided benefit of admission to the medical school solely because of their race, the classification must be regarded as suspect and it will be sustained only if it is supported by substantial state purpose or interest and only where it is established that the classification is necessary to the accomplishment of such purpose or for safeguarding such interest. The University has failed to discharge this burden, though the State interest in removing "identified discrimination"

and attainment of a "diverse student body" were certainly compelling interests. In other words, the University has failed to establish that for attaining the said abjectives, creation of quotas was necessary.

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

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

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

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

In this manner, the learned Judge agreed with Brennan, J. that race-conscious admissions programmes are permissible under the Fourteenth Amendment, but qualified the meaning of the race-conscious programmes. At the same time, he agreed with the learned Chief Justice that the special admissions programme of Davis was unconstitutional. He commended the Harvard

admissions programme which provided for certain preferences in favour of racially disadvantaged sections, without reserving any seats as such for them.

48. We may next notice the decision in *Fullilove v. Phillip M. Klutznick* [1980] 65 Lawyers Ed. 2nd 90. The Public Works Employment Act, 1977 contained a provision to the effect that at least 10% of federal funds granted for local public works projects must be used by the State or the local grantee to procure services or supplies from businesses owned by minority group members, defined as United State citizens "who are negroes, spanish-speaking, Orientals, Indians, Eskimos and Aleuts". Regulations were framed under the Act and guidelines issued requiring the grantees and private contractors to seek out all available qualified bona fide minority business enterprises (MBEs), to the extent feasible, for fulfilling the 10% MBE requirement. The guidelines provided that contracts shall be awarded to bona fide MBEs, even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. This requirement could, however, be waived in individual cases if the grantee established the infeasibility of the requirement. Several associations of construction contractors and Sub-contractors filed a suit in the Federal District Court for a declaration that the said provision of the Public Works Employment Act and the regulations made thereunder are void and enforceable being violative of the equal protection clause of the Fourteenth Amendment and equal protection component of the due process clause of the Fifth Amendment. The challenge failed in the District Court as well as in the Court of Appeals. The matter was then carried to the United State Supreme Court. By a majority of 6:3 (Stewart, Rehnquist and Stevens, JJ. dissenting) the Supreme Court repelled the challenge. Chief Justice Burger speaking for himself. White and Powell, JJ. stated the object of the impugned provision in the following words:

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation, otherwise it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting.

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

We held that "just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

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

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

In my separate opinion in *Bakke*, I recounted the ingenious and pervasive forms of discrimination against the Negro" long condoned under the Constitution and concluded that "the position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment" I there stated:

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.

50. We may now examine the decision in *Metro Broadcasting, Inc. v. Federal Communications Commission*, rendered on June 27, 1990 (Copies of the decision have been made available to us by Sri K. Parasaran, counsel for Union of India). Under the Communications Act, 1934, the Federal Communications Commission was vested with the exclusive authority to grant licences to persons wishing to construct and operate Radio and Television Broadcasting Station in United States. The grant of licences was to be based on 'public convenience, interest or necessity'. The commission found that over the last two decades relatively fewer members of minority groups have held broadcasting licences, indeed less than one percent. Even as late as in 1986, they owned just 2.1%. The Commission proposed to remedy this under-representation and accordingly evolved a policy whereunder minorities were to be granted certain preferences in the matter of grant of these licences. The policy had two prominent features. The first was to provide for a preference in the matter of evaluation of applicants and the second was, what may be called, 'distress sale policy'. The second feature meant that where the qualifications of a licensee to hold a broadcast licence comes into question he was entitled to transfer the said licence to save the disqualification provided such transfer is made in favour of a member of a minority. The said two features were questioned by *Metro Broadcasting Inc.*, which matter was ultimately brought to the Supreme Court. The decision of the majority (Brennan, White, Marshall, Blackmun and Stevens, JJ.) rendered by Brennan, J. is note-worthy for the shift of approach from the earlier decisions. It is now held that a classification based on race (benign race conscious measures) is constitutionally permissible even if it is not designed to compensate victims of past governmental or societal discrimination so long as it serves important governmental objectives and is substantially related to achievement of those objectives. In other words, it is held that it is not necessary that the court apply a strict standard of scrutiny to evaluate racial classification to ascertain whether it is necessary for achieving the relevant objective and further whether it is narrowly tailored to achieve a compelling state interest. Brennan, J. relied upon the opinion of Chief Justice Burger in *Fullilove* for this liberal approach. It would be appropriate to quote certain observations from his opinion:

We hold that benign race-conscious measures mandated by Congress - even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree....

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

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

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

52. We have examined the decisions of U.S. Supreme Court at some length only with a view to notice how another democracy is grappling with a problem similar in certain respects to the problem facing this country. The minorities (including blacks) in United States are just about 16 to 18% of the total population, whereas the backward classes (including the Scheduled Castes and Scheduled Tribes) in this country - by whichever yardstick they are measured - do certainly constitute a majority of the population. The minorities there comprise 5 to 7 groups - Blacks, Spanish-speaking people, Indians, Puerto Ricans, Aleuts and so on - whereas the castes and communities comprising backward classes in this country run into thousands. Untouchability - and 'unapproachability', as it was being practised in Kerala - is something which no other country in the world had the misfortune to have - nor the caste system. There have been equally old civilisations on earth like ours, if not older, but none had evolved these pernicious practices, much less did they stamp them with scriptural sanction. Now coming to Constitutional provisions, Section 1 of the Fourteenth Amendment (insofar as it guarantees equal protection of the laws) corresponds to Article 14 but they do not have provisions corresponding to Article 16(4) or 15(4). Title VI of the Civil Rights Act enacted in 1964 roughly corresponds to Clause (2) of Articles 15 and 16.

53. At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Clause (1) of Article 16, appointments and/or posts can be reserved in favour of a class. But an argument is now being advanced - evidently inspired by the opinion of Powell, J. in *Bakke* that Article 16(1) permits only preferences but not reservations. The reasoning in support of the said argument is the same as was put forward by Powell, J. This argument, in our opinion, disregards the fact that that is not the unanimous view of the court in *Bakke*. Four Judges including Brennan, J. took the view that such a reservation was not barred by the Fourteenth Amendment while the other four (including Warren Burger, C.J.) took the view that the Fourteenth Amendment and Title VI of the Civil Right Acts, 1964 bars all race-conscious programmes. At the same time, there are a series of decisions relating to school desegregation - from *Brown to Board of Education v. Swann* (28 L.Ed. 2nd 586) - where the court has been consistently taking the view that if race be the basis of discrimination, race can equally form the basis of remedial action. The shift in approach indicated by *Metro Broadcasting Inc.* is equally significant. The 'lingering effects' (of past discrimination) theory as well as the standard of strictest scrutiny of race-conscious programmes have both been abandoned. Suffice it to note that no single uniform pattern of thought can be discerned from these decisions. Ideas appear to be still in the process of evolution.

PART - III (QUESTIONS 1 AND 2) We may now proceed to deal with the questions aforementioned.

Question. 1(a): Whether the 'provision' in Article 16(4) must necessarily be made by the Parliament/Legislature?

54. Sri K.K.Venugopal, learned Counsel for the petitioner in Writ Petition No. 930 of 1990 submits that the "provision" contemplated by Clause (4) of Article 16 can be made only by and should necessarily be made by the legislative wing of the State and not by the executive or any other authority. He disputes the correctness of the holding in *Balaji* negating an identical contention. He submits that since the provision made under Article 16(4) affects the fundamental rights of other citizens, such a provision can be made only by the Parliament/Legislature. He submits that if the power of making the "provision" is given to the executive, it will give room for any amount of abuse. According to the learned Counsel, the political executive, owing to the degeneration of the electoral process, normally acts out of political and electoral compulsions, for which reason it may not act fairly and independently. If, on the other hand, the provision is to be made by the legislative wing of the State, it will not only provide an opportunity for debate and discussion in the Legislature where several shades of opinion are represented but a balanced and unbiased decision free from the allurements of electoral gains is more likely to emerge from such a deliberating body. Sri Venugopal cites the example of Tamil Nadu where, according to him, before every general election a few communities are added to the list of backward classes, only with a view to winning them over to the ruling party. We are not concerned with the aspect of what is ideal or desirable but with what is the proper meaning to be ascribed to the expression 'provision' in Article 16(4) having regard to the context. The use of the expression 'provision' in Clause (4) of Article 16 appears to us to be not without design. According to the definition of 'State' in Article 12, it includes not merely the government and Parliament of India and Government and Legislature of each of the States but all

local authorities and other authorities within the territory of India or under the control of the Government of India which means that such a measure of reservation can be provided not only in the matter of services under the Central and State Governments but also in the services of local and other authorities referred to in Article 12. The expression 'Local Authority' is defined in Section 3(31) of the General Clauses Act. It takes in all municipalites, Panchayats and other similar bodies. The expression 'other authorities' has received extensive attention from the court. It includes all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Now, would it be reasonable, possible or practicable to say that the Parliament or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides providing for in respect of services under the Central/State Government? This aspect would become clearer if we notice the definition of "Law" in Article 13(3)(a). It reads:

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

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

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

Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Article 16(4) is significant. Whereas Clauses (3) and (5) of Article 16 - and Clauses (2) to (6) of Article 19 - use the word "Law", Article 16(4) uses the word "provision". Regulation of service conditions by orders and Rules made by the Executive was a well known feature at the time of the framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of Clause (4). Accordingly, we hold, agreeing with Balaji, that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case. Balaji has been followed recently in *Comptroller and Auditor General of India v. Mohan Lal Mehrotra*. With respect to the argument of abuse of power by the political executive, we may say that there is adequate safeguard against misuse by the political executive of the power under Article 16(4) in the provision itself. Any determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. As held herein - as also by earlier judgments - the exercise is an objective one. Certain objective social and other criteria has to be satisfied before any group or class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power.

Question 1(b): Whether an executive order making a 'provision' under Article 16(4) is enforceable forthwith?

55. A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate Legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate Legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the Executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Sri Jethmalani. Once we hold that a provision under Article 16(4) can be made by the executive, it must necessarily follow that such a provision is effective the moment it is made. A Constitution Bench of this Court in *B.S. Yadav* (1981 S.C. 561), (*Y.V. Chandrachud*, C.J., speaking for the Bench) has observed:

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

Be that as it may, there is yet another reason, why we cannot agree that the impugned Memorandums are not effective and enforceable the moment they are issued. It is well settled by the decisions of this Court that the appropriate government is empowered to prescribe the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. It is further held by this Court that even where Rules under the proviso to Article 309 are made, the government can issue orders/instructions with respect to matters upon which the Rules are silent. [see *Sant Ram Sharma v. State of Rajasthan*]. This view has been reiterated in a recent decision of this Court in *Comptroller and Auditor General v. Mohanlal Mehrotra* wherein it is held:

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

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

Question 2(a). Whether Clause (4) of Article 16 is an exception to Clause (1)?

56. In *Balaji* it was held - "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in *Champakam*, with a view to remove the defect pointed out by this Court namely, the absence of a provision in Article 15 corresponding to Clause (4) of Article 16. Following *Balaji* it was held by another Constitution Bench (by majority) in *Devadasan* - "further this Court has already held that Clause (4) of Article 16 is by way of a proviso or an exception to Clause (1)". Subbarao, J., however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in *Devadasan*, it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe set-back from the majority decision in *State of Kerala and Ors. v. N.M. Thomas*. Though the minority (H.R. Khanna and A.C. Gupta, JJ.) stuck to the view that Article 16(4) is an exception, the majority (Ray, C.J., Mathew, Krishna Iyer and Fazal Ali, JJ.) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg. J. took a slightly different view which it is not necessary to mention here). The said four learned Judges - whose views have been referred to in para 41 - held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in *Thomas* is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that Clause (4) of Article 16 is not exception to Clause (1) of Article 16. It is an instance of classification implicit in and permitted by Clause (1). The speech of Dr. Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly - referred to in para 28 - shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft Clause (3) was put in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony

with Clause (1). Indeed, even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

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

Question 2(b): Whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes?

57. The question then arises whether Clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts." The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in *Karamchari Sangh* are instances of supplementay, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour. The other type of measure is the one in *Thomas*. There was no provision for reservation in favour of Scheduled Castes/Scheduled Tribes in the matter of promotion to the category of Upper Division Clerks. Certain tests were required to be passed before a Lower Division Clerk could be promoted as Upper Division Clerk. A large number of Lower Division Clerks belonging to S.C./S.T. were not able to pass those tests, with the result they were stagnating in the category of L.D.Cs. Rule 13AA was accordingly made empowering the government to grant exemption to members of S.C./S.T. from passing those tests and the Government did exempt them, not absolutely, but only for a limited period. This provision for exemption was a lesser form of special treatment than reservation. There is no reason why such a special provision should not be held to be included within the larger concept of reservation. It is in

this context that the words "any provision for the reservation of appointments and posts" assume significance. The word "any" and the associated words must be given their due meaning. They are not a mere surplusage. It is true that in Thomas it was assumed by the majority that Clause (4) permits only one form of provision namely reservation of appointments/posts and that if any concessions or exemptions are to be extended to backward classes it can be done only under Clause (1) of Article 16. In fact the argument of the writ petitioners (who succeeded before the Kerala High Court) was that the only type of provision that the State can make in favour of the backward classes is reservation of appointments/posts provided by Clause (4) and that the said clause does not contemplate or permit granting of any exemptions or concessions to the backward classes. This argument was accepted by Kerala High Court. This Court, however, by a majority (Ray, C.J., Mathew, Krishna Iyer and Fazal Ali, JJ.) reversed the view taken by Kerala High Court, holding that such exemptions/concessions can be extended under Clause (1) of Article 16. Beg, J. who joined the majority in exemption provided by impugned notification was indeed a kind of reservation and was warranted by and relatable to Clause (4) of Article 16 itself. This was because - according to the learned Judge - Clause (4) was exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. We are inclined to agree with the view taken by Beg, J. for the reasons given hereinabove. In our opinion, therefore, where the State finds it necessary - for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under Clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under Clause (4) itself. In this sense, Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Clause (4) of Article 16.

Question 2(c): Whether Article 16(4) is exhaustive of the very concept of reservations?

58. The aspect next to be considered is whether Clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside Clause (4) i.e., under Clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that Clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, and not for all and sundry reasons - that any further reservations, of whatever kind, should be provided under Clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of Clause (4) should act as a damper upon the propensity to create further classes

deserving special treatment. The reason for saying so is very simply. If reservations are made both under Clause (4) as well as under Clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do.

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

59. For the reasons given in the preceding paragraphs we must reject the argument that Clause (1) of Article 16 permits only extending of preferences, concessions and exemptions, but does not permit reservation of appointments/posts. As pointed out in para (54) the argument that no reservations can be made under Article 16(1) is really inspired by the opinion of Powell, J. in Bakke. But in the very same paragraph we had pointed out that it is not the unanimous opinion of the Court. In principle, we see no basis for acceding to the said contention. What kind of special provision should be made in favour of a particular class is a matter for the State to decide, having regard to the facts and circumstances of a given situation - subject, of course, to the observations in the preceding paragraph.

PART - IV (QUESTIONS 3, 4 AND 5) Question 3(a): Meaning of the expression "Backward Class of citizens" in Article 16(4).

60. What does the expression "Backward Class of Citizens" in Article 16(4) signify and how should they be identified? This has been the single most difficult question tormenting this nation. The expression is not defined in the Constitution. What does it mean then? The arguments before us mainly revolved round this question. Several shades of opinion have been presented to us ranging from one extreme to the other. Indeed, it may be difficult to set out in full the reasoning presented before us orally and in several written propositions submitted by various counsel. We can mention only the substance of and the broad features emerging from those submissions. At one end of the spectrum stands Sri N.A. Palkhiwala (supported by several other counsel) whose submissions may briefly be summarised in the following words: a secular, unified and caste-less society is a basic feature of the Constitution. Caste is a prohibited ground of distinction under the Constitution. It ought be erased altogether from the Indian Society. It can never be the basis for determining backward classes referred to in Article 16(4). The Report of the Mandal Commission, which is the basis of the impugned Memorandums, has treated the expression "backward classes" as synonymous with backward castes and has proceed to identify backward classes solely and exclusively on the basis of caste, ignoring all other considerations including poverty. It has indeed invented castes for Non-Hindus where none exists. The Report has divided the nation into two sections, backward and forward, placing 52% of the population in the former section. Acceptance of Report would spell disaster to the unity and integrity of the nation. If half of the posts are reserved for backward classes, it would seriously jeopardise the efficiency of the administration, educational system, and all other services resulting in backwardness of the entire nation. Merit will disappear by deifying backwardness. Article 16(4) is broader than Article 15(4). The expression "backward class of citizens" in Article 16(4) is not limited to "socially and educationally backward classes" in Article 15(4). The impugned Memorandums, based on the said report must necessarily fall to the ground along with the Report. In fact the main thrust of Sri Palkhiwala's argument has been against the

Mandal Commission Report.

61. Sri K.K.Venugopal appearing for the petitioner in Writ Petition No. 930 of 1990 adopted a slightly different approach while reiterating that the expression "backward classes of citizens" in Article 16(4) cannot be construed as backward castes. According to him, backwardness may be social and educational and may also be economic. The authority appointed to identify backward classes must first settle the criteria or the indicators for determining backward classes and then it must apply the said criteria to each and every group in the country. In the course of such identification, it may well happen that certain castes answer and satisfy the criteria of backwardness and may as a whole qualify for being termed as a backward class. But it is not permissible to start with castes to determine whether a caste is a backward class. He relied upon the provision in Clause (2) of Article 38 and Article 46 to say that the objective is to minimize the inequalities in income not only among individuals but also among groups of persons and to help the weaker sections of the society. The economic criterion is an important one and must be applied in determining backward classes and also for excluding those sections or identified groups who may for the sake of convenience be referred to as the 'creamy layer'. Since castes do not exist among Muslims, Christians and Sikhs, caste can never be the basis of identification. The learned Counsel too pointed out the alleged basic errors in the approach adopted by and conclusions arrived at by the Mandal Commission.

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

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

only question whether the exercise of power is a fraud on the Constitution. The learned Counsel referred to certain American decisions to show that even in that country several programmes of affirmative action and compensatory discrimination have been evolved and upheld by courts.

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

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

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

Sri P.S. Poti appearing for the State of Kerala supported the identification of backward classes solely and exclusively on the basis of caste. He submitted that the caste system is scientifically organised and practiced in Kerala and, therefore, furnishes a perfectly scientific basis for identification of backward classes. He submitted that besides the vice of untouchability, another greater vice of 'unapproachability' was also being practiced in that State.

Sri Ram Awadesh Singh, M.P., President of Lok Dal and President of All India Federation of Backward Classes, Scheduled Castes, Scheduled Tribes and Religious minorities submitted that caste should be the sole criteria for determining backwardness. He referred to centuries of injustice meted

out by upper castes to shudras and panchamas and submitted that these castes must now be given a share in the governance of the country which alone will assure their dignity besides instilling in them a sense of confidence and a spirit of competition.

66. Sri K.Parasaran, learned Counsel appearing for the Union of India urged the following submissions:

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

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

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

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

67. In paragraphs 33 to 42, we have noticed how this Court has been grappling with the problem over the years. In Venkataraman's case, a Seven-Judge Bench of this Court noticed the list of backward classes mentioned in Schedule III to the Madras Provincial and Subordinate Service Rules, 1942, as also the fact that backward classes were enumerated on the basis of caste/race. It found no objection thereto though in Champakam, rendered by the same Bench and on the same day it found such a classification bad under Article 15 on the ground that Article 15 did not contain a clause corresponding to Clause (4) of Article 16. In Venkataraman's case this Court observed that in respect of the vacancies reserved for backward classes of Hindus, the petitioner (a Brahmin) cannot have any claim inasmuch as "those reserved posts (were reserved) not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such post in favour of a backward class of citizens." The writ petition was allowed on the ground that the allocation of vacancies to and among communities other than Harijans and backward classes of

Hindus cannot be sustained in view of Clauses (1) and (2) of Article 16.

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

Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens.... Though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves.

The learned Judge further proceeded to hold:

Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, the test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains or even Linguists are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in to to from the operation of Article 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or class of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is in the ultimate analysis the result of poverty to a very large extent.... It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.

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

The criticism of the Respondents' counsel against the Judgment runs thus: While it recognises the relevance and significance of the caste and the integral connection between caste, poverty and social backwardness, it yet refuses to accept caste as the sole basis of identifying socially backward classes, partly for the reason that castes do not exist among non-Hindus. The Judgment does not examine whether caste can or cannot form the starting- point of process of identification of socially backward

classes. Nor does it consider the aspect - how does the non-existence of castes among non-Hindus (assuming that the said premise is factually true) makes it irrelevant in the case of Hindus, who constitute the bulk of the country's population. There is no rule of law that a test of basis adopted must be uniformly applicable to the entire population in the country as such.

Before proceeding further it may be noticed that Balaji was dealing with Article 15(4), which clause contains the qualifying words "socially and educationally" preceding the expression "backward classes". Accordingly, it was held that the backwardness contemplated by Article 15(4) is both social and educational. Though, Clause (4) of Article 16 did not contain any such qualifying words, yet they came to be read into it. In Janaki Prasad Parimoo, Palekar, J. speaking for a Constitution Bench, took it as "well-settled that the expression 'backward classes' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4)". More of this later.

69. In Minor P.Rajendran, the caste vis-a-vis class debate took a sharp turn. The ratio in this case marks a definite and clear shift in emphasis. (We have dealt with it at some length in para 36). Suffice it to mention here that in this decision, it was held that "a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)... It is true that in the present case the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was a sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens." This principle was reiterated in Peeriakaruppan. Balram and Trilokinath-II. We have referred to these decisions at some length in paras 38 and 39. In Peeriakaruppan, Hegde, J. concluded, "a caste has always been recognised as a class."

70. This issue was gone into in some detail in Vasant Kumar, where all the five Judges constituting the Constitution Bench expressed different opinions. Chandrachud, C.J. did not express himself on this aspect but other four learned Judges did. Desai, J. recognised that "in the early stages of the functioning of the Constitution, it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Article 15(4)." He also recognised that "there has been some vacillation on the part of the judiciary on the question whether the caste should be the basis for recognising the backwardness." After examining the significance of caste in the Indian social structure, the learned Judge observed:

Social hierarchy and economic position exhibit an indisputable mutuality. The lower the caste, the poorer its member. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste.

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

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

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

71. Chinnappa Reddy, J. dealt with the question at quite some length. The learned Judge quoted Max Weber, according to whom the three dimensions of social inequality are class, status and power - and stressed the importance of poverty in this matter. Learned Judge opined that caste system is closely entwined with economic power. In the words of the learned Judge: Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste.

The learned Judge too recognised the percolation of caste system into other religions and concluded his opinion in the following words:

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

72. A.P.Sen,J. dealt with this question in a short opinion. According to him:

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

73. "E.S.Venkataramiah,J. too dealt with this aspect at some length. After examining the origins of the caste and the ugly practices associated with it, the learned Judge opined:

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

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

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

The learned Judge also supported the imposition of a means test as was done by the Kerala Government in *K.S.Jayasree and Anr. v. State of Kerala and Anr.* .

The above opinions emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognise that in the Indian context, lower castes are and ought to be treated as backward classes. Rajendran and Vasant Kumar (opinions of Chinnappa Reddy and Venkataramiah, JJ.) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Article 16(4) and Article 15(4).

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

Andhra Pradesh and parts of present States of Kerala and Karnataka.) The definition read as follows:

3(A). "Backward classes" means the communities mentioned in Schedule III of this part.

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

The former State of Mysore was one of the earliest States, where certain provisions were made in favour of Backward Classes. The opinion of E.S.Venkataramiah, J. in Vasant Kumar, (at pages 442-443) traces briefly the history of reservations in the State of Mysore from 1918-21 upto the re-organisation of State. The learned Judge points out how the expression 'backward classes' and 'backward communities' were used interchangeably. All the castes/communities' except Brahmins in the State were notified as backward communities/castes. As far back as 1921, preferential recruitment was provided in favour of "backward communities", in Government services.

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

75. In the former princely State of Travancore, the expression used was "Communities", as would be evident from the Proceedings of the Government of His Highness the Maharaja of Travancore, contained in Order R. Dis. N. 893/general dated Trivandrum, 25th June, 1935. It refers to earlier orders on the subject as well. What is significant is that the expression "communities" was used as taking in Muslims and certain sections of Christians as well; it was not understood as confined to castes in Hindu social system alone. The operative portion of the order reads as follows:

...Accordingly, Government have decided that all communities whose population is approximately 2 per cent of the total population of the State or about one lakh, be recognised as separate communities for the purpose of recruitment to the public service. The only exception from the above rule will be the Brahmin community who, though forming only 1.8 per cent of the total population, will be dealt with as a separate community. On the above basis the classification of communities will be as follows:-

A. HINDU

1. Brahmin.
2. Nayar.
3. Other Caste Hindu.
4. Kummula.
5. Nudar.
6. Ezlmva.
7. Cheramar (Pulaya)
8. Other Hindu.

B. MUSLIM.

C. CHRISTIAN.

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

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

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

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

76. We may also refer to a speech delivered by Dr. Ambedkar on May 9, 1916 at the Columbia university of New York, U.S.A. on the subject "castes in India: their mechanism, genesis and development" (the speech was published in Indian Antiquary-May 1917-Vol.XLI), which shows that as early as 1916, "class" and "caste" were used inter-changeably. In the course of the speech, he said:

....society is always composed of classes. It may be an exaggeration to assert the theory of class-conflict, but the existence of definite classes in a society is a fact. Their basis may differ. They may be economic or intellectual or social, but an individual in a society is always a member of a class. This is a universal fact and early Hindu society could not have been an exception to this rule, and, as a matter of fact, we know it was not. If we bear this generalization in mind, our study of the genesis of caste would be very much facilitated, for we have only to determine what was the class that first made itself into a caste, for class and caste, so to say, are next door neighbours, and it is only a span that separates the two. A Caste is an Enclosed Class.

A little later he stated:

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

77. In Encyclopaedia Britannica Vol. 16, the following statement occurs under the heading "Slavery, Serfdom and Forced labour" under the sub-heading "servitude in Ancient India and China." - "castes in India."

More abundant than slavery were serfdom. Within the rigid classification of social classes in ancient India, the Sudra caste was obliged to serve the Ksatriya, or warrior caste, the Brahmins, or priests,

and the Vaisyas, or farmers, cattle raisers and merchants. There is an unbreakable barrier, however, separating these castes from the inferior Sudra caste, the descendants of the primitive indigenous people who lived in serfdom.

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

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

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

Assortment, bracket, branch, brand, breed, caste, category, classification, classes, denomination, designation, division...; gradation, grade, group, grouping hierarchy.... sect, social rank, social status....

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

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

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

78. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr. Ambedkar as conclusive on the meaning of the expression "backward classes." We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in Clause (4). We are aware that what is said during these debates is not conclusive or binding upon the court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr. Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft Clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to

understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. See *Madhu Limaye* A.I.R. 1969 S.C. 1014 at 1018; *Golaknath v. State of Punjab* (Subba Rao, C.J.); opinion of Sikri, C.J., in *Dhillon v. Union of India* and the several opinions in *Keshavananda Bharati* where the relevance of these debates is pointed out, emphasising at the same time, the extent to which and the purpose for which they can be referred to). Since the expression "backward" or "backward class of citizens" is not defined in the Act, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable.

79. According to Dr. Ambedkar (his speech is referred in para 28 and need not be reproduced here), the Drafting Committee was of the opinion that such a qualifying expression was necessary to indicate that the classes of citizens for whom reservations were to be made are those "communities which have not had so far representation in the State." It was also of the opinion that without such a qualifying expression (like 'backward') the "exemption made in favour of reservation will ultimately eat up the rule altogether". This was also the opinion of Sri K.M.Munshi, who too was a member of the Drafting Committee. In his speech (referred to in para 27) he explains why the said qualifying expression "backward" was inserted by the Drafting Committee in draft Article 10(3). His speech, in so far as it is relevant on this aspect, has been quoted in extenso in para 28 and need not be repeated here.

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

Reference can also be made in this context to the speech of Dr. Ambedkar in the Parliament at the time the First Amendment to the Constitution was being enacted. It must be remembered that the Parliament which enacted the First Amendment was the very same Constituent Assembly which framed the Constitution and Dr. Ambedkar as the Minister of Law was piloting the Bill. He said that backward classes "are nothing else but a collection of certain castes". (the relevant portion of his speech is referred to in para 32) and that it was for those backward classes that Article 15(4) was being enacted.

80. Pausing here, we may be permitted to make a few observations. The speeches of Dr. Ambedkar may have to be understood in the context of the then obtaining ground realities viz., (a) Hindus constituted 84% of the total population of India. And among Hindus, caste discrimination was unfortunately an unpleasant reality; (b) caste system had percolated even the Non-Hindu religions - no doubt to varying extents. Particularly among Christians in Southern India, who were converts from Hinduism, it was being practised with as much rabidity as it was among Hindus. (This aspect has been stressed by the Mandal Commission (Chapter 12 paras 11 to 16) and has also been judicially recognised. (See, for instance, the opinions of Desai and Chinnappa Reddy, JJ. in *Vasant Kumar*).

Encyclopaedia Britannica-II-Micropaedia refers to existence of castes among Muslims and Christians at pages 618 and 619. Among Muslims, it is pointed out, a distinction is made between 'Ashrats' (supposed to be descendants/ascendants of Arab immigrants) and non-Ashrafs (native converts). Both are divided into subgroups. Particularly, the non-Ashrafs, who are converts from Hinduism, it is pointed out, practice caste system (including endogamy) "in a manner close to that of their Hindu counter-parts." All this could not have been unknown to Dr. Ambedkar, the keen social scientist that he was.

(c) It is significant to notice that throughout his speech in the Constituent Assembly, Dr. Ambedkar was using the word "communities" (and not 'castes') which expression includes not only the castes among the Hindus but several other groups. For example, Muslims as a whole were treated as a backward community in the princely State of Travancore besides several sections/denominations among the Christians. The word "community" is clearly wider than "caste" - and "backward communities" meant not only the castes - wherever they may be found - but also other groups, classes and sections among the populace.

81. Indeed, there are very good reasons why the Constitution could not have used the expression "castes" or "caste" in Article 16(4) and why the word "class" was the natural choice in the context. The Constitution was meant for the entire country and for all time to come. Non-Hindu religions like Islam, Christianity and Sikh did not recognise caste as such though, as pointed out hereinabove, castes did exist even among these religions to a varying degree. Further, a Constitution is supposed to be a permanent document expected to last several centuries. It must surely have been envisaged that in future many classes may spring-up answering the test of backwardness, requiring the protection of Article 16(4). It, therefore, follows that from the use of the word "class" in Article 16(4), it cannot be concluded either that "class" is antithetical to "caste" or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens. The word "class" in Article 16(4), in our opinion, is used in the sense of social class - and not in the sense it is understood in Marxist jargon.

In Rajendran, Trilokinath-II, Balram and Peerikarupam, this reality was recognised and given effect to, notwithstanding the fact that they had to respect and operate within the rather qualified formulation of Balaji.

For the sake of completeness, we may refer to a few passages from Vasant Kumar to show what does the concept of 'caste' signify? D.A. Deasi, J. defines and describes "caste" in the following terms:

What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it. Homo Hierarchicus is expected to be the central and substantive element of the caste/system which differentiate it from other social systems. The concept of purity and impurity conceptualises the caste system.... There are four essential features of the caste system which maintained its homo hierarchicus character: (1) hierarchy (2) commensality: (3) restrictions on marriage; and (4) hereditary occupation. Most of the caste are endogamous groups. Intermarriage between two groups is impermissible. But 'Pratilom'

marriages are not wholly known.

Venkataramiah, J. also defined "caste" in practically the same terms. He said:

A caste is an association of families which practice the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste.... A caste is based on various factors. Sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth, in a family. Certain ideas of ceremonial purity are peculiar to each caste.... Even the choice of occupation of members of castes was predetermined in many cases, and the members of particular caste were prohibited from engaging themselves in other types of callings, profession or occupations. Certain occupations were considered to be degrading or impure.

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

theme remains the same. This is the stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon. We are not saying it ought to be encouraged. It should not be. It must be eradicated. That is the ideal - the goal. But any programme towards betterment of these sections-classes of society and any programme designed to eradicate this evil must recognise this ground reality and attune its programme accordingly. Merely burying our heads in the sand - Ostrich-like - wouldn't help. One cannot fight his enemy without recognizing him. The U.S. Supreme Court has said repeatedly, if race be the basis of discrimination - past and present - race must also form the basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far. Without a doubt, an extensive restructuring of socio-economic system is the answer. That is indeed the goal, as would be evident from the preamble and Part IV (Directive Principles). But we are concerned here with a limited aspect of equality emphasised in Article 16(4) - equality of opportunity in public employment and a special provision in favour of backward class of citizens to enable them to achieve it.

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

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

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

Coming back to the question of identification, the fact remains that one has to begin somewhere - with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely inter-twined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found

socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and soon and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of Clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (After excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by Justice O.Chinnappa Reddy Commission in this respect.

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

83A. The only basis for saying that caste should be excluded from consideration altogether while identifying the Backward Class of Citizens for the purpose of Article 16(4) is Clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of Clause (2). It prohibits discrimination on any or all of the grounds mentioned therein. The significance of the word "any" cannot be minimised. Reservation is not being made under Clause (4) in favour of a 'caste' but a 'backward class'. Once a caste satisfies the criteria of backwardness, it becomes a backward class for

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

84. Another contention urged is that only that group or section of people, who are suffering the lingering effects of past discrimination, can alone be designated as a backward class and not others. This argument, inspired by certain American decisions, cannot be accepted for more than one reason. Firstly, when the caste discrimination is still prevalent, more particularly in rural India (which comprises the bulk of the total population), the theory of lingering effects has no relevance. Where the discrimination has ended, does that aspect become relevant and not when the discrimination itself is continuing. Secondly, as we have noticed hereinabove, the said theory has practically been given up by the U.S. Supreme Court in *Metro Broadcasting*. In this case, it is held sufficient for introducing and implementing a race-conscious programme that such programme serves important State objectives. In other words, according to this test, it is no longer necessary to prove that such programme is designed to compensate victims of past societal or governmental discrimination. Thirdly, the basic premise of the theory of lingering effects is not accepted by all the learned Judges of U.S. Supreme Court. If one sees the opinion of Douglas, J. in *Defunis* and of Marshall, J. in *Bakke* and *Fullilove*. It would become evident. They also say that discriminatory practices against blacks and other minorities have not come to an end but are still persisting. In this country too, none can deny - in the face of the material collected by the various Commissions including Mandal Commission - that discrimination persists even today in India. The representation of the socially backward classes in the Government apparatus is quite inadequate and that conversely the upper classes have a disproportionately large representation therein. This is the lingering effect, if one wants to see it.

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

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

Article 15(4) speaks about socially and educationally backward classes of citizens." However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a 'backward class citizens' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Article 15(4) and 16(4).

It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does Clause (4) of Article 15. It may be remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: "backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. Thus, S.E.B.Cs, referred to in Article 340 is only one of the categories for whom Article 16(4) was enacted; Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services - which may mean, at any level whatsoever - insisting upon educational backwardness may not be quite appropriate.

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

are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness. It is necessary to state at this stage that the Mandal Commission appointed under Article 340 was concerned only with the socially and educationally backward classes contemplated by the said Article. Even so, it is evident that social backwardness has been given precedence over others by the Mandal Commission - 12 out of 22 total points. Social backwardness - it may be reiterated - leads to educational and economic backwardness. No objection can be, nor is taken, to the validity and relevancy of the criteria adopted by the Mandal Commission. For a proper appreciation of the criteria adopted by the Mandal Commission and the difficulties in the way of evolving the criteria of backwardness, one must read closely Chapters III and XI of Volume I along with Appendixes 12 and 21 in Volume II. Appendix XII is the Report of the Research Planning Team of the Sociologists while Appendix 21 is the 'Final List of Tables' adopted in the course of socio-educational survey. In particular, one may read paras 11.18 to 11.22 in Chapter XI, which are quoted hereunder for ready reference:

11.18. Technical Committee constituted a Sub-Committee of Experts (Appendix-20, Volume II) to help the Commission prepare 'Indicators of Backwardness' for analysing data contained in computerised tables. After a series of meetings and a lot of testing of proposed indicators against the tabulated data, the number of tables actually required for the Commission's work was reduced to 31 (Appendix-21 Volume II). The formulation and refinement of indicators involved testing and validation checks at every stage.

11.19. In this connection, it may be useful to point out that in social sciences no mathematical formulae or precise bench-marks are available for determining various social traits. A survey of the above type has to read warily on unfamiliar ground and evolve its own norms and bench-marks. This exercise was full of hidden pitfalls and two simple examples are given below to illustrate this point.

11.20. In Balaji's case the Supreme Court held that if a particular community is to be treated as educationally backward, the divergence between its educational level and that of the State average should not be marginal but substantial. The Court considered 50% divergence to be satisfactory. Now, 80% of the population of Bihar (1971 Census) is illiterate. To beat this percentage figure by a margin of 50% will mean that 120% members of a caste/class should be illiterates. In fact it will be seen that in this case even 25% divergence will stretch us to the maximum saturation point of 100%.

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

for such a distinction.

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

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

102. The S.E.B.Cs. referred to by the impugned Memorandums are undoubtedly 'backward class of citizens' within the meaning of Article 16(4).

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

86. 'Means test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as "the creamy layer" argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class - as forward as any other forward class member - and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since Jayasree, almost every decision has accepted the validity of this submission.

On the other hand, the learned Counsel for the State of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representation received. In this behalf, the learned Counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class

has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar, to the following effect:

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

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

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

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

(c) Whether a class should be situated similarly to the Scheduled Caste/Scheduled Tribe for being qualified as a Backward Class?

87. In Balaji it was held "that the backward classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes." The correctness of this observation is questioned by the counsel for the respondents. Reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar (at page 406) where, dealing with the above observations in Balaji, the learned Judge said:

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

88. We see no reason to qualify or restrict the meaning of the expression "backward class of citizens" by saying that it means those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes. As pointed out in para 85, the relevant language employed in both the

clauses is different. Article 16(4) does not expressly refer to Scheduled Castes or Scheduled Tribes; if so, there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection. As a matter of fact, neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated. If any group or class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such a priori notions into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say. How difficult is the process of ascertainment of backwardness would be known if one peruses Chapters III and XI of Volume I of the Mandal Commission Report along with Appendixes 12 and 21 in Volume II. It must be left to the Commission/Authority appointed to identify the backward classes to evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria. If, in any case, a particular caste or class is wrongly designated or not designated a backward class, it can always be questioned before a court of law as well. We may add that relevancy of the criteria evolved by Mandal Commission (Chapter XI) has not been questioned by any of the counsel before us. Actual identification is a different matter, which we shall deal with elsewhere.

88A. We may now summarise our discussion under Question No. 3.(a) a caste can be an quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (b) Neither the Constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. If can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be down with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes, (d) 'Creamy layer' can be, and must be, excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes,

who indubitably fall within the expression "backward class of citizens." The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).

Adequacy of Representation in the services under the State:

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

Question 4: (a) Whether backward classes can be identified only and exclusively with reference to the economic criterion:

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

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

91. In *Chitrallekha*, this Court held that such an identification is permissible. We see no reason to differ with the said view inasmuch as this is but another method to find socially backward classes. Indeed, this test in the Indian context is broadly the same as the one adopted by the Mandal Commission. While answering Question 3(b), we said that identification of backward classes can be done with reference to castes alongwith other occupational groups, communities and classes. We did not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, Rickshawpullers/drivers, street-hawkers etc. may well qualify for being designated as Backward

Classes.

Question No. 5: Whether Backward Classes can be further divided into backward and more backward categories?

92. In Balaji it was held "that the sub-classification made by the order between Backward Classes and more backward classes does not appear to be justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of backward classes, what the impugned order, in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced compared to the more advanced classes in the State and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of backward and more backward. The classification of the two categories, therefore, is not warranted by Article 15(4)." The correctness of this holding is questioned before us by the counsel for the respondents. It is submitted that in principle there is no justification for the said holding. It is submitted that even among backward classes there are some who are more backward than the others and that the backwardness is not and cannot be uniform throughout the country nor even within a State. In support of this contention, the Respondents rely upon the observations of Chinnappa Reddy, J. in Vasant Kumar, where the learned judge said:

We do not see why on principle there cannot be a classification into Backward Classes and More Backward Classes, if both classes are not merely a little behind, but far far behind the most advanced classes. In fact such a classification would be necessary to help the More Backward Classes; otherwise those of the Backward Classes who might be a little more advanced than the More Backward Classes might walk away with all the seats.

92A. We are of the opinion that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that gold-smiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that gold-smiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the

Commission and the State - and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group-A comprises of "Aboriginal tribes. Vimukta jatis. Nomadic and semi-nomadic tribes etc.". Group-B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group-C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group-D comprises of all other classes/communities/groups, which are not included in groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [1972] 3 S.C.R. 247 AT 286. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, O.B.Cs. will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law.

PART - V (QUESTION NOS. 6, 7 AND 8) Question 6: To what extent can the reservation be made?

- (a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?
- (b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?
- (c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to ?

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

When Article 15(4) refers to the special provision for the advancement of certain classes or Scheduled Castes or Scheduled Tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exhaustive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4)

authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored....A Special provision contemplated by Article 15(4) like reservation for posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the State and the center have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be adverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.

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

This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time Clause (4) of Article 16 does not fix any limit on the power of the government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the authorities, this is however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward class of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object to this provision is to take steps to make inadequate representation adequate.

Krishna Iyer, J. agreed with the view taken by Fazal Ali, J. in the following words:

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

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

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

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

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

94. It is argued before us that the observations on the said question in Thomas were obiter and do not constitute a decision so as to have the effect of overruling Balaji. Reliance is also placed upon the speech of Dr. Ambedkar in the Constituent Assembly, where he said that reservation must be confined to a minority of seats (See para 28). It is also pointed out that Krishna Iyer, J. who agreed with Fazal Ali, J. in Thomas on this aspect, came back to, and affirmed, the 50% rule in Karamchari Sangh (at pp. 241 and 242). On the other hand, it is argued for the respondents that when the population of the other backward classes is more than 50% of the total population, the reservation in their favour (excluding Scheduled Castes and Scheduled Tribes) can also be 50%.

94A. We must, however, point out that Clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State Legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits - and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in Narayan Rao v. State 1987 A.P. 53, striking down the enhancement

of reservation from 25% to 44% for O.B.Cs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%.

It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.

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

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

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

95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations that is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition

(O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

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

96. The next aspect of this question is whether an year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. Balaji does not deal with this aspect but Devadasan (majority opinion) does. Mudholkar, J. speaking for the majority says:

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

On the other hand is the approach adopted by Ray, C.J. in Thomas. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, C.J. would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go, i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e., 270 by other backward classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to

eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% an year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

(d) Was Devadasan correctly decided?

97. The rule (providing for carry forward of unfilled reserved vacancies as modified in 1955) struck down in Devadasan read as follows:

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

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

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

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

(iii) U.P.S.C. recommended 16 for unreserved and 30 for reserved vacancies - a total of 46;

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

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

The majority, speaking through Mudholkar, J. upheld the contention of the petitioners and struck down the Rule purporting to apply the principle of Balaji. The vice of the Rule was pointed out in the following wards:

In order to appreciate better the import of this rule on recruitment, let us take an illustration. Supposing in two successive years no candidate from amongst the Scheduled Castes and Tribes is

found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved vacancies for each of those years would, according to the Government resolution, be 18 for each year. Now, since these vacancies were not filled in those years a total of 36 vacancies will be carried forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Tribes. By operation of the carry forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%.

98. We are of the respectful opinion that on its own reasoning, the decision in so far as it strikes down the Rule is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said Rule. But it would not be correct to presume that that is the necessary and the only consequence of that rule. Let us take the very illustration given at pp. 691-2, - namely 100 vacancies arising in three successive years and 18% being the reservation quota - and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are filled up and 9 are carried forward. Similarly, in the second year again, 9 are filled up and another 9 are carried forward. Result would be that in the third year, $9 + 9 + 18 = 36$ (out of a total of 100) would be reserved which would be far less than 50%; the rule in Balaji is not violated. But by striking down the Rule itself, carrying forward of vacancies even in such a situation has become impermissible, which appears to us indefensible in principle. We may also point out that the premise made in Balaji and reiterated in Devadasan, to the effect that Clause (4) is an exception to Clause (1) is no longer acceptable, having been given up in Thomas. It is for this reason that in Karamchari Sangh, Krishna Iyer, J. explained Devadasan in the following words:

In Devadasan's case the court went into the actuals, not into the hypotheticals. This is most important. The Court actually verified the degree of deprivation of the 'equal opportunity' right....

.... What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right.... Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC&ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical precision is different in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule shall not result, in any given year, in the selection of appointments of SC&ST candidates considerably in excess of 50% we uphold Annexure I.

We are in respectful agreement with the above statement of law. Accordingly, we over-rule the decision in Devadasan. We have already discussed and explained the 50% rule in paras 93 to 96. The same position would apply in the case of carry forward rule as well. We, however, agree that an year should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength.

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

Question No, 7: Whether Clause (4) of Article 16 provides reservation only in the matter of initial appointments/direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well?

100. The petitioner's submission is that the reservation of appointments or posts contemplated by Clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to frog-leap over his compatriots, which was bound to generate acute heart - burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are given how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of dis-heartening which kills the spirit of competition and develops a sense of dis-interestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon in-efficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in Clause (J) of Article 51A (Fundamental Duties).

101. Sri K.Parasaran, learned Counsel appearing for the Union of India raised a preliminary objection to the consideration of this question at all. According to him, this question does not arise at present inasmuch as the impugned Memorandums do not provide for reservation in the matter of promotion. They confine the reservation only to direct recruitment. Learned counsel reiterated the well-established principle of Constitutional Law that Constitutional questions should not be decided

in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case and where it is found necessary to decide them for a proper decision of the case. A large number of decisions of this Court and English courts are relied upon in support of this proposition. If for any reason this Court decides to answer the said question, says the counsel, the answer can only be one - which is already given by this Court in a number of decisions namely, Rangachari, Hiralal and Karamchari Sangh. He submits that an appointment to a post is made either by direct recruitment or by promotion or by transfer. In all these cases it is but an appointment. If so, Article 16(4) does undoubtedly take in and warrant making a provision for reservation in the matter of promotion as well. Learned counsel commended to us the further reasoning in Rangachari that adequate representation means not merely quantitative representation but also qualitative representation. He says further that adequacy in representation does not mean representation at the lowest level alone but at all levels in the administration. Regarding the Constituent Assembly debates, his submission is that those debates do not indicate that the said provision was not supposed to apply to promotions. In such a situation, it is argued, plain words of the Constitution should be given their due meaning and that there is no warrant for cutting down their ambit on the basis of certain suppositions with respect to interpretation of Clauses (1), (2) and (4). This is also the contention of the other counsel for respondents.

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

103. Reservation in the case of promotion is normally provided only where the promotion is by selection, i.e., on the basis of merit. For, if the promotion is on the basis of seniority, such a rule may not be called for; in such a case the position obtaining in the lower category gets reflected in the higher category (promotion category) also. Where, however, promotion is based on merit, it may happen that members of backward classes may not get selected in the same proportion as is obtaining in the lower category. With a view to ensure similar representation in the higher category also, reservation is thought of even in the matter of promotion based on selection. This is, of course, in addition to the provision for reservation at the entry (direct recruitment) level. This was the position in Rangachari. Secondly, there may be a service/class/category, to which appointment is made partly by direct recruitment and partly by promotion (i.e., promotion on the basis of merit). If no provision is made for reservation in promotions, the backward class members may not be represented in this category to the extent prescribed. We may give an illustration to explain what we are saying. Take the category of Assistant Engineers in a particular service where 50% of the vacancies arising in a year are filled up by direct recruitment and 50% by promotion (by selection i.e., on merit basis) from among Junior Engineers. If provision for reservation is made only in the matter of direct recruitment but not in promotions, the result may be that members of backward classes (where quota, let us say, is 25%) would get in to that extent only in the 50% direct recruitment quota but may not get in to that extent in the balance 50% promotion quota. It is for this reason that reservation is thought of even in the matter of promotions, particularly where

promotions are on the basis of merit. The question for our consideration, however, is whether Article 16(4) contemplates and permits reservation only in the matter of direct recruitment or whether it also warrants provision being made for reservation in the matter of promotions as well. For answering this question, it would be appropriate, in the first instance, to examine the facts of and dicta in Rangachari, Hiralal and Karamchari Sangh.

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

(a) matters relating to employment [in Clause (1)] must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.

(b) in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service.

(c) The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one.

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

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

106. Validity of a number of circulars issued by the Railway Administration was questioned in *Karamchari Sangh*, a petition under Article 32. The experience gained over the years disclosed that reservation of appointments/posts in favour of SC/STs, though made both at the stage of initial recruitment and promotion was not achieving the intended results, inasmuch as several posts meant for them remained unfilled by them. Accordingly, the Administration issued several circulars from time to time tending further concessions and other measures to ensure that members of these categories avail of the posts reserved for them fully. (The original circular is referred to in the judgment as Ann.-F, whose validity was upheld in *Rangachari* itself. The other circulars are referred to as Annexures I, H, J and K). These circulars contemplated (i) giving one grade higher to SC/ST candidates than is assignable to an employee (ii) carrying forward vacancies for a period of three years and (iii) provision for in-service training and coaching (after promotion) to raise the level of efficiency of SC/ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petitioners was that these circulars, being inconsistent with the mandate of Article 335, are bad. *Rangachari* was sought to be reopened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The Division Bench (Krishna Iyer, Pathak and Chinnappa Reddy, JJ.) not only refused to re-open *Rangachari* but also repelled the attack upon the circulars. It was held that no dilution of efficiency in administration resulted from the implementation of the circulars inasmuch as they preserved the criteria of eligibility and minimum efficiency required and also provided for in-service training and coaching to correct the deficiencies, if any. The carry forward rule was also upheld subject to the condition that the operation of the rule shall not result, in any given year, selection/appointment of Scheduled Caste/Scheduled Tribe candidates in excess of 50%.

In *Comptroller and Auditor General v. K.S. Jagannathan*, it was held:

It is now well settled by decisions of this Court that the reservation in favour of backward classes of citizens including the members of the Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made. [See for instance: and *Akhil Bhartiya Soshit Karamchari Sangh v. U.O.I.* [1981] 1 S.C. 246.]

107. We find it difficult to agree with the view in *Rangachari* that Article 16(4) contemplates or permits reservation in promotions as well. It is true that the expression "appointment" takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizens. But this question has not to be answered on a reading of Article 16(4) alone but on a combined reading of Article 16(4) and Article 335. In *Rangachari* this fact was acknowledged but explained away on a basis which, with great respect to the learned Judges who constituted the majority - does not appear to be acceptable. The propositions emerging from the

majority opinion in Rangachari have been set out in Para 104. Under proposition (d) (as set out in para 104), the majority does say that "in providing for the reservation of appointments or posts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency;" but then it explains it away by saying "but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts." We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream - a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-fogging and the deleterious effects of "leap-fogging" need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class-IV and Class-III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.

It is true that Rangachari has been the law for more than 30 years and that attempts to re-open the issue were repelled in Karamchari Sangh. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in Rangachari, to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed

that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12-such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise modify or reissue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

A purist or a legal theoretician may find this direction a little illogical. We can only answer them in the words of Lord Roskill. In his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject "Law Lords, Reactionaries or Reformers?", the learned Law Lord said:

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

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

Question No. 8: Whether Reservations are anti-meritarian?

108. In Balaji and other cases, it was assumed that reservations are necessarily anti-meritarian. For example, in Janaki Prasad Parimoo it was observed, "it is implicit in the idea of reservation that a less meritorious person be preferred to another who is more meritorious." To the same effect is the

opinion of Khanna, J. in Thomas, though it is a minority opinion. Even Subba Rao, J. who did not agree with this view did recognize some force in it. In his dissenting opinion in Devadasan, While holding that there is no conflict between Article 16(4) and Article 335, he did say, "it is inevitable in the nature of reservation that there will be a lowering of standards to some extent", but, he said, on that account the provision cannot be said to be bad, inasmuch as in that case, the State had, as a matter of fact, prescribed minimum qualifications, and only those possessing such minimum qualifications were appointed. This view was, however, not accepted by Krishna Iyer, J. in Thomas. He said "efficiency means, in terms of good government, not marks in examinations only, but responsible and responsive service to the people. A chaotic genius is a grave danger to public administration. The inputs of efficiency rule include a sense of belonging and of accountability (not pejoratively used) if its composition takes in also the weaker segments of "We, the people of India". No other understanding can reconcile the claim of a radical present and the hangover of the unjust past." A similar view was expressed in Vasant Kumer by Chinnappa Reddy, J. The learned judge said "the mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after Independence, the position of the Scheduled Castes etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the district administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it."

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

110. The respondents, on the other hand, contend that the marks obtained at the examination/test/interview at the stage of entry into service is not an indicia of the inherent merit of a candidate. They rely upon the opinion of Douglas, J. in *Defunis* where the learned Judge illustrates the said aspect by giving example of a candidate coming from disadvantaged sections of society and yet obtaining reasonably good scores - thus manifesting his "promise and potential" - vis-a-vis a candidate from a higher strata obtaining higher scores. (His opinion is referred to in para 44). On account of the disadvantages suffered by them and the lack of opportunities, - the Respondents say - members of backward classes of citizens may not score equally with the members of socially advanced classes at the inception but in course of time, they would. It would be fallacious to

presume that nature has endowed intelligence only to the members of the forward classes. It is to be found everywhere. It only requires an opportunity to prove itself. The directive in Article 46 must be understood and implemented keeping in view these aspects, say the Respondents.

111. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate - if it can be called that - of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of Article to say that the mandate is maintenance of efficiency of administration.) May be, efficiency, competence and merit are not synonymous concepts; May be, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with - and may, in some cases, excel members of open competitor candidates. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are anti meritarian. Merit there is even among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency alongwith others.

Having said this, we must append a note of clarification. In some cases arising under Article 15, this Court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in State of M.P. v. Nivedita Jain admission to medical course was regulated by an entrance test (called Pre-Medical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that Scheduled Cast/Schedule Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard altogether. The Government's action was challenged in this Court but was upheld. Since it was a case under Article 15, Article 335 had no relevance and was not applied. But in the case of Article 16, Article 335 would be relevant and any order on the lines of the order of the Government of M.P. (in Nivedita Jain) would not be permissible, being inconsistent with the efficiency of administration. To wit, in the matter of appointment of Medical Officers, the Government or the Public Service Commission cannot say that there shall be no minimum qualifying marks for Scheduled Castes/Scheduled Tribes candidates, while prescribing a minimum for others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes - consistent with the requirements of efficiency of administration - it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind.

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

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

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

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

PART - VI (QUESTIONS 9, 10 & 11 AND OTHER MISCELLANEOUS QUESTIONS).

Question No. 9: Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?

113. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and

orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive - a co-equal wing - in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed.

Question No. 10: Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?

114. While dealing with Question No. 3(d), we held that that exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No. 5, we held that it is not impermissible for the State to categorise backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the gold-smiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backward classes may indeed serve to help the more backward among them to get their due. But the question now is whether Clause (i) of the Office Memorandum dated 25th September, 1991 is sustainable in law. The said clause provides for a preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with the context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as a measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e., 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is: what is the meaning and context of the expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally - if the 'more backward' take away all the available vacancies/posts reserved for O.B.Cs., none would remain for 'backward'

among the O.B.Cs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression preference in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true insertion behind the clause.

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

Question No. 11: Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Article 16?

115. This clause provides for a 10% reservation (in appointments/posts) in favour of economically backward sections among the open competition (non-reserved) category. Though the criteria is not yet evolved by the Government of India, it is obvious that the basis is either the income of a person and/or the extent of property held by him. The impugned Memorandum does not say whether this classification is made under Clause (4) or Clause (1) of Article 16. Evidently, this classification among a category outside Clause (4) of Article 16 is not and cannot be related to Clause (4) of Article 16. If at all, it is relatable to Clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of Livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated 25.5.1991 fails and is accordingly declared as such.

THE CONCEPT OF POSITIVE ACTION AND POSITIVE DISCRIMINATION

116. Dr. Rajiv Dhawan describes Article 15(4) as a provision envisaging programmes of positive action and Article 16(4) as a provision warranting programmes of positive discrimination. We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs., Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts. But it may not be entirely right to say that Article 15(4) is a

provision envisaging programmes of positive action. Indeed, even programmes of positive action may sometimes involve a degree of discrimination. For example, if a special residential school is established for Scheduled Tribes or Scheduled Castes at State expense, it is a discrimination against other students, upon whose education a far lesser amount is being spent by the State. Or for that matter, take the very American cases - Fullilove or Metro Broadcasting Can it be said that they do not involve any discrimination? They do. It is another matter that such discrimination is not unconstitutional for the reason that it is designed to achieve an important governmental objective.

DESIRABILITY OF A PERMANENT STATUTORY BODY TO EXAMINE COMPLAINTS OF OVER INCLUSION/UNDER INCLUSION.

117. We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under Clause (4) of Article 16 itself - or under Article 16(4) read with Article 340 - as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of O.B.Cs. As suggested by Chandrachud, C.J. in Vasant Kumar, there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be.

SHOULD THE MATTER GO BACK TO Constitution BENCH TO GO INTO THE DEFECTS OF THE MANDAL COMMISSION REPORT.

118. Now that we have answered all the questions raised for our consideration, question now arises, whether in view of the answers given and directions being given by us, is it necessary to send back the matter to the Five-Judge Bench to consider whether the investigation and survey done, and conclusions arrived at, by the Mandal Commission are contrary to law and if so, whether the impugned Office Memorandums, based as they are on the report of the said Commission, can be sustained? We think not. This is not a case where the Five-Judge Bench framed certain questions and referred them to this Bench. All the matters as such were placed before this Bench for disposal. During the course of hearing, however, when some counsel wanted to take us into details of

castes/groups/classes which, according to them, have been wrongly included or excluded, as the case may be, we refused to go into those details saying that those details can be gone into before the Five-Judge Bench later. Otherwise, we heard the counsel fully on the alleged illegalities in the approach and methodology adopted by the Commission. The written arguments bear them out. We shall notice the criticism first and then answer the question posed at the inception of this para.

118A. The first and foremost criticism levelled against the approach and the procedure adopted by Mandal Commission in that the Mandal Commission has adopted caste and caste alone as the basis of its approach throughout. On this count alone, it is argued, the entire report of the Commission is vitiated. It is pointed out that in its very first letter dated 25th April, 1979 (Appendix VII at page 91-Vol. 2) addressed to all the Ministries and Departments of the Central Government, the Commission has prescribed the following test for determining the socially and educationally backward classes:

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

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

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

(b) Regarding the non-Hindu Communities

(i) an employee will be deemed to be socially backward if either (1) he is a convert from those Hindu communities which have been defined as socially backward as per para 4(a)(i) above, or (2) in case he is not such a convert, his parental income is below the prevalent poverty line, i.e., Rs. 71 per head per month.

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

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

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

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

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

(a) The Mandal Commission Report has not been accepted by the Government of India in its fullness, nor has the Government accepted the list of Other Backward Classes Prepared by it in its entirety. What is now in issue is not the validity of the Report but the validity of the impugned Office Memorandums issued on the basis of the Report. The First Memorandum expressly directs that only those classes will be treated as backward classes for the purposes of Article 16(4) as are common to both the Mandal List and the respective State List. (It may be remembered that the Mandal Commission has prepared the lists of Other Backward Classes State-wise). Almost every caste, community and occupational group found in the State lists is also found in the concerned State list prepared by Mandal Commission; Mandal lists contain many more castes/occupational groups than the respective State lists. (It should indeed be rare that a particular caste/group/class is included in the State list and is not included in the Mandal list relating to that State. In such a case, of course, such caste/group/class would not be treated as an O.B.C. under the Office Memorandum dated 13th

August, 1990). In such a situation, what the Office Memorandum dated 13th August, 1990 does in effect is to enforce the respective state lists. In other words, the Government of India has, for all practical purposes, adopted the respective State lists, as they obtained on 13th August, 1990. In this sense, the lists prepared by Mandal have no real significance at present. The State lists were prepared both for the purposes of Article 16(4) as well as Article 15(4). The following particulars furnished by the Union of India do establish that these State lists have been prepared after due enquiry and investigation and have stood the test of time and judicial scrutiny:

Basis of identification of SEBCs/OBCs in the States covered by O.M. of 13.8.1990.

S.No. Name of States Whether State's list is based on report of Commission/ Committee Status

1. 2. 3. 4.

1. Andhra Pradesh Reports of the Commission headed by Shri K. M. Anantharaman and Shri Muralidhara Rao (June, 1970 and August, 1982 respectively). State's G.O. based on the report of the Anantharam Commission was upheld by the Supreme Court in Balaram case (AIR 1972 SC 1375). The modified list of OBCs based on the report of Muralidhara Rao Commission was upheld by the A.P. High Court but the increased quantum of reservation from 25% to 44% was struck down (Judgment of 5-9-1986).

2. Bihar Commission set up in 1971 under the Chairmanship of Sri Mungeri Lal. Not challenged.

3. Gujarat Commission headed by Shri A. R. Bakshi, Retd. High Court Judge (Report of Feb., 1976).

4. Goa No Commission/ Committee State Government have notified 4 communities as OBC on their own. The list was challenged in the High Court in 1986 for quashing the G.O. and instead declare all the 19 communities recommended by the Mandal Commission as OBCs. The High Court rejected the petitioner's claim on 10-3-88. The matter is now before the Supreme Court through SLP No. 9813 of 1988.

5. Haryana Committees of 1951 and 1965. (In 1990 Gurnam Singh Commission was also set up and its report accepted by State Government).

6. Himachal Pradesh Based on the list of OBCs declared by the erstwhile State of Punjab for the areas merged in the State of Himachal Pradesh in November, 1966. The list is now extended to the entire State. Not challenged

7. Karnataka Commission headed by Shri L. G. Havanuri (Report of Nov. 75) The Karnataka High Court struck down the inclusion of certain communities in the list of SEBCs. The matter was then taken to the Supreme Court in the Vasanth Kumar's case. (High Court judgment was prior to Mandal report.)

8. Kerala (i) Commission headed by Shri G. Kumara Pillai set up in 1964.

(ii) Commission headed by Shri N. P. Damodaran set up in 1967. The Kerala Govt. vide communication dt. 8-2-91 has intimated that the list of OBCs has not been challenged.

9. Madhya Pradesh Mahajan Commission (report of Dec. 1983) (when Mandal was working, no State list) List stayed by M.P. High Court.

10. Maharashtra Committee headed by Shri B. D. Deshmukh (report of Jan. 1964) Not challenged

11. Punjab Committees set up in 1951 and 1965. The latter Committee was headed by Shri Brish Bhan. Not challenged

12. Tamil Nadu (i) Commission headed by Shri A. N. Sattanathan set up in 1969.

(ii) Commission headed by Shri J. A. Ambasankar (report of Feb. 1985) The revised list prepared by the Ambasankar Commission has been challenged in the

13. Uttar Pradesh Commission headed by Shri Chhedi Lal Sathi (Report of 1977). Supreme Court vide WP No. 1 of 1987 which is pending Status report not received from State Government.

Even if in one or two cases (e.g., Goa), the list is prepared without appointing a Commission, it cannot be said to be bad on that account. The Government, which drew up the list, must be presumed to be aware of the conditions obtaining in their State/area. Unless so held by any competent court - or the permanent mechanism (in the nature of a Commission) directed to be created herewith holds otherwise - the lists must be deemed to be valid and enforceable.

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

at both central and state level and with respect to which we have made appropriate directions elsewhere.

(b) Strictly speaking, appointment of a Commission under Article 340 is not necessary to identify the other backward classes. Article 340 does not say so. According to it, the Commission is to be constituted "to investigate the conditions of socially and educationally backward classes...and the difficulties under which they labour and to make recommendations as to the steps that should be taken of the Union or any State to remove such difficulties...." The Government could have, even without appointing a Commission, specified the O.B.Cs., on the basis of such material as it may have had before it (e.g., the lists prepared by various State Governments) and then appointed the Commission to investigate their conditions and to make appropriate recommendations. It is true that Mandal Commission was constituted "to determine the criteria for defining the socially and educationally backward classes" and the Commission did determine the same. Even so, it is necessary to keep the above constitutional position in mind, - more particularly in view of the veto given to State lists over the Mandal lists as explained in the preceding sub-para. The criteria evolved by Mandal Commission for defining/identifying the Other Backward Classes cannot be said to be irrelevant. May be there are certain errors in actual exercise of identification, in the nature of over-inclusion or under- inclusion, as the case may be. But in an exercise of such magnitude and complexity, such errors are not uncommon. These errors cannot be made a basis for rejecting either the relevance of the criteria evolved by the Commission or the entire exercise of identification, It is one thing to say that these errors must be rectified by the Government of India by evolving an appropriate mechanism and an altogether different thing to say that on that account, the entire exercise becomes futile. There can never be a perfect report. In human affairs, such as this, perfection is only an ideal - not an attainable goal. More than forty years have passed by. So far, no reservations could be made in favour of O.B.Cs. for one or the other reason in Central services though in many States, such reservations are in force. Reservations in favour of O.B.Cs. are in force in the States of Kerala, Tamil Nadu, Karnataka, Andhra Pradesh, Maharashtra, Orissa, Bihar, Gujarat, Goa, Uttar Pradesh, Punjab, Haryana and Himachal Pradesh among others. In Madhya Pradesh, a list of O.B.Cs. was prepared on the basis of Mahajan Commission Report but it appears to have been stayed by the High Court.

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

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

Respondents in justification of the Mandal Commission Report.

Before parting with this aspect, we must say that identifying the impugned Office Memorandums with the Mandal Commission report is basically erroneous. Such an identification is bound to lead one into confusion. He would be missing the wood for the trees. Instead of concentrating on the real issues, he would deviate into irrelevance and imbalance. Mandal Commission report may have led to the passing of the impugned Office Memorandum dated 13th August, 1990; it may have acted as the catalytic agent in bringing into existence the reservation in favour of O.B.Cs. (loosely referred to as SEBCs. in the O.M.) but the Office Memorandum dated 13th August, 1990 doesn't incorporate the Mandal lists of O.B.Cs. as such. It incorporates, in truth and effect, the State lists as explained hereinabove. In a social measure like the impugned one, the court must give due regard to the judgment of the Executive, a co-equal wing of the State and approach the measure in the spirit in which it is conceived. This very idea is put forcefully by Joseph Raz (Fellow of Balliol College, Oxford) in his article "The Rule of Law and its virtue" (1977) 93 Law Quarterly Review 195 at 211 in the following words:

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

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

PART - VII

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

(1)(a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Para 55)

(b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Para 56) (2)(a) Clause (4) of Article 16 is not an exception to Clause (1). It is an instance and an illustration of the classification inherent in Clause (1). (Para 57)

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 58)

(c) Reservations can also be provided under Clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under Clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' - as explained in this Judgment. (Para 60) (3)(a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (Paras 61 to 82)

(b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with the occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 83 and 84)

(c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (Paras 87 and 88)

(d) 'Creamy layer' can be, and must be excluded. (Para 86)

(e) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. (Para 85)

(f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority. (Para 89) (4)(a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. (Para 90)

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised. (Para 91).

(5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. (Para 92) (6)(a)&(b) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main-stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be. (Para 96)

(d) Devadasan was wrongly decided and is accordingly over-ruled to the extent it is inconsistent with this judgment. (Paras 97 to 99) (7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. If is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of backward class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. (Ahmadi, J. expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extent concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. (Paras 100 to 107).

(8) While the rule of reservation cannot be called anti-meritarion, there are certain services and posts to which it may not be advisable to apply the rule of reservation. (Paras 108 to 112) (9) The distinction made in the impugned Office Memorandum dated 25th September, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as other Backward classes, as explained in para 114 of this Judgment (Para 114). (11) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned office memorandum dated 25.9.1991 is constitutionally invalid and is accordingly struck down. (Para 115) (12) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4).

(Para 113) (13) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism - in the nature of a Commission - for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of O.B.Cs. and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor. (Para 117) (14) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of Five Judges. (Paras 118 to 119) 122. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 26. Our answers question-wise are:

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

(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', S.Cs., S.Ts. and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are inter-twined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to Article 46 do include S.E.B.Cs. referred to in Article 340 and covered by Article 16(4).

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

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

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

To the extent, Devadasan is inconsistent herewith, it is over-ruled.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay,

necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

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

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

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

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

(As pointed out at the end of the paragraph 101 of this judgment, Ahmadi, J. having upheld the preliminary objection raised by Sri Parasaran and others has not associated himself with the discussion on the question whether reservation in promotion is permissible. Therefore, the views expressed in this judgment on the said point are not the views of Ahmadi. J.) THE FOLLOWING DIRECTIONS ARE GIVEN TO THE GOVERNMENT OF INDIA. THE STATE GOVTS. AND THE ADMINISTRATION OF UNION TERRITORIES.

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

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

This direction shall not however apply to States where the reservations in favour of backward classes are already in operation. They can continue to operate them. Such States shall however evolve the said criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated 'Other Backward Classes'.

(C) It is clarified and directed that any and all objections to the criteria that may be evolved by the Government of India and the State Governments in pursuance of the direction contained in Clause (B) of Para 123 as well as to the classification among backward classes and equitable distribution of the benefits of reservations among them that may be made in terms of and as contemplated by Clause (1) of the Office Memorandum dated 25th September 1991, as explained herein, shall be preferred only before this Court and not before or in any other High Court or other Court or Tribunal. Similarly, and petition or proceeding questioning the validity, operation or implementation of the two impugned Office Memorandums, on any grounds whatsoever, shall be filed or instituted only before this Court and not before any High Court or other Court or Tribunal.

124. The Office Memoranda dated August 13, 1990 impugned in these writ petitions is accordingly held valid and enforceable subject to the exclusion of the socially advanced members/sections from the notified 'Other Backward Classes', as explained in para 123(B).

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

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

The writ Petitions and Transferred Cases are disposed of in the light of the principles, directions, clarifications and orders contained in this Judgment.

No costs.

S. Ratnavel Pandian, J.

125. Equality of status and of opportunity...' the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1791 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' (in Part III) through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional provisions

dealing with equal distribution of justice in the social, political and economic spheres.

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

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

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

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

130. Confining to the issue involved in this case as regards the equal opportunity in the matters of public employment, I venture to articulate without any reservation, even on the possibility of any refutation that it is highly deplorable and heart-rending to note that the constitutional provision, namely, Clause (4) of Article 16 proclaiming a "Fundamental Right" enacted about 42 years ago for providing equality of opportunity in matters of public employment to people belonging to any backward class has still not been given effect to in services under the Union of India and many more States. A number of Backward Classes Commission have been appointed in some of the States,

the recommendations of which have been repeatedly subjected to judicial scrutiny. Though the President of India appointed the second Backward Classes Commission under the chairmanship of Shri B.P. Mandal as far back as 1st January, 1979 and the Report was submitted in December, 1980, no effective steps were taken for its implementation till the issuance of the two impugned OMs. Having regard to this appalling situation and the pathetic condition of the backward classes, for the first time the Union of India has issued the Office Memorandum (hereinafter called the 'O.M.') in August 1991 and thereafter an amended O.M. in September 1991 on the basis of the recommendations of the Mandal Commission.

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

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

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

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

berserk regardless of human rights and dignity.

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

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

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

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

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

Caste or no caste, creed or no creed,... or class, or caste, or nation, or institution which bars the power of free thought and action of an individual - even so long as that power does not injure others - is devilish and must go down.

(Vide 'The Complete Works of Swami Vivekananda, Vol. V. page 29')

139. A Biblical verse in New Testament says "He denied none that come unto Him, black and white".

140. Sura 10 Verse No. 44 of Holy Quran reads:

Verily God will not deal unjustly with man in aught; it is man that wrongs his own soul.

141. The Hindus who form the majority, in our country, are divided into 4 Varnas - namely, Brahmins, Kshatriyas, Vaishyas (who are all twice born) and lastly Shudras which Varnas are having

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

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

143. Recognizing and recalling the self-less and dedicated social service carried on by those great leaders from their birth to the last breath; the then Prime Minister while making his clarificatory statement regarding the implementation of the Mandal Commission's Report in the Rajya Sabha on the 9th August 1990 paid the tributes in the following words:

In fact this is the realisation of the dream of BHARAT RATNA Dr. B.R. AMBEDKAR, of the great PERIYAR RAMASWAMY and Dr. RAM MANOHAR LOHIA.

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

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

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

147. The very blood and soul of our Constitutional scheme are to achieve the objectives of our Constitution as contained in the preamble which is part of our Constitution as declared by this Court

in *Kesvananda Bharti v. Kerala*, 1993 (Suppl.) SCR 1. So it is incumbent to lift the veil and see the notable aspirations of the Constitution.

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

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

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

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

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

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

COMMISSIONS ON BACKWARD CLASSES 1918-1990 Andhra Pradesh Manohar Pershad Committee (1968-69) Ananta Raman Commission (1970) Muralidhara Rao Commission (1982) Bihar Mungeri Lal Commission (1971-76) Gujarat A.R. Bakshi Commission (1972-76) Justice C.V. Rane Commission (1981-83) Justice R.C. Mankad Commission (1987) Haryana Gurnam Singh Commission (1990) Jammu and Justice Ganjendragadkar Commission (1967-68) Kashmir Justice J.N. Wazir Commission (1969) Justice Adarsh Anand Commission (1976-77) Karnataka Justice L.C. Miller Committee (1918-1920; Mysore) Naganna Gowda Commission (1960-61) L.G. Havnur Commission (1972-75) T. Venkataswamy Commission (1983-86) Justice Chinnappa Reddy Commission (1989-90) Kerala Justice CD. Nokes Committee (1935; Travancore-Cochin) V.K. Vishvanatham Commission (1961-63) G. Kumar Pillai Commission (1964-66) N.P. Damodaran Commission (1967-70) Maharashtra O.H.B. State Committee (1928-30; Bombay Presidency) B.D.

Deshmukh Committee (1961-64) Punjab Brish Ban Committee (1965-66) Tamil Nadu A.N. Sattanathan Commission (1969-70) J.M. Ambasankar Commission (1982-86) Uttar Pradesh Chhedi Lal Sathi Commission (1975-77) All India Kaka Kalelkar Commission (1953-55) B.P. Mandal Commission (1979-80) Note : 1. Where two dates are mentioned they refer to year of appointment and year of submission. Where only one is mentioned it refers to year of submission which is also the year of appointment in some cases. 2. The three commissions of the colonial period mentioned here had an ambit wider than those groups that later came to be known as Backward Classes.

154. Second Backward Classes Commission (popularly known as Mandal Commission)

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

156. It was about twenty-four years after the First Backward Classes Commission submitted its Report in 1955 that the President of India pursuant to the resolution of the Parliament appointed the second Backward Classes Commission on 1st January 1979 under the Chairmanship of Shri B.P. Mandal to investigate the conditions of Socially and Educationally Backward Classes (for short 'SEBCs') within the territory of India. One of the terms of reference of the Commission was to determine the criteria for defining the SEBCs. The Commission commenced its functioning on 21st March, 1979 and completed its work on 12th December 1980, during the course of which it made an extensive tour throughout the length and breadth of India in order to collect the requisite data for its final report. The Commission submitted its report with a minute of dissent of one of its members, Shri L.R. Naik on 31st December 1980. The Commission appears to have identified as many as 3743 castes as SEBCs and made its recommendations under Chapter XIII of Volume I of its report (vide paras 13. 1 to 13.39) and finally suggested "regarding the period of operation of Commission's recommendations, the entire scheme should be reviewed after twenty years. (Vide para 13.40)

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

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

Percentage of Distribution of India Population by Caste and Religious Groups S.No. Group Name Percentage of the total population I. Scheduled Castes and Scheduled Tribes A-1 Scheduled Castes 15.05 A-2 Scheduled Tribes 7.51 Total of 'A' 22.56 II. Non-Hindu Communities, Religious Groups, etc. B-1 Muslims (other than STs) 11.19 (0.2)* B-2 Christians (other than STs) 2.16 (0.44)* B-3 Sikhs (other than SCs & STs) 1.67 (0.22)* B-4 Budhists (Other than STs) 0.67 (0.03)* B-5 Jains 0.47 Total

of 'B' 16.16 III. Forward Hindu Castes & Communities C-1 Brahmins (including Bhumihars) 5.52 C-2 Rajputs 3.90 C-3 Marathas 2.21 C-4 Jats 1.00 C-5 Vaishyas-Bania etc. 1.88 C-6 Kayasthas 1.07 C-7 Other forward Hindu castes/groups 2.00 Total of 'C' 17.58 Total of 'A', 'B' & 'C' 56.30 IV. Backward Hindu Castes & Communities D. Remaining Hindu castes/groups which come in the category of 'Other Backward Classes' 43.70@ V. Backward Non-Hindu Communities E. 52% of religious groups under Section B may also be treated as OBCs 8.40 F. The approximate derived population of Other Backward Classes including non-Hindu Communities 52% (Aggregate of D & E, rounded) @ This is a derived figure * Figures in brackets give the population of S.C. & S.T. among these non-Hindu Communities.

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

No. 36012/31/90-Estt (SCT) Government of India Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OFFICE MEMORANDUM New Delhi, the 13th August, 1990 Subject : Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in services under the Government of India.

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

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

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

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

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

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

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

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

sd/- (Smt. Krishna Singh) Joint Secretary to the Govt. of India Amended Memorandum: No. 36012/31/90-Estt. (SCT) Government of India Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OFFICE MEMORANDUM New Delhi, the 25th September, 1991. Subject : Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in service under the Government of India.

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

2. (1) 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.

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

sd/-

(A.K. HARIT) DEPUTY SECRETARY TO THE GOVT. OF INDIA

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

160. Legislative History of Article 15(4) of the Constitution

161. A legislative historical event that warranted the introduction of Clause 4 to Article 15 may be briefly retraced.

162. The Government of Tamil Nadu issued a Communal G.O. in 1927 making compartmental reservation of posts for various communities. Subsequently the G.O. was revised. In 1950 one Smt. Champakam Dorairajan who intended to join the Medical College, on enquiries came to know that in respect of admissions into the Government Medical College the authorities were enforcing and observing an order of the Government, namely, notification G.O.No. 1254 Education dated 17.5.1948 commonly known as Communal G.O. which restricted the number of seats in Government Colleges for certain castes. It appeared that the proportion fixed in the old Communal G.O. had been adhered to even after commencement of the Constitution on January 26, 1950. She filed a Writ Petition on 7th June 1950 under Article 226 of the Constitution for issuance of a writ of mandamus restraining the State of Madras from enforcing the said Communal G.O. on the ground that the G.O. was sought or purported to be regulated in such a manner as to infringe the violation of the fundamental rights guaranteed under Articles 15(1) and 29(2). Similarly one Srinivasan who had applied for admission into the Government Engineering College at Guindy also filed a Writ Petition praying for a writ of mandamus for the same relief as in *Champakam Dorairajan*. A Full Bench of the Madras High Court heard both the Writ Petitions and allowed them (vide *Smt. Champakam Dorairajan and Anr. v. State of Madras*, this connection it may be mentioned that while the Writ Petition was pending before the High Court, another revised G.O. No. 2208 dated June 16, 1950 substantially reproducing the communal proportion fixed in the old Communal G.O. came into being. The State on being aggrieved by the judgment of the Madras High Court preferred an appeal before this Court in *State of Madras v. Smt. Champakam Dorairajan* [1951] SCR 525. A seven-Judges Bench dismissed the appeal holding that "the Communal G.O. being inconsistent with the provisions of Article 29(2) in Part III of the Constitution is void under Article 13." This judgment necessitated the introduction of a Bill called Constitution (First Amendment) Bill for over-riding the decision of this Court in *Champakam's* case (supra).

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

We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has the responsibility, there are groups, classes, individuals, communities, if

you like, who are backward. They are backward in many ways - economically, socially, educationally - sometimes they are not backward in one of these respects and yet backward in another. The fact is therefore that if we wish to encourage them in regard to these matters, we have to do something special for them....

Therefore one has to keep a balance between the existing fact as we find it and the objective and ideal that we aim at.

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

165. Scope of Article 16(4) of the Constitution

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

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

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

168. Though initially, Article 10(3) of the draft Constitution did not contain the qualifying word 'backward' preceding the words 'class of citizens' the said qualifying word was subsequently inserted on the suggestion of the Drafting Committee. Strong objection was taken for insertion of the word 'backward' and more so for the introduction of Article 10(3) of the draft Constitution. Amendments were moved by one section of the members of the Constituent Assembly for complete deletion of Clause (3) and by another section for the omission of the word 'backward'. The discussion and

debate took place at length for and against the introduction of Clause (3) as well as for the insertion of the word 'backward'. Before the motions for amendments were put on vote, Dr. B.R. Ambedkar in answering the scathing criticism made in the course of the debate and explaining the significance of Clause (3) of Article 10 with the qualifying word 'backward' and insisting the sustenance of the said clause emphatically expressed his views as follows:

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

169. While winding up the debate he said:

...the Drafting Committee had to produce a formula which would reconcile these three point of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in 'so to say into the administration....

that no better formula could be produced than the one that is embodied in Clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity has been embodied in Sub-clause (1) of Article 10. It is a generic principle....Supposing for instance, we are to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity....I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly... somebody asked me: "What is a backward community"? Well, I think 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.

(emphasis supplied) (Constituent Assemble Debates, Volume VII Pages 700-703)

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

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

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

173. The word 'backward' is very wide bringing within its fold the social backwardness, educational backwardness, economic backwardness, political backward and even physical backwardness.

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

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

176. Ray, C.J. in State of Uttar Pradesh v. Pradeep Tandon and Ors. has gone to the extent of saying that "when Article 15(1) forbids discrimination on grounds only of religion, race, caste - caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1)". The effect of this judgment is that caste can never be a criterion. This decision has also ruled that the place of habitation and the environment are also the determining factors in judging the social and educational backwardness.

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

178. Meaning of 'Class' and 'Caste'

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

180. The Oxford English Dictionary (Volume II):

Class :

(2) a division or order of society according to status; a rank or grade of society;... (6) a number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division.

Caste (2) one of the several hereditary classes into which society in India has from time immemorial been divided; the members of each caste being socially equal, having the same religious rites, and generally following the same occupation or profession; those of one caste have no social intercourse with those of another; (3) the system or basis of this division among the Hindoos.

181. In Webster Comprehensive Dictionary (International Edition), the meaning of the words is given as follows:

Class :

(1) A number or body of persons with common characteristics: the educated class; (2) social rank, caste Caste :

(1) one of the hereditary classes into which Hindu society is divided in India (2) the principle of practice of such division or the position it confers; (3) the division of society on artificial grounds; a social class

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

Class :

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

Caste :

(1) Social, an endogamous and hereditary social group limited to persons of the same rank, occupation, economic position etc. and having mores distinguishing it from other such groups, (2) any rigid wealth, hereditary rank or privileges, or by profession or employment, having special significance when applied to the artificial divisions or social classes into which the Hindus are rigidly separated.

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

Class :

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

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

Caste :

Caste is a largely, exclusive social class, membership in which is determined by birth and involves particular customary restrictions and privileges. The word derives from the Portugues casta, meaning 'breed', 'race', or 'kind' and was first used to denote the Hindu social system of social distinctions (2) Hinduism, any of the four social divisions, the Brahman, Kshatriya, Vaisya and Sudra, into which Hindu society is rigidly divided, each caste having its own privileges and limitations, transferred by inheritance from one generation to the next (3) any class or group of society sharing common cultural features.... (6) pertaining to characterised by caste; a caste society; a caste system; a caste structure.

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

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

Caste A class or grade, or division of society separated from others by differences of classification on the Indian subcontinent. While this remains the basic connotation, the word 'caste' is also used to describe in whole or in part social system that emerged at various times in other parts of the world....

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

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

189. See R. Chitralkha and Anr. v. State of Mysore and Ors. ; Triloki Nath v. J. & K. State [1969] 1 SCR 103 at 105 and K.C. Vasanth Kumar v. Karnataka [1985] Supp. 1 SCR 352.

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

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

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

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

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

Delhi, Dadra and Nagar Haveli and Haryana desired the economic factor to be the sole determinant of backwardness.

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

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

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

198. Reference also may be made to the observation of Krishna Iyer, J. in *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India and Ors.* where he has said:

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

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

200. In *M.R. Balaji v. State of Mysore* [1963] Suppl. 1 SCR 439, Gajendragadkar, J. observed, "Though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be the sole or the dominant test in that behalf."

201. Subba Rao, J. speaking for the majority of the Constitution Bench in *R. Chitrlekha v. State of Mysore* has stated:

...what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individual may be considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests.

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

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

203. Wanchoo, C.J. speaking for the Constitution Bench in *Minor P. Rajendran v. State of Madras and Ors.*, pointed out that "if the reservation in question has been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)".

(emphasis supplied).

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

205. In *State of Andhra Pradesh v. P. Sagar*, it has been observed:

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

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

would directly offend the Constitution."

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

208. Hegde, J. in *A. Peerikaruppan, etc. v. State of Tamil Nadu* has observed:

A caste has always been recognised as class.

209. Vaidialingam, J. in *State Andhra Pradesh and Ors. v. U.S.V. Balram etc.* [1972] 3 SCR 447 in his conclusion upheld the list of Backward Class in that case as they satisfied the various tests, which have been laid down by this Court for ascertaining the social and educational of a backwardness of a class even though the said list was exclusively based on caste.

(emphasis our)

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

211. Speaking for the Bench in *U.P. State v. Pradip Tandon Ray*, the learned Chief Justice after stating that neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4) when Article 15(1) forbids discrimination on grounds only of religion, race caste - observed that caste cannot be made one of the criteria for determining social and educational backwardness and that if the caste or religion is recognised as a criterion of social and educational backwardness, Article 15(4) still stultify Article 15(1). Further, he observed that "It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste but when a classification taken recourse to caste as one of the criteria in determining socially and educationally backward classes, the expression 'classes' in that case violates the rule of *expressio unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than groups based on caste."

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

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

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

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

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

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

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

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

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

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

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

Serial No. 26 Converts to Christianity from Scheduled Castes irrespective of the generation of conversion for the purpose of reservation of seats in Educational Institutional and for seats in Public Services. 98* Labbais including Rowthar and Marakayar (whether their spoken language is Tamil or Urdu.) 100 Latin Catholics...: in Kanyakumari district and Shenkottah taluk of Tirunelveli district. 110 Meenavar, Parvatharajakulam, Pattanavar, Sembadavar (including converts to Christianity). 115 Mukkuvar or Mukayar (including converts to Christianity). 118 Nadar, Shanar and Gramani, including Christian Nadar, Christian Shanar and Christian Gramani. 136 Paravar including converts to Christianity (except in Kanyakumari district and Shenkottah taluk of Tirunelveli district where the community is a Scheduled Caste.) * Item No. 98 denotes Muslim community.

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

(5) Accordingly, the Government declare that, in addition to the Christian Converts mentioned in paragraph one above, the persons belonging to the other Christian communities who are converts from any Hindu community included in the list of Backward Classes also will be considered as socially and educationally backward for the purposes of Article 15(4) of the Constitution.

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

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

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

226. The Nav. Budhists, and Neo Budhists the majority of whom are converts from Scheduled Castes enjoy the reservation on the ground that their low status in that community have not become

advanced equal to the status of others and their social backwardness is not changed in spite of change of their religion.

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

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

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

230. Reference may be made to paragraphs 12.11 to 12.16 of Chapter XII of the Report.

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

12.18 After giving a good deal of thought to these difficulties, the Commission has evolved the following rough and ready criteria for identifying non-Hindu OBCs:-

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

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

232. Even assuming that the caste factor would not furnish a reliable yardstick to identify 'socially and educationally backward groups' in the communities other than Hindu community as there is no commonness since all sections of people among Budhists, Muslims, Sikhs and Christians etc. and as the respective religion of those communities do not recognise the caste system, yet on the principle of the other agreed criteria such as traditional occupation, trade, place of residence, poverty lack of education or economic backwardness etc. the social and economic backwardness of those

communities could be identified independently of the caste criterion. Once these 'casteless societies' are tested on the anvil of the established relevant criteria de hors the caste criterion, there may not be any difficulty in identifying the social and educational backwardness of the section of the people of that community and classifying them as 'backward class of citizens' within the meaning of Article 16(4).

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

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

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

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

236. Does not the very mention of the caste named 'purada vannans' indicate that the people belonging to that community were so backward, both socially, economically as well as educationally

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

237. There is no denying that many of the castes are identified even by their traditional occupation. This is so because numerous castes arranged in a hierarchical order in the Hindu social structure are tied up with their respective particular traditional occupation consequent upon the creation of four Varnas on the concept of divine origin of caste system based on the Vedic principles. Can it be said that the propagation and practice on the caste - based discrimination; the marked dividing line between upper caste Hindus and Shudras, and the practice of untouchability in spite of the Constitutional declaration of abolition of untouchability under Article 17 are completely eradicated and erased? Can it be said that the social backwardness has no relation to caste status? The unchallengeable answer for the first question would be in the negative and for the second question, the answer would be that social backwardness does have a relation with the caste status.

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

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

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

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

241. It is common knowledge that in Hindu society, if a person merely mentions the name of a traditional occupation, another by his empirical knowledge can immediately identify the caste by the said traditional occupation. To illustrate, the traditional occupation of washing clothes is identified with washerman (Dhobi), caste, traditional occupation of haircutting is identified with Barber (Nai) - caste, traditional occupation of pottery is identified with Potter (Kumhar's caste), and so on. Of course in modern times, persons belonging to any particular caste might have shifted over to other

occupation leaving their traditional occupation but generally speaking, the occupation is identified with the caste and vice-versa. Many backward castes have taken 'agriculture' as their profession. In such an unquestionable situation, in my opinion, there can be no justification in saying that caste in Hindu society cannot serve as a primary criterion even at the starting point in ascertaining its social, economic and educational backwardness. To say that in the effort of ascertaining social backwardness, caste should be considered only at the end point, is a misnomer and fallacious. Because after identifying and classifying a group of persons belonging to a particular caste by testing with the application of the relevant criteria other than the caste criterion, the identification of the caste of that class of persons is no more required as in the case of identification of casteless society as a backward class. In fact, this Court in a number of decisions has held that a caste may become a 'backward class' provided that caste satisfies the test of backwardness.

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

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

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

245. What the Expression "Backward Class" means?

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

247. Reference may also be made to *Triloki Nath* (11) (supra) and *Balaram*.

248. The facts in *Balaram* (cited above) disclose that for the admission to the integrated M.B.B.S. Course in the government medical colleges in Andhra Pradesh, the Government issued a G.O. making a reservation of 25% of seats in favour of 'backward classes' as recommended by the Andhra Pradesh Backward Classes Commission besides other reservations inclusive of reservation for Scheduled Castes and Scheduled Tribes. The reservation for the 'backward classes' was challenged on the ground that the Government Order violated Article 15(1) read with Article 29 and that the reservation was not saved by Article 15(4). The High Court held that the Commission had merely enumerated the various persons belonging to a particular caste as 'backward classes' which was contrary to the decision of this Court and violative of the constitutional provisions and consequently struck down the G.O. The Government preferred an appeal before this Court. *Vaidialingam*, J.

speaking for the Bench has observed:

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

(emphasis supplied)

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

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

only by their economic backwardness and not by the test of social and educational backwardness, evidently for the reason that they are all socially and educationally well advanced.

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

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

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

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

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

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

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

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

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

Indicators (Criteria) for Social and Educational Backwardness 11.23 As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e. Social, Educational and Economic. They are:-

A. Social

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

B. Educational

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

C. Economic

- (viii) Castes/Classes where the average value of family assets is at least 25% below the State average.
- (ix) Castes/Classes where the number of families living in 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 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

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

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

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

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

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

There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes.

263. Criticism levelled against Mandal Commission Report

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

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

266. The above criticism, in my considered view, is very uncharitable and bereft of the factual position. Hence it has to be straightaway rejected as unmeritorious since that Report is not actually based solely on caste criteria but on the anvil of various factors grouped under three heads i.e. social, educational and economic backwardness but giving more importance - rightly too - to the social backwardness as having a direct consequence of caste status.

267. Adopting the policy of 'Running with the hare and hunting with the hounds', a conciliatory argument was advanced saying that although it is necessary to make provisions for providing equality of opportunity in matters of public employment 'in favour of any backward class' in terms of Article 16(4), the present Report based on 1931 census can never serve a correct basis for identifying the 'backward class', that therefore, a fresh Commission under Article 340(1) of the Constitution is required to be appointed to make a fresh wide survey sumey through out the length and breadth of the country and submit a new list of OBCs (other backward classes) on the basis of the present day Census and that there are million ways of guaranteeing progress of backward classes and ensuring that it percolates down the social scale, but the Mandal commission is the one.

268. Firstly, in my view if the above argument is accepted it will result in negation of the just claim of the SEBCs to avail the benefit of Article 16(4) which is a fundamental right.

269. Secondly, this attack is based on a misconception. A perusal of the Report would indicate that the 1931 census does not have been even a remote connection with the identification of OBCs. But on the other hand, they are identified only on the basis on the country-wide socio-educational field survey and the census report of 1961 particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes personal knowledge gained through extensive touring and receipt of voluminous public evidence and lists of OBCs notified by various States. It

was only after the identification of OBCs, the Commission was faced with the task of determining their population percentage and at that stage 1931 census become relevant. It is to be further noted after 1931 census, no caste-wise statistics had been collected. In fact, the identification of classes by the Commission was based on the realities prevailing in 1980 and not in 1931. It is brought to our notice that the same method had already been adopted in Section 5 of the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976.

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

12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes, communities, and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country.

12.10 Working on the above basis, the Commission culled out caste/community-wise population figures from the census records of 1931 and, then grouped them into broad caste-clusters and religious groups. These collectivities were subsequently aggregated under five major heads i.e. (i) Scheduled Castes and Scheduled Tribes; (ii) Non-Hindu communities, Religious Groups, etc.; (iii) Forward Hindu Castes and Communities; (iv) Backward Hindu Caste and Communities; and (v) Backward Non-Hindu Communities....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To make my point clear, take the illustration of a horse race. Two horses are set down to run a race - one is a first class race horse and the other an ordinary one. Both are made to run from the same

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

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

A good way to appreciate the "something more" quandary is to consider the metaphor of the shackled runner, an analogy frequently advanced by spokesmen for minorities:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

298. Attention was also drawn to *Defunis v. Charles Ode guard* [1974] 40 L. Ed. 2nd 164.

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

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

301. Mr Parasaran, the learned senior counsel, appearing on behalf of the Union of India articulated that Articles 16(4) and 335 are so worded as to give a wide latitude to the State in the matter of reservation and that Article 16(4) having no-obstinate clause reading "Nothing in this Article shall prevent the State from making any provision...." has an over-riding effect on Article 16(2).

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

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

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

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

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

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

308. In passing, it may be stated that this Court while reversing the judgment of the Punjab and Haryana High Court in favour of the appellant State of Punjab v. Hiralal and Ors. upheld the reservation which was made not by a legislation but by an executive order. See also Mangal Singh v. Punjab State Police .

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

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

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

311. Whether formation of opinion by State is subjective?

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

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

314. Whether the policy of Government can be subjected to judicial review:

315. The action of the Government in making provision for the reservation of appointments or posts in favour of any 'backward class of citizens' is a matter of policy of the Government. What is best for the 'backward class' and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservation is a matter for decision exclusively within the province of the Government and such matters do not ordinarily attract the power of judicial review or judicial interference except on the grounds which are well settled by a catena of decisions of this Court. Reference may be made to (1) *Hindustan Zinc v. A.P. State Electricity Board* ; (2) *Sitaram Sugars v. Union of India and Ors.* [1990] 3 SCC 233; (3) *D.C.M. v. S. Paramjit Singh* ; (4) *Minerva Talkies v. State of Karnataka and Ors.* 1988 Suppl. SCC 176; (5) *State of Karnataka v. Ranganath Reddy* ; (6) *Kerala State Electricity Board v. S.N. Govind Prabhu* [1986] 4 SCC; (7) *Prag Ice Company v. Union of India and Ors.* [1978] 2 SCC 459; (8) *Saraswati Industries Syndicate Ltd. v. Union of India* ; (9) *Murti Match Works v. Assistance Collector, Central Excise and Ors.* ; (10) *I. Govindraja Mudaliar v. State of Tamil Nadu and Ors.* : and (11) *Narender Kumar v. Union of India and Ors.* [1969] 2 SCR 375.

316. To what extent can the reservation be made?

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

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

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

this Article falling under Fundamental Rights and, therefore, reservation if the circumstances so warrant can go even upto 100%.

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

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

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

323. As to what extent the proportion of reservation will be so excessive as to render it bad must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula. In fact, Article 16(4) itself does not limit the power of the Government in making the reservation to any maximum percentage; but it depends upon the quantum of adequate representation required in the Services. In this context, it would be appropriate to recall some of the decisions of this Court, not agreeing with Balaji as regards the fixation of percentage of reservation.

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

.... Clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid that the percentage of reservation should not exceed 50%. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make an adequate representation adequate.

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

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

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

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

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

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

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

Constitution.

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

(emphasis supplied)

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

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

332. The most important pivotal and crucial issue that I would now like to ponder over relates to the intent of para 2(i) of the OM dated 25th September 1991 whereunder it is declared that "Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference will be given to the candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates".

(emphasis supplied)

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

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

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

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

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

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

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

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

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

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

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

The matters are adjourned to 31st October 1991 when learned Additional Solicitor General will tell us how and when Government would be able to give the list of the economic criteria referred to in the notification of 25th September 1992.

(emphasis supplied)

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

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

(emphasis supplied)

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

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

347. When the 'means test' is analysed in depth so as to explore its merits and demerits, one would come to an inevitable conclusion that it is not a decisive test but on the other hand it will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods. Further, this test will be totally unworkable and impracticable in the determination of "getting somebody in and getting somebody out" from among the same identified SEBCs. If this 'means test' argument is accepted and put into action by scanning the identified SEBCs by applying a super-imposition test, the very object and purpose of reservation, intended for

the socially backward class would reach only a cul-de-sac and the identified SEBCs would be left in a maze. In my considered opinion, it will be a futile exercise for the courts to find out the reasons in support of the division between and among the group of SEBCs and make rule therefor, for multiple reasons, a few of which which I am enumerating hereunder.

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

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

I would like to indicate the various reasons in support of my opinion that this process of elimination or exclusion of a section of people from and out of the same category of SEBCs cannot be sustained leave apart the authority of the Government to take any decision and formulate its policy in its discretion or opinion provided that the policy is not violative of any constitutional or legal provisions or that discretion or opinion is not vitiated by non-application of mind, arbitrariness, formulation of collateral grounds or consideration of irrelevant and extraneous material etc.

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

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

(c) Take a case wherein there are two brothers belonging to the same family of 'backward class' of whom one is employed in Government service and another is privately employed or has chosen some other profession. The annual income of the Government employee if slightly exceeds the

ceiling limit, his children will not fall within the category of 'poorer sections' whereas the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

354. It may not be out of place to mention here that in Tamil Nadu, based on one of the recommendations of the First Backward Classes Commission constituted in 1969 - known as 'Sattanatham Commission' - the Government issued orders in G.O. Ms. No. 1156, Social Welfare

Department, dated 2nd July 1979, superimposing the income ceiling of Rs. 9,000 per annum as additional criterion for the backward classes to be eligible for reservation for admission in educational institutions and recruitment to public services. This order was challenged before the High Court but the High Court by 2:1 upheld the G.O. However, the order provoked a considerable volume of public criticism. After an All-party meet, the Government in G.O. Ms. No. 72, Social Welfare Department dated 1st February 1980 revoked their orders and the position as it stood prior to 2nd July 1979 was restored. Simultaneously, by another G.O. Ms. No. 73, Social Welfare Department dated 1st February 1980, the Government raised the percentage of reservation for backward classes from 31 per cent to 50 per cent commensurate with the population of the backward classes in the State. Both the GOs i.e. G.O. Ms. No. 72 and 73 dated 1st February 1980 were challenged in the Supreme Court in Writ Petition Nos. 4995-4997 of 1980 along with W.P. No. 402 of 1981.

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

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

357. Further, it is clear for the afore-mentioned reasons that the Executive while making the division of sub-classification has not properly applied its mind to various factors, indicated above which may ultimately defeat the very purpose of the division or sub-classification. In that view, para 2(i) not only becomes constitutionally invalid but also suffers from the vice of non-application of mind and arbitrariness.

358. For the fermentation reason, I am of the firm view that the division made in the amended OM dividing a section of the people as 'poorer sections' and leaving the remaining as 'non-poorer sections' on economic criterion from and same unit of identified and ascertained SEBCs, having common characteristics the primary of which is the social backwardness as listed in the report of the Commission, is not permissible and valid and such a division or sub-classification is liable to be struck down as being violative of Clause (4) of Article 16 of the Constitution.

359. A further submission has been made stating that the benefits of reservation are often snatched away or eaten up by top creamy layer of socially advanced backward class who consequent upon their social development no longer suffer from the vice of social backwardness and who are in no way handicapped and who by their high professional qualifications occupy upper echelons in the public services and therefore, the children of those socially advanced section of the people, termed as 'creamy layer' should be completely removed from the lists of 'Backward Classes' and they should not be allowed to compete with the children of socially under-privileged people and avail the quota of reservation. By way of illustration it is said that if a member of a designated backward class holds a high post by getting through the qualifying examinations of IAS, IFS, IPS or any other All India Service, there can be no justification in extending the benefit of reservation to their children, because the social status is will advanced and they no longer suffer from the grip of poverty.

360. On the same analogy, it has been urged that the children of other professionals such as Doctors, Engineers, Lawyers etc. etc. also should not be given the benefit of reservation, since in such cases, they are not socially handicapped.

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

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

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

Based on the replies furnished by 30 Central Ministries and Departments and 31 attached and subordinate offices and public sector undertakings under the administrative control of 14 Ministries (which may be treated as sufficiently representative of the total picture) the Commission arrived at the following figures:-

Category of classes	Total number	Percentage	Percentage Employees of SC/ST of OBCs
15,71,638	18.72	12.55	All

(Extracted from page 92 of First Part of Mandal Commission Report)

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

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

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

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

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

368. Added to the above submission, it has been urged that some pseudo communities have smuggled into the backward classes and they should be removed from the list of OBCs, lest those

communities would be eating away the major portion of the reservation which is meant only for the true and genuine backward classes. There cannot be any dispute that such pseudo communities should be weeded out from the list of backward classes but that exercise must be done only by the Government on proper verification.

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

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

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

The validity of the Mandal Commission Report as such is not in issue before us....

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

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

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

layer' pales into insignificance.

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

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

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

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

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

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

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

382. In Mohan Kumar Singhania v. Union of India [1992] Supp. 1 SCC 594, a three-Judges Bench of this Court to which I was a party has taken a view that once candidates even from reserved communities are allocated and appointed to a Service based on their ranks and performance and brought under the one and same stream of category, then they too have to be treated on par with all

other selected candidates and there cannot be any question of preferential treatment at that stage on the ground that they belong to reserved community though they may be entitled for all other statutory benefits such as the relaxation of age, the reservation etc. Reservation referred to in that context is referable to the reservation at the initial stage or the entry point as could be gathered from that judgment.

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

384. Hence, I share the view of my learned brother B.P. Jeevan Reddy, J. holding that "Article 16(4) does not permit provision for reservation in the matter of promotions and that this rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis" and the direction given by him that wherever reservations are provided in the matter of promotion such reservation may continue in operation for a period of five years from this day.

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

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

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

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

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

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

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

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

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

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

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

(12) The reservation of 10% of the vacancies in civil posts and Services in favour of other economically backward sections of the people who are not covered by any other scheme of the reservation as mentioned in para 2(ii) of the impugned amended Officer Memorandum dated 25th September 1991 is constitutionally invalid and it is accordingly struck down. In this regard, I am also in agreement with conclusion No. (11) of paragraph 121 of the judgment of my learned brother, B.P. Jeevan Reddy, J.

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

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

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

(16) In Writ Petition No. 1094 of 1991 (Sreenarayana Dharma Paripalana Yogam v. Union of India), there is a prayer (prayer 'b'), inter alia, for issuance of a writ of mandamus directing the respondent

to implement the impugned unamended office memorandum dated 13th August 1990. In the light of my conclusions, striking down the amended office memorandum dated 25th September 1991, I direct the Union of India to immediately implement the unamended office memorandum dated 13th August 1990.

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

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

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

Dr. T.K. Thommen, J.

387. 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 Government's lists. A list of such castes/communities is being issued separately.

(v)...

388. 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.

...

389. 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%.

390. 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.

391. 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 our 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 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 Government. 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.

392. 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 'recognisable and persistent collectivities'.

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

393. 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 caste 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 caste or communities or who belong to certain low occupations as socially, educationally and economically backward.

394. 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 Constitution, 'and settle the legal position relating to reservation' and thus lay down the guideline by which the validity and reasonableness of Government Orders on reservation can be tested in appropriate cases.

395. 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 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.

396. 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 this 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 'poorer 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....

397. Constituent Assembly Debates, Vol. 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 caused 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.

398. What the Constitution permits is the adoption of suitable and appropriate 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.

399. 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.

400. 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.

4.1. 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.

401. The makers of the Constitution were fully conscious of the unfortunate position of the Scheduled Castes and 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.

402. 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.

403. 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 v. Allan Bakke* 438 US 265, 57 L Ed. 2d 750. See also *H. Earl Fullilove v. Philip M. Klutznick* 448 US 448, 65 L Ed. 2d 902; *Metro Broadcasting Inc. v. Federal Communications Commission* 58 I.W. 5053 (Decided on 27.6.1990); *Oliver Brown v. Board of Education of Topeka* 347 US 483, 98 L Ed. 2d 873; *City of Richmond v. J.A. Croson Co.* 488 US 469; *Wendy Wygant v. Jackson Board of Education* 476 US 267, 90 L Ed. 2d 260.

404. 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 splendour 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.

405. Equality is one of the magnificent cornerstones of Indian democracy: Smt. Indira Nehru Gandhi v. Shri Raj Narain ; Minerva Mills Ltd. and Ors. v. Union of India and Ors. ; Waman Rao and Ors. v. Union of India and Ors. . Article 14, 15 and 16 embody facets of the many-sided grandeur of equality; The General Manager, Southern Railway v. Rangachari ; State of Kerala and Anr. v. N.M. Thomas and Ors. . 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 and Anr. v. N.M. Thomas and Ors. . See also Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors. [1959] SCR 279.

406. Any State action distinguishing classes of persons is liable to be condemned as invidious and unconstitutional unless justified as a benign classificational 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.

407. In the words of Judge Tanaka of the 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 commutative* 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....

408. South West Africa Cases (Second Phase), ICJ Rep. p. 6, 305-6.

409. 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 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 Scheduled Tribes'.

410. 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 and Ors. v. State of Mysore* [1963] Supp. 1 SCR 439.

411. 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 be comparable to the Scheduled Castes and the Scheduled Tribes. As stated by this Court in *M.R. Balaji and Ors. v. State of Mysore* [1963] Supp. 1 SCR 439 at 458:-

...the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes.

See also *Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr.* ; *Janki Prasad Parimoo and Ors. v. State of Jammu & Kashmir and Ors.* ; *State of Uttar Pradesh v. Pradip Tandon and Ors.* ; *State of Kerala and Anr. v. N.M. Thomas and Ors.* ; *State of Andhra Pradesh and Anr. v. P. Sagar and K.C. Vasanth Kumar and Anr. v. State of Karnataka* [1985] Suppl. 1 SCR 352, 376.

412. In the Constituent Assembly during the discussions on draft Article 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 were likely to claim the benefit of reservation at the expense 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 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 or touchables, 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 supplied)

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

414. 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)

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

416. The President of India issued the Constitution (Scheduled Castes) the Order, 1950 relating to 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.

417. 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 and 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 Tribes 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 and Ors. v. State of Mysore* [1963] Supp. 1 SCR 439, 458; *State of Uttar Pradesh v. Pradip Tandon and Ors.* and *Janki Prasad Parimoo and Ors. v. State of Jammu & Kashmir and Ors.*

418. What is sought to be identified is not caste, religion and the like, but social and educational backwardness, generally manifested 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 bereft 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 deny 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'être* of reservation.

419. 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 v. Pradip Tandon and Ors.* :

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 or 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 and Ors. v. State of Jammu & Kashmir and Ors.* ; *State of Andhra Pradesh and Anr. v. P. Sagar* .

420. 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.

421. 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.

422. 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. Chitralakha and Anr. v. State of Mysore and Ors.* :

...the expression 'classes' is not synonymous 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.

423. 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 likeness or common traits, and who are identifiable by some common attributes'. *Triloki Nath and Anr. v. State of Jammu & Kashmir and 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 v. State of Madras and Ors. ; State of Andhra Pradesh and Anr. v. P. Sagar ; A. Peeriakaruppan etc. v. State of Tamil Nadu and Ors. ; State of Andhra Pradesh and Ors. v. U.S.V. Balram Etc. ; Triloki Nath and Anr. v. State of Jammu & Kashmir and Ors. [1969] 1 SCR

639. True the discussions in the Constituent Assembly Debates centered 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', I.C. Golak Nath v. State of Punjab, . 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 it honours the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right. Brown 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.

640. '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 religiously packed programmes would be uncharitable to the noble and pious spirit of the founding fathers, legally impermissible and constitutionally ultra vires. Deriving inspiration from the American philosophy that, 'just as the race of students must be considered in determining whether a constitutional violation has occurred

so also must race be considered in formulating remedy' without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 10(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.

641. *Brown v. Board of Education* (supra) which is considered as 'turning the clock back' on racial discrimination was given much after Venkataramana. Provisions like Article VI were introduced in America in 1964 only. When *Bakke* (supra) was delivered Justice Harshal lamented, 'this Court in the Civil Rights cases and *Plessy v. 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 v. 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 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 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 untouchables 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 Articles 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.

642. 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 *S. Venkatramana v. State of Madras*, AIR 1951 SC 229, 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 338(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 recognise caste in the conventional sense known to Hindu society'. In Chitrallekha 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 any 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 a list where backwardness was determined amongst others 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 Peeriakaruppan it was observed that, 'a caste has always been recognised as a class'. Support for this was sought {torn 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 Peeriakaruppan 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 Peeriakaruppan 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.

643. '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 rights effort is being made to encourage those to whom nature has not been so kind. Do such persons not form a class? Are they not backward? They cannot, obviously compete on equal level with others. Backwardness which the Constitution makers had to tackle by making special provision, due to social and economic condition, was different but that does not exclude backwardness arising due to different reasons in new set up.

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

645. From out of various backward class of citizens who could be provided protection under Article 16(4) the President has been empowered by Article 340 to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. What does the expression 'socially and educationally backward classes' connote? How 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 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 ascertain the difficulties and the problems of the socially and educationally backward classes and to make recommendations so that steps may be taken by the Union and the States to solve their problems, remove their difficulties and improve their conditions. Since backwardness has been qualified by the words 'social and educational' the ambit of the expression is not as wide as backward class in Article 16(4). What does it mean then? A social class, 'is an aggregate of persons within a society possessing about the same status'. 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'. 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 castes 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 assert a higher social status. 'The struggle launched by these backward castes as a subaltern in the pre-independence period, changed its course in the post independence period' due to vested interest in reservation, 'It is well known that up to year 1931, the 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, are the 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 domains;
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 caste (or group of castes) to another. Secondly, power is shifting from caste itself and comes to be located in more differentiated political organs and institutions. This has been empirically found by Beeville, 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." Both - Harrison's study in Andhra Pradesh and Srinivas 'in Mysore depict the rise to power of the two pairs of non-Brahman dominant castes followed by the decline of the Brahmins'. Any determination of social backwardness, therefore, cannot be valid unless these important aspects are taken into consideration.

646. Educational backwardness too 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 16(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 educational 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.

647. Two things emerge from it, one, that the backward class in Article 16(4) and socially and educationally in Article 340, being expressions with different connotations they cannot be understood in one and same sense. The one is wider and includes the other. A socially and educationally backward class may be backward class but not vice versa. Other is that such investigation cannot be caste based. Meaning of 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 who are 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.

648. 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'.

649. 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 appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State.

The order further outlined the procedure to be followed by the Commission as required by Article 340 by directing it to examine the recommendations of the Backward Classes Commission appointed earlier and the considerations which stood in the way of the acceptance of its recommendations by Government.

The Commission thus was required to undertake the exercise so as to avoid repetition of those failings 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 and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are:

A. Social

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

B. Educational

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.

(vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average.

(vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in 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 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight one fact that socially and educationally backward classes are economically backward also.

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

(Emphasised 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. (Examples

: Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)

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

651. 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.

652. 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.

653. Use of expression, 'nothing in this 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 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 destructive of equality for Article 16(1) would apply equally to Article 16(4). The non-obstante clause was to take out absolutism of Article 16(1) and not to destroy the negatism of Article 16(2).

654. 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 a legal method of identification of backward classes for Article 16(4).

655. 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. If 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 Niaz Beg and Anr. v. Union of India and Anr. , furnishes best illustration of the former. A notification discriminating between candidates of North Eastern States, Tripura, Manipur etc. on the one hand and others for IAS examination and exempting them from offering language paper compulsory for everyone was upheld on linguistic concession. When it comes to any State action on race, religion or caste etc. the word, 'only' mitigates the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. Use of word, 'only' was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. For instance, in State of Rajasthan v. Pradip Singh, , 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 or collectivity on manual labour, lower age of marriage, poor schooling, living in kuccha house etc. and applying it to caste would be violative of Article 16(2) not only for being caste based but also for violation of Article 14 because it, excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus, determined would not be caste coupled with other but on caste and caste alone.

656. 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. An interpretation or construction resulting in such catastrophic consequences must be avoided.

657. 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 those 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 class of Muslims or Christians may not be better educationally or economically and in many cases even socially than the intermediate class of backward class of Sri Paik'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 Buddhists 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. A Commission appointed under Article 340 by the President is not to identify Hindu, backwards only but the backward class within the territory of India which includes Hindu, Muslim, Sikh or Christian etc. born and residing in India within meaning of Article 5 of the Constitution. The expression is not only backward class but backward class of citizens. And citizens means all those who are mentioned in Articles 5 and 10 of the Constitution.

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

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

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

(3) Backward class under Article 16(4) is not confined to erstwhile sudras or depressed classes or intermediate backward classes amongst Hindus only.

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

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

660. 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 an individual a group or class that has remained backward for whatever reason, should be provided every help to overcome the shortcomings but once disadvantage disappears the basis itself must go. For instance there may be four groups of different nature deserving such protection. Some of it may improve and come up in the social stream within short time. Can it be said that since they were kept excluded for hundred years the compensation by way of protective benefits should continue for hundred years. That would be mockery of protective discrimination. The compensation principle, 'makes little sense unless it is involved in connection with assertion that the malignant effects of prior deprivation are still continuing'. The social utility of preferential treatment extended to the 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.

661. An egalitarian society or welfare state wedded to secularism does not and cannot mean a social order in which religion or caste ceases to exist. 'India is a secular but not an anti-religious state. 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 Report (1990).

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

662. Even Mandal Commission observed that what, 'caste lost on ritual front it gained on political front'. In politics caste may or may not play an important role but politics and constitutional exercise are not the same. A candidate may secure a ticket on caste considerations but if he or his

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

Thus, (i) backwardness and inadequacy of representation in service must exist on the date the reservation is being made.

(ii) Any past injustice which entitles a group for protective discrimination must on principle of compensation or social justice be continuing on the date when reservation is being made.

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663. 'It is easier to give power but difficult to give wisdom'. Dr. Ambedkar quoted this Burke's thought in the Constituent Assembly Debate and exhorted 'let us prove by our conduct that we have not only the power but also the wisdom to carry with us all sectors of the country which is bound to lead us to unity'. How to effectuate this wisdom? For Article 16(4) how to determine who can be legally considered to be backward class of citizens? The answer is simple. By adopting, constitutionally permissible methodology of identification irrespective of their race, religion or caste. The difficulty, however, arises in finding out the criteria. Although the work should normally be left to be undertaken by the State as the courts are ill equipped for such exercise due to lack of data, necessary expertise and relevant material but with development of role of courts from mere, 'superintend and supervise' to legitimate constitutional affirmative decision, this Court is not only duty bound but constitutionally obliged to lay down principles for guidance for those who are entrusted with this responsibility, with a sense of duty towards the country as the occasion demands never more than now, but with remotest intention to interfere with legislative, or executive process. What the Nation should remember is that the basic values of constitutionalism 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.

664. Before doing so it is necessary to be stated, at the outset, that identification of backward classes for purposes of different States may not furnish safe and sound basis for including all such groups or collectivities for reservation in services under the Union. Reason is that local conditions play major part in such exercise. For instance habitation in hills of U.P. was upheld as valid basis for identifying

backwardness. Same may not be true of residents of hills in other States. Otherwise 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 collectivities 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 'Economic and Political Weekly' Vol. 26 (1991) p. 601 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 not they call themselves vaishyas, and are acknowledged as such by others. It is significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar.' 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 State, as well, after adjusting it with prevalent local conditions.

665. 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 Americana 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 communal 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 endogamy. Among the Catholics, the Syrian Romans and the Latin Romans generally do not intermarry. The Christians have not wholly discarded the idea of food restrictions

and pollution by lower caste members. When lower caste Hindus were converted to Christianity a generation or two ago, they were not allowed to sit with high caste Christians in Church, and separate churches were erected for them.

666. 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 milkman 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.

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, betal leaves, grovers, 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 Christian, forward or backward does not prefer marrying in another sect what to say of caste. But these considerations are not relevant for identifying backward class for public employment. Lack of education, at least among so-called intermediate backward classes, was more due to personal volition than social ostracisation. Historical social backwardness has already been taken care of by providing reservation to SC/ST and empowering President to include any group or collectivity found to be suffering from such disability. Same yardstick cannot be applied for 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' 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.

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

668. Ideal and wise method, therefore, would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be the caste itself. Find out their social acceptability and educational standard. Weight them in the balance of economic conditions. Result would be backward class of citizens needing genuine protective umbrella. Group or collectivity which may thus emerge may be members of one or the other community. Advantage of occupational based identification would be that it shall apply uniformly irrespective of race, religion and caste. Reason for accepting occupation based identification is that prior to 1950 Sudras amongst Hindus were all those who were not twice born. Amongst them there was vertical and occupational divisions. No similar to hierarchy existed amongst Muslims. Same is true of other communities. 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'. It was said by Lord Bryce long back for America that classes way not be divided, for political purposes into upper and lower and richer and poorer, 'but according to their respective occupation they follow'. Class according to Tawny 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.

669. 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 hierarchal system. They cannot be considered to be backward in any community not because of their religion but the nature of occupation. Similarly the untouchables became outcaste due to nature of the job they performed. On lower level whether it is barber or tailor, washerman or milkman, agricultural class or artisan they are a group or class who can be identified in any community. Identifying them by caste may mean that a Muslim or Christian who for generations has been carrying on same occupation as his counterpart amongst Hindus cannot be identified as backward class. And if it is done then for Hindus it would be caste based whereas for others occupational. How far that would be legal and

constitutional is one matter but if the yardstick of occupation is applied to every community the identification would be uniform without exclusion of any. For instance weavers or washerman. They may be both Hindus and Muslims. It would be unfair to include Hindu washerman and exclude Muslim washerman.

670. 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 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 low as untouchable in the order became depressed. For instance cobler. Same did not apply to those who carried on better occupation. A person having landed property and carrying on agricultural occupation did not in social hierarchy command lesser respect than the one carrying on same occupation belonging to higher caste. But backwardness should be traditional. For instance only those 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 tests 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 Balaji 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 either 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 occupationists both in South and North have chosen to remain educationally backward even though by virtue of their landed property they have always been compared to any higher class. Can such persons be permitted to take benefit of such benign measures. Not on the language, purpose and objective of these provisions.

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

for benefit under Article 16(4) because it would be within constitutional sanction.

672. 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 a equate 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'. But from the purpose and objective of Article 16(4) a collectivity or group which is found to be backward cannot qualify for being included if it is adequately represented. Word 'any' has great significance. In wider sense it extends to and includes all group or collectivity, which is as much 'any' backward class as any singularity. In the larger sense comprising of entire plurality it continues and may continue but in the limited sense the group may keep on getting in and out depending on continuance of those conditions which entitled it to be determined as backward. A government of a State or the Central 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 as well. If that itself ceases to exist the power cannot be continued to be exercised. Where power is coupled with duty the condition precedent must exist for valid exercise of power. Mere identification of collectivity or group by a Commission cannot clothe the government to exercise the power unless it further undertakes the exercise of determining if such group or collectivity is adequately or inadequately represented. The exercise is mandatory not in the larger sense alone but in the narrower sense as well.

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673. More important that determination of backward class is the proportion in which reservation can be done as it is not only a social or economic problem or the question of empowering but a constitutional and legal issue which calls for serious deliberation. Although political statesmanship of the framers of the Constitution intended to confine it to 'minority of seats' the judicial pragmatism raised it 'broadly and generally' to less than 50% in Balaji and not beyond that in T. Devadason v. Union of India . Effect of these two decisions was that the reserved and non-reserved seats both for 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 and Anr. v. Union of India, , the provision for government nominees in medical colleges was upheld, 'as the government which bears the financial burden of running medical colleges' could not be, 'denied the right to decide from what sources the admission will be made' then D.N. Chanchala

v. State of Mysore, , did not find it unreasonable to extend the principle of preferential treatment, of socially and educationally backward in Article 15(4), to children of political sufferers as 'it would not in any way be improper if that principle were to be applied to those who are handicapped but do not fall under Article 15(4)'. The reservation in favour of wards of defence personnel was upheld as a reasonable classification in *Subhashini v. State of Mysore*, AIR 1966 Mysore 40 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 *Davadasan*, on the one hand and *Chitra Ghosh*, *Chanchala* and *Thomas* on the other was that reservation up to 50% under Articles 15(4) and 16(4) and up to, 'reasonable extent' under Article 16(1). Under one it became SC/ST and BC and under the other wards of Military and Defence personnel, *Jagdish Rai v. State of Haryana* , Political, sufferers, sportsman, Children of MISA, *State of Karnataka v. Jacob Maltew* ILR (1964) 2 Kerala p. 53 and *DSIR, Chhotey Lal v. State of U.P.* , detenue etc. Is this sound either constitutionally or legally or socially?

674. 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.'

675. Originally this Article as introduced in the Constituent Assembly was Article 10 and its Sub-article (3) identical to Sub-article (4) of Article 16 provided for reservation, 'in favour of any class of citizens'. It was the Drafting Committee which qualified the expression, 'class of citizens' by adding the word 'backward' before it. Effect of this addition was that clause got narrowed and the reservation could be made only for those class of citizens who could be grouped as backward. Putting it the other way the framers of the Constitution decided against expansive reservation which under original proposal could have extended to any class of citizens. What was thus consciously and deliberately given up by 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, which eroded the very foundation of Equal Protective clause 'mainly intended for the benefit of Negro freedom'.

676. 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 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) 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 word '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.

677. In Thomas, (supra 46) Mathew J., introduced concept of proportional equality from two American decisions Griffin v. Illinois 351 US (12) and Harper v. Virginia Board of Educations 383 US 663 [1966]. 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

exceed 50%. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16. The answer must necessarily be in the negative.

cannot be accepted as correct construction of Article 16(4). True as observed by Krishna Iyer, J., in *Soshit Karamchari* (Supra) and Chinnappa Reddy, J., in *Vasanth Kumar* (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 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 Bounding Fathers.

678. 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 Aristotle that equals 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 best illustration of distance between theory and practice of equal protection. The recognition and realisation that neither all men are equal nor are the circumstances in which they are born or grow are same gave rise to classification and grouping of persons similarly situated and extending them equal or same treatment. But the classification has to be reasonable and rational bearing a just relation with the legislative purpose and should not be invidious or arbitrary. In our constitutional scheme the classification in matters of employment or appointment in the services has been done constitutionally. From the entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alike for purposes of employment except those who fall under Article 16(4) any further classification of grouping for reservation would be constitutionally invalid. No legislative exercise can transcend the constitutional barrier. For valid classification legislature or

executive measures must be co-related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only, any further reservation being beyond constitutional purpose would be impermissible and per se invalid.

679. Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective. Atoning for the past injustices on backward classes through Constitutional mechanism was morality raised to 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 position', *Dhirendra Kumar Mandal v. The Supdt. & Remembrancer of Legal Affairs to the Govt. of West Bengal and Anr.* and the varying needs of different classes of persons require special treatment. Principle of reasonable classification was developed by theorists and courts to enable State to function effectively by classifying reasonably. But the theory developed by Tussman and Breck 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 tainted by the mischief at which the law aims said to be, 'the first comprehensive analysis of the Equal Protection Clause' may be applicable while considering the scope of Article 14 but once the Constitution makers treated employment in services separately by creating fundamental right in favour of all citizens in pursuance of the ideal of Preamble to secure to all its citizens equality in opportunity and status then it has to be understood in its own perspective. Various sub-articles of Article 16 specially Clause 4 indicates constitutional classification and creation of two classes one dealt with in Article 16(1) and the other in Article 16(4). Principle of reasonable classification for purposes of creating another class or planting one class in another would be constitutionally infirm.

680. 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 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 Constitution the State action would be liable to be struck down for absence of necessary co-relation between constitutional purpose and its means. Nexus such as national purpose or principle contained in Article 15(4) would not justify such action. Even preferential 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 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.

681. 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 principle clause. Equality is the rule. Protection is the exception. Exception cannot exhaust the rule itself. True no restriction was placed on size of reservation. But reason was the consensus understanding that it was for minority of seats. That apart the reservation under Article 16(4) cannot be taken in isolation. Article 16(1) and Article 16(4) being part of same objective and goal, any policy of reservation must constitutionally withstand the test of 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 Constituent 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 Articles 15(4) and 16(4) 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.

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682. Promotion is the most sensitive branch of service jurisprudence. Although its purpose is manifold but the principle objective is, 'to secure the best possible incumbents for the higher

positions while maintaining the morale of the whole organisation' as it not only, 'serves the public interest' but is founded on the inherent principle that the higher one moves the greater is the responsibility he assumes.

683. 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 State of Punjab v. Hira Lal , and Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan and Anr. . 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'.

684. 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.

685. 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 seniority in cadre of one group to be specific the forward group is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimisation.

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

687. 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 v. 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.

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688. 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 SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.' But the de 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 backward 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. Article 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.

689. Is it possible to reserve under Article 16(1)? Detailed reasons have been given, earlier, against any reservation under cover of doctrine of reasonable classification. Eradication of poverty which, 'is not to be exalted or praised, but is an evil thing which must be fought and stamped out' is one of the ideals set out in the Preamble of the Constitution as it postulates to achieve economic justice and exhorts the State under Article 38(2) to, 'minimise the inequality of income'. All the same can the State for this purpose reserve posts for the economically backwards 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 action 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 *Griffin v. Illinois* 351 US 12 (1955) as it amounted to denial of right of appeal to poor persons. In *Harper v. Virginia Board of Elections* 383 US 663 [1966] Poll tax for voting was invalidated as, 'wealth, like race, creed or colour, is not germane to one's ability to participate intelligently in the electoral process'. Protection was given to the appellants in effect or consequence of equal protection clause. Duty of State to protect against deprivation due to poverty should not be confused with 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 and 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.

690. More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class. Therefore, (1) No reservation can be made on economic criteria.

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

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

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691. Various infirmities were highlighted in the report of the Second Backward Class Commission and the consequent invalidity of the government order issued on it. Attack on the report varied from the reference being beyond Article 340 to manner and method of ascertaining backwardness by issuing questionnaire to hardly one per cent of the population, interviewing interested and biased persons only, relying on obsolete material such as caste census of 1931, importing personal knowlege, rewriting 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 20% inflating backward classes by 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 alacrity not on objective consideration but for extraneous reasons, acceptance of the report without any discussion or debate in the Parliament which was the least considering the far-reaching consequences of such report, acting by executive order instead of legislative measure, when reservation for backward class was being made in Union services for the first time, propriety of basing the action on a report rendered 10 years earlier without any regard to social and economic changes in the meantime when such period is normally considered sufficient for review and re-assessment of continuance of such actions, etc.

692. 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 others 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.

693. 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'.

694. 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 in 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 equilibrium

by confining it to minority of posts and treating them preferentially for such length of time, as a self operating mechanism, coming to an end once the constitutional objective of enabling them to stand on their own is fulfilled. Why reservation policy in services or the benefits of welfare measures pursued by different States for the weaker sections of the society have not percolated to the needy and deserving at the rock bottom is more a political issue than constitutional or legal. But no effort can succeed unless the policy makers eschew extraneous considerations and tackle the problem sincerely and with understanding. So long the identification of the backward class is not made properly and practically it would serve the vested interest only. And the 'halves' among Sudra or the intermediate backward classes shall not permit it to reach the have-nots the real and genuine backward classes.

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

Judicial Review gives time for the sober second thought * * * * CONCLUSIONS

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

(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 Constitutional.

(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.

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

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

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

(4) Reservation being 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 the 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, property or status criteria.

698. 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 submissions of the report, a period considered sufficient for evaluation if the reservation may be continued or not.

699. Valuable assistance was rendered by Shri K.K. Venugopal and Shri N.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.

700. 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 J. Siva Subramaniam, Shri Poti, Smt. Rani Jethmalani also made submissions. Shri Ram Avadhesh Singh argued in person.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION

Civil Appeal No. 629 of 2022
(Arising out of SLP (C) No. 30621 of 2011)

Jarnail Singh & Ors. Appellant (s)

Versus

Lachhmi Narain Gupta & Ors. Respondent (s)

W I T H

Civil Appeal No. 630 of 2022
(Arising out of SLP (C) No.31735 of 2011)

Civil Appeal No. 631 of 2022
(Arising out of SLP (C) No. 35000 of 2011)

Civil Appeal No. 632 of 2022
(Arising out of SLP (C) No.2839 of 2012)

Civil Appeal No. 636 of 2022
(Arising out of SLP (C) No. 5859 of 2012)

Civil Appeal No. 635 of 2022
(Arising out of SLP (C) No. 5860 of 2012)

Civil Appeal No. 633 of 2022
(Arising out of SLP (C) No. 4831 of 2012)

Civil Appeal No. 637 of 2022
(Arising out of SLP (C) No. 30841 of 2012)

Civil Appeal No. 638 of 2022
(Arising out of SLP (C) No. 6915 of 2014)

Civil Appeal No. 642 of 2022
(Arising out of SLP (C) No. 23344 of 2014)

Civil Appeal No. 753 of 2022
(Arising out of SLP (C) No. 1332 of 2022)
(D. No. 35818 of 2017)

Civil Appeal No. 759 of 2022
(Arising out of SLP (C) No.1347 of 2022)
(D. No. 30694 of 2018)

Civil Appeal Nos. 643-644 of 2022
(Arising out of SLP (C) Nos.23339-23340 of 2014)

Civil Appeal No. 646 of 2022
(Arising out of SLP (C) No. 21343 of 2015)

Civil Appeal Nos. 703-704 of 2022
(Arising out of SLP (C) Nos. 14549-14550 of 2019)

Civil Appeal No. 735 of 2022
(Arising out of SLP (C) No. 845 of 2020)

Civil Appeal No. 645 of 2022
(Arising out of SLP (C) No. 33163 of 2014)

Civil Appeal No. 713 of 2022
(Arising out of SLP (C) No. 25756 of 2019)

Civil Appeal No. 648 of 2022
(Arising out of SLP (C) No. 31191 of 2015)

Civil Appeal Nos. 4876-4877 of 2017

Civil Appeal Nos. 4878-4879 of 2017

Civil Appeal No. 4880 of 2017

Civil Appeal No. 4881 of 2017

Civil Appeal No.4882 of 2017

Civil Appeal No.11817 of 2016

Civil Appeal No.11816 of 2016

Civil Appeal No. 11820 of 2016

Civil Appeal No. 651 of 2022
(Arising out of SLP (C) No. 31240 of 2016)

Civil Appeal No. 4833 of 2017

Civil Appeal Nos.701-704 of 2017

Civil Appeal Nos. 11822-11825 of 2016

Civil Appeal Nos.11837-11840 of 2016

Civil Appeal Nos.11842-11845 of 2016

Civil Appeal Nos. 11829-11832 of 2016

Civil Appeal Nos. 11847-11850 of 2016

Civil Appeal No.11828 of 2016

Contempt Petition (C) No.13 of 2017

In

Civil Appeal Nos.4562-4564 of 2017

Civil Appeal No. 734 of 2022

(Arising out of SLP (C) No. 626 of 2020)

Civil Appeal Nos. 724-727 of 2022

(Arising out of SLP (C) Nos. 28164-28167 of 2019)

Civil Appeal No. 736 of 2022

(Arising out of SLP (C) No.851 of 2020)

Contempt Petition (C) No.11 of 2017

In

Civil Appeal Nos.4562-4564 of 2017

Civil Appeal Nos.4562-4564 of 2017

Contempt Petition (C) No.314 of 2016

In

SLP (C) No.4831 of 2012

Civil Appeal No.5247 of 2016

T.P.(C) Nos. 608-609 of 2017

Civil Appeal No. 652 of 2022

(Arising out of SLP (C) No.10638 of 2017)

Civil Appeal No. 764 of 2022

(Arising out of SLP (C) No. 1354 of 2022)

(CC No. 6821 of 2017)

Civil Appeal No. 656 of 2022
(Arising out of SLP (C) No. 18844 of 2017)

Civil Appeal Nos. 654-655 of 2022
(Arising out of SLP (C) Nos. 19422-19423 of 2017)

Civil Appeal No. 647 of 2022
(Arising out of SLP (C) No.25191 of 2015)

Civil Appeal No. 649 of 2022
(Arising out of SLP (C) No.33688 of 2015)

Civil Appeal No. 650 of 2022
(Arising out of SLP (C) No.31425 of 2016)

Civil Appeal No. 653 of 2022
(Arising out of SLP (C) No.17491 of 2017)

Civil Appeal No. 657 of 2022
(Arising out of SLP (C) No.24681 of 2017)

Civil Appeal No. 663 of 2022
(Arising out of SLP (C) No. 32944 of 2017)

Civil Appeal No. 754 of 2022
(Arising out of SLP (C) No. 1336 of 2022)
(D. No. 28776 of 2017)

Civil Appeal No. 755 of 2022
(Arising out of SLP (C) No. 1338 of 2022)
(D. No. 29066 of 2017)

Civil Appeal Nos. 768-775 of 2022
(Arising out of SLP (C) Nos. 1359-1366 of 2022)
(D. No. 30189 of 2017)

Civil Appeal No. 752 of 2022
(Arising out of SLP (C) No. 1202 of 2022)
(D. No. 31145 of 2017)

Civil Appeal Nos. 659-660 of 2022
(Arising out of SLP (C) Nos. 28446-28447 of 2017)

Civil Appeal No. 658 of 2022
(Arising out of SLP (C) No.28306 of 2017)

Civil Appeal Nos. 683-694 of 2022
(Arising out of SLP (C) Nos.13993-14004 of 2019)

Civil Appeal No. 661 of 2022
(Arising out of SLP (C) No. 30942 of 2017)

Civil Appeal No. 765 of 2022
(Arising out of SLP (C) No. 1356 of 2022)
(D. No. 33488 of 2017)

Civil Appeal Nos. 761-763 of 2022
(Arising out of SLP (C) Nos.1351-1353 of 2022)
(D. No. 34271 of 2017)

Civil Appeal Nos. 777-780 of 2022
(Arising out of SLP (C) Nos. 1370-1373 of 2022)
(D. No.34520 of 2017)

Civil Appeal Nos. 695-702 of 2022
(Arising out of SLP (C) Nos.14105-14112 of 2019)

Civil Appeal No. 766 of 2022
(Arising out of SLP (C) No. 1357 of 2022)
(D. No. 35577 of 2017)

Civil Appeal No. 776 of 2022
(Arising out of SLP (C) No. 1367 of 2022)
(D. No. 36305 of 2017)

Civil Appeal No. 767 of 2022
(Arising out of SLP (C) No. 1358 of 2022)
(D. No.36377 of 2017)

Civil Appeal No. 662 of 2022
(Arising out of SLP (C) No.31288 of 2017)

Civil Appeal No. of 2022
(Arising out of SLP (C) No. of 2022)
(D. No.38895 of 2017)

Civil Appeal No. 677 of 2022
(Arising out of SLP (C) No. 13719 of 2019)

Civil Appeal No. 678 of 2022
(Arising out of SLP (C) No. 13720 of 2019)

Civil Appeal No. 670 of 2022
(Arising out of SLP (C) No. 28842 of 2018)

Civil Appeal No. 671 of 2022
(Arising out of SLP (C) No. 28844 of 2018)

Civil Appeal No. 679 of 2022
(Arising out of SLP (C) No.13721 of 2019)

Civil Appeal No. 672 of 2022
(Arising out of SLP (C) No. 28846 of 2018)

Civil Appeal No. 673 of 2022
(Arising out of SLP (C) No. 28847 of 2018)

Civil Appeal No. 674 of 2022
(Arising out of SLP (C) No. 28848 of 2018)

Civil Appeal Nos. 707-708 of 2022
(Arising out of SLP (C) Nos. 21309-21310 of 2019)

Civil Appeal No. 782 of 2022
(Arising out of SLP (C) No. 1376 of 2022)
(D. No.28194 of 2019)

Civil Appeal No. 757 of 2022
(Arising out of SLP (C) No. 1345 of 2022)
(D. No. 34750 of 2018)

Civil Appeal Nos. 715-723 of 2022
(Arising out of SLP (C) Nos.27951-27959 of 2019)

Civil Appeal Nos. 681-682 of 2022
(Arising out of SLP (C) Nos.13974-13975 of 2019)

Civil Appeal No. 756 of 2022
(Arising out of SLP (C) No. 1339 of 2022)
(D. No.41552 of 2018)

Civil Appeal No. 666 of 2022
(Arising out of SLP (C) No.18925 of 2018)

Civil Appeal Nos. 750-751 of 2022
(Arising out of SLP (C) Nos. 1199-1200 of 2022)
(D. No.22349 of 2018)

Civil Appeal No. 667 of 2022
(Arising out of SLP (C) No.22985 of 2018)

Civil Appeal Nos. 747-749 of 2022
(Arising out of SLP (C) Nos. 1196-1198 of 2022)
(D. No.23907 of 2018)

Civil Appeal Nos. 668-669 of 2022
(Arising out of SLP (C) Nos.27401-27402 of 2018)

Civil Appeal No. 758 of 2022
(Arising out of SLP (C) No. 1346 of 2022)
(D. No.30693 of 2018)

Contempt Petition (C) No.985 of 2018
In
Civil Appeal No.5247 of 2016

Civil Appeal No. 516 of 2022
(Arising out of SLP (C) No. 1201 of 2022)
(D. No.24594 of 2018)

Civil Appeal No. 705 of 2022
(Arising out of SLP (C) No.14611 of 2019)

Civil Appeal No. 760 of 2022
(Arising out of SLP (C) No. 1348 of 2022)
(D. No.39571 of 2018)

Civil Appeal Nos. 675-676 of 2022
(Arising out of SLP (C) Nos.5724-5725 of 2019)

Civil Appeal Nos. 517-519 of 2022
(Arising out of SLP (C) Nos.10551-10553 of 2019)

Civil Appeal No. 706 of 2022
(Arising out of SLP (C) No.18314 of 2019)

Civil Appeal No. 711 of 2022
(Arising out of SLP (C) No.21364 of 2019)

Civil Appeal No. 634 of 2022
(Arising out of SLP (C) No.20777 of 2019)

Civil Appeal No. 680 of 2022
(Arising out of SLP (C) No.22246 of 2019)

Contempt Petition (C) No.1067 of 2019
In
SLP (C) No.30621 of 2011

Civil Appeal Nos. 522-627 of 2022
(Arising out of SLP (C) Nos. 110-215 of 2020)

Civil Appeal No. 714 of 2022
(Arising out of SLP (C) No.26891 of 2019)

Civil Appeal No. 730 of 2022
(Arising out of SLP (C) No. 29159 of 2019)

Civil Appeal No. 729 of 2022
(Arising out of SLP (C) No.29152 of 2019)

Civil Appeal No. 732 of 2022
(Arising out of SLP (C) No. 571 of 2020)

Civil Appeal No. 728 of 2022
(Arising out of SLP (C) No.29150 of 2019)

Writ Petition (C) No. 1371 of 2019

Civil Appeal No. 731 of 2022
(Arising out of SLP (C) No.29234 of 2019)

Civil Appeal No. 1078 of 2022
(Arising out of SLP (C) No. 920 of 2020)

Civil Appeal No.1004 of 2020

Civil Appeal No.2434 of 2019

Civil Appeal No. 664 of 2022
(Arising out of SLP (C) No. 1132 of 2018)

Civil Appeal Nos. 738-739 of 2022
(Arising out of SLP (C) Nos.2395-2396 of 2020)

Civil Appeal Nos. 709-710 of 2022
(Arising out of SLP (C) Nos. 1326-1327 of 2022)
(D. No.43894 of 2019)

Civil Appeal No. 737 of 2022
(Arising out of SLP (C) No. 887 of 2020)

Civil Appeal No. 733 of 2022
(Arising out of SLP (C) No. 609 of 2020)

Civil Appeal No. 741 of 2022
(Arising out of SLP (C) No. 7332 of 2020)

Civil Appeal No. 740 of 2022
(Arising out of SLP (C) No. 6834 of 2020)

Civil Appeal No. 742 of 2022
(Arising out of SLP (C) No. 8066 of 2020)

Civil Appeal No. 743 of 2022
(Arising out of SLP (C) No. 8588 of 2020)

Civil Appeal No. 744 of 2022
(Arising out of SLP (C) No.15749 of 2020)

Civil Appeal No. 628 of 2022
(Arising out of SLP (C) No.15148 of 2020)

Civil Appeal No. 745 of 2022
(Arising out of SLP (C) No. 639 of 2021)

Civil Appeal No. 746 of 2022
(Arising out of SLP (C) No.3684 of 2021)

Contempt Petition (C) Nos.200-201 of 2021
In
SLP (C) Nos.5724-5725 of 2019

Contempt Petition (C) Nos.211-212 of 2021
In
Civil Appeal No.5247 of 2016

Writ Petition (C) No. 882 of 2021

Contempt Petition (C) Nos.378-379 of 2021
In
Civil Appeal Nos.11837-11840 of 2016

J U D G M E N T

L. NAGESWARA RAO, J.

1. Leave granted (except Diary No.38895/2017).
2. Reservation of 27 per cent in favour of backward classes was the subject matter of dispute in ***Indra Sawhney & Ors. v. Union of India & Ors.***¹. This Court was of the opinion that Article 16(4) of the Constitution of India does not provide for reservation in the matter of promotions. It was clarified that the judgment shall have

¹ 1992 Supp (3) SCC 217

prospective operation and shall not affect the promotions already made, whether made on regular or on any other basis. Reservation provided in the matter of promotions in the Central services or State services were directed to be continued for a period of five years from the date of the judgment.

3. By the Constitution (Seventy-seventh Amendment) Act, 1995, which came into force on 17.06.1995, Article 16 of the Constitution was amended by insertion of Article 16(4-A), which then read as below:-

“Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State”.

4. The above amendment was made in view of the State’s opinion that representation of the Scheduled Castes and the Scheduled Tribes (“**SCs**” and “**STs**”) in services in the States had not reached the required level and that it was necessary to continue the existing dispensation by providing reservation in promotions. Therefore, the Government decided to continue the existing policy of

reservation in promotions for the SCs and the STs, according to the Statement of Objects and Reasons of the Constitution (Seventy-seventh Amendment) Act, 1995.

5. In ***Union of India & Ors. v. Virpal Singh Chauhan & Ors.***², this Court held that roster-point promotees who were given the benefit of accelerated promotion would not get consequential seniority. As the Government was of the opinion that the concept of “catch-up” rule was not in the interest of SCs and STs in the matter of seniority on promotion, Article 16(4-A) was further amended by the Constitution (Eighty-fifth Amendment) Act, 2001 to give the benefit of consequential seniority in addition to accelerated promotion. At present, Article 16(4-A) reads as follows:-

“(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.”

6. A number of vacancies which were reserved for SCs and STs could not be filled up due to non-availability of

² (1995) 6 SCC 684

candidates belonging to these categories. Such of these vacancies which were not filled up were treated as “backlog vacancies” and were carried forward. In ***Indra Sawhney*** (supra), this Court held that reservations contemplated in a year under Article 16(4) shall not exceed 50 per cent. In practice, backlog vacancies were not included within the ceiling of 50 per cent reservation in a year. An office memorandum was issued on 29.08.1997 making the 50 per cent limit applicable to current as well as backlog vacancies, in accordance with ***Indra Sawhney*** (supra). Thereafter, several representations were made to the Central Government about the injustice that would be caused to the members of SCs and STs in view of the office memorandum dated 29.08.1997, which led to a further amendment to Article 16 of the Constitution of India, by insertion of Article 16(4-B) by the Constitution (Eighty-first Amendment) Act, 2000. Article 16(4-B) reads as under: -

“(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies

shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.”

7. The validity of the above amendments made to Article 16 (4) was considered by this Court in ***M. Nagaraj & Ors. v. Union of India & Ors.***³. The key issue that was identified and decided in ***M. Nagaraj*** (supra) is whether any constitutional limitation mentioned in Article 16(4) and Article 335 stood obliterated by the constitutional amendments resulting in Articles 16(4-A) and 16(4-B). This Court upheld the constitutional amendments. The amendments were held to be enabling provisions. This Court observed that the State is not bound to make reservation for SCs and STs in matters of promotion. However, if it wishes to exercise its discretion, the State has to collect quantifiable data showing the backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution of India.

³ (2006) 8 SCC 212

8. This Court in ***State of Tripura & Ors. v. Jayanta Chakraborty & Ors.***⁴ referred ***M. Nagaraj*** (supra) to a larger bench for reconsideration. Further, in ***State of Maharashtra & Anr. v. Vijay Ghogre & Ors.***⁵, this Court thought it appropriate that the request for reconsideration of the judgment in ***M. Nagaraj*** (supra) should be heard by a constitution bench. The request made for referring ***M. Nagaraj*** (supra) to a seven-judge bench was not entertained by this Court in ***Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors.***⁶. However, the conclusion arrived at in ***M. Nagaraj*** (supra) relating to collection of quantifiable data showing backwardness of the SCs and the STs was held to be invalid as the same was contrary to a larger bench judgment of this Court in ***Indra Sawhney*** (supra), wherein it had been held by the Court that conditions of social and educational backwardness are presumed to be satisfied in case of SCs and STs as they are identified and grouped as such because of prior discrimination and its continuing ill effects. The Court rejected the remaining grounds of challenge to the decision

4 (2018) 1 SCC 146

5 (2018) 17 SCC 261

6 (2018) 10 SCC 396

in ***M. Nagaraj*** (supra) and reiterated that the State has to collect quantifiable data regarding inadequate representation of SCs and STs in the services of the State, if reservation is sought to be provided in promotions.

9. In the meanwhile, some High Courts have dealt with matters where reservation in promotions provided by the Central Government and the State Governments to SCs and STs have been assailed as being violative of the law laid down by this Court in ***M. Nagaraj*** (supra). The judgments of the High Courts have been challenged before this Court. In view of the broad similarities in the issues involved, all the cases were tagged together. On 18.01.2021, a direction was given to the Advocates-on-Record appearing for each State to submit a note to the learned Attorney General for India, identifying the issues involved in their respective cases. The learned Attorney General for India was requested to hold a conference with the counsel appearing in the matters to finalise the issues for determination and a list of issues with reference to each State was directed to be prepared thereafter. A note was

submitted by the learned Attorney General formulating issues that arise for our consideration.

10. When the matter was listed for hearing on 14.09.2021, it was made clear that this Court would not entertain any arguments for reconsideration of the law laid down by this Court in ***M. Nagaraj*** (supra) as a constitution bench in ***Jarnail Singh*** (supra) had rejected such a request. This Court was informed that the cases in this batch of matters can be bifurcated into eleven categories. As the common issues that have been raised could be decided without reference to the facts of each case, the learned counsel appearing for the parties were requested to make submissions on the issues that had been identified by the learned Attorney General. After considering the issues identified by the learned Attorney General and other learned counsel and hearing them, the following six points are formulated for determination:-

- 1) What is the yardstick by which, according to ***M. Nagaraj*** (supra), one would arrive at quantifiable data showing inadequacy of representation of SCs and STs in public employment?

- 2) What is the unit with respect to which quantifiable data showing inadequacy of representation is required to be collected?
- 3) Whether proportion of the population of SCs and STs to the population of India should be taken to be the test for determining adequacy of representation in promotional posts for the purposes of Article 16(4-A)?
- 4) Should there be a time period for reviewing inadequacy of representation?
- 5) Whether the judgment in ***M. Nagaraj*** (supra) can be said to operate prospectively?
- 6) Whether quantifiable data showing inadequacy of representation can be collected on the basis of sampling methods, as held by this Court in ***B.K. Pavitra & Ors. v. Union of India & Ors.***⁷ ("***B.K. Pavitra II***")?

1) YARDSTICK FOR ARRIVING AT QUANTIFIABLE DATA

11. Articles 16(4) and 16(4-A) are enabling provisions. It was held in ***M. Nagaraj*** (supra) that the discretion of the State to provide reservation is subject to the existence of

⁷ (2019) 16 SCC 129

backwardness and inadequacy of representation in public employment. It was further held that backwardness has to be based on objective factors whereas inadequacy has to factually exist. There is no fixed yardstick to identify equality, justice and efficiency which are variable factors and it depends on the facts and circumstances of each case. This Court was of the further opinion that the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured on the basis of data. In case of a challenge made to reservations provided by the State Government, it is incumbent on the State Government to satisfy the Court that the decision is supported by quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution of India.

12. The exercise of identifying and measuring concepts of efficiency, backwardness and inadequacy of representation on the basis of data depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve

certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.⁸

13. The learned Attorney General argued before this Court in ***Jarnail Singh*** (supra) that this Court did not indicate any test for determining adequacy of representation in service in ***M. Nagaraj*** (supra). He submitted that it is important to decide the yardstick applicable for arriving at quantifiable data showing inadequacy of representation of SCs and STs to avoid multiple litigation. This Court refused to lay down any criteria for determining the adequacy of representation, as the States were given liberty to determine the factors relevant for deciding adequate representation, depending upon the promotional posts in question.

14. It is well-established that it is neither legal nor proper for the Courts to issue directions or advisory sermons to the executive in respect of the sphere which is exclusively within their domain under the Constitution⁹. In ***Asif***

⁸ *Uttar Pradesh Power Corporation Limited v. Rajesh Kumar & Ors.* (2012) 7 SCC 1

⁹ *Mallikarjuna Rao & Ors. v. State of Andhra Pradesh & Ors.* (1990) 2 SCC 707

***Hameed & Ors. v. State of Jammu & Kashmir & Ors.*¹⁰,**

this Court observed as under: -

“When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an Appellate Authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive...”.

15. In ***P. Ramachandra Rao v. State of Karnataka***¹¹, R. C. Lahoti, J. referred to a monograph *“Judicial Activism and Constitutional Democracy in India”* by T.R. Andhyarujina, in his judgment. While lauding judicial activism, a note of caution was sounded in the said monograph to the effect that the Supreme Court should leave *“the decision-making to other branches of government after directing their attention to the problems rather than itself entering into the remedial field”*. The following sentences from the

¹⁰ 1989 Supp (2) SCC 364

¹¹ (2002) 4 SCC 578

monograph are very well borne out in this particular context: *"...courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if courts have to rely on their own knowledge or research it is bound to be selective and subjective. ... Moreover, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases."*

16. Determination of inadequate representation of SCs and STs in services under a State is left to the discretion of the State, as the determination depends upon myriad factors which this Court cannot envisage. A conscious decision was taken by this Court in ***M. Nagaraj*** (supra) and ***Jarnail Singh*** (supra) to leave it to the States to fix the criteria for determining inadequacy of representation. The submission of the learned Attorney General for India that this Court has to lay down the yardstick for measuring adequacy of representation did not yield a favourable result as this Court in ***Jarnail Singh*** (supra) found it befitting for the States to

have the liberty to evaluate the representation of SCs and STs in public employment. Laying down of criteria for determining the inadequacy of representation would result in curtailing the discretion given to the State Governments. In addition, the prevailing local conditions, which may require to be factored in, might not be uniform. Moreover, in ***M. Nagaraj*** (supra), this Court made it clear that the validity of law made by the State Governments providing reservation in promotions shall be decided on a case-to-case basis for the purpose of establishing whether the inadequacy of representation is supported by quantifiable data. Therefore, we are of the opinion that no yardstick can be laid down by this Court for determining the adequacy of representation of SCs and STs in promotional posts for the purpose of providing reservation.

2) UNIT FOR COLLECTING QUANTIFIABLE DATA

17. Seniority of Superintending Engineers in the Irrigation Department of the State of Punjab was the subject matter of a writ petition filed under Article 32 of the Constitution of India in ***R.K. Sabharwal & Ors. v. State of Punjab & Ors.***¹². The relevant instructions issued by the State of

¹² (1995) 2 SCC 745

Punjab provided for 14 per cent reservation for SCs. Two points came up for consideration before this Court in the said judgment, the first being that in case more than 14 per cent of the Scheduled Caste candidates are appointed/promoted in a cadre on their own merit/seniority, then the purpose of reservation having been achieved in the said cadre, the Government instructions providing reservations would become inoperative. The second point on which arguments were heard is that roster cannot operate once the posts earmarked for the SCs, STs and Backward Classes are filled. Any post falling vacant in a cadre, thereafter, is to be filled from the category - reserved or general - due to retirement etc. of whose member the post fell vacant. The first point raised by general category candidates was rejected by this Court by holding that reserved category candidates can compete for non-reserved posts and in the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation. This Court was of the opinion that Article 16(4) of the Constitution of India enables the State Government to make

provision for reservation in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the services. The percentage of posts reserved for Backward Classes, as prescribed by the State, has to be strictly followed and cannot be varied or changed simply because some members of the Backward Class have already been appointed/promoted against the general seats.

18. The second point relates to the implementation of the roster in the form of “running account” year to year. Roster points were fixed in a lot of 100 posts. This Court held that once 14 per cent posts earmarked in the roster are filled up, the result envisaged by the instructions is achieved. Thereafter, there is no justification for operating the roster. This Court observed that the “running account” is to operate only till the quota provided by the instructions is reached and not thereafter. The vacancies arising in the cadre, after the initial posts are filled, will have to be filled from amongst the category to which the post belonged in the roster.

19. In *M. Nagaraj* (supra), this Court observed that the appropriate Government has to apply cadre strength as a unit in the operation of the roster in order to ascertain

whether a given class/group is adequately represented in the service. Cadre strength as a unit also ensures that the upper ceiling limit of 50 per cent is not violated. Following the law laid down in ***R.K. Sabharwal*** (supra), this Court in ***M. Nagaraj*** (supra) further held that the roster has to be post-specific and not vacancy based.

20. In ***M. Nagaraj*** (supra), this Court held that it is open to the State to provide for reservation in promotions subject to limitation that there must exist compelling reasons for backwardness, inadequacy of representation *in a class of post(s)* keeping in mind the overall administrative efficiency. While referring to the roster, this Court observed that the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. Collection of quantifiable data regarding inadequacy of representation as stipulated by ***M. Nagaraj*** (supra) is relatable to the cadre concerned, according to ***Jarnail Singh*** (supra).

21. While it is clear that the unit for collection of quantifiable data is with respect to a cadre, it is necessary

to understand what *cadre* means. For a better appreciation, it would be profitable to relate to the historical background of the concerned rules applicable to services under the Centre as well as the states. In exercise of the powers conferred by sub-section (2) of Section 96B of the Government of India Act, 1919, the Secretary of State in Council made the Civil Services (Classification, Control and Appeal) Rules, 1930. Public services in India were classified as per Rule 14 of the said Rules in the following manner: (i) the all India Services; (ii) the Central Services, Class-I; (iii) the Central Services, Class-II; (iv) the Provincial Services; (v) the Specialist Services; and (vi) the Subordinate Services. The First Central Pay Commission considered the classification of services to *“secure fair treatment to the employees on the basis of their services to Government, fair return to the Government for the salary paid to its employees, and relative fairness to employees in different kinds of position on the basis of the nature of the duties performed”*. According to the Report of the First Central Pay Commission, the Central Services were broadly divided into four categories, *i.e.*, Class I, Class II, Subordinate Services

and Inferior Services. After taking note of some objections regarding the use of the words “subordinate” and “inferior” as being derogatory, the First Central Pay Commission recommended that those categories be referred to as Class III and Class IV. The classification of the Civil Services of the Union of India as per the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (“**CCA Rules, 1965**”) is: (1) Central Civil Services, Class I; (2) Central Civil Services; Class II; (3) Central Civil Services, Class III; and (4) Central Civil Services, Class IV. Rule 4 of the said Rules provides that a particular class can comprise of different grades. All civil posts under the Union were reclassified from ‘Class’ to ‘Group’ by way of the notification of the Government of India in the Department of Personnel and Administrative Reforms number S.O. 5041 dated 11.11.1975 and as recorded in Rule 6-A of the CCA Rules, 1965. Thereafter, the Central Civil Services/the Central Civil Posts were organised into Group ‘A’, Group ‘B’, Group ‘C’ and Group ‘D’. The present structure of the Central Civil Services is that a particular Service is divided across Groups, which further consist of grades.

22. During the course of the hearing, the Union of India has filed an affidavit informing this Court of the compliance of the conditions prescribed in ***M. Nagaraj*** (supra) before making reservation in promotions in services under the Centre. The Union of India referred to an Office Memorandum dated 02.07.1997, which heavily relied on ***R.K. Sabharwal*** (supra), wherein this Court had held that the cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence, the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The Union of India has brought to the notice of this Court that there are around 90 Ministries/Departments under the Government of India in which 30 lakh employees are working. Referring to information received from 44 Ministries/Departments out of the 90, the Union of India has stated that there are around 3800 cadres. We were also apprised of the fact that instructions have been in existence since 2013 for appointment of an officer of the rank of Deputy Secretary to

the Government of India as a Liaison Officer, who is responsible for ensuring compliance of the instructions on reservation. According to the affidavit filed by the Union of India, thousands of reservation rosters are being maintained in the various offices/units/sub-units of the Departments and Ministries in the Government of India. Office Memorandum dated 02.07.1997 issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Government of India contains principles for preparing the rosters. According to para 4(c) of the said Office Memorandum, “cadre”, for the purpose of a roster, shall mean a particular grade and shall comprise the number of posts to be filled by a particular mode of recruitment in terms of the applicable recruitment rules. Explanatory Notes which are appended to the Office Memorandum dated 02.07.1997 elaborate the principles for making and operating post-based rosters. Para 5 of the Explanatory Notes reads as follows:

“While cadre is generally to be construed as the number of posts in a particular grade, for the purpose of preparation of roster, it shall comprise posts required to be filled by a particular mode of recruitment in terms of the applicable recruitment rules. To illustrate, in a cadre comprising 200

posts, where the recruitment rules prescribe a ratio of 50:50 for direct recruitment and promotions, the roster for direct recruitment shall have 100 points and that for promotion shall have 100 points – thus making a total of 200.”

23. The Union of India has filed the prevalent service rules of the States of Andhra Pradesh, Uttar Pradesh, West Bengal, Rajasthan, Madhya Pradesh, Punjab and Himachal Pradesh for the purpose of demonstrating the implementation of reservation in promotions in services under these States. Rule 2(8) of the Andhra Pradesh State and Subordinate Services Rules, 1996 defines “cadre” as posts in various classes, categories and grades in a service. “Service” has been defined in Rule 2(30) as a post or a group of posts or categories of posts classified by the State Government as State or Subordinate Service, as the case may be. Rule 22 which deals with Special Representation (Reservation) empowers the State Government to make a provision for reservation in promotions. The said Rule refers to the implementation of a 100-point roster for promotion to the next higher category. It would be relevant to refer to the reservation policy of the State of Punjab according to which reservation for SCs and STs is on the basis of roster registers

maintained for each category of posts. The State of Himachal Pradesh has decided to provide reservation in promotions by following the Explanatory Notes to the Office Memorandum issued by the Government of India dated 02.07.1997.

24. It would be relevant to refer to the judgments of this Court which have dealt with the scope of the expression “cadre”. Rule 4(2) of the Central Engineering Service, Class I, Recruitment Rules, 1954 provided that 75% of the vacancies in the grade of Executive Engineer, Class I shall be filled by promotion from Assistant Executive Engineers, Class I. Interpreting the words “vacancies in the grade of Executive Engineer”, this Court in **A.K. Subraman & Ors. v. Union of India & Ors.**¹³ held that the word “grade” is used in the sense of cadre. The dispute that arose for consideration of this Court in **Dr Chakradhar Paswan v. State of Bihar & Ors.**¹⁴ relates to the posts of Director and three Deputy Directors in the Directorate of Indigenous Medicines, Department of Health, State of Bihar being grouped together for the purpose of implementing the

13 (1975) 1 SCC 319

14 (1988) 2 SCC 214

policy of reservation under Article 16(4) of the Constitution of India. This Court was of the opinion that though the Director and three Deputy Directors are Class I posts, the posts of Director and Deputy Directors do not constitute one 'cadre'. It was held that the term "cadre" has a definite legal connotation in service jurisprudence. This Court referred to Fundamental Rule 9(4) which defines the word "cadre" to mean the strength of a service or part of a service sanctioned as a separate unit. It was observed that as the post of Director is the highest post in the Directorate of Indigenous Medicines for which a higher pay scale is prescribed in comparison to Deputy Directors, who are entitled to a lower scale of pay, they constitute two distinct cadres or grades. This Court further expressed its view that it is open to the Government to constitute as many cadres in any particular service as it may choose, according to administrative convenience and expediency. This Court concluded that the post of Director and Deputy Directors constitute different cadres in the service.

25. In *K. Manickaraj v. Union of India*¹⁵, the appellant was a Welfare Inspector, Grade III belonging to Scheduled

¹⁵ (1997) 4 SCC 342

Caste category. He claimed promotion to Grade II by contending that four posts were reserved for Scheduled Castes as there were 26 Grade II posts. The Respondent contended that there were only 23 Grade II posts as three Grade III posts which were temporarily upgraded to Grade II did not form part of the cadre strength of Grade II Inspectors. While allowing the appeal of K. Manickaraj, this Court recognized that promotions take place from one grade to a higher grade, with the cadre strength for the purpose of providing reservation in such promotion to be the total number of posts available in the grade to which promotion was sought. The meaning of “cadre” fell for consideration of this Court again in ***Union of India v. Pushpa Rani & Ors.***¹⁶. “Cadre” in the 1985 edition of the Railway Establishment Code is defined as the strength of a service or a part of a service sanctioned as a separate unit. This Court held that the posts sanctioned in different grades would constitute independent cadres, even for the purpose of implementing the roster. The reason for giving an enlarged meaning to the term “cadre” was that the posts in the railway establishment are sanctioned with reference to

¹⁶ (2008) 9 SCC 242

grades. Even temporary, work-charged, supernumerary and shadow posts created in different grades can constitute part of the cadre.

26. It is relevant to refer to another judgment of this Court in ***State of Rajasthan v. Fateh Chand Soni***¹⁷, wherein the meaning of “promotion” was looked into. This Court held that ‘promotion’ not only covered advancement to higher position or rank but also implied advancement to a higher grade. Whether the officers serving in Arms, Arms Support and Services comprise a single cadre for purposes of promotion was the question adjudicated by this Court in ***Union of India & Anr. v. Lieutenant Colonel P.K. Choudhary & Ors.***¹⁸. This Court held that they do not constitute a single cadre, even though they might be drawing the same salary, holding the same rank, wearing the same uniform and serving the same employer with similar service benefits. As the officers were allocated to different Arms and Services which put them in distinct cadres, with promotional avenues being made available against the posts comprising that cadre alone, there cannot

17 (1996) 1 SCC 562

18 (2016) 4 SCC 236

be constitution of a common cadre. This Court referred to an earlier judgment in ***Sub-Inspector Rooplal & Anr. v. Lt. Governor & Ors.***¹⁹ in which it was held that equivalence of two posts is not judged by the sole factor of equal pay. There are four factors in that regard, namely: (i) the nature and duties of the post, (ii) the responsibilities and powers exercised by the officer holding a post; the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for recruitment to the post; and (iv) the salary of the post. This Court, in ***Lieutenant Colonel P.K. Choudhary*** (supra), was of the further opinion that transferability or interchangeability of one incumbent to another in the cadre are essential attributes of a common cadre.

27. In ***R.K. Sabharwal*** (supra), this Court held that the right to be considered for appointment can only be claimed in respect of a post in a cadre and that the concept of 'vacancy' has no relevance in operating the percentage of reservation. It was further held that the cadre strength is always measured by the number of posts comprising the cadre.

¹⁹ (2000) 1 SCC 644

28. It is clear from the above statutory regime and the law laid down by this Court that civil posts under the Government are organised into different services. A service constitutes 'classes'/ 'groups' of posts. A 'class'/'group' is further bifurcated into grades. Though the nomenclature might be different, the structure of services under the Union and the States is similar. According to the instructions issued by the Union of India, cadres are constituted for each grade. At the cost of repetition, the Union of India submitted that there are 3800 cadres in 44 Ministries/Departments. Fundamental Rule 9(4) defines "cadre" to mean the strength of a service or part of a service sanctioned as a separate unit. It is the choice of a State to constitute cadres. The entire service cannot be considered to be a cadre for the purpose of promotion from one post to a higher post in a different grade. Promotion is made from one grade to the next higher grade, in relation to which cadres are constituted. This Court in ***Dr Chakradhar Paswan*** (supra) has categorically stated that the post of Director and Deputy Director cannot form one cadre. A

cadre is constituted by the Government by taking into account several factors within its sole discretion.

29. In the Office Memorandum dated 02.07.1997, the Union of India set out the principles for making and operating post-based rosters, in which it has been expressly stated that cadre is to be construed as the number of posts in a particular grade. It is made clear that rosters have been prepared grade-wise which are reviewed on a yearly basis and that reservation in promotions is implemented on the basis of these rosters, which operate grade-wise. In ***M. Nagaraj*** (supra), this Court approved that the percentage of reservation in promotions was to be applied to the entire cadre strength, as held in ***R.K. Sabharwal*** (supra). While doing so, this Court in ***M. Nagaraj*** (supra) made it clear that the unit for operation of the roster would be the cadre strength. Before providing for reservation in promotions to a cadre, the State is obligated to collect quantifiable data regarding inadequacy of representation of SCs and STs. Collection of information regarding inadequacy of representation of SCs and STs cannot be with reference to the entire service or 'class'/'group' but it should be relatable

to the grade/category of posts to which promotion is sought. Cadre, which should be the unit for the purpose of collection of quantifiable data in relation to the promotional post(s), would be meaningless if data pertaining to representation of SCs and STs is with reference to the entire service.

3) PROPORTIONATE REPRESENTATION AS TEST OF ADEQUACY

30. In ***R.K. Sabharwal*** (supra), it was observed that State Governments may take the total population of a particular Backward Class and its representation in the State services for the purpose of coming to a conclusion that there is inadequate representation in the State services. In ***M. Nagaraj*** (supra), this Court was of the considered view that the exercise of collecting quantifiable data depends on numerous factors, with conflicting claims to be optimised by the administration in the context of local prevailing conditions in public employment. As equity, justice and efficiency are variable factors and are context-specific, how these factors should be identified and counter-balanced will depend on the facts and circumstances of each case. The attempt of the learned Attorney General for India to impress

upon this Court that the proportion of SCs and STs in the population of India should be taken as the test for determining whether they are adequately represented in promotional posts, did not yield results. This Court in ***Jarnail Singh*** (supra) found no fault with ***M. Nagaraj*** (supra) regarding the test for determining the adequacy of representation in promotional posts in the State. While emphasising the contrast in the language used between Article 330 and Articles 16(4-A) and 16(4-B) of the Constitution, this Court declined the invitation of the learned Attorney General for India to hold that the proportion of SCs and STs to the population of India should be the test for determining inadequacy of representation in promotional posts. Therefore, we are not persuaded to express any opinion on this aspect. It is for the State to assess the inadequacy of representation of SCs and STs in promotional posts, by taking into account relevant factors.

4) TIME PERIOD FOR REVIEW

31. There is near unanimity amongst the counsel for both sides that the data collected to establish inadequacy of representation, which forms the basis for providing

reservation for promotions, should be reviewed periodically. Ms. Indira Jaising, learned Senior Counsel appearing for members of the reserved categories, supported the submissions of the learned Attorney General for India that a review should be conducted every 10 years. Mr. Gopal Sankaranarayanan, learned Senior Counsel, submitted that it is time for reservation in public employment to be discontinued. Additionally, he submitted that the lion's share of reservation for members of SCs and STs accrued to the benefit of a select few within these categories, which further strengthened the requirement for review to appraise whether certain groups/classes within these categories had achieved the desired representation. We are not inclined to express any view on discontinuation of reservations in totality, which is completely within the domain of the legislature and the executive. As regards review, we are of the opinion that data collected to determine inadequacy of representation for the purpose of providing reservation in promotions needs to be reviewed periodically. The period for review should be reasonable and is left to the Government to set out.

5) PROSPECTIVE OPERATION OF THE JUDGMENT IN
M. NAGARAJ

32. While holding that Article 16(4-A) does not provide for reservation in matters of promotion, this Court in **Indra Sawhney** (supra) saved the promotions that were already made. It was made clear that the judgment shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. Already-existing provisions made for reservation in promotions in Central or State services were permitted to continue to operate for a period of five years from the date of the judgment in **Indra Sawhney** (supra). Article 16(4-A) was brought into force from 17.06.1995. This Court upheld the validity of Article 16(4-A) in **M. Nagaraj** (supra) on 19.10.2006 and observed that reservation in promotions in public services can be made, subject to collection of quantifiable data by the State showing backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution. Reservation in promotions provided by various State

Governments and the Central Government have been challenged in the High Courts on the ground of non-compliance with the requirement of collection of quantifiable data showing backwardness of the class and inadequacy of representation. It is relevant to mention at this stage that collection of quantifiable data regarding backwardness of SCs and STs is no more required in view of the judgment of this Court in **Jarnail Singh** (supra). In respect of the data relating to inadequacy of representation of SCs and STs, the High Courts have adjudicated writ petitions which are the subject matter of special leave petitions pending in this Court.

33. The duty of the court is not to 'pronounce a new law, but to maintain and expound the old one'.²⁰ Holmes, J., in his dissent in **Kuhn v. Fairmont Coal Co.**²¹, held "*I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.*" In **M. Nagaraj** (supra), this Court upheld the constitutional validity of Article 16(4-A), subject to the

²⁰ Blackstone, Commentaries 69 (15th ed. 1809)

²¹ 215 U.S. 349 (1910)

State collecting quantifiable data showing inadequate representation. The law declared by this Court interpreting Article 16(4-A) in ***M. Nagaraj*** (supra) applies from 17.06.1995, *i.e.*, the date on which Article 16(4-A) came into force (See: ***Ravi S. Naik v. Union of India & Ors.***²²; ***Lily Thomas & Ors. v. Union of India & Ors.***²³). The contention put forth by the learned Attorney General for India and the learned counsel appearing for the reserved category candidates, which requires to be examined, is regarding the prospective applicability of the law laid down in ***M. Nagaraj*** (supra), *i.e.*, from the date of the judgment.

34. This Court, in ***I.C. Golak Nath & Ors. v. State of Punjab & Anr.***²⁴, held that the Parliament had no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights. However, to save the past transactions, the doctrine of prospective overruling was invoked and the judgment was given prospective operation. The following propositions were laid down in ***Golak Nath*** case (supra):

22 1994 Supp (2) SCC 641

23 (2000) 6 SCC 224

24 (1967) 2 SCR 762

*“(1) The doctrine of prospective overruling can be invoked only in matters arising out of the Constitution;
(2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India;
(3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.”*

While interpreting the scope of Article 142 of the Constitution, this Court held that the law declared by the Supreme Court is the law of the land and in so declaring, the operation of the law can be restricted to the future, thereby saving past transactions.

35. The power of this Court under Article 142 of the Constitution is a constituent power transcendental to statutory prohibition.²⁵ In ***Orissa Cement Ltd. v. State of Orissa & Ors.***²⁶, this Court observed that relief can be granted, moulded or restricted in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. The doctrine of prospective overruling is in essence a recognition of the principle that the Court moulds the reliefs claimed to meet the justice of

²⁵ *Ashok Kumar Gupta & Anr. v. State of U.P. & Ors.* (1997) 5 SCC 201

²⁶ 1991 Supp (1) SCC 430

the case, as has been held in ***Somaiya Organics (India) Ltd. & Anr. v. State of U.P. & Anr.***²⁷. It was further clarified that while in ***Golak Nath*** (supra), ‘prospective overruling’ implied an earlier judicial decision on the same issue which was otherwise final, this Court had used the power even when deciding on an issue for the first time. There is no need to refer to other judgments of this Court which have approved and applied the principle of prospective overruling or prospective operation of judgments. There cannot be any manner of doubt that this Court can apply its decision prospectively, *i.e.*, from the date of its judgment to save past transactions.

36. While objecting to the contention of the learned Attorney General for India to declare the law laid down by ***M. Nagaraj*** (supra) as having prospective operation, Mr. Rakesh Dwivedi, learned Senior Counsel appearing for the unreserved candidates, submitted that relief can be moulded in exercise of the power under Article 142 of the Constitution. It is no doubt true that ***M. Nagaraj*** (supra) did not state that it would be prospective in operation. It is necessary for this Court to examine whether a judgment can

²⁷ (2001) 5 SCC 519

be made prospectively applicable subsequently by a different bench of this Court. The doctrine of prospective overruling was applied to Indian law in ***Golak Nath*** (supra) by following the theory which was prevalent in the United States of America. Reference was made to the judgment of ***Linkletter v. Walker***²⁸ which declared an earlier decision of the U.S. Supreme Court in ***Mapp v. Ohio***²⁹ to be prospective in operation.

37. For a better understanding, it is necessary to refer to the issue in ***Linkletter*** (supra). The United States Supreme Court in ***Weeks v. United States***³⁰ held that illegally-seized evidence cannot be used in federal courts, by establishing the exclusionary rule. The applicability of the exclusionary rule to states fell for consideration in ***Wolf v. Colorado***³¹. Taking note of the fact that 16 States adopted the exclusionary rule laid down in ***Weeks*** (supra) while 31 other States rejected the exclusionary rule, the U.S. Supreme Court held that it was not a departure from basic standards of due process to allow States to introduce illegally-obtained evidence in State trials. Later, the U.S.

28 381 U.S. 618 (1965) : 1965 SCC Online US SC 126

29 367 U.S. 643 (1961)

30 232 U.S. 383 (1914)

31 338 U.S. 25 (1949)

Supreme Court in **Mapp** (supra) held that the exclusion of evidence seized in violation of search and seizure provisions of the Fourth Amendment was required of the States by the due process clause of the Fourteenth Amendment. In **Linkletter** (supra), the U.S. Supreme Court was confronted with the question of prospective operation of its earlier judgment in **Mapp** (supra). The overruling of the judgment in **Wolf v. Colorado** (supra) by **Mapp** (supra) was made prospective by the U.S. Supreme Court by making the following observations:

"22. We believe that the existence of the Wolf doctrine prior to Mapp is 'an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' Chicot County Drainage Dist. v. Baxter State Bank, supra, 308 U.S. at 374, 60 S.Ct. at 319. The thousands of cases that were finally decided on Wolf cannot be obliterated. The 'particular conduct, private and official,' must be considered. Here 'prior determinations deemed to have finality and acted upon accordingly' have 'become vested.' And finally, 'public policy in the light of the nature both of the (Wolf doctrine) and of its previous application' must be given its proper weight. Ibid. In short, we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp.

23. *It is clear that the Wolf Court, once it had found the Fourth Amendment's unreasonable Search and Seizure Clause applicable to the States through the Due Process Clause of the Fourteenth Amendment, turned its attention to whether the exclusionary rule was included within the command of the Fourth Amendment. This was decided in the negative. It is clear that based upon the factual considerations heretofore discussed the Wolf Court then concluded that it was not necessary to the enforcement of the Fourth Amendment for the exclusionary rule to be extended to the States as a requirement of due process. Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. See, e.g., Rea v. United States, supra. We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of Mapp. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.*

24. *It is true that both the accused and the States relied upon Wolf. Indeed, Wolf and Irvine each pointed the way for the victims of illegal searches to seek reparation for the violation of their privacy. Some pursued the same. See*

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In addition, in *Irvine*, a flag in a concurring opinion warned that *Wolf* was in stormy weather. On the other hand, the States relied on *Wolf* and followed its command. Final judgments of conviction were entered prior to *Mapp*. Again and again this Court refused to reconsider *Wolf* and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

25. Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

The point to be noticed is that the U.S. Supreme Court in **Linkletter** (supra) declared its earlier judgment in **Mapp** (supra) to be prospective in operation, after considering the consequences of **Mapp** (supra) being given retrospective effect.

38. This Court in ***Indra Sawhney*** (supra) interpreted Article 16(4-A) of the Constitution by holding that reservation cannot be provided in promotions. However, reservation in promotions were permitted for a further period of five years from the date of the judgment. In ***Ashok Kumar Gupta & Anr. v. State of U.P. & Ors.***³², promotions in Public Works Department of the Government of Uttar Pradesh were challenged. One of the grounds of challenge was that the direction of the Supreme Court for prospective overruling of the judgment of this Court in ***General Manager, Southern Railway v. Rangachari***³³ and for operation of the ratio in ***Indra Sawhney*** (supra) after five years from the date of the judgment was inconsistent with and contrary to the scheme of the Constitution. In other words, it was contended by the appellants in ***Ashok Kumar Gupta*** (supra) that after having declared reservation in promotions under Articles 16(1) and 16(4) as unconstitutional and overruling ***Rangachari*** (supra) as not being correct in law, the Court cannot postpone the operation of the judgment to a future

32 (1997) 5 SCC 201

33 (1962) 2 SCR 586

date as it amounts to perpetration of void action and is violative of the appellants' fundamental rights. In **Ashok Kumar Gupta** (supra), this Court was of the opinion that there is no prohibition for this Court to postpone the operation of the judgment in **Indra Sawhney** (supra) or to prospectively overrule the ratio in **Rangachari** (supra). This Court further held that:

“60. It would be seen that there is no limitation under Article 142(1) on the exercise of the power by this Court. The necessity to exercise the power is to do “complete justice in the cause or matter”. The inconsistency with statute law made by Parliament arises when this Court exercises power under Article 142(2) for the matters enumerated therein. Inconsistency in express statutory provisions of substantive law would mean and be understood as some express prohibition contained in any substantive statutory law. The power under Article 142 is a constituent power transcendental to statutory prohibition. Before exercise of the power under Article 142(2), the Court would take that prohibition (sic provision) into consideration before taking steps under Article 142(2) and we find no limiting words to mould the relief or when this Court takes appropriate decision to mete out justice or to remove injustice. The phrase “complete justice” engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be

cribbed or cabined within any limitations or phraseology. Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for this Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of this Court does not arise. As held earlier, the power under Article 142 is a constituent power within the jurisdiction of this Court. So, the question of a law being void ab initio or nullity or voidable does not arise.

61. *Admittedly, the Constitution has entrusted this salutary duty to this Court with power to remove injustice or to do complete justice in any cause or matter before this Court. The Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio was in operation for well over three decades under which reservation in promotions were given to several persons in several services, grades or cadres of the Union of India or the respective State Governments. This Court, with a view to see that there would not be any hiatus in the operation of that law and, as held earlier, to bring about smooth transition of the operation of law of reservation in promotions, by a judicial creativity extended the principle of prospective overruling applied in Golak Nath case [(1967) 2 SCR 762 : AIR 1967 SC 1643] in the case of statutory law and of the judicial precedent in Karunakar case [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and further elongated the principle postponing the operation of the judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] for five years from the date of the judgment. This judicial creativity is not*

anathema to constitutional principle but an accepted doctrine as an extended facet of stare decisis. It would not be labelled as proviso to Article 16(4) as contended for."

39. Whether the judgment of this Court in ***Indian Council for Enviro-Legal Action v. Union of India & Ors.***³⁴ was prospective was the subject-matter of consideration in ***Goan Real Estate and Construction Limited & Anr. v. Union of India & Ors.***³⁵. After a detailed consideration of the judgment in ***Indian Council for Enviro-Legal Action*** (supra), this Court in ***Goan Real Estate*** (supra) concluded that though not stated categorically in ***Indian Council for Enviro-Legal Action*** (supra), it was the intention of this Court to give prospective effect to the judgment. The above is an instance where this Court declared an earlier judgment to have prospective effect.

40. A contrary view was expressed by this Court in ***M.A. Murthy v. State of Karnataka & Ors.***³⁶ in which it was held that prospective overruling can be done only by the Court which has rendered the decision. The dispute that arose for consideration of this Court in the said judgment pertained to appointment to the posts of Manager (Finance

34 (1996) 5 SCC 281

35 (2010) 5 SCC 388

36 (2003) 7 SCC 517

and Accounts) in the Karnataka State Financial Corporation. The appellants challenged the selection of respondent no. 4 before the Karnataka High Court. Though the learned Single Judge of the High Court found respondent no. 4 therein to be ineligible as on the date of his appointment, the selection was not disturbed on the ground that he obtained qualifications by the time of interview. The learned Single Judge relied upon the judgment of this Court in ***Ashok Kumar Sharma & Anr. v. Chander Shekher & Anr.***³⁷ (***Ashok Kumar Sharma case No. I***). The judgment of the learned Single Judge was upheld by the Division Bench of the High Court. Thereafter, a review application was filed informing the Division Bench of the High Court that the judgment of this Court in ***Ashok Kumar Sharma case No. I*** was overruled in ***Ashok Kumar Sharma & Ors. v. Chander Shekhar & Anr.***³⁸ (***Ashok Kumar Sharma case No. II***). By holding that on the date of the judgment of the Division Bench, ***Ashok Kumar Sharma case No. I*** held the field, the High Court dismissed the review petition. Taking note of the fact that ***Ashok Kumar Sharma case No. II***

³⁷ 1993 Supp (2) SCC 611

³⁸ (1997) 4 SCC 18

was a judgment of this Court in review of the judgment in ***Ashok Kumar Sharma case No. I***, which, therefore, merged with the subsequent judgment, making the later decision the one and only judgment rendered for all purposes, this Court found that the High Court had committed an error in not following the law laid down by this Court in ***Ashok Kumar Sharma case No. II***. While holding so, this Court referred to the doctrine of prospective overruling and earlier judgments of this Court in ***Golak Nath*** (supra), ***Ashok Kumar Gupta*** (supra) and others. This Court proceeded to observe that there shall be no prospective overruling unless it is so indicated in a particular decision.

41. The facts of the case and the dispute resolved by this Court in ***M.A. Murthy*** (supra) relate to the applicability of the subsequent judgment of ***Ashok Kumar Sharma case No. II*** rendered in review of an earlier judgment. The question of prospective overruling did not arise in the said case. The observation made in ***M.A. Murthy*** (supra) that there shall be no prospective overruling unless indicated in

the particular decision is *obiter*. *Obiter dictum* is defined in Black's Law Dictionary (9th Edn., 2009), as follows:

“Obiter dictum.— A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). — Often shortened to dictum or, less commonly, obiter.

...

Strictly speaking an “obiter dictum” is a remark made or opinion expressed by a judge, in his decision upon a cause, “by the way”—that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the Judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as “dicta”, or “obiter dicta”, these two terms being used interchangeably.”

Wharton's Law Lexicon (14th Edn., 1993) defines the term “obiter dictum” as “*an opinion not necessary to a judgment; an observation as to the law made by a Judge in the course of a case, but not necessary to its decision, and therefore, of no binding effect; often called as obiter dictum, ‘a remark by the way’*”. A decision on a point not necessary for the purpose of or which does not fall for determination in that

decision becomes an obiter dictum.³⁹ It is a well-settled proposition that only the ratio decidendi can act as the binding or authoritative precedent. Reliance placed on mere general observations or casual expressions of the Court, is not of much avail.⁴⁰ Therefore, the casual and unnecessary observation in **M.A. Murthy** (supra) that there shall be no prospective overruling unless it is so indicated in a particular decision is *obiter* and not binding. Moreover, in **M.A. Murthy** (supra), this Court failed to consider the ratio of the judgment of this Court in **Ashok Kumar Gupta** (supra), even after referring to it. As stated above, the prospective overruling of **Rangachari** (supra) by **Indra Sawhney** (supra) was upheld in **Ashok Kumar Gupta** (supra).

42. This Court in **Golak Nath** (supra) and **Ashok Kumar Gupta** (supra), referred to above, has laid down that Article 142 empowers this Court to mould the relief to do complete justice. To conclude this point, the purpose of holding that **M. Nagaraj** (supra) would have prospective effect is only to avoid chaos and confusion that would ensue from its retrospective operation, as it would have a debilitating

39 *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior & Ors. v. Union of India & Anr.* (1971) 1 SCC 85

40 *Gimar Traders v. State of Maharashtra & Ors.* (2007) 7 SCC 555

effect on a very large number of employees, who may have availed of reservation in promotions without there being strict compliance of the conditions prescribed in ***M. Nagaraj*** (supra). Most of them would have already retired from service on attaining the age of superannuation. The judgment of ***M. Nagaraj*** (supra) was delivered in 2006, interpreting Article 16(4-A) of the Constitution which came into force in 1995. As making the principles laid down in ***M. Nagaraj*** (supra) effective from the year 1995 would be detrimental to the interests of a number of civil servants and would have an effect of unsettling the seniority of individuals over a long period of time, it is necessary that the judgment of ***M. Nagaraj*** (supra) should be declared to have prospective effect.

6) QUANTIFIABLE DATA AND SAMPLING METHOD

43. The Karnataka Legislature enacted the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2002. This Court declared the provisions of the said Act as unconstitutional on the ground that the Government of Karnataka failed to produce

quantifiable data to show any compelling necessity for exercising power under Article 16(4-A) and therefore, Sections 3 and 4 of the said Act were held to be unconstitutional. Thereafter, the Government of Karnataka constituted a committee, headed by the Additional Chief Secretary to the State of Karnataka, and entrusted the following tasks to the committee:-

“(1) Collect information in cadre-wise representation of SCs and STs in all the Government departments.

(2) Collect information regarding backwardness of SCs and STs.

(3) Study the effect on the administration due to the provision of reservation in promotion to SCs and STs.”

44. On 05.05.2017, the ‘Report on Backwardness, Inadequacy of Representation and Administrative Efficiency in Karnataka’ was submitted by the Ratna Prabha Committee. The Government of Karnataka accepted the Report and the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Bill 2017 was passed by the Legislative Assembly and the Legislative Council and thereafter, received Presidential assent on 14.06.2018. The grievance of the petitioners

therein was that the data was collected only from 31 departments out of a total of 62, based on Groups 'A', 'B', 'C' and 'D' and not on cadre. A further complaint was made that no data was collected with respect to public sector undertakings, boards, corporations, local bodies, grant-in-aid institutions and autonomous bodies, and therefore, the data is only representative in nature. This Court reproduced a summary of the Ratna Prabha Committee Report, which is as follows:

“2.5. Summary:

(1) The analysis of time series data collected for the last 32 years (1984-2016 except for 1986) across 31 departments of the State Government provides the rich information on the inadequacy of representation of SC and ST employees in various cadres of Karnataka Civil Services.

(2) The total number of sanctioned posts as per the data of 2016 is 7,45,593 of which 70.22% or 5,23,574 are filled up across 31 departments.

(3) The vacancies or posts are filled up through Direct Recruitment (DR) and Promotions including consequential promotion.

(4) The overall representation of the SC and ST employees of all 31 departments in comparison with total sanctioned posts comprises of 10.65% and 2.92% respectively. This proves inadequacy of representation of SCs and Sts.

(5) On an average the representation in Cadre A for SCs is at 12.07% and STs 2.70% which sufficiently proves the inadequacy of representation.

(6) The extent of representation in Cadre B is on an average of 9.79% and 2.34% for STs for all the years of the study period.

(7) It is observed that on an average 3.05% of SC representation is inadequate in the Cadre 'C' whereas, 0.05% excess representation is seen for STs.

(8) On an average of 2% and 1% over-representation of employees of SCs and STs is found in Cadre D respectively. However, in the last 5 years, inadequacy of representation of SCs by 3% is found in this cadre.

(9) The representation of Scheduled Caste in Cadres A, B and C is on an average 12, 9.79 and 12.04% respectively whereas in Cadre D it is 16.91.

(10) In case of STs in the Cadres A and B the representation is 2.70 and 2.34%. However, excess representation of 0.04 and 0.93% is found in case of Group C and Group D respectively.

(11) Over-representation in some years and departments is attributed to either Direct Recruitment or retirement of employees or filling up of backlog vacancies as the latter does not fall under 50% limitation of reservation.

2.6: Conclusion:

The data clearly shows the inadequacy of representation of SCs and STs in the civil services in Groups A, B and C and adequate representation in Group D.”

This Court found the challenge to the Report on the ground of data having been collected on the basis of Groups A, B, C and D as opposed to cadres, to be without merit. The basis of the said conclusion of the Court was that there is no fixed meaning ascribed to the term ‘cadre’ in service jurisprudence. Further, this Court held that collection of quantifiable data on the inadequacy of representation is in the *services* of the State, according to **M. Nagaraj** (supra). In addition, this Court was also of the view that Article 16(4-A) referred to inadequacy of representation in the *services* of the State. It was further declared that collection of data on the basis of groups does not exclude data pertaining to cadres, as a group includes posts in all the cadres in that group.

45. Collection of quantifiable data for determining the inadequacy of representation of SCs and STs is a basic requirement for providing reservation in promotions, as laid down by this court in **M. Nagaraj** (supra). The unit for the purpose of collection of data is a cadre, according to **M.**

Nagaraj (supra) and **Jarnail Singh** (supra). For the purpose of collection of quantifiable data for providing reservation in promotions, the entire service cannot be taken to be a unit and treated as a cadre, as already stated. The structure of services in the State of Karnataka is along the same lines as that of services in the Central Government. Services are divided into 'groups', which are further bifurcated into cadres. There is no confusion that a cadre is not synonymous with a 'group'.

46. The first term of reference for the Ratna Prabha Committee was to collect data cadre-wise. The conclusion of this Court in **B.K. Pavitra II** (supra) that the expression 'cadre' has no fixed meaning in service jurisprudence is contrary to the judgments of this Court, which have been referred to above while answering point 2. In clear terms, **M. Nagaraj** (supra) held that the unit for collection of quantifiable data is *cadre*, and not *services* as has been held in **B.K. Pavitra II** (supra). Article 16(4-A) of the Constitution enables the State to make reservation in promotions for SCs and STs, which are not adequately represented in the services of the State. However, the provision for reservation

in matters of promotion is with reference to *class or classes of posts* in the services under the State. That 'groups' consist of cadres is a fact which was taken into consideration by this Court in ***B.K. Pavitra II*** (supra). The conclusion that the collection of data on the basis of 'groups' is valid, is contrary to the decisions of this court in ***M. Nagaraj*** (supra) and ***Jarnail Singh*** (supra).

47. The State should justify reservation in promotions with respect to the cadre to which promotion is made. Taking into account the data pertaining to a 'group', which would be an amalgamation of certain cadres in a service, would not give the correct picture of the inadequacy of representation of SCs and STs in the cadre in relation to which reservation in promotions is sought to be made. Rosters are prepared cadre-wise and not group-wise. Sampling method which was adopted by the Ratna Prabha Committee might be a statistical formula appropriate for collection of data. However, for the purpose of collection of quantifiable data to assess representation of SCs and STs for the purpose of providing reservation in promotions, cadre, which is a part of a 'group', is the unit and the data has to

be collected with respect to each cadre. Therefore, we hold that the conclusion of this Court in ***B.K. Pavitra II*** (supra) approving the collection of data on the basis of 'groups' and not cadres is contrary to the law laid down by this Court in ***M. Nagaraj*** (supra) and ***Jarnail Singh*** (supra).

48. It is made clear that we have not expressed any opinion on the merits of any individual case as we have only answered the common issues that were formulated after hearing the parties.

49. List the matters on 24/2/2022 for further hearing.

.....J.
[L. NAGESWARA RAO]

.....J.
[SANJIV KHANNA]

.....J.
[B.R. GAVAI]

**New Delhi,
January 28, 2022**

Supreme Court - Daily Orders

Jarnail Singh vs Lachhmi Narain Gupta . on 17 May, 2018

1

ITEM NO.69

COURT NO.5

SECTION IV-B

S U P R E M E C O U R T O F
RECORD OF PROCEEDINGS

I N D I A

Petition(s) for Special Leave to Appeal (C)

No(s). 30621/2011

(Arising out of impugned final judgment and order dated 15-07-2011
in CWP No. 13218/2009 passed by the High Court Of Punjab & Haryana
At Chandigarh)

JARNAIL SINGH

& ORS.

Petitioner(s)

VERSUS

LACHHMI NARAIN GUPTA . & ORS.

Respondent(s)

(I.A.NOS.25195/2018 (FOR CLARIFICATION/DIRECTIONS) AND I.A.NO.
25199/2018 (FOR INTERVENTION) IN SLP(C)NO.30621/2011

Date : 17-05-2018 This matter was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE KURIAN JOSEPH

HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR

Counsel for the
parties

Mr. K. K. Venugopal, Attorney General

Mr. Vikramjit Banerjee, ASG

Mr. K. Radhakrishnan, Sr. Adv.

Mr. P. K. Mullick, Adv.

Mr. Rohit Bhat, Adv.

Ms. Sadhana Sandhu, Adv.

Ms. Niranjana Singh, Adv.

Mrs. Anil Katiyar, Adv.

Mr. M. K. Maroria, Adv.

Mr. Sanri Ranjan Das, Adv.

Mr. Anindo Mukherjee, Adv.

Mrs. Sarla Chandra, Adv.

Mr. A. Subba Rao, Adv.

Mr. KLDS Vinober, Adv.

Dr. K. S. Chauhan, Adv.

Mr. Chand Kiran, Adv.

Mr. Murali Lal, Adv.

Signature Not Verified

Mr. R. S. M. Kalky, Adv.

Mr. Ajit Kumar Ekka, Adv.

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MAHABIR SINGH
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14:21:05 IST
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Mr. Shantanu Krishna, Adv.
Mr. Shashank Shukla, Adv.

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Mr. Gopal Sankarnayaran, Adv.
Mr. Lal Pratap Singh, Adv.
Mr. Umesh Pratap Singh, Adv.
Mr. Ram Singh, Adv.
Ms. Ruchi Kohli, Adv.

Mr. Prashant Bhushan, Adv.
Ms. Aniy Shukla, Adv.
Mr. Shakti Vardhan, Adv.

Mr. Chandra Bhushan Prasad, AOR

Ms. N. Annapoorani, AOR

UPON hearing the counsel the Court made the following
O R D E R

It is directed that the pendency of this Special Leave Petition shall not stand in the way of Union of India taking steps for the purpose of promotion from reserved to reserved and unreserved to unreserved and also in the matter of promotion on merits.

Post for further orders after summer vacation.

(JAYANT KUMAR ARORA)
COURT MASTER

(RENU DIWAN)
ASSISTANT REGISTRAR

Supreme Court of India

M.Nagaraj & Others vs Union Of India & Others on 19 October, 2006

Author: S.H.Kapadia

Bench: Y.K.Sabharwal Cji, K.G.Balakrishnan, S.H.Kapadia, C.K.Thakker, P.K. Balasubramanyan

CASE NO.:

Writ Petition (civil) 61 of 2002

PETITIONER:

M.Nagaraj & Others

RESPONDENT:

Union of India & Others

DATE OF JUDGMENT: 19/10/2006

BENCH:

Y.K.SABHARWAL CJI & K.G.BALAKRISHNAN & S.H.KAPADIA & C.K.THAKKER & P.K. BALASUBRAMANYAN

JUDGMENT:

JUDGMENT with WP (C) Nos.62, 81, 111, 134, 135, 206, 226, 227, 255, 266, 269, 279, 299, 294, 295, 298, 250, 319, 375, 386, 387, 320, 322, 323, 338, 234, 340, 423, 440, 453, 460, 472, 482, 483, 484, 485, 550, 527 and 640 of 2002, SLP (C) Nos. 4915-4919 of 2003, W.P. (C) Nos.153/2003, C.P. (C) No. 404/2004 in W.P.(C) No. 255/2002, C.P. (C) No.505/2002 in WP (C) No.61/2002, C.P. (C) No.553/2002 in WP (C) No.266/2002, C.P. (C) No.570/2002 in WP (C) No.255/2002, C.P. (C) No.122/2003 in WP (C) No.61/2002, C.P. (C) No.127/2003 in WP (C) No.61/2002, C.P. (C) No.85/2003 in WP (C) No.255/2002, W.P. (C) Nos. 313 and 381 of 2003, CIVIL APPEAL Nos. 12501-12503/1996, SLP (C) No.754/1997, WP (C) No.460 of 2003, CIVIL APPEAL Nos. 7802/2001 and 7803/2001, W.P. (C) No.469/2003, SLP (C) No.19689/1996, WP (C) No. 563/2003, WP (C) No.2/2003, WP (C) Nos. 515, 519 and 562 of 2004, WP (C) No. 413 of 1997, WP (C) No.286 of 2004 and SLP (C) No.14518 of 2004.

DELIVERED BY:

S.H.KAPADIA, J.

KAPADIA, J.

The width and amplitude of the right to equal opportunity in public employment, in the context of reservation, broadly falls for consideration in these writ petitions under Article 32 of the Constitution.

FACTS IN WRIT PETITION (CIVIL) NO.61 OF 2002:

The facts in the above writ petition, which is the lead petition, are as follows.

Petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-Fifth Amendment) Act, 2001 inserting Article 16(4A) of the Constitution retrospectively from 17.6.1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in the case of Union of India and others v. Virpal Singh Chauhan and others, Ajit Singh Januja and others v. State of Punjab and others (Ajit Singh-I), Ajit Singh and others (II) v. State of Punjab and others, Ajit Singh and others (III) v. State of Punjab and others, Indra Sawhney and others v. Union of India, and M. G.

Badappanavar and another v. State of Karnataka and others. Petitioners say that the Parliament has appropriated the judicial power to itself and has acted as an appellate authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside. Petitioners have further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution. Petitioners say that the equality in the context of Article 16(1) connotes "accelerated promotion" so as not to include consequential seniority. Petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). Petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency. Petitioners say that in the case of Indra Sawhney⁵ decided on 16.11.1992, this Court has held that under Article 16(4), reservation to the backward classes is permissible only at the time of initial recruitment and not in promotion. Petitioners say that contrary to the said judgment delivered on 16.11.1992, the Parliament enacted the Constitution (Seventy-Seventh Amendment) Act, 1995. By the said amendment, Article 16(4A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-Seventh Amendment) Act, 1995 is also challenged by some of the petitioners. Petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous. A roster-point promotee in the graduate stream would reach the 4th level by the time he attains the age of 45 years. At the age of 49, he would reach the highest level and stay there for nine years. On the other hand, the general merit promotee would reach the 3rd level out of 6 levels at the age of 56 and by the time, he gets eligibility to the 4th level, he would have retired from service. Petitioners say that the consequences of the impugned 85th Amendment which provides for reservation in promotion, with consequential seniority, would result in reverse discrimination in the percentage of representation of the reserved category officers in the higher cadre. BROAD ISSUES IN WRIT PETITION No.527 OF 2002: The broad issues that arise for determination in this case relate to the:

1. Validity

2. Interpretation

3. Implementation of (i) the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000, and the Constitution (Eighty-Fifth Amendment) Act, 2001; and, (ii) Action taken in pursuance thereof

which seek to reverse decisions of the Supreme Court in matters relating to promotion and their application with retrospective effect.

ARGUMENTS:

The substance of the arguments advanced on behalf of the petitioners briefly is as follows:

Equality is a part of the basic structure and it is impossible to conceive of the Constitution without equality as one of its central components. That, equality is the basic feature referred to in the preamble to our Constitution. Petitioners further submit that Article 16 is integral to equality; that, Article 16 has to be read with Article 14 and with several Articles in Part-IV. According to the petitioners, the Constitution places an important significance on public employment and the rule of equality, inasmuch as, a specific guarantee is given under Article 16 protecting equality principles in public employment. In this connection, reliance is also placed on the provisions of Part XIV to show that the Constitution makers had given importance to public employment by making a special provision in the form of Part XIV providing certain rights and protection to the office holders in the services of the Union and the States. These provisions are Articles 309, 311, 315, 316, 317 and 318 to 323. Special provisions have also been made in Article 323-A which permits establishment of tribunals as special and adjudicatory mechanism. That, Article 335 recognizes the importance of efficiency in administration and the various provisions of the Constitution indicate that public employment was and is even today of central concern to the Constitution. It is urged that equality in matters of public employment cannot be considered as merely an abstract concept. Petitioners say that over the years, this Court has delivered many decisions laying down that principles of 'equality' and 'affirmative action' are the pillars of our Constitution. These judgments also provide conclusions based on principles which gave meaning to equality both as an individual right and as group expectations. It is submitted that clause (4) of Article 16 is an instance of the classification implicit and permitted by Article 16(1) and that this view of equality did not dilute the importance of Article 16(1) or Article 16(2) but merely treated Article 16(4) as an instance of the classification; that this relationship of sub-clauses within Article 16 is not an invitation for reverse discrimination and that, equality of opportunity cannot be overruled by affirmative action. It is submitted that "equality in employment" consists of equality of opportunity [Article 16(1)], anti- discrimination [Article 16(2)], special classification [Article 16(3)], affirmative action [Article 16(4)] which does not obliterate equality but which stands for classification within equality], and lastly, efficiency [Article 335]. As regards the words 'nothing in this article' in Article 16(4), it is urged that these words cannot wipe out Article 16(1) and, therefore, they have a limited meaning. It is urged that the said words also occur in Articles 16(4A) and 16(4B). It is urged that equality in the Constitution conceives the individual right to be treated fairly without discrimination in the matter of equality of opportunity. It also conceives of affirmative action in Article 15(4) and Article 16(4). It enables classification as a basis for enabling preferences and benefits for specific beneficiary groups and that neither classification nor affirmative action can obliterate the individual right to equal opportunity. Therefore, a balance has to be evolved to promote equal opportunities while protecting individual rights. It is urged that as an individual right in Article 16(1), enforceability is provided for whereas "group expectation" in Article 16(4) is not a fundamental right but it is an enabling power which is not coupled with duty. It is submitted that if the structural balance of equality in the light of the

efficiency is disturbed and if the individual right is encroached upon by excessive support for group expectations, it would amount to reverse discrimination.

On the question of power of amendment, it is submitted that the limited power of amendment cannot become an unlimited one. A limited amendment power is one of the basic features of our Constitution and, therefore, limits on that power cannot be destroyed. Petitioners submit that Parliament cannot under Article 368 expand its amending power so as to acquire for itself the right to abrogate the Constitution and if the width of the amendment invites abrogation of the basic structure then such amendment must fail. Reliance is placed in this connection on the judgment in *Minerva Mills Ltd. and others v. Union of India and others*. On the question of balancing of fundamental rights vis-à-vis directive principles, it is submitted that directive principles cannot be used to undermine the basic structure principles underlying fundamental rights including principles of equality, fundamental freedoms, due process, religious freedom and judicial enforcement.

On the question of balancing and structuring of equality in employment, it is urged that quotas are subject to quantitative limits and qualitative exclusions; that, there is a distinction between quota limits (example 15% to SCs) and ceiling-limits/maximum permissible reservation limits (example 50%) which comes under the category of quantitative limits. However, quotas are also subject to qualitative exclusions like creamy layer. It is urged that in numerous judgments and in particular in *Indra Sawhney*⁵, *M.G. Badaappanavar*⁶, *Ajit Singh (II)*³, the equality of opportunity in public employment is clarified in order to structure and balance Articles 16(1) and 16(4).

In answer to the respondents' contentions that Articles 16(4A) and 16(4B) and the changes to Article 335 are merely enabling provisions and that in a given case if the exercise undertaken by the appropriate Government is found to be arbitrary, this Court will set it right, it is contended that ingressing the basic structure is a per se violation of the Constitution. In this connection, it is alleged that the basis for impugned amendments is to overrule judicial decisions based on holistic interpretation of the Constitution and its basic values, concepts and structure. In this connection, it is urged that the 77th Amendment introducing Article 16(4A) has the effect of nullifying the decision in the case of *Indra Sawhney*⁵; that, the 81st Amendment introducing Article 16(4B) has been brought in to nullify the effect of the decision in *R.K. Sabharwal & Others v. State of Punjab and others*, in which it has been held that carry forward vacancies cannot be filled exceeding 50% of the posts. Petitioners say that similarly the Constitution (Eighty-Second Amendment) Act, 2000 introducing the proviso to Article 335 has been introduced to nullify the effect of the decision in the case of *Indra Sawhney*⁵ and a host of other cases, which emphasize the importance of maintaining efficiency in administration. It is submitted that, the 85th Amendment adding the words 'with consequential seniority' in Article 16(4A) has been made to nullify the decision in *Ajit Singh (II)*³.

Accordingly it is urged that the impugned amendments are violative of the basic structure and the fundamental values of the Constitution articulated in the preamble and encapsulated in Articles 14, 16 and 19; that, they violate the fundamental postulates of equality, justice, rule of law and secularism as enshrined in the Constitution and that they violate the fundamental role of the Supreme Court as interpreter of the Constitution. That, the impugned amendments create an untrammelled, unrestrained and unconstitutional regime of reservations which destroys the judicial

power and which undermines the efficacy of judicial review which is an integral part of rule of law. It is argued that, Articles 14 and 16 have to be read with Article 335 as originally promulgated; that, the impugned amendments invade the twin principles of efficiency, merit and the morale of public services and the foundation of good governance. It is urged vehemently that the impugned amendments open the floodgates of disunity, disharmony and disintegration.

On behalf of the respondents, following arguments were advanced. The power of amendment under Article 368 is a 'constituent' power and not a 'constituted power'; that, that there are no implied limitations on the constituent power under Article 368; that, the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure. In such process of amendment, if it destroys the basic feature of the Constitution, the amendment will be unconstitutional. Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368. Such change of the law so declared by the Supreme Court will not merely for that reason alone violate the basic structure of the Constitution or amount to usurpation of judicial power. This is how Constitution becomes dynamic. Law has to change. It requires amendments to the Constitution according to the needs of time and needs of society. It is an ongoing process of judicial and constituent powers, both contributing to change of law with the final say in the judiciary to pronounce on the validity of such change of law effected by the constituent power by examining whether such amendments violate the basic structure of the Constitution. On every occasion when a constitutional matter comes before the Court, the meaning of the provisions of the Constitution will call for interpretation, but every interpretation of the Article does not become a basic feature of the Constitution. That, there are no implied limitations on the power of the Parliament under Article 368 when it seeks to amend the Constitution. However, an amendment will be invalid, if it interferes with or undermines the basic structure. The validity of the amendment is not to be decided on the touchstone of Article 13 but only on the basis of violation of the basic features of the Constitution.

It is further submitted that amendments for giving effect to the directive principles cannot offend the basic structure of the Constitution. On the contrary, the amendments which may abrogate individual rights but which promote Constitutional ideal of 'justice, social, economic and political' and the ideal of 'equality of status' are not liable to be struck down under Article 14 or Article 16(1) and consequently, such amendments cannot violate the basic structure of the Constitution. That, the amendments to the Constitution which are aimed at removing social and economic disparities cannot offend the basic structure. It is urged that the concepts flowing from the preamble to the Constitution constitute the basic structure; that, basic structure is not found in a particular Article of the Constitution; and except the fundamental right to live in Article 21 read with Article 14, no particular Article in Part-III is a basic feature. Therefore, it is submitted that equality mentioned in Articles 14 and 16 is not to be equated to the equality which is a basic feature of the Constitution.

It is submitted that the principle of balancing of rights of the general category and reserved category in the context of Article 16 has no nexus to the basic feature of the Constitution. It is submitted that basic feature consists of constitutional axioms like constitutional supremacy, and democratic form of government, secularism, separation of powers etc. Respondents contend that Article 16(4) is a part of the Constitution as originally enacted. The exercise of the power by the delegate under Article 16(4) will override Article 16(1). It is not by virtue of the power of the delegate, but it is by virtue of constituent power itself having authorized such exercise by the delegate under Article 16(4), that article 16(1) shall stand overruled. The only limitation on the power of delegate is that it should act within four corners of Article 16(4), namely, backward classes, which in the opinion of the State are not adequately represented in public employment. If this condition precedent is satisfied, a reservation will override Article 16(1) on account of the words 'nothing in this Article shall prevent the State'. It is urged that jurisprudence relating to public services do not constitute basic feature of the Constitution. That, the right to consideration for promotion in service matters is not a basic feature.

It is lastly submitted that Articles 16(4A) and 16(4B) are only enabling provisions; that, the constitutionality of the enabling power in Articles 16(4A) and 16(4B) is not to be tested with reference to the exercise of the power or manner of exercise of such power and that the impugned amendments have maintained the structure of Articles 16(1) to 16(4) intact. In this connection, it is submitted that the impugned amendments have retained reservations at the recruitment level inconformity with the judgment in *Indra Sawhney*⁵, which has confined Article 16(4) only to initial appointments; that Article 16(4A) is a special provision which provides for reservation for promotion only to SCs and STs. It is urged that if SCs/STs and OBCs are lumped together, OBCs will take away all the vacancies and, therefore, Article 16(4A) has been inserted as a special provision. That, in *Indra Sawhney*⁵, the focus was on Backward Classes and not on SCs/STs and, therefore, there was no balancing of rights of three groups, namely, general category, other backward classes and scheduled castes/scheduled tribes. It is, therefore, contended that under Article 16(4A), reservation is limited. It is not to the extent of 50% but it is restricted only to SCs and STs, and, therefore, the "risk element" pointed out in *Indra Sawhney*⁵ stands reduced. To carve out SCs/STs and make a separate classification is not only constitutional, but it is a constitutional obligation to do so under Article

46. That, Article 16(4) is an overriding provision over Article 16(1) and if Article 16(4) cannot be said to constitute reverse discrimination then Article 16(4A) also cannot constitute reverse discrimination.

It is next submitted that this Court has taken care of the interests of the general category by placing a ceiling on filling-up of vacancies only to a maximum of 50% for reservation. The said 50% permitted by this Court can be reserved in such manner as the appropriate Government may deem fit. It is urged that if it is valid to make reservation at higher levels by direct recruitment, it can also be done for promotion after taking into account the mandate of Article 335.

It is next submitted that the amendment made by Article 16(4B) makes an exception to 50% ceiling-limit imposed by *Indra Sawhney*⁵, by providing that the vacancies of previous years will not

be considered with the current year's vacancies. In this connection, it was urged that Article 16(4B) applies to reservations under Article 16(4) and, therefore, if reservation is found to be within reasonable limits, the Court would uphold such reservations depending upon the facts of the case and if reservation suffers from excessiveness, it may be invalidated. Therefore, the enabling power under Article 16(4B) cannot be rendered invalid.

For the above reasons, respondents submit that there is no infirmity in the impugned constitutional amendments.

KEY ISSUE:

It is not necessary for us to deal with the above arguments serially. The arguments are dealt with by us in the following paragraphs subject-wise.

The key issue, which arises for determination in this case is whether by virtue of the impugned constitutional amendments, the power of the Parliament is so enlarged so as to obliterate any or all of the constitutional limitations and requirements?

STANDARDS OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS:

Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In the case of *Sakal Papers (P) Ltd. & Others v. Union of India* and others this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal

sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in the case of *A.K. Gopalan v. State of Madras*. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in *A.K. Gopalan*¹⁰ and held in its landmark judgment in *Maneka Gandhi v. Union of India* and another that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees. For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression. In India, till recently, there is no legislation securing freedom of information. However, this Court by a liberal interpretation deduced the right to know and right to access information on the reasoning that the concept of an open government is the direct result from the right to know which is implicit in the right of free speech and expression guaranteed under Article 19(1)(a). The important point to be noted is that the content of a right is defined by the Courts. The final word on the content of the right is of this Court. Therefore, constitutional adjudication plays a very important role in this exercise. The nature of constitutional adjudication has been a subject matter of several debates. At one extreme, it is argued that judicial review of legislation should be confined to the language of the constitution and its original intent. At the other end, non-interpretivism asserts that the way and indeterminate nature of the constitutional text permits a variety of standards and values. Others claim that the purpose of a Bill of Rights is to protect the process of decision making.

The question which arises before us is regarding nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure. The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings.

In *S.R. Bommai & Others etc. v. Union of India & Others etc.*, the basic structure concept was resorted to although no question of constitutional amendment was involved in that case. But this Court held that policies of a State Government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under Article 356, that is, imposition of the President's rule. In that case, secularism was held to be an essential feature of the Constitution and part of its basic structure. A State Government may be dismissed not because it

violates any particular provision of the Constitution but because it acts against a vital principle enacting and giving coherence to a number of particular provisions, example: Articles 14, 15 and 25. In S.R. Bommai¹², the Court clearly based its conclusion not so much on violation of particular constitutional provision but on this generalized ground i.e. evidence of a pattern of action directed against the principle of secularism. Therefore, it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of Constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as 'essential features' or part of the 'basic structure' of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of the Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of the Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

As stated above, the doctrine of basic structure has essentially emanated from the German Constitution. Therefore, we may have a look at common constitutional provisions under German Law which deal with rights, such as, freedom of press or religion which are not mere values, they are justiciable and capable of interpretation. The values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. They are to be informed. Overarching and informing of these rights and values is the principle of human dignity under the German basic law. Similarly, secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Therefore, axioms like secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and

21. These principles are beyond the amending power of the Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values. For example, under the German Constitutional Law, human dignity under Article 1 is inviolable. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give. It simply is. Every human being has dignity by virtue of his existence. The Constitutional Courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by interpretation given to the concept by the Constitutional Courts.

Under the Indian Constitution, the word 'federalism' does not exist in the preamble. However, its principle (not in the strict sense as in U.S.A.) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the seventh schedule to the Constitution.

To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a pre-occupation with constitutional identity. In *Kesavananda Bharati Sripadagalvaru and others v. State of Kerala and another*, it has been observed that 'one cannot legally use the constitution to destroy itself'. It is further observed 'the personality of the constitution must remain unchanged'. Therefore, this Court in *Kesavananda Bharati*¹³, while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*¹³. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. Secularism in India has acted as a balance between socio-economic reforms which limits religious options and communal developments. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.

Lastly, constitutionalism is about limits and aspirations. According to Justice Brennan, interpretation of the Constitution as a written text is concerned with aspirations and fundamental principles. In his Article titled 'Challenge to the Living Constitution' by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living constitution. To conclude, as observed by Chandrachud, CJ, in *Minerva Mills Ltd.*⁷, 'the Constitution is a precious heritage and, therefore, you cannot destroy its identity'.

Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our constitution works because of its generalities, and because of the good sense of the Judges when

interpreting it. It is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance.

IS EQUALITY A PART OF THE FUNDAMENTAL FEATURES OR THE BASIC STRUCTURE OF THE CONSTITUTION?

At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things justice both social and economic. Secondly, a federal Constitution with its distribution of legislative powers between Parliament and State legislatures involves a limitation on legislative powers and this requires an authority other than Parliament and State Legislatures to ascertain whether the limits are transgressed and to prevent such violation and transgression. As far back as 1872, Lord Selbourne said that the duty to decide whether the limits are transgressed must be discharged by courts of justice. Judicial review of legislation enacted by the Parliament within limited powers under the controlled constitution which we have, has been a feature of our law and this is on the ground that any law passed by a legislature with limited powers is *ultra vires* if the limits are transgressed. The framers conferred on the Supreme Court the power to issue writs for the speedy enforcement of those rights and made the right to approach the Supreme Court for such enforcement itself a fundamental right. Thus, judicial review is an essential feature of our constitution because it is necessary to give effect to the distribution of legislative power between Parliament and State legislatures, and is also necessary to give practicable content to the objectives of the Constitution embodied in Part-III and in several other Articles of our Constitution.

In the case of *Minerva Mills*⁷, Chandrachud, C.J., speaking for the majority, observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be rendered nugatory. In the said judgment, the majority took the view that the principles enumerated in Part-IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and every State claims to strive for securing the welfare of its people. The distinction between different forms of Government consists in the fact that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like Articles 14 and

19. Without these freedoms, democracy is impossible. If Article 14 is withdrawn, the political pressures exercised by numerically large groups can tear the country apart by leading it to the legislation to pick and choose favoured areas and favourite classes for preferential treatment.

From these observations, which are binding on us, the principle which emerges is that "equality" is the essence of democracy and, accordingly a basic feature of the Constitution. This test is very important. Free and fair elections per se may not constitute a basic feature of the Constitution. On their own, they do not constitute basic feature. However, free and fair election as a part of representative democracy is an essential feature as held in the Indira Nehru Gandhi v. Raj Narain (Election case). Similarly, federalism is an important principle of constitutional law. The word 'federalism' is not in the preamble. However, as stated above, its features are delineated over various provisions of the Constitution like Articles 245, 246 and 301 and the three lists in the seventh schedule to the Constitution.

However, there is a difference between formal equality and egalitarian equality which will be discussed later on.

The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an Article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

WORKING TEST IN THE MATTER OF APPLICATION OF THE DOCTRINE OF BASIC STRUCTURE:

Once it is held that fundamental rights could be abridged but not destroyed and once it is further held that several features of the Constitution can not be destroyed, the concept of 'express limitation' on the amending power loses its force for a precise formulation of the basic feature of the Constitution and for the courts to pronounce on the validity of a constitutional amendment.

A working test has been evolved by Chandrachud, J. in the Election Case¹⁴, in which the learned Judge has rightly enunciated, with respect, that "for determining whether a particular feature of the Constitution is a part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance."

Applying the above test to the facts of the present case, it is relevant to note that the concept of 'equality' like the concept of 'representative democracy' or 'secularism' is delineated over various Articles. Basically, Part-III of the Constitution consists of the equality code, the freedom code and the right to move the courts. It is true that equality has several facets. However, each case has to be seen in the context of the placement of an Article which embodies the foundational value of equality.

CONCEPT OF RESERVATION:

Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.

Our Constitution has, however, incorporated the word 'reservation' in Article 16(4) which word is not there in Article 15(4). Therefore, the word 'reservation' as a subject of Article 16(4) is different from the word 'reservation' as a general concept.

Applying the above test, we have to consider the word 'reservation' in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in the Election Case¹⁴.

JUSTICE, SOCIAL, ECONOMIC AND POLITICAL IS PROVIDED NOT ONLY IN PART-IV (DIRECTIVE PRINCIPLES) BUT ALSO IN PART-III (FUNDAMENTAL RIGHTS):

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realized only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realized. Fundamental rights represent the claims of the individual and the restrictions thereon are the claims of the society. Article 38 in Part- IV is the only Article which refers to justice, social, economic and political. However, the concept of justice is not limited only to directive principles. There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. Great social injustice resulted from treating sections of the Hindu community as 'untouchable' and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part-III also provide for political and social justice.

This discussion is important because in the present case, we are concerned with reservation. Balancing a fundamental right to property vis-à-vis Articles 39(b) and 39(c) as in *Kesavananda Bharati*¹³ and *Minerva Mills*⁷ cannot be equated with the facts of the present case. In the present case, we are concerned with the right of an individual of equal opportunity on one hand and preferential treatment to an individual belonging to a backward class in order to bring about equal level- playing field in the matter of public employment. Therefore, in the present case, we are concerned with conflicting claims within the concept of 'justice, social, economic and political',

which concept as stated above exists both in Part-III and Part-IV of the Constitution. Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. This is reality of life. The concept of 'public employment' unlike right to property is socialistic and, therefore, falls within the preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of 'equality of opportunity' in public employment concerns an individual, whether that individual belongs to general category or backward class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a backward class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimization of these conflicting interests and claims.

EQUITY, JUSTICE AND MERIT:

The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard-concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of Scheduled Caste and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the government in the matter of reservation under Article 16(4) as well as Article 16(4A) come in the form of Article 335 of the Constitution.

Merit is not a fixed absolute concept. Amartya Sen, in a book, Meritocracy and Economic Inequality, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of 'merit' independent of our value system. The content of merit is context- specific. It derives its meaning from particular conditions and purposes. The impact of any affirmative action policy on 'merit' depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways they consider it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of "extent of reservation" is not an absolute concept and like merit it is context- specific.

The point which we are emphasizing is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact-situation in each case. Therefore, 'vesting of the power' by an enabling provision may be constitutionally valid and yet 'exercise of the power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

RESERVATION AND AFFIRMATIVE ACTION:

Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide level- playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalizing results with respect to various groups. Both the conceptions constitute "equality of opportunity".

It is the equality "in fact" which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is under-written by a special justification. Equality in Article 16(1) is individual- specific whereas reservation in Article 16(4) and Article 16(4A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise.

EXTENT OF RESERVATION:

Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions property systems, public organisations etc. The problem is what should be the basis of distribution? Writers like Raphael, Mill and Hume define 'social justice' in terms of rights. Other writers like Hayek and Spencer define 'social justice' in terms of deserts. Socialist writers define 'social justice' in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality "formal equality" and "proportional equality". "Formal equality" means that law treats everyone

equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy.

Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social. The question of extent of reservation involves two questions:

1. Whether there is any upper limit beyond which reservation is not permissible?
2. Whether there is any limit to which seats can be reserved in a particular year; in other words the issue is whether the percentage limit applies only on the total number of posts in the cadre or to the percentage of posts advertised every year as well?

The question of extent of reservation is closely linked to the issue whether Article 16(4) is an exception to Article 16(1) or is Article 16(4) an application of Article 16(1). If Article 16(4) is an exception to Article 16(1) then it needs to be given a limited application so as not to eclipse the general rule in Article 16(1). But if Article 16(4) is taken as an application of Article 16(1) then the two articles have to be harmonized keeping in view the interests of certain sections of the society as against the interest of the individual citizens of the society.

Maximum limit of reservation possible Word of caution against excess reservation was first pointed out in *The General Manager, Southern Railway and another v. Rangachari Gajendragadkar, J.* giving the majority judgment said that reservation under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. A reasonable balance must be struck between the claims of backward classes and claims of other employees as well as the requirement of efficiency of administration.

However, the question of extent of reservation was not directly involved in *Rangachari*¹⁵. It was directly involved in *M.R. Balaji & Ors. V. The State of Mysore & Ors.* with reference to Article 15(4). In this case, 60% reservations under Article 15(4) was struck down as excessive and unconstitutional. *Gajendragadkar, J.* observed that special provision should be less than 50 per cent, how much less would depend on the relevant prevailing circumstances of each case.

But in *State of Kerala and another v. N.M. Thomas and others* *Krishna Iyer, J.* expressed his concurrence to the views of *Fazal Ali, J.* who said that although reservation cannot be so excessive as to destroy the principle of equality of opportunity under clause (1) of Article 16, yet it should be noted that the Constitution itself does not put any bar on the power of the Government under Article 16(4). If a State has 80% population which is backward then it would be meaningless to say that reservation should not cross 50%.

However, in *Indra Sawhney*⁵ the majority held that the rule of 50% laid down in *Balaji*¹⁶ was a binding rule and not a mere rule of prudence.

Giving the judgment of the Court in *Indra Sawhney*⁵, Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of backward classes to the total population would certainly be relevant. He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of principle of equality under Article 14. (emphasis added) Are reserved category candidates free to contest for vacancies in general category In *Indra Sawhney*⁵ Reddy, J. noted that reservation under Article 16(4) do not operate on communal ground. Therefore if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in *R.K. Sabharwal*⁸ the Supreme Court held that while general category candidates are not entitled to fill the reserved posts; reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of backward class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class.

Number of vacancies that could be reserved Wanchoo, J. who had given dissenting judgment in *Rangachari*¹⁵ observed that the requirement of Article 16(4) is only to give adequate representation and since Constitution-makers intended it to be a short-term measure it may happen that all the posts in a year may be reserved. He opined that reserving a fixed percentage of seats every year may take a long time before inadequacy of representation is overcome. Therefore, the Government can decide to reserve the posts. After having reserved a fixed number of posts the Government may decide that till those posts are filled up by the backward classes all appointments will go to them if they fulfil the minimum qualification. Once this number is reached the Government is deprived of its power to make further reservations. Thus, according to Wanchoo, J. the adequacy of representation has to be judged considering the total number of posts even if in a single year or for few years all seats are reserved provided the scheme is short-term.

The idea given by Wanchoo, J. in *Rangachari*¹⁵ did not work out in practice because most of the time even for limited number of reservations, every year qualified backward class candidates were not available. This compelled the government to adopt carry-forward rule. This carry-forward rule came in conflict with *Balaji*¹⁶ ruling. In cases where the availability of reserved category candidates is less than the vacancies set aside for them, the Government has to adopt either of the two alternatives:

(1) the State may provide for carrying on the unfulfilled vacancies for the next year or next to the next year, or (2) instead of providing for carrying over the unfulfilled vacancies to the coming years, it may provide for filling of the vacancies from the general quota candidates and carry forward the unfilled posts by backward classes to the next year quota.

But the problem arises when in a particular year due to carry forward rule more than 50% of vacancies are reserved. In *T. Devadasan v. Union of India* and another, this was the issue. Union Public Service Commission had provided for 17% reservation for Scheduled Castes and Scheduled Tribes. In case of non-availability of reserved category candidates in a particular year the posts had to be filled by general category candidates and the number of such vacancies were to be carried forward to be filled by the reserved category candidate next year. Due to this, the rule of carry forward reservation in a particular year amounted to 65% of the total vacancies. The petitioner contended that reservation was excessive which destroyed his right under Article 16(1) and Article 14. The court on the basis of decision in *Balaji*¹⁶ held the reservation excessive and, therefore, unconstitutional. It further stated that the guarantee of equality under Article 16(1) is to each individual citizen and to appointments to any office under the State. It means that on every occasion for recruitment the State should see that all citizens are treated equally. In order to effectuate the guarantee each year of recruitment will have to be considered by itself.

Thus, majority differed from Wanchoo's, J. decision in *Rangachari*¹⁵ holding that a cent per cent reservation in a particular year would be unconstitutional in view of *Balaji*¹⁶ decision.

Subba Rao, J. gave dissenting judgment. He relied on Wanchoo's, J. judgment in *Rangachari*¹⁵ and held that Article 16(4) provides for adequate representation taking into consideration entire cadre strength. According to him, if it is within the power of the State to make reservations then reservation made in one selection or spread over many selections is only a convenient method of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the said castes and tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right.

In the case of *Thomas*¹⁷ under the Kerala State and Subordinate Services Rules, 1950 certain relaxation was given to Scheduled Caste and Scheduled Tribe candidates passing departmental tests for promotions. For promotion to upper division clerks from lower division clerks the criteria of seniority-cum-merit was adopted. Due to relaxation in merit qualification in 1972, 34 out of 51 vacancies in upper division clerks went to Scheduled Caste candidates. It appeared that the 34 members of SC/ST had become senior most in the lower grade. The High Court quashed the promotions on the ground that it was excessive. The Supreme Court upheld the promotions. Ray, C.J. held that the promotions made in services as a whole is nowhere near 50% of the total number of the posts. Thus, the majority differed from the ruling of the court in *Devadasan*¹⁹ basically on the ground that the strength of the cadre as a whole should be taken into account. Khanna, J. in his dissenting opinion made a reference to it on the ground that such excessive concession would impair efficiency in administration.

In *Indra Sawhney*⁵, the majority held that 50% rule should be applied to each year otherwise it may happen that (if entire cadre strength is taken as a unit) the open competition channel gets choked for some years and meanwhile the general category candidates may become age barred and ineligible. The equality of opportunity under Article 16(1) is for each individual citizen while special provision under Article 16(4) is for socially disadvantaged classes. Both should be balanced and

neither should be allowed to eclipse the other.

However, in R.K. Sabharwal⁸ which was a case of promotion and the issue in this case was operation of roster system, the Court stated that entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. With regard to ruling in Indra Sawhney case⁵ that reservation in a year should not go beyond 50% the Court held that it applied to initial appointments. The operation of a roster, for filling the cadre strength, by itself ensures that the reservation remains within the 50% limit. In substance the court said that presuming that 100% of the vacancies have been filled, each post gets marked for the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate. The Court was concerned with the possibility that reservation in entire cadre may exceed 50% limit if every year half of the seats are reserved. The Constitution (Eighty-first Amendment) Act, 2000 added Article 16(4B) which in substance gives legislative assent to the judgment in R.K. Sabharwal⁸.

CATCH-UP RULE IS THE SAID RULE A CONSTITUTIONAL REQUIREMENT UNDER ARTICLE 16(4):

One of the contentions advanced on behalf of the petitioners is that the impugned amendments, particularly, the Constitution (Seventy-Seventh Amendment) and (Eight-Fifth Amendment) Acts, obliterate all constitutional limitations on the amending power of the Parliament. That the width of these impugned amendments is so wide that it violates the basic structure of equality enshrined in the Constitution.

The key issue which arises for determination is whether the above "catch-up" rule and the concept of "consequential seniority" are constitutional requirements of Article 16 and of equality, so as to be beyond the constitutional amendatory process. In other words, whether obliteration of the "catch-up" rule or insertion of the concept of "consequential seniority code", would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16.

The concept of "catch-up" rule appears for the first time in the case of Virpal Singh Chauhan¹. In the category of Guards in the Railways, there were four categories, namely, Grade 'C', Grade 'B', Grade 'A' and Grade 'A' Special. The initial recruitment was made to Gr. 'C'. Promotion from one grade to another was by seniority-cum-suitability. The rule of reservation was applied not only at the initial stage of appointment to Grade 'C' but at every stage of promotion. The percentage reserved for SC was 15% and for ST, it was 7.5%. To give effect to the rule of reservation, a forty- point roster was prepared in which certain points were reserved for SCs and STs respectively. Subsequently, a hundred-point roster was prepared reflecting the same percentages. In 1986, general candidates and members of SCs/STs came within Grade 'A' in Northern-Railway. On 1.8.1986, the Chief Controller promoted certain general candidates on ad hoc basis to Grade 'A' Special. Within three months, they were reverted and SCs and STs were promoted. This action was challenged by general candidates as arbitrary and unconstitutional before the tribunal. The general candidates asked for three reliefs, namely, (a) to restrain the Railways from filling-up the posts in higher grades in the category of Guards by applying the rule of reservation; (b) to restrain the Railway from acting upon the

seniority list prepared by them; and (c) to declare that the general candidates were alone entitled to be promoted and confirmed in Grade 'A' Special on the strength of their seniority earlier to the reserved category employees. The contention of the general candidates was that once the quota prescribed for the reserved group is satisfied, the forty- point roster cannot be applied because that roster was prepared to give effect to the rule of reservation. It was contended by the general candidates that accelerated promotion may be given but the Railways cannot give consequential seniority to reserved category candidates in the promoted category. (Emphasis added). In this connection, the general category candidates relied upon the decisions of the Allahabad and Madhya Pradesh High Courts. It was contended by the general candidates that giving consequential seniority in addition to accelerated promotion constituted conferment of double benefit upon the members of the reserved category and, therefore, violated the rule of equality in Article 16(1). It was further urged that accelerated promotion-cum- accelerated seniority is destructive of the efficiency of administration inasmuch as by this means the higher echelons of administration would be occupied entirely by members of reserved categories. This was opposed by the reserved category candidates who submitted that for the purposes of promotion to Grade 'A' Special, the seniority list pertaining to Grade 'A' alone should be followed; that, the administration should not follow the seniority lists maintained by the administration pertaining to Grade 'C' as urged by the general candidates and since SCs and STs were senior to the general candidates in Grade 'A', the seniority in Grade 'A' alone should apply. In short, the general candidates relied upon the 'catch-up' rule, which was opposed by the members of SC/ST. They also relied upon the judgment of this Court in R.K. Sabharwal⁸.

This Court gave following reasons for upholding the decision of the tribunal. Firstly, it was held that a rule of reservation as such does not violate Article 16(4). Secondly, this Court opined, that there is no uniform method of providing reservation. The extent and nature of reservation is a matter for the State to decide having regards to the facts and requirements of each case. It is open to the State, if so advised, to say that while the rule of reservation shall be applied, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over seniors in the feeder category and that it is open to the State to interpret the 'catch-up' rule in the service conditions governing the promotions [See: para 24]. Thirdly, this Court did not agree with the view expressed by the tribunal [in Virpal Singh Chauhan¹] that a harmonious reading of clauses (1) to (4) of Article 16 should mean that a reserved category candidate promoted earlier than his senior general category candidates in the feeder grade shall necessarily be junior in the promoted category to such general category. This Court categorically ruled, vide para 27, that such catch-up principle cannot be said to be implicit in clauses (1) to (4) of Article 16 (emphasis supplied). Lastly, this Court found on facts that for 11 vacancies, 33 candidates were considered and they were all SC/ST candidates. Not a single candidate belonged to general category. It was argued on behalf of the general candidates that all top grades stood occupied exclusively by the reserved category members, which violated the rule of equality underlying Articles 16(1), 16(4) and 14. This Court opined that the above situation arose on account of faulty implementation of the rule of reservation, as the Railways did not observe the principle that reservation must be in relation to 'posts' and not 'vacancies' and also for applying the roster even after the attainment of the requisite percentage reserved for SCs/STs. In other words, this Court based its decision only on the faulty implementation of the rule by the Railways which the Court ordered to be rectified.

The point which we need to emphasize is that the Court has categorically ruled in Virpal Singh Chauhan¹ that the 'catch-up' rule is not implicit in clauses (1) to (4) of Article 16. Hence, the said rule cannot bind the amending power of the Parliament. It is not beyond the amending power of the Parliament.

In Ajit Singh (I)², the controversy which arose for determination was whether after the members of SCs/STs for whom specific percentage of posts stood reserved having been promoted against those posts, was it open to the administration to grant consequential seniority against general category posts in the higher grade. The appellant took a clear stand that he had no objection if members of SC/ST get accelerated promotions. The appellant objected only to the grant of consequential seniority. Relying on the circulars issued by the administration dated 19.7.1969 and 8.9.1969, the High Court held that the members of SCs/STs can be promoted against general category posts on basis of seniority. This was challenged in appeal before this Court. The High Court ruling was set aside by this Court on the ground that if the 'catch-up' rule is not applied then the equality principle embodied in Article 16(1) would stand violated. This Court observed that the 'catch-up' rule was a process adopted while making appointments through direct recruitment or promotion because merit cannot be ignored. This Court held that for attracting meritorious candidate a balance has to be struck while making provisions for reservation. It was held that the promotion is an incident of service. It was observed that seniority is one of the important factors in making promotion. It was held that right to equality is to be preserved by preventing reverse discrimination. Further, it was held that the equality principle requires exclusion of extra-weightage of roster-point promotion to a reserved category candidate (emphasis supplied). This Court opined that without 'catch-up' rule giving weightage to earlier promotion secured by roster-point promotee would result in reverse discrimination and would violate equality under Articles 14, 15 and 16. Accordingly, this Court took the view that the seniority between the reserved category candidates and general candidates in the promoted category shall be governed by their panel position. Therefore, this Court set aside the factor of extra-weightage of earlier promotion to a reserved category candidate as violative of Articles 14 and 16(1) of the Constitution.

Therefore, in Virpal Singh Chauhan¹, this Court has said that the 'catch-up' rule insisted upon by the Railways though not implicit in Articles 16(1) and 16(4), is constitutionally valid as the said practice/process was made to maintain efficiency. On the other hand, in Ajit Singh (I)², this Court has held that the equality principle excludes the extra-weightage given by the Government to roster-point promotees as such weightage is against merit and efficiency of the administration and that the Punjab Government had erred in not taking into account the said merit and efficiency factors.

In the case of Ajit Singh (II)³, three interlocutory applications were filed by State of Punjab for clarification of the judgment of this Court in Ajit Singh (I)². The limited question was whether there was any conflict between the judgments of this Court in Virpal Singh Chauhan¹ and Ajit Singh (I)² on one hand and vis-à-vis the judgment of this Court in Jagdish Lal and others v. State of Haryana and others. The former cases were decided in favour of general candidates whereas latter was a decision against the general candidates. Briefly, the facts for moving the interlocutory applications were as follows. The Indian Railways following the law laid down in Virpal Singh

Chauhan¹ issued a circular on 28.2.1997 to the effect that the reserved candidates promoted on roster-points could not claim seniority over the senior general candidates promoted later on. The State of Punjab after following Ajit Singh (I)² revised their seniority list and made further promotions of the senior general candidates following the 'catch-up' rule. Therefore, both the judgments were against the reserved candidates. However, in the later judgment of this Court in the case of Jagdish Lal²⁰, another three-Judge bench took the view that under the general rule of service jurisprudence relating to seniority, the date of continuous officiation has to be taken into account and if so, the roster-point promotees were entitled to the benefit of continuous officiation. In Jagdish Lal²⁰, the bench observed that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights of the reserved candidates and, therefore, the reserved candidates were entitled to the benefit of continuous officiation.

Accordingly, in Ajit Singh (II)³, three points arose for consideration:

- (i) Can the roster point promotees count their seniority in the promoted category from the date of their continuous officiation vis-à-vis general candidates, who were senior to them in the lower category and who were later promoted to the same level?
- (ii) Have Virpal¹ and Ajit Singh (I)² have been correctly decided and has Jagdish Lal²⁰ been correctly decided?
- (iii) Whether the catch-up principles are tenable?

At the outset, this Court stated that it was not concerned with the validity of constitutional amendments and, therefore, it proceeded on the assumption that Article 16(4A) is valid and is not unconstitutional. Basically, the question decided was whether the 'catch-up' principle was tenable in the context of Article 16(4). It was held that the primary purpose of Article 16(4) and Article 16(4A) is to give due representation to certain classes in certain posts keeping in mind Articles 14, 16(1) and 335; that, Articles 14 and 16(1) have prescribed permissive limits to affirmative action by way of reservation under Articles 16(4) and 16(4A) of the Constitution; that, Article 335 is incorporated so that efficiency of administration is not jeopardized and that Articles 14 and 16(1) are closely connected as they deal with individual rights of the persons. They give a positive command to the State that there shall be equality of opportunity of all citizens in public employment. It was further held that Article 16(1) flows from Article 14. It was held that the word 'employment' in Article 16(1) is wide enough to include promotions to posts at the stage of initial level of recruitment. It was observed that Article 16(1) provides to every employee otherwise eligible for promotion fundamental right to be considered for promotion. It was held that equal opportunity means the right to be considered for promotion. The right to be considered for promotion was not a statutory right. It was held that Articles 16(4) and 16(4A) did not confer any fundamental right to reservation. That they are only enabling provisions. Accordingly, in Ajit Singh (II)³, the judgment of this Court in Jagdish Lal²⁰ case was overruled. However, in the context of balancing of fundamental rights under Article 16(1) and the rights of reserved candidate under Articles 16(4) and 16(4A), this Court opined that Article 16(1) deals with a fundamental right whereas Articles 16(4) and 16(4A) are only

enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. As a remedial measure, the Court held that in matters relating to affirmative action by the State, the rights under Articles 14 and 16 are required to be protected and a reasonable balance should be struck so that the affirmative action by the State does not lead to reverse discrimination.

Reading the above judgments, we are of the view that the concept of 'catch-up' rule and 'consequential seniority' are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty etc. It cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that 'equality code' under Article 14, 15 and 16 is violated by deletion of the 'catch-up' rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the 'catch-up' rule nor the concept of 'consequential seniority' are implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan¹.

Before concluding, we may refer to the judgment of this court in M.G. Badappanavar⁶. In that case the facts were as follows. Appellants were general candidates. They contended that when they and the reserved candidates were appointed at Level-1 and junior reserved candidates got promoted earlier on the basis of roster- points to Level-2 and again by way of roster-points to Level-3, and when the senior general candidate got promoted to Level-3, then the general candidate would become senior to the reserved candidate at Level-3. At Level-3, the reserved candidate should have been considered along with the senior general candidate for promotion to Level-4. In support of their contention, appellants relied upon the judgment of the Constitution Bench in Ajit Singh (II)³. The above contentions raised by the appellants were rejected by the tribunal. Therefore, the general candidates came to this Court in appeal. This Court found on facts that the concerned Service Rule did not contemplate computation of seniority in respect of roster promotions. Placing reliance on the judgment of this Court in Ajit Singh (I)² and in Virpal Singh¹, this court held that roster promotions were meant only for the limited purpose of due representation of backward classes at various levels of service and, therefore, such roster promotions did not confer consequential seniority to the roster-point promotee. In Ajit Singh (II)³, the circular which gave seniority to the roster-point promotees was held to be violative of Articles 14 and 16. It was further held in M. G. Badappanavar⁶ that equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution. For this proposition, this Court placed reliance on the judgment in Indra Sawhney⁵ while holding that if creamy layer among backward classes were given some benefits as backward classes, it will amount to equals being treated unequals. Applying the creamy layer test, this Court held that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution and in which event, even Article 16(4A) cannot be of any help to the reserved category candidates. This is the only judgment of this Court delivered by three-Judge bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is part of the basic structure of the Constitution.

Accordingly, the judgment of the tribunal was set aside.

The judgment in the case of M. G. Badappanavar⁶ was mainly based on the judgment in Ajit Singh (I)² which had taken the view that the departmental circular which gave consequential seniority to the 'roster-point promotee', violated Articles 14 and 16 of the Constitution. In none of the above cases, the question of the validity of the constitutional amendments was involved. Ajit Singh (I)², Ajit Singh (II)³ and M. G. Badappanavar⁶ were essentially concerned with the question of 'weightage'. Whether weightage of earlier accelerated promotion with consequential seniority should be given or not to be given are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy and representation in public employment and overall efficiency of services. The above judgments, therefore, did not touch the questions which are involved in the present case.

SCOPE OF THE IMPUGNED AMENDMENTS Before dealing with the scope of the constitutional amendments we need to recap the judgments in Indra Sawhney⁵ and R.K. Sabharwal⁸. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However in R.K. Sabharwal⁸, this court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota-limit has been reached. It was clarified that the judgment in Indra Sawhney⁵ was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensure that the reservation remains within the ceiling-limit of 50%.

In our view, appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling-limit of 50% is not violated. Further, roster has to be post- specific and not vacancy based.

With these introductory facts, we may examine the scope of the impugned constitutional amendments.

The Supreme Court in its judgment dated 16.11.92 in Indra Sawhney⁵ stated that reservation of appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion. Prior to the judgment in Indra Sawhney⁵ reservation in promotion existed. The Government felt that the judgment of this court in Indra Sawhney⁵ adversely affected the interests of SCs and STs in services, as they have not reached the required level. Therefore, the Government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone. We quote hereinbelow Statement of Objects and Reasons with the text of the Constitution (Seventy-Seventh Amendment) Act, 1995 introducing clause (4A) in Article 16 of the Constitution:

"THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995 STATEMENT OF OBJECTS AND REASONS The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th

November, 1992 in the case of Indra Sawhney v. Union of India⁵, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4A) in the said Article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.

2. The Bill seeks to achieve the aforesaid object.

THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995 [Assented on 17th June, 1995, and came into force on 17.6.1995] An Act further to amend the Constitution of India BE it enacted by Parliament in the Forty- sixth Year of the Republic of India as follows:-

1. Short title. - This Act may be called the Constitution (Seventy-seventh Amendment) Act, 1995.

2. Amendment of Article 16. - In Article 16 of the Constitution, after clause (4), the following clause shall be inserted, namely:- "(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

The said clause (4A) was inserted after clause (4) of Article 16 to say that nothing in the said Article shall prevent the State from making any provision for reservation in matters of promotion to any class(s) of posts in the services under the State in favour of SCs and STs which, in the opinion of the States, are not adequately represented in the services under the State.

Clause (4A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4A) of Article 16 emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4A) will be governed by the two compelling reasons "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further in Ajit Singh (II)³, this court has held that apart from 'backwardness' and 'inadequacy of representation' the State shall also

keep in mind 'overall efficiency' (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government by providing for reservation in promotion for SCs and STs.

After the Constitution (Seventy-Seventh Amendment) Act, 1995, this court stepped in to balance the conflicting interests. This was in the case of *Virpal Singh Chauhan*¹ in which it was held that a roster-point promotee getting the benefit of accelerated promotion would not get consequential seniority. As such, consequential seniority constituted additional benefit and, therefore, his seniority will be governed by the panel position. According to the Government, the decisions in *Virpal Singh*¹ and *Ajit Singh (I)*² bringing in the concept of "catch-up" rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade.

In the circumstances, clause (4A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Suffice it to state that, the Constitution (Eighty-Fifth Amendment) Act, 2001 was an extension of clause (4A) of Article 16. Therefore, the Constitution (Seventy-Seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-Fifth Amendment) Act, 2001.

We quote hereinbelow Statement of Objects and Reasons with the text of the Constitution (Eighty-Fifth Amendment) Act, 2001:

"THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001 STATEMENT OF OBJECTS AND REASONS The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. The judgments of the Supreme Court in the case of *Union of India v. Virpal Singh Chauhan* (1995) 6 SCC 684 and *Ajit Singh Januja (No.1) v. State of Punjab* AIR 1996 SC 1189, which led to the issue of the O.M. dated 30th January, 1997, have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the Government servants belonging to Scheduled Castes and Scheduled Tribes.

2. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of O.M. dated 30th January 1997 immediately. Mere withdrawal of the O.M. dated 30th will not meet the desired purpose and review or revision of seniority of the Government servants and grant of consequential benefits to such Government servants will also be necessary. This will require amendment to Article 16(4A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects.

THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001 The following Act of Parliament received the assent of the President on the 4th January, 2002 and is published for general information:-

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty- second Year of the Republic of India as follows:-

1. Short title and commencement.- (1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June 1995.

2. Amendment of Article 16.- In Article 16 of the Constitution, in clause (4A), for the words "in matters of promotion to any class", the words "in matters of promotion, with consequential seniority, to any class" shall be substituted."

Reading the Constitution (Seventy-Seventh Amendment) Act, 1995 with the Constitution (Eighty-Fifth Amendment) Act, 2001, clause (4A) of Article 16 now reads as follows:

"(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State."

The question in the present case concerns the width of the amending powers of the Parliament. The key issue is whether any constitutional limitation mentioned in Article 16(4) and Article 335 stand obliterated by the above constitutional amendments.

In R.K. Sabharwal⁸, the issue was concerning operation of roster system. This court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. It was held that if the roster is prepared on the basis of the cadre strength, that by itself would ensure that the reservation would remain within the ceiling-limit of 50%. In substance, the court said that in the case of hundred-point roster each post gets marked for the category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone (replacement theory).

The question which remained in controversy, however, was concerning the rule of 'carry-forward'. In Indra Sawhney⁵ this court held that the number of vacancies to be filled up on the basis of reservation in a year including the 'carry-forward' reservations should in no case exceed the ceiling-limit of 50%.

However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49% and if the judgment of this court in Indra Sawhney⁵ had to be

applied it became difficult to fill "backlog vacancies". According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling- limit of 50%. Therefore, the Government inserted clause (4B) after clause (4A) in Article 16 vide the Constitution (Eighty-First Amendment) Act, 2000.

By clause (4B) the "carry-forward"/"unfilled vacancies" of a year is kept out and excluded from the overall ceiling-limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-First Amendment) Act, 2000. Quoted hereinbelow is the Statement of Objects and Reasons with the text of the Constitution (Eighty-First Amendment) Act, 2000:

"THE CONSTITUTION (EIGHTY FIRST AMENDMENT) ACT, 2000 (Assented on 9th June, 2000 and came into force 9.6.2000) STATEMENT OF OBJECTS AND REASONS Prior to August 29, 1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non- availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as "Backlog Vacancies". These vacancies were treated as a distinct group and were excluded from the ceiling of fifty per cent reservation. The Supreme Court of India in its judgment in the Indra Sawhney versus Union of India held that the number of vacancies to be filled up on the basis of reservations in a year including carried forward reservations should in no case exceed the limit of fifty per cent. As total reservations in a year for the Scheduled Castes, the Scheduled Tribes and the other Backward Classes combined together had already reached forty-nine and a half per cent and the total number of vacancies to be filled up in a year could not exceed fifty per cent., it became difficult to fill the "Backlog Vacancies" and to hold Special Recruitment Drives. Therefore, to implement the judgment of the Supreme Court, an Official Memorandum dated August 29, 1997 was issued to provide that the fifty per cent limit shall apply to current as well as "Backlog Vacancies" and for discontinuation of the Special Recruitment Drive.

Due to the adverse effect of the aforesaid order dated August 29, 1997, various organisations including the Members of Parliament represented to the central Government for protecting the interest of the Scheduled castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make amendment in the constitution so that the unfilled vacancies of a year, which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) of Article 16 of the Constitution, shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent, reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before august 29, 1997. The Bill seeks to achieve the aforesaid object.

THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT, 2000 (Assented on 9th June, 2000 and came into force 9.6.2000) An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty- first Year of the Republic of India as follows:-

1. Short title: This Act may be called the Constitution (Eighty-first Amendment) Act, 2000.
2. Amendment of Article 16: In Article 16 of the Constitution, after clause (4A), the following clause shall be inserted, namely: - "(4B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R.K. Sabharwal⁸. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies do not arise. Therefore, in effect, Article 16(4B) grants legislative assent to the judgment in R.K. Sabharwal⁸. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.

As stated above, clause (4A) of Article 16 is carved out of clause (4) of Article 16. Clause (4A) provides benefit of reservation in promotion only to SCs and STs. In the case of S. Vinod Kumar and another v. Union of India and others this court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in Indra Sawhney⁵.

By the Constitution (Eighty-Second Amendment) Act, 2000, a proviso was inserted at the end of Article 335 of the Constitution which reads as under: "Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this court in Vinod Kumar²¹ which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4A).

INTRODUCTION OF "TIME" FACTOR IN VIEW OF ARTICLE 16(4B):

As stated above, Article 16(4B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling- limit of 50% on current vacancies continues to remain. In working-out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained. On one hand of the spectrum, we have unfilled vacancies; on the other hand, we have a time-spread over number of years over which unfilled vacancies are sought to be carried-over. These two are alternating factors and, therefore, if the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact-situation. What is stated hereinabove is borne out by Service Rules in some of the States where the carry- over rule does not extend beyond three years.

WHETHER IMPUGNED CONSTITUTIONAL AMENDMENTS VIOLATES THE PRINCIPLE OF BASIC STRUCTURE:

The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is - whether the constitutional limitations on the amending power of the Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the 'width test' and the test of 'identity'. As stated hereinabove, the concept of the 'catch-up' rule and 'consequential seniority' are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism etc. Obliteration of these concepts or insertion of these concepts do not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of backward classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, 'backwardness' and 'inadequacy of representation'. As stated above equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4A) is derived from clause (4) of Article 16. Clause

(4A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is whether the impugned amendments discard the original constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicate that the impugned amendments have been promulgated by the Parliament to overrule the decision of this court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this court is the law of the land. The judgments of this court in *Virpal Singh*¹, *Ajit Singh (I)*², *Ajit Singh (II)*³ and *Indra Sawhney*⁵, were judgments delivered by this court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well-settled that the Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the Rule of Law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on mode of exercise of the power. Though the amending power in Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise. [See: *Kihoto Hollohan v. Zachillhu & Others*].

Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-Second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4A) and Article 16(4B) fall in the pattern of Article 16(4) and as long as the parameters

mentioned in those articles are complied-with by the States, the provision of reservation cannot be faulted. Articles 16(4A) and 16(4B) are classifications within the principle of equality under Article 16(4).

In conclusion, we may quote the words of Rubinfeld:

"ignoring our commitments may make us rationale but not free. It cannot make us maintain our constitutional identity".

ROLE OF ENABLING PROVISIONS IN THE CONTEXT OF ARTICLE 14:

The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [Emphasis added]. Every discretionary power is not necessarily discriminatory. According to the Constitutional Law of India, by H.M. Seervai, 4th Edn. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of 'guided power'. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred would be corrected by the Courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4A) and 16(4B). Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-à-vis efficiency which depends on the fact- situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalizing measures depending upon the fact-situation.

It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for backward classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4A) and 16(4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court

discussed hereinabove. Therefore, there is a basic difference between 'equality in law' and 'equality in fact' (See: 'Affirmative Action' by William Darity). If Articles 16(4A) and 16(4B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4A) and 16(4B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4A) and 16(4B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of 'guided power'. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

APPLICATION OF DOCTRINE OF "GUIDED POWER" ARTICLE 335 :

Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-Second Amendment) Act, 2000, we find that the said proviso has a nexus with Articles 16(4A) and 16(4B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that "efficiency" is variable factor. It is for the concerned State to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.

In conclusion, we reiterate that the object behind the impugned Constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotions subject to the circumstances and the constitutional limitations indicated above.

TESTS TO JUDGE THE VALIDITY OF THE IMPUGNED STATE ACTS:

As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely,

backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.

Are the impugned amendments making an inroad into the balance struck by the judgment of this court in the case of *Indra Sawhney*?

Petitioners submitted that equality has been recognized to be a basic feature of our Constitution. To preserve equality, a balance was struck in *Indra Sawhney* so as to ensure that the basic structure of Articles 14, 15 and 16 remains intact and at the same time social upliftment, as envisaged by the Constitution, stood achieved. In order to balance and structure the equality, a ceiling-limit on reservation was fixed at 50% of the cadre strength, reservation was confined to initial recruitment and was not extended to promotion. Petitioners further submitted that in *Indra Sawhney*, vide para 829 this Court has held that reservation in promotion was not sustainable in principle. Accordingly, petitioners submitted that the impugned constitutional amendments makes a serious inroad into the said balance struck in the case of *Indra Sawhney* which protected equality as a basic feature of our Constitution. We quote hereinbelow paragraph 829 of the majority judgment in the case of *Indra Sawhney* which reads as follows:

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

(emphasis supplied) What are the outer boundaries of the amendment process in the context of Article 16 is the question which needs to be answered. Equality is the basic feature of the Constitution as held in *Indra Sawhney*⁵. The content of Article 14 was originally interpreted by this Court as a concept of equality confined to the aspects of discrimination and classification. It is only after the rulings of this Court in *Maneka Gandhi*¹¹ and *Ajay Hasia and others v. Khalid Mujib Sehravardi and others* , that the content of Article 14 got expanded conceptually so as to comprehend the doctrine of promissory estoppel, non arbitrariness, compliance with rules of natural justice, eschewing irrationality etc. There is a difference between "formal equality" and "egalitarian equality". At one point of time Article 16(4) was read by the Supreme Court as an exception to Article 16(1). That controversy got settled in *Indra Sawhney*⁵. The words "nothing in this Article" in Article 16(4) represents a legal device allowing positive discrimination in favour of a class. Therefore, Article 16(4) relates to "a class apart". Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in matters of employment. Therefore, Article 16(1) and Article 16(4) operate in different fields. Backwardness and inadequacy of representation, therefore, operate as justifications in the sense that the State gets the power to make reservation only if backwardness and inadequacy of representation exist. These factors are not obliterated by the impugned amendments.

The question still remains as to whether any of the constitutional limitations are obliterated by way of the impugned constitutional amendments. By way of the impugned amendments Articles 16(4A) and 16(4B) have been introduced.

In *Indra Sawhney*⁵ the equality which was protected by the rule of 50%, was by balancing the rights of the general category vis-à-vis the rights of BC en bloc consisting of OBC, SC and ST. On the other hand, in the present case the question which we are required to answer is: whether within the egalitarian equality, indicated by Article 16(4), the sub-classification in favour of SC and ST is in principle constitutionally valid. Article 16(4A) is inspired by the observations in *Indra Sawhney*⁵ vide para 802 and 803 in which this Court has unequivocally observed that in order to avoid lumping of OBC, SC and ST which would make OBC take away all the vacancies leaving SC and ST high and dry, the concerned State was entitled to categorise and sub- classify SCs and STs on one hand vis-à-vis OBC on the other hand. We quote hereinbelow paragraphs 802 and 803 of the judgment in *Indra Sawhney*⁵ :

"802. We are of the opinion that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational

groups viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that gold-smiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that gold-smiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State - and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group-A comprises "Aboriginal tribes, Vimukta jatis, Nomadic and semi-nomadic tribes etc.". Group-B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group-C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group-D comprises all other classes/communities/groups, which are not included in groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [1972] 3 S.C.R. 247 at

286. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

(emphasis supplied) "803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, O.B.Cs. will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

(emphasis supplied) Therefore, while judging the width and the ambit of Article 16(4A) we must ascertain whether such sub-classification is permissible under the Constitution. The sub-classification between "OBC" on one hand and "SC and ST" on the other hand is held to be constitutionally permissible in Indra Sawhney⁵. In the said judgment it has been held that the State could make such sub-classification between SCs and STs vis-à-vis OBC. It refers to sub-classification within the egalitarian equality (vide paras 802 and 803). Therefore, Article 16(4A) follows the line suggested by this Court in Indra Sawhney⁵. In Indra Sawhney⁵ on the other hand vide para 829 this Court has struck a balance between formal equality and egalitarian equality by laying down the rule of 50% (ceiling-limit) for the entire BC as "a class apart" vis-à-vis GC. Therefore, in our view, equality as a concept is retained even under Article 16(4A) which is carved out of Article 16(4).

As stated above, Article 14 enables classification. A classification must be founded on intelligible differential which distinguishes those that are grouped together from others. The differential must have a rational relation to the object sought to be achieved by the law under challenge. In *Indra Sawhney*⁵ an opinion was expressed by this Court vide para 80² that there is no constitutional or legal bar to making of classification. Article 16(4B) is also an enabling provision. It seeks to make classification on the basis of the differential between current vacancies and carry-forward vacancies. In the case of Article 16(4B) we must keep in mind that following the judgment in *R.K. Sabharwal*⁸ the concept of post-based roster is introduced. Consequently, specific slots for OBC, SC and ST as well as GC have to be maintained in the roster. For want of candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category. Therefore, by Article 16(4B) a classification is made between current vacancies on one hand and carry-forward/backlog vacancies on the other hand. Article 16(4B) is a direct consequence of the judgment of this court in *R.K. Sabharwal*⁸ by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4A) and 16(4B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4A) and 16(4B) together form part of the same scheme. As stated above, Articles 16(4A) and 16(4B) are both inspired by observations of the Supreme Court in *Indra Sawhney*⁵ and *R.K. Sabharwal*⁸. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4A) and 16(4B). The impugned constitutional amendments, therefore, do not obliterate equality.

The test for judging the width of the power and the test for adjudicating the exercise of power by the concerned State are two different tests which warrant two different judicial approaches. In the present case, as stated above, we are required to test the width of the power under the impugned amendments. Therefore, we have to apply "the width test". In applying "the width test" we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representation. As stated above, these limitations are not obliterated by the impugned amendments. However, the question still remains whether the concerned State has identified and valued the circumstances justifying it to make reservation. This question has to be decided case- wise. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on facts of each case. The judgment in *Indra Sawhney*⁵ does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the concerned State will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/ STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

The constitutional principle of equality is inherent in the Rule of Law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The Rule of Law is satisfied when laws are applied or enforced equally, that is, evenhandedly, free of bias and without irrational distinction. The concept of equality allows

differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case to case basis.

Existence of power cannot be denied on the ground that it is likely to be abused. As against this, it has been held vide para 650 of Kesavananda Bharati¹³ that where the nature of the power granted by the Constitution is in doubt then the Court has to take into account the consequences that might ensue by interpreting the same as an unlimited power. However, in the present case there is neither any dispute about the existence of the power nor is there any dispute about the nature of the power of amendment. The issue involved in the present case is concerning the width of the power. The power to amend is an enumerated power in the Constitution and, therefore, its limitations, if any, must be found in the Constitution itself. The concept of reservation in Article 16(4) is hedged by three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. Reservation is not in issue. What is in issue is the extent of reservation. If the extent of reservation is excessive then it makes an inroad into the principle of equality in Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements.

At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, "formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In Indra Sawhney⁵ all the judges except Pandian, J. held that the "means test" should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In Indra Sawhney⁵ this Court has, therefore, accepted caste as determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in Indra Sawhney⁵. The question as to the "determinant" of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in Indra Sawhney⁵ has evolved numerical benchmarks like ceiling-limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

CONCLUSION:

The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling

factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in *Indra Sawhney*⁵, the concept of post-based Roster with in-built concept of replacement as held in *R.K. Sabharwal*⁸.

We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

Subject to above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001.

We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate bench in accordance with law laid down by us in the present case.

Reference is answered accordingly.

Supreme Court of India

R. K. Sabharwal And Ors vs State Of Punjab And Ors on 10 February, 1995

Equivalent citations: 1995 AIR 1371, 1995 SCC (2) 745

Author: K Singh

Bench: Kuldip Singh (J), Mohan, S. (J), Mukherjee M.K. (J), Hansaria B.L. (J), Majmudar S.B. (J)

PETITIONER:

R. K. SABHARWAL AND ORS.

Vs.

RESPONDENT:

STATE OF PUNJAB AND ORS.

DATE OF JUDGMENT 10/02/1995

BENCH:

KULDIP SINGH (J)

BENCH:

KULDIP SINGH (J)

MOHAN, S. (J)

MUKHERJEE M.K. (J)

HANSARIA B.L. (J)

MAJMUDAR S.B. (J)

CITATION:

1995 AIR 1371

1995 SCC (2) 745

JT 1995 (2) 351

1995 SCALE (1) 685

ACT:

HEADNOTE:

JUDGMENT:

1. The petitioners and respondents 4, 5 and 6 are members of the Punjab Service of Engineers (Class 1) (the Service) in the Irrigation Department of the State of Punjab. The respondents are members of the Scheduled Castes whereas the petitioners belong to the general category. The conditions of service of the members of the Service are governed by the Rules called The Punjab Service of Engineers Class I P.W.D. (I.B.) Rules, 1964 (the Rules). The Punjab Government by the instructions dated May 4, 1974 provided reservations for the Scheduled Castes and Backward Classes in promotions to and within Class I and II services under the State Government. It was laid down under the said instructions that 16 per cent of the posts to be filled by promotion were to be reserved for members of the Scheduled Castes and Backward Classes (14 per cent for the Scheduled Casts and 2 per cent for the Backward Classes) subject to the conditions that the persons to be considered must possess the minimum necessary qualifications and they should have, satisfactory record of

service. The instructions further provided as under:

"(i) In a lot of 100 vacancies occurring from time to time, those falling at serial numbers mentioned below should be treated as reserved for the members of Scheduled Castes; 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87, 91 and so on. Vacancies falling at serial numbers 26 and 76 should be treated as reserved for the members of Backward Classes.

(ii) The reservation prescribed shall be given effect to in accordance with a roster to be maintained in each Department. The roster will be implemented in the form of a running account from year to year."

Rule 9 of the Rules which provides for promotion within the service reads as under "Promotion within service;-

(1) Subject to the provisions of sub-rules 2 and 3 members of the Service shall be eligible for promotion to any of the posts in the Service, namely, Executive Engineers, Superintending Engineers and Chief Engineers: Provided that a Member of the Service in whose case the qualifications mentioned in clause (a) of Rule 6 have been waived, shall not be eligible for promotion to the post of Superintending Engineer or above till he has acquired the necessary qualification.

Explanation:- Once an officer has been appointed a member of the Service, his promotion within it from one rank to an- other shall be regarded as promotion within the same cadre. (2) Promotions shall be made by selection on the basis of merit and suitability in all respects and no member of the Service shall have any claim to such promotion as a matter of right or mere seniority.

(3) A member of the Service shall not be eligible for promotion to the rank of---

(a) Executive Engineer unless he has rendered five years service as an Assistant Executive Engineer; Provided that an officer who has rendered six years or more service as an Assistant Executive Engineer shall unless he is considered unsuitable for promotion, be given preference for such promotion over an eligible Class II Officer;

(b) Superintending Engineer, unless he has rendered seven years service as an Executive Engineer;

(c) Chief Engineer, unless he has rendered three years service as Superintending Engineer;

Provided that, if it appears to be necessary to promote an officer in public interest, the Government may, for reasons to be recorded in writing, either generally for a specified period or in any individual case reduce the period specified in clauses (a), (b) and (c) to such extent as it may deem proper.

It is stated in the writ petition that the petitioners are at serial Nos. 19, 23, 26, 29, 30, 31, 34 and 38 of the seniority list of the Service whereas the respondents are at serial Nos. 46, 140 and 152.

Respondent Rattan Singh was promoted to the rank of Chief Engineer against the post reserved for the Scheduled Castes by superseding 36 senior colleagues including the petitioners. Similarly, respondents Surjit Singh and Om Prakash were promoted as Superintending Engineers against the reserve vacancies by superseding 82 and 87 senior colleagues respectively. According to the petitioners at the time of promotion of these respondents the petitioners were already working as Superintending Engineers for several years. It is further averred in the petition that respondents 4, 5 and 6 were in fact working as Executive Engineers when the petitioners were holding the posts of Superintending Engineers.

2. On the above facts the petitioners have challenged the reservation-policy on several grounds but Mr. Harish Salve, learned counsel for the petitioners, has confined the arguments to the following two points:

(1) The object of reservation is to provide adequate representation to the Scheduled Castes/Tribes and Backward classes in services and as such any mechanism provided to achieve that end must have nexus to the object sought to be achieved. The precise argument is that for working out the percentage of reservation the promotees/appointees belonging to the Scheduled Castes and Backward Classes whether appointed against the general category posts or against the reserve posts are to be counted. In other words if more than 14% of the Scheduled Castes candidates are appointed/promoted in a cadre on their own merit/seniority by competing with the general category candidates then the purpose of reservation in the said cadre having been achieved the Government instructions providing reservations would become inoperative.

3. Once the posts earmarked for the Scheduled Castes/Tribes and Backward Classes on the roster are filled the reservation is complete. Roster cannot operate any further and it should be stopped. Any post falling vacant, in a cadre thereafter, is to be filled from the category - reserve or general - due to retirement etc. of whose member of the post fell vacant.

4. Adverting to the first point Mr. Harish Salve and Mr. Rajiv Dhawan, learned counsel representing the petitioners, have contended that the total number of promotees/appointees belonging to the reserve categories in a cadre are to be counted to work-out the prescribed percentage of reservation. According to the learned counsel the reserve categories can take advantage of the reservation made in their favour till their representation in the Service -- including those appointed against general category posts -- reaches the prescribed percentage. For working out the percentage the promotees/appointees belonging to reserve categories in the Service, whether on the reserve posts or general category posts, are to be counted.

Support is sought from the judgment of the Punjab and Haryana High Court in *Joginder Singh Sethi and others v. Punjab Government and other* 1982 (2) SLR 307. In the said case 22% reservation was provided for the members of Scheduled Castes/Tribes and Backward Classes. In the cadre strength of 202 posts the Scheduled Castes candidates were entitled to 42 posts. There were already 47 members of the said category in the cadre but out of them 10 were promoted on the basis of seniority-cum-merit against the general category posts. There being only 37 persons who had been promoted against the reserved posts 4 more Scheduled Castes were sought to be promoted against

the reserve vacancies. The High Court quashed the promotion on the ground that the cadre was already having more than 22% persons from the reserve categories. We are of the view that the High Court in Joginder Singh Sethi's case fell into a patent error. The said case was subsequently considered by a Full Bench of Punjab & Haryana High Court in Jaswant Singh v. Secretary to Government of Punjab, Education Department [1989 (4) Services Law Reporter 257]. The Full Bench did not agree with the ratio in Joginder Singh Sethi's case and reversed the same.

5. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any backward class of citizen which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular backward class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a backward class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/ Rules providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number of appointment/promotees belonging to the backward classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same.

6. We see no force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts.....are reserved for members of the Scheduled Caste and Backward Classes. In a lot of 100 posts those falling at serial numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in

the roster for-the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Caste. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards upto 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed per-centage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State services and is consistent with the demographic estimate based on the proportion worked out in relation to their populations. The numerical quota of posts is not shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/ promotees occupy the posts meant for them in the roster. The operation of the roster and the running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at Roster - points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be short-fall nor excess in the percentage of reservation.

7. The expressions "posts" and "vacancies", often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre - strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

8. When all the roster-points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong. Jeevan Reddy, J. speaking for the majority in *Indra Sawhney vs. Union of India* (AIR 1993 SC 477) observed as under:-

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

9. The quoted observations clearly illustrate that the rule of 50 % a year as unit and not entire strength of the cadre has been adopted to protect the rights of the general category under clause (1) of Article 16 of the Constitution of India. These observations in Indra Sawhney's case, are only in relation to posts which are filled initially in a cadre. 'The operation of a roster, for filling the cadre strength, by itself ensures that the reservation remains within the 50 % limit. Indra Sawhney's case is not the authority for the point that the roster survives after the cadre-strength is full and the percentage of reservation is achieved.

10. A Division Bench of the Allahabad High Court in J.C. Malik and others v. Union of India and others (1978)SLR 844) interpreted Railway Board's circular dated April 20, 1970 providing 15% reservations for the Scheduled Casts. The High Court held that the percentage of reservation is in respect of the appointment to the posts in a cadre. On the basis of the material placed before the High Court it reached the conclusion that if the reservation is permitted in the vacancies after all the posts in cadre are filled then serious consequences would ensue and the general category is likely to suffer considerably. We see no infirmity in the view taken by the High Court.

11. We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster, 14 posts at various roster points are filled from amongst the scheduled Casts/ Scheduled Tribes candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by December 31, 1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire. Again in the 1996, 25 more persons belonging to the general category persons (out of the

84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Sched-

uled Casts and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are filled by the same category of persons whose retirement etc. caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the event of non-availability of a reserve candidate at the roster-point it Would be open to the State Government to carry forward the point in a just and fair manner.

12. We, therefore, find considerable force in the second point raised by the learned counsel for the petitioners. We, however, direct that the interpretation given by us to the working of the roster and our findings on this point shall be operative prospectively.

13. The writ petition is, therefore, disposed of in the above terms. No costs.

Supreme Court of India

Union Of India And Ors. Etc vs Virpal Singh Chauhan Etc on 10 October, 1995

Equivalent citations: 1996 AIR 448, 1995 SCC (6) 684

Author: B Jeevan Reddy

Bench: Jeevan Reddy, B.P. (J)

PETITIONER:

UNION OF INDIA AND ORS. ETC.

Vs.

RESPONDENT:

VIRPAL SINGH CHAUHAN ETC.

DATE OF JUDGMENT 10/10/1995

BENCH:

JEEVAN REDDY, B.P. (J)

BENCH:

JEEVAN REDDY, B.P. (J)

AGRAWAL, S.C. (J)

CITATION:

1996 AIR 448

1995 SCC (6) 684

JT 1995 (7) 231

1995 SCALE (5) 648

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T B.P. JEEVAN REDDY, J.

C.A. NOS.9272-73 & 9277 1995 (ARISING OUT OF S.L.P. (C) NOS.6468 OF 1987, 1682/88, AND 8111/94), C.A. NO.2261/87, 5044/89, 4436/90, 18/90, W.P. (C) 1208/87 AND 565/93. [Main Opinion] Leave granted in Special Leave Petitions.

1. These appeals/writ petitions raise an important but difficult question concerning the nature of rule or reservation in promotions obtaining in the Railway service and the rule concerning the determination of seniority between general candidates and candidates belonging to reserved classes in the promoted category. The issue is best illustrated by taking the facts in the first of these matters, viz., Union of India and Ors. v. Virpal Singh Chauhan - civil appeal No.9272/95 arising from Special Leave Petition (C) No.6468 of 1987. The appeal is preferred against the judgment of the Central Administrative Tribunal (Allahabad Bench) disposing of Original Application No.647 of 1986 with

certain directions. [It was originally filed as a writ petition in the Allahabad High Court which, on the constitution of the Central Administrative Tribunal (Allahabad Bench), was transferred to the Tribunal.] It was filed by, what may be called for the sake of convenience, employees not belonging to any of the reserved categories (hereinafter referred to as "general candidates" - which means open competition candidates). The railway Administration as well as the employees belonging to reserved categories, i.e., Scheduled Castes and Scheduled Tribes were impleaded as respondents. The writ petition/original application came to be filed in the following circumstances:

Among the category of Guards in the Railway service, there are four categories, viz., Grade 'C' Grade 'B' Grade 'A' and Grade 'A'special. The initial recruitment is made to Grade 'C' and they have to ascend rung after rung to go upwards. The promotion from one grade to another in this category is by seniority-cum-suitability. In other words, they are "non-selection posts". The rule of reservation is applied not only at the initial stage of appointment to Grade 'C' but at every stage of promotion. The percentage reserved for Scheduled Castes is fifteen percent and for Scheduled Tribes 7.5%, a total of 22.5 percent. To give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for Scheduled Castes and Scheduled Tribes respectively, commensurate with the percentage of reservation in their favour. For Scheduled Castes candidates, the places reserved in the roster were: 1, 8, 14, 22, 28 and 36 and in the case of Scheduled Tribes candidates, they were: 4, 17 and 31. Subsequently, a hundred-point roster has been prepared, again reflecting the aforesaid percentages.

2. In the year 1986, the position was that both the petitioners in the original application (general candidates) and the party-respondents in the said original application (members of Scheduled Castes and Scheduled Tribes) were in the grade of Guards Grade 'A' in the Northern Railway. On August 1, 1986, the Chief Controller, Tundla passed orders promoting certain general candidates on ad hoc basis to Grade 'A' special. Within less than three months, however, they were sought to be reverted and in their place, members of Scheduled Castes/Scheduled Tribes were sought to be promoted. Compalining that such a course of action is illegal, arbitrary and unconstitutional, the general candidates approached the High Court, which petition, as stated above, was transferred to the Tribunal. The general candidates asked for three reliefs, viz., (a) to restrain the Railway authorities from filling up the posts in the higher grades in the category of Guards by applying the rule of reservation; (b) to restrain the Railway Administration from acting upon the illegal seniority list prepared by them; and (c) to declare that the petitioners (general candidates) are entitled to be promoted and confirmed in Guard Grade 'A' special on the strength of their seniority earlier to the reserved category employees. Their contention, in short, was (1) that once the quota prescribed for a reserved category is satisfied, the rule of reservation - or the forty-point roster prepared to give effect to the said rule - cannot be applied or followed any longer and (2) that the forty-point roster is prepared only to give effect to the rule of reservation. It may provide for accelerated promotion but it cannot give seniority also to a reserved category candidate in the promoted category. According to them, the seniority in Guard Grade 'C' should govern and should be reflected in all subsequent grades notwithstanding the earlier promotion of the members of the reserved categories. Their case was that even if a reserved category member 'X' is promoted from Grade 'C' to Grade 'B' earlier than his senior 'Y' (general candidate), the position should be that when the general candidate also gets promoted later to Grade 'B' which means that in Grade 'B', 'Y' again becomes senior to 'X'.

They submitted that this should be the rule to be followed to ensure that command of Articles 14 and 16 of the Constitution of India prevails. They relied upon two decisions of the Allahabad High Court and another decision of Madhya Pradesh in support of their contention. They also relied upon certain circulars of the Railway Board in this behalf.

3. The case of the Railway Administration (Respondent Nos.1 to 4 in the original application) was that the Administration is maintaining separate seniority lists for each of the grades in the category of Guards according to the policy in vogue. The ad hoc promotions of general candidates ordered on August 1, 1986 were irregular inasmuch as the seniors in the category of Grade 'A' Guards were ignored and juniors promoted by the Chief Controller, Tundla. The Chief Controller, Tundla was not competent to order the said ad hoc promotions. The promotions ordered later of Scheduled Castes/Scheduled Tribes candidates is strictly in accordance with the seniority position in Grade 'A' and is unobjectionable. The Administration submitted that seniority is determined on the basis of the date of promotion and since promotion effected applying the forty-point roster cannot be said to be an ad hoc promotion, a Scheduled Caste/Scheduled Tribe candidate promoted earlier to a particular grade becomes senior to another candidate, general or otherwise, who is promoted to that grade later. In short, according to them, the date of promotion to a particular grade determines the seniority in that grade.

4. The reserved candidates (respondents in the original application) supported the stand of the Administration. They submitted that the seniority list pertaining to Guards Grade 'C' is not relevant and cannot be followed in the matter of promotion to Grade 'A' special from Grade 'A'. For the purpose of promotion to Grade-a special, the seniority list pertaining to Grade 'A' should be followed and since in that grade, the Scheduled Castes/Scheduled Tribes candidates were seniors, they were entitled to be promoted to Grade 'A' Special earlier than their juniors in that seniority list. They submitted that the seniority in a grade should be determined according to the date of promotion/appointment to that grade and not in any other manner. They submitted that inasmuch as in the higher grades, the representation of Scheduled Castes/Scheduled Tribes members was quite inadequate, the Scheduled Castes/Scheduled Tribes candidates obtained rapid promotions from one grade to another but it is neither contrary to the rules nor is it inconsistent with Articles 16 and 14. In fact, the very rule of reservation in promotions is meant to increase the representation of Scheduled Castes/Scheduled Tribes candidates in the higher echelons of services quickly. No exception can be taken to the said rule, they submitted.

5. Since the Tribunal has strongly relied upon two decisions of the Allahabad High Court and a decision of the Madhya Pradesh High Court, it would be appropriate to refer to their ratio briefly.

6. In Civil Writ Petition No.1809 of 1972, J.C. Mallik v. Union of India, the Allahabad High Court held that the rule of reservation or the forty-point roster, as the case may be, cannot be followed and applied once the representation of Scheduled Castes/Scheduled Tribes in a particular grade, cadre or service, reaches the prescribed level of percentage. In other words, once the quota of 22 1/2% in favour of Scheduled Castes/Scheduled Tribes is satisfied, the rule of reservation/forty-point roster can no longer be followed and applied. It may be mentioned that this decision has since been referred with approval in the Constitution Bench decision in R.K. Sabharwal v. State of Punjab (1995

(2) S.C.C.745).

7. The other decision of the Allahabad High Court is in Second Appeal No.2745 of 1983 arising from Suit No.308 of 1981, M.P. Dwivedi v. Union of India & Ors. The learned District Judge, whose decision was under appeal in the said second appeal, had decreed the suit filed by the general candidates in the following words: "The defendants- appellants, their agents and servnts are restrained by means of permanent injunction from filling up the posts of higher grade in the category of Guards by way of reservation in favour of Scheduled Castes and Scheduled Tribes candidates in excess of fixed by Railway Board. Their claim for declaration to the effect that they are entitled to be promoted to the higher grades in the category of Guards on the strength of their seniority list prepared by the defendant for Guards Grade-C on their initial grades is also decreed". When the matter came to the High Court, the learned Single Judge, who disposed of the second appeal, held:

"(A)fter having considered the entire position I am of the opinion that in the present case promotion from grade 'A' to 'A' Special cannot be made on the basis of reservation so long as Guards belonging to Scheduled Castes or Scheduled Tribes class in grade 1A' Special are in excess of the percentage reserved for them. The position, however, will always remain fluctuating and will have to be reviewed by the authorities from time to time. But the right of Scheduled Castes and Scheduled Tribes candidates to promotion merely on the basis or their seniority-cum- suitability without any reference to reservation will not be barred. As and when percentage of Scheduled Castes and Scheduled Tribes guards in grade Scpecial goes down below the requisite percentage their right to promotion on the basis of reservation will revive. Subject to this modification the decree for injunction passed by the Court below is confirmed and the appeals are dismissed."

8. The judgment of the Madhya Pradesh High Court is in G.C. Jain v. Divisional Rail Manager, Central Railway (reported in 1986 (1) S.L.R.588). The passage relied upon by the Tribunal reads thus:

"Those SC & ST candidates who have come or been promoted due to reservation quota, having already jumped the queue, cannot be permitted to compete with general candidates for further promotion. They are a special class by themselves and they have only to go to the reserve quota for further promotion. If the reserve quota is already full in the next grade, the SC & ST candidates just below that grade in the reserve quota will have to wait till vacancy occurs in the higher grade in the reserve quota. However, we want to make it clear that this will not apply to such SC & ST candidates who on their own in competition with the general candidates have attained their present position and not due to reservation, they are entitled to compete further with the general candidates and they will not be affected for promotion in the general quota even if the reserved quota is full in the next higher grade".

9. On the basis of the aforesaid decisions and certain circulars of the Railway Board, which will be referred at a later stage, the Tribunal laid down the following principles in Para-26 of its judgment. (We have split up the paragraph into several sub-paras to bring out the several principles distinctly):

"26. To clarify the position further we will enunciate the principles of determining seniority in situations as are under dispute here.

The basic seniority in grade `C' will be the quiding seniority list for the cadre of quards.

Reservations in promotions would be made against posts in the grades and not against vacancies.

Persons who are promoted by virtue of the application of roster would be given accelerated promotion but not the seniority.

The seniority in a particular grde amongst the incumbents available for promotion to the next grade will be recast each time new incumbents enter from the lower grade on the basis of the initial grade `C' Guard who gets promoted to grade `B' or from grade `B' to grade `A' and so on will find his position amongst the incumbents of that grade on the basis of the original grade `C' seniority.

Such persons as are superseded for any reasons other than on account of reservation will be excluded. A person superseded on account of a punishment or unfitness will count his seniority on the revised basis and not on original grade `C' seniority.

The reserved community candidates who are senior not by virtue of reservations but by the position in grade `C' selections which the grade `C' seniority list will automatically take care of, will not wait for reservation percentage to be satisfied for their promotion. They will get promoted in their normal turn irrespective of the percentage of reserved community candidates in the higher grade. Others who get promoted as a result of reservation by jumping the queue will wait for their turn.

Reservation will again have to be applied on depletion of the reservation quota in the higher grade to make good the shortfalls."

10. The Tribunal directed that a fresh seniority list be drawn in the light of the principles enunciated by it in Para-26 and promotions made on that basis. The Tribunal rejected the contention of the general candidates that "no promotions at all be made for reserved community candidates because quota is full". Similarly, it rejected the contention of the general candidates (petitioners in the original applaication) that all promotions in the higher grades shall be made on the basis of the seniority list pertaining to Grade `C' alone. It held that the seniority list will be separately prepared for each grade in accordance with the principles enunciated by it and that the list must be updated every time there is promotion to that category. It clarified that a reserved community candidate who

gets promotion on his own merit and not on the basis of rule of reservation-cum-forty-point roster will be entitled to be promoted irrespective of the quota position. But those reserved community candidates who obtained promotion by jumping the queue on the basis of rule of reservation will get the promotion on the basis of the revised seniority list to be prepared in accordance with the directions contained in Para-26.

11. The Indian Railway Establishment Manual, Volume-I, contains instructions regulating inter alia seniority of non-gazetted Railway servants. They are contained in Chapter-III. Para 306 says, "candidates selected for appointment at an earlier selection shall be senior to those selected later irrespective of the dates of posting except in the case covered by paragraph 305 above". Para 309 reads: "SENIORITY ON PROMOTION.-- Paragraph 306 above applies equally to seniority in promotion vacancies in one and the same category due allowance being made for delay, if any, in joining the new posts in the exigencies of service." Para 314 says that subject to Paragraphs 302 to 306, "when the dates of appointment to the grade are the same, the date of entry into the grade next below it shall determine seniority". Para 319 deals with seniority on promotion to non-selection posts. This paragraph states that "promotion to non-selection posts shall be on the basis of seniority- cum-suitability, suitability being judged by the authority competent to fill the post, by oral and/or written test or a departmental examination or a trade test or by scrutiny of record of service as considered necessary." It further says that "a railway servant, once promoted in his turn after being found suitable against a vacancy, which is non- fortuitous, should be considered as senior in that grade to all others who are subsequently promoted after being found suitable".

12. So far as the rule of reservation is considered, it has been made applicable to Railway service by orders issued by the Railway Board from time to time pursuant to and in obedience to the policy decisions of the Ministry of Home Affairs. The decision of this Court in *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India* (1981 (1) S.C.C.264) refers to the several orders issued from time to time in this behalf. They are also found at Pages 4 to 6 (Chapter-I) and Pages 59 to 89 (Chapter-III) of the Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Railway Services (Third Edition-1985). We do not think it necessary to refer to them in this judgment since we are concerned herein not with the validity of the rule of reservation but with its nature and its effect upon the question of seniority. We shall, therefore, refer to the Railway Board's circulars alone relevant on this aspect. Here too, we will refer first to orders applicable to non- selection posts. Railway Board's letter dated 13th August, 1959 is of a general nature. It says that "as a general rule the seniormost candidate should be promoted to a higher non- selection post, subject to his suitability. Once promoted against a vacancy which is non-fortuitous, he should be considered as senior in the grade to all others who are subsequently promoted". [Printed at Page 507 in Chapter-XII of the Brochure aforesaid]*. The Railway Board's letter dated August 31, 1982 (at Page 512 - Chapter XII of the Brochure) deals with the subject "Reservation for Scheduled Castes and Scheduled Tribes in promotion in Group 'D' and 'C' (Class IV and III) on the basis of seniority-cum- suitability". Para-4 of the letter reads:

"Against the above background, the matter has been reviewed by the Board.

It has been decided that posting of Scheduled Caste/Scheduled Tribe candidates on promotions in non- selection posts should also be done as per the reserved points on the roster subject, however, to the condition that seniority of the Scheduled Caste/Scheduled Tribe candidates in comparison to other candidates will continue to be governed by the panel position in the case of categories where training is not provided and in accordance with the merit position in the examination where training is provided."

(Emphasis added)

* The several circulars and orders issued by the Railway Board from time to time are arranged chapter-wise in the said Brochure. Chapter-V deals with Rosters, Chapter-IX with promotion to non-selection posts and Chapter-XII with confirmation and seniority. The Brochure is published by the Government of India, Ministry of Railways (Railway Board), New Delhi.

13. It is evident that this letter is speaking of the seniority position in the initial entry category/grade. It says that while posting shall be done as per roster points, seniority shall continue to be governed by the ranking given in the selection list/panel. This clearly brings out the departure being made from the normal principle that the date of entry in a category/grade determines the seniority.

14. Indeed, the Railway Board's letter dated January 19, 1972 (Pages 194-195 - Chapter-VIII dealing with promotion to selection posts - of the Brochure) shows that even in the case of promotions made on the basis of merit, the same principle applies.

15. The Railway Board's letter dated October 20, 1960 referred to in the judgment of Madhya Pradesh High Court in G.C. Jain says, "seniority of SC/ST employees will be determined under the normal rules. The reservation roster is considered only a machinery to ensure the prescribed percentage of reservation for SC/ST employees and should not be related to the question of seniority and confirmation. If any of the SC/ST employee is confirmed in the post by virtue of roster, such confirmation will not give them any benefit in respect of seniority". Again, the very same idea stated clearly.

16. At Page 503 of the Brochure, in Chapter-XXII dealing with confirmation and seniority, Railway Board's letter dated February 11, 1972 is extracted, the relevant portion whereof reads:

"Sub: Reservation for Scheduled Castes and Scheduled Tribes-- Application of roster both at the time of initial recruitment and confirmation. Reference Board's letter No.E(SCT) 62CM15/7 dated 20th April 1963 which provides that the reservation roster is to be applied only at the time of initial recruitment and that confirmation should be made in the order of seniority which in the case of non- trained categories is determined on the basis of the position in the panel supplied by the Railway

Service Commission and in the case of trainee categories on the basis of the merit position in the examination.

2. The Board after careful consideration have decided that in the posts filled by direct recruitment on or after the date of issue of this letter, reservation may be made for Scheduled Castes and Scheduled Tribes both at the time of initial appointment on temporary basis as well as at the time of confirmation. In posts filled by promotion, however, no reservation is admissible at the stage of confirmation of promotees and the existing procedure of confirming employees in order of their panel position may continue." (Emphasis added)

17. Again at Page 508, extracts of Railway Board's letter dated January 19, 1972 are set out, which read:

"3. The seniority of candidates belonging to Scheduled Castes and Scheduled Tribes vis-a-vis others will continue to be determined as at present, i.e., according to the panel position in the case of categories where training is not provided and in accordance with the merit position in the examination where training is provided."

And finally at Page 512, the circular/letter of the Railway Board dated August 31, 1982 is set out, which has already been extracted hereinbefore.

18. Pausing here for a moment, we must explain what does panel mean and signify in the case of promotions. Though we enquired repeatedly, this aspect could not be clarified by the learned Additional Solicitor General. In particular, we wanted to know whether a panel is prepared only in the case of selection posts or is it also prepared in the case of non-selection posts. The several instructions in Indian Railway Establishment Manual are also not helpful on this aspect. We are, therefore, left to interpret the expression ourselves. Having regard to the fact that in all the above circulars/letters, the expression "panel" has been used to denote a merit list or select list, as it may be called, we think it reasonable to understand as a panel which is prepared in the case of selection posts only. In the case of non-selection posts, there is no question of such a panel. In their case, the senior is promoted automatically unless he is found to be unsuitable to hold the promotion post. No panel, i.e., merit list or select list is called for in the case of non-selection posts. May be, ultimately, a list of persons to be promoted is prepared but that is neither a merit list, nor a select list.

19. Sri Altaf Ahmed, learned Additional Solicitor General questioned the correctness and validity of the principles enunciated by the Tribunal in Para-26 of its judgment. He submitted that according to the Indian Railway Establishment Manual, seniority is determined by the date of promotion/appointment to the concerned grade and that the said principle cannot be altered or departed from in the name of ensuring equality. Once the rule of reservation is remembered that in the higher echelons of administration, representation of Scheduled Castes/Scheduled Tribes has been inadequate all these years, there is nothing surprising if the members of Scheduled Castes/Scheduled Tribes get promotions sooner and earlier than the general candidates. This is the natural consequence of applying the rule of reservation in promotions - and not an unintended one.

The said consequence cannot, therefore, be a basis for evolving a rule which partially off-sets the very purpose and meaning of the rule of reservation. Sri Altaf Ahmed further submitted that effecting promotions in accordance with the roster vacancies are not and cannot be called "fortuitous promotions". They are regular vacancies and promotion to them is a regular promotion. He relied upon the decision of the Central Administrative Tribunal in Durga Charan Halder v. Union of India (Original Application No.854 of 1990) wherein it has been held that the date of promotion, effected following the forty-point roster/hundred-point roster, is determinative of seniority. He submitted that the decision of the Central Administrative Tribunal (Patna Bench) to the contrary is the subject matter of appeal in this batch. The Patna Tribunal has followed the decision of the Allahabad Tribunal in Virpal Singh Chauhan.

20. Sri Rajeev Dhawan, learned counsel appearing for the respondents-general candidates, put forward the following submissions while opposing the contentions of the learned Additional Solicitor General:

(i) Article 16(4) of the Constitution enables the State to define the extent and nature of the benefits to be extended to the backward classes. It is not as if there is only one particular method of providing reservations under the said clause.

(ii) The purpose behind Article 16(4) is to ensure adequate representation to backward classes in the administrative apparatus of the State. The purpose of Article 16(4) is only to ensure adequate representation and not to confer additional benefits - other than those which logically flow from the rule of reservation. As soon as adequate representation is achieved, the rule of reservation must be kept in abeyance and if there is a roster the application of the roster must be stopped.

(iii) A harmonious construction of clauses (4) and (1) of Article 16 - both of which are indeed facets of the very same principle of equality - implies that while the members of reserved categories will be entitled to equal treatment in all matters relating to service conditions, they cannot claim accelerated seniority in addition to accelerated promotion. If this principle is not recognised, it would result in the reserved category members stealing an additional march over the general candidates which defeats the guarantee of equality extended by Article 16(1) to general candidates. In other words, giving accelerated seniority in addition to accelerated promotion amounts to conferring double benefit upon the members of reserved category and is violative of rule of equality in Article 16(1).

(iv) The command of Article 335 of the Constitution shall also have to be kept in mind in this behalf. Accelerated promotion-cum-accelerated seniority is destructive of the efficiency of administration inasmuch as by this means the higher echelons of administration come to be occupied almost entirely by members of reserved categories - at any rate, far beyond the percentage of reservation prescribed for them.

(v) The decisions of this Court clearly establish the distinction between promotion and seniority. It would be too simplistic to say that seniority automatically follows the promotion.

(vi) A candidate belonging to reserved category appointed/promoted on the basis of rule of reservation should not be held entitled to compete for a general vacancy in the roster. They should be confined to reserved vacancies alone. Non-observance of this rule has resulted in a situation where in the higher grades of Railway Guards the representation of Scheduled Castes/Scheduled Tribes has risen upto seventy percent (in the case of Guard Super Grade) and forty percent (in the case of Guard Grade `A' Special) instead of 22.5 percent. This anomaly cannot be allowed to occur.

21. Sri K.B. Rohtagi, learned counsel appearing for the respondents in Civil Appeal No.2261 of 1987 (for Guards belonging to Scheduled Castes/Scheduled Tribes categories) supported the contentions of the learned Additional Solicitor General.

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22. Clause (4) of Article 16 of the Constitution enables 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." In *Indra Sawhney v. Union of India* (1992 Suppl.(III) S.C.C.217), it has been held by the majority (in the opinion delivered by one of us, B.P. Jeevan Reddy, J.):

"The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression `reservation'. Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are any provision for the reservation of appointments or posts'. The question is whether the said words contemplate only one form of provision namely reservation simpliciter, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway administration and noticed in *Karamchari Sangh* (1981 (1) S.C.C.246) are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour. The other type of measure is the one in *Thomas* (1976 (2) S.C.C.310). There was no provision for reservation in favour of Scheduled Castes/Scheduled Tribes in the matter of promotion to the category of Upper Division Clerks. Certain tests were required to be passed before a Lower Division Clerk could be promoted as Upper Division Clerk. A large number of Lower Division clerks belonging to SC/ST were not able to pass those tests, with the result they were stagnating in the category of LDCs. Rule 13-AA was accordingly made empowering

the Government to grant exemption to members SC/ST from passing those tests and the government did exempt them, not absolutely, but only for a limited period. This provision for exemption was a lesser form of special treatment than reservation. There is no reason why such a special provision should not be held to be included within the larger concept of reservation."

23. This statement of law makes it clear that there is no uniform or prescribed method of providing reservation. The extent and nature of reservation is a matter for the State to decide having regard to the facts and requirements of each case. Such a situation was indeed dealt with in *National Federation of State Bank of India v. Union of India & Ors.* (1995 (3) S.C.C. 432) [rendered by one of us, B.P. Jeevan Reddy, J. on behalf of the Bench which included R.M. Sahai and S.C. Sen, JJ.]. In the case of service under Public Sector Banking Institutions, while reservation in promotions was provided in the case of promotion from Class- IV to Class-III, Class-III to Class-II and from Class-II to Class-I, no such reservation was provided so far as promotions within Class-I were concerned. Only a concession (set out in the judgment) was provided in favour of Scheduled Castes/Scheduled Tribes candidates with a view to enable them to obtain promotions within Class-I which they may not have obtained otherwise. It was held by this Court that such a concession can also be provided under Article 16(4). In short, it is open to the State, if it is so advised, to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the State to so provide. The only question is whether it is so provided in the instant case?

24. It is the common case of the parties before us that the rule of reservation in the Railway services - to be more precise to the category of Railway Guards, whether in the matter of initial appointment or in the matter of promotion, from one grade to another, is provided by the circulars/letters of the Railway Board. These circulars/letters have been issued by the Railway Board in exercise of the power conferred upon it by Rule 123 of the Statutory Rules framed by the President of India. We have referred to the circulars/letters of the Railway Board hereinbefore. In the circular/letter dated August 31, 1982 which deals with the subject of "Reservation for Scheduled Castes and Scheduled Tribes in promotion in Group 'D' and 'C' (Class IV and III) on the basis of seniority-cum-suitability" it is specifically ordered that while "posting of Scheduled Caste/Scheduled Tribe candidates on promotions in non-selection posts should also be done as per the reserved points on the roster", such promotion shall be "subject to the condition that seniority of the Scheduled Caste/Scheduled Tribe candidates in comparison to other candidates will continue to be governed by the panel position in the case of categories where training is not provided and in accordance with the merit position in the examination where training is provided". So far as the several grades among Railway Guards are concerned, the relevant service conditions do not provide for any training followed by examination on promotion from one grade to another. Hence, the seniority between the reserved category candidates and general candidates in the promoted category shall

continue to be governed by their panel position. We have discussed hereinbefore the meaning of the expression "panel" and held that in case of non-selection posts, no "panel" is prepared or is necessary to be prepared. If so, the question arises, what did the circular/letter dated August 31, 1982 mean when it spoke on seniority being governed by the panel position? In our opinion, it should mean the panel prepared by the selecting authority at the time of selection for Grade 'C'. It is the seniority in this panel which must be reflected in each of the higher grade. This means that while the rule of reservation gives accelerated promotion, it does not give the accelerated - or what may be called, the consequential - seniority. There is, however, one situation where this rule may not have any practical relevance. In a given case, it may happen that by the time the senior general candidate gets promoted to the higher grade, the junior reserved category candidate (who was promoted to the said higher grade earlier) may get promoted to yet higher grade. In other words, by the time the senior general category candidate enters, say, Grade 'B', his junior Scheduled Caste/Scheduled Tribe candidate is promoted to Grade 'A'. It is obvious that in such a case, the rule evolved in the aforesaid circulars does not avail the senior general candidate for there can be no question of any seniority as between, say, a person in 'B' grade and a person in 'A' grade.

25. Now let us see how does the above principle operate in practice. Selection is made for direct recruitment to Grade 'C' Guards. A panel is prepared by the selecting authority on the basis of and in the order of merit. Appointments have to be made from out of this list/panel. But appointment orders will not be issued in the order in which the candidates are arranged in this select list/panel; they will be issued following the roster. Suppose the forty-point roster is being operated afresh, then the first vacancy in the roster would go to a Scheduled Caste candidate though he may be down below in the select list/panel. The candidate at Sl. No.1 in the said select list - a general candidate - will be appointed in the second vacancy. But once appointed, the general candidate (at Sl. No.1 in the select list) will rank senior to the Scheduled Caste candidate though he (general candidate) is appointed subsequent to the Scheduled Caste candidate. Now take the case of promotions (based on seniority-cum-suitability, i.e., non-selection posts) to Grade 'B'. Roster applies even to promotions to Grade 'B'. Again assume that the forty-point roster is opening now in Grade 'B'. The first vacancy has again got to go to a Scheduled Caste candidate though he may not be the senior-most in Grade 'C'. The senior-most candidate in Grade 'C' (the general candidate, who was at Sl. No.1 in the select list/panel and who regained his seniority on appointment to Grade 'C' as aforesaid) will be promoted in the next vacancy. But once promoted, the general candidate again becomes senior to the Scheduled Caste candidate though promoted subsequent to the Scheduled Caste candidate. And so on and so forth. It is in this manner that the rule of reservation (and the roster) merely enables a reserved category candidate to obtain an appointment or promotion, as the case may be - which he may not have obtained otherwise or would not have obtained at the time he is now getting - but it does not give him the seniority. In this sense, the rule confers a limited benefit - a qualified benefit. We have already stated that such a rule of reservation does not fall foul of Article 16(4).

26. We are of the opinion that the aforesaid circulars/letters providing for reservation in favour of Scheduled Castes/Scheduled Tribes candidates, rosters and their operation and on the subject of seniority as between general candidates and reserved category candidates, being in the nature of special rules prevail over the general instructions contained in Volume-I of the Indian Railway Establishment Manual including those contained in Paras 306, 309 and 319 et al. Accordingly, we

agree with the conclusion of the Tribunal in the order under appeal (Virpal Singh Chauhan) though we may not agree with all the reasons given by the Tribunal. In other words, we may not agree with the view expressed by the Tribunal that a harmonious reading of Clauses (1) and (4) of Article 16 should mean that a reserved category candidate promoted earlier than his senior-general category candidate in the feeder category shall necessarily be junior in the promoted category to such general category candidate. No such principle may be said to be implicit in the said clauses. But inasmuch the Railway Board's circulars concerned herein do provide specifically for such a situation and since they cannot be said to be violative of the constitutional provisions, they must prevail and have to be given effect to. It is not brought to our notice that the said instructions are inconsistent in any manner with any of the statutory provisions or statutory rules relevant in this behalf.

27. So far as the other question considered by the Tribunal (viz., that once the representation of the reserved categories in a given unit of appointment reaches the prescribed percentage, the rule of reservation or the roster based on it cannot be given effect to), the Constitution Bench decision of this Court in *R.K. Sabharwal v. State of Punjab* settles the issue. In this decision, it has been held that where the total number of posts in a cadre reserved for reserved candidates are filled by operation of a roster, the object of rule of reservation must be deemed to have been achieved and that thereafter there would be no justification to operate the roster. Para-5 of the said judgment brings out the reasons for the said rule and the rule itself:

"We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of 'running account' is to make sure that the Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of 'running account' in the impugned instructions has to be so interpreted that it does not result in excessive reservation. '16% of the posts...' are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Castes and thereafter the said class is entitled to 7th, 15th, 22nd and onwards upto 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved.

In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the

numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the 'running account' must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example, the Scheduled Caste persons holding the posts at roster points 1, 7, 15, retire then roese slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation."

28. The Constitution Bench has, however, made it clear that the rule enunciated by them shall operate only prospectively [vide Para 11]. It has further been held in the said decision that the "percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength (and that) the concept of 'vacancy' has no relevance in operating the percentage of reservation". (As a matter of fact, it is stated that this batch of cases were also posted for hearing before the Constitution Bench along with R.L. Sabharwal batch of cases but these cases were de-linked on the ground that they raise certain other issues which did not arise in R.K. Sabharwal.) Be that as it may, as a result of the decision in R.K. Sabharwal and the views/findings recorded by us hereinabove, the following position emerges:

(i) Once the number of posts reserved for being filled by reserved category candidates in a cadre, category or grade (unit for application of rule of reservation) are filled by the operation of roster, the object of rule of reservation should be deemed to have been achieved and thereafter the roster cannot be followed except to the extent indicated in Para-5 of R.K. Sabharwal. While determining the said number, the candidates belonging to the reserved category but selected/promoted on their own merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates.

(ii) The percentage of reservation has to be worked out in relation to number of posts in a particular cadre, class, category or grade (unit for the purpose of applying the rule of reservation) and not with respect to vacancies.

(iii) So far as Railway Guards in Railway service are concerned - that is the only category we are concerned herewith - the seniority position in the promoted category as between reserved candidates and general candidates shall be the same as their inter se seniority position in Grade 'C'

at any given point of time provided that at that given point of time, both the general candidate and the reserved category candidates are in the same grade. This rule operates whether the general candidate is included in the same batch of promotees or in a subsequent batch. (This is for the reason that the circulars/letters aforesaid do not make or recognise any such distinction.) In other words, even if a Scheduled Caste/Scheduled Tribe candidate is promoted earlier by virtue of rule of reservation/roster than his senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. The earlier promotion of the Scheduled Caste/Scheduled Tribe candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category.

29. If the above three rules are observed and followed, there may not remain much room for grievance on the part of the general candidates. While in the very scheme of things, it is not possible to give retrospective effect to these rules - a fact recognised in R.K. Sabharwal - the above rules, operated conjointly, should go a long way in maintaining a balance between the demands of merit and social justice.

30. Sri Rajeev Dhawan, learned counsel for the general candidates, pointed out, what according to him, are the inequitable and anomalous situations which would follow, if the candidate appointed/promoted on the basis of rule of reservation is not confined to reserved posts alone and is allowed to compete for general posts as well. In such a situation, he submits, the reserved candidate will enjoy yet another - third - advantage. Whenever, it is convenient to him, he will claim to be considered for a reserved post and where it is more convenient to him, he will claim to be considered for a general post, whereas a general candidate is restricted to general posts alone. In our opinion, however, the plea of the learned counsel cannot simply be accepted; his submission flies in the face of the established law on the subject.

31. Sri Dhawan then pointed out that Rule 3 stated above is not sufficient to do justice to the general candidates and that in practice, it has resulted in denial of just rights to general candidates. He elaborates his submission thus; a reserved category candidate may get promoted from Grade 'C' to Grade 'B' earlier than his senior general category candidate (senior with reference to the select list/panel prepared at the time of selection to Grade 'C' by operation of rule of reservation/roster. The general candidate who is senior to him in the said select list/panel may get promoted to Grade 'B' later but what may happen, meanwhile, is that the reserved category candidate is no longer there in Grade 'B' - he has ascended to Grade 'A'. In such a situation, there will be no occasion for applying the aforesaid Rule 3 as between these two candidates. Sri Dhawan submits that this is precisely what has happened in the case of Railway Guards. Even the Railway Administration has admitted this situation in their counter, he says, though they have ascribed it to inadequate representation of the reserved categories in the higher grades. Sri Dhawan says that, in practice, the candidates belonging to reserved categories got rapid promotions, leaving their erstwhile senior general candidates in the category in which they were originally appointed. May be that Sri Dhawan's complaint is true - we have already dealt with the possibility and consequence of such a situation - but his grievance, in effect, is not against Rule 3 aforesaid but against the very rule of reservation being applied in promotions. It may be recalled that in Indra Sawhney, eight of the nine

learned Judges constituting the Bench opined that Article 16(4) does not permit or warrant reservation in the matter of promotions. This was precisely for the reason that such a rule results in several untoward and inequitable results. The Bench, however, permitted the existing rules in that behalf to operate for a period of five years from the date of judgment based as those rules were on an earlier Constitution Bench decision in *General Manager, Southern Railway & Anr. v. Rangachari* (1962 (2) S.C.R.687). It is another matter that since then a constitutional amendment has been brought in permitting reservation in promotions to the extent of Scheduled Castes and Scheduled Tribes only, we need express no opinion on the said amendment.

32. Sri Dhawan points out yet another anomaly. Where a candidate belonging to Scheduled Caste gets selected on his own merit, i.e., in the general category, he will be treated as a general candidate and on that account he suffers prejudice vis-a-vis another reserved category candidate who could not be selected on his own merit (i.e., in the general category) and was selected only because of and under the rule of reservation. For illustrating his submission, learned counsel says, take an instance where out of forty candidates selected, a Scheduled Caste candidate selected on merit stands at S. No.18 in the select list, whereas another Scheduled Caste candidate selected under and only because of the reserved quota stands at S. No.33. But when the occasion for appointment arises, the Scheduled Caste candidate at Sl. No.33 will be appointed against the first roster-point, whereas the Scheduled Caste candidate at S. No.18, being a general candidate has to wait for his turn. This, the learned counsel says, amounts, in effect, to punishing the Scheduled Caste candidate at S. No.18 for his merit. Because he was meritorious, he was selected in general category and is treated as a general candidate. He suffers all the disadvantages any other general candidate suffers while another Scheduled Caste candidate, far less meritorious than him and who was selected only by virtue of rule of reservation, steals a march over him in the matter of initial appointment and in promotion after promotion thereafter. This is undoubtedly a piquant situation and may have to be appropriately rectified as and when the occasion arises. It is not pointed out that any such situation has arisen in the appeals before us. It is probable that many such situations may arise which cannot be foretold now. According to the general category candidates concerned herein, of course, the rule of reservation/roster has already given rise to many distortions. According to them, the representation of the reserved categories in Guard Grade 'A' Special has reached forty percent as against the prescribed 22.5 percent. It is not possible for us to say, on the material before us, how and why the said situation has come about. It may be partly because the rule now enunciated in *R.K. Sabharwal* was not there and was not being followed. It may also be that such a result has been brought about by a combined operation of the factors mentioned in

(i) and (ii) above. The fact remains that the situation - assuming that it is what is described by the general candidates - cannot be rectified with retrospective effect now. The Constitution Bench in *R.K. Sabharwal* too has directed that the rule enunciated therein shall have only prospective operation. So far as the present appeals are concerned, it is sufficient to direct that the Railway authorities shall hereinafter follow Rules (i), (ii) and

(iii) [stated in Para No.28] with effect from the date of judgment in *R.K. Sabharwal*, i.e., February 10, 1995.

33. Learned counsel have sought to bring to our notice individual facts of some of the appeals before us but we do not propose to enter into those facts or make any pronouncement thereon. The proper course, in our considered opinion, is to send all these matters back to the Tribunal to work out the rights of individuals concerned applying the three principles aforesaid. These appeals are accordingly disposed of in the above terms and matters remanded to the respective Tribunals. Write petitions are dismissed. No costs.

SELECTION POSTS CIVIL APPEAL NO.9276 OF 1995 ARISING OUT OF S.L.P. (C) NO.18370 OF 1993:

34. Delay condoned. Leave granted.

35. This appeal arises from the judgment of Central Administrative Tribunal (Madras Bench) allowing Original Application No.869 of 1991 filed by the respondent, Sri D. Williams. The relevant facts, drawn from the counter filed on behalf of the Railway Board and its officials before the Tribunal, are the following:

36. The cadre of Station Masters is divided into five grades. The grades and inter se percentage is as follows:

----- Sl. Category & Grade Whether selection
Percentage No. or non-selection distribution of post in each grade

1. Asst. Station Master	Recruitment/	10%
Rs.1200-2040	Selection	
2. Station Master	Non-Selection	70%
Rs.1400-2300		
3. Station Master/T.I	Non-Selection/	10%
Rs.1600-2600	Recruitment	
4. Dy. Station Supdt/T.I.	Selection	10%
Rs.2000-3200		

5. Station Supdt./T.I Selection 10% of posts Rs.2375-3500 in Rs.2000-3200

37. The posts of Assistant Station Masters in the scale of Rs.1200-2040/- are filled by direct recruitment through Railway Recruitment Boards to the extent of fifty percent. The balance fifty percent is filled by promotion of departmental employees. The higher grades in the said cadre are filled by promotion from the immediately lower grade. Twenty five percent of the posts in the scale of Rs.1600- 2600/- are, however, filled by direct recruitment of Traffic Apprentices.

38. The first respondent, Sri Williams (petitioner in the original application before the Tribunal) was promoted to the post of Deputy Station Superintendent/Traffic Inspector in the scale of

Rs.2000-3200/- on December 30, 1989. Actually, he was initially appointed as a Signaller in the scale of Rs.60-150/-. Over the years, he earned promotions one after the other. In the scale of Rs.130-240/-, he was senior to Respondent Nos.4 to 10 in the original application (they are not impleaded as respondents in this appeal), all of whom belong to Scheduled Castes/Scheduled Tribes. Because of rule of reservation and the manner in which it was implemented, the said Scheduled Castes/Schedule Tribes candidates were promoted to the higher categories sooner. They came to be promoted to the post of Deputy Station Superintendent/Traffic Inspector in the scale of Rs.2000- 3200/- far earlier to Sri Williams, i.e., on January 1, 1984 or earlier. On that basis, the said Scheduled Castes/Scheduled Tribes candidates were being treated as seniors to Sri Williams who is, of course, a general candidate.

39. The posts of Station Superintendent/Traffic Inspector in the scale of Rs.2375-3500/- are controlled by and dealt with at Head Quarter's level. They are filled on "All Railway" basis by a process of selection (which comprises of viva-voce only) from among the Deputy Station Superintendents/Traffic Inspectors in the scale of Rs.2000- 3200/-.

40. Eleven vacancies arose in the scale of Rs.2375-3500/-. According to rules, three candidates have to be considered for every vacancy. Accordingly, a list of thirty three senior-most candidates in the scale of Rs.2000-3200/- was prepared on the basis of their respective dates of entry in the said grade. They were 'alerted' to be ready to appear for the interview by a letter dated July 12, 1991. All the thirty three senior-most employees so alerted belong to Scheduled Castes/Scheduled Tribes. Sri Williams was not among the thirty three. It is then that Sri Williams approached the Tribunal praying for setting aside the alert notice dated July 12, 1991, to revise the seniority list of all the grades in the Station Masters' category protecting the seniority of general candidates and for a further declaration that rule of reservation cannot be applied against vacancies. He sought a further declaration that the said rule of reservation is confined to recruitment to the scale of Rs.1200-2040/- alone - i.e., to the lowest grade in the cadre - and not to higher grades.

41. The Tribunal allowed the original application filed by Sri Williams following its earlier decision in Original Application No.85 of 1989. The Tribunal declared that for the purpose of promotion under the general quota, seniority of the Scheduled Castes/Scheduled Tribes candidates should not be determined on the basis of the date of their actual promotion but on the basis of the date on which they would have been promoted in due course if the rule of reservation were not applied. The Tribunal, however, declared that the seniority in the grade of Rs.1600-2600/- shall not be disturbed because the applicant had not approached the Tribunal in time to challenge the seniority in that scale. The relief granted by the Tribunal is in the following terms:

"In the result, we allow the application and pass the following orders:-

We direct the respondents to revise the seniority of the applicants and respondents in the scale of Rs.2000-3200 taking into account for the applicant his date of actual promotion and for the respondents 4 to 10 the date on which they would have been granted promotion in that grade but for the preferential treatment based on reservation. Promotion shall be made according to a selection based on the revised

list."

42. The learned Additional Solicitor General appearing for the appellants (Union of India and the Railways) challenged the correctness of the decision of that Tribunal on the ground that it has evolved a principle of seniority not recognised by any rule or circular orders of the Railway Board and is unsustainable in any event. He submitted, relying upon the decision in *Karam Chand v. Haryana State Electricity Board* (1989 Suppl.(1) S.C.C.342) that the date of promotion to a particular grade or category determines the seniority in that grade or category. Inasmuch as the said thirty three candidates were alerted (Called for) on the basis of their seniority for interview (for selection to eleven posts in the grade of Rs.2375-3500/-) no valid grievance can be made by any one to such a course.

43. Sri S. Murlidhar, learned counsel for Sri D. Williams submits that this is a demonstrable case of injustice being done to general candidates by applying not only the rule of reservation at every stage of promotion but also because the rule of seniority enunciated by the Railway Board in its several circulars was not being followed by the concerned authorities. He submits that it is for the Railways to explain how the situation has come about where all the thirty three candidates being considered for eleven vacancies happen to belong exclusively to Scheduled Castes/Scheduled Tribes categories. He submits that Sri Williams was admittedly a senior to Respondent Nos.4 to 10 (in the original application, i.e., Scheduled Castes/Scheduled Tribes candidates) in the grade of Rs.130- 240/- but then the said Scheduled Castes/Scheduled Tribes candidates obtained rapid and preferential promotions to next higher grades, viz., Rs.330-560/-, Rs.425-640/-, Rs.455-700/-, Rs.1600-2600/- and then to the grade of Rs.2000-3200/-. They reached the grade of Rs.2000-3200/- more than five years earlier to Sri Williams who was their senior in the lower category of Rs.130-240/- The result of faulty implementation of rule of reservation and rule of seniority is that all the top grades have come to be occupied exclusively by the reserved category members, a situation, which he characterises as a total negation of the Rule of Equality underlying Articles 16(1), 16(4) and 14. He emphasises the fact that the Railways have not explained in their counter as to how the above situation has come about except stating baldly that since the Scheduled Castes/Scheduled Tribes candidates were seniors to Sri Williams in the grade of Rs.2000-3200/-, they were rightly alerted for interview.

44. It is true that this case presents a rather poignant turn of events. Of the thirty three candidates being considered for eleven vacancies, all are Scheduled Castes/Scheduled Tribes candidates. Not a single candidate among them belongs to general category. The learned counsel for the respondent is justified in complaining that appellants have failed to explain how such a situation has come about. Not only the juniors are stealing a march over their seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Castes/Scheduled Tribes candidates in the service have also been left behind. Such a configuration could not certainly have been intended by the framers of the Constitution or the framers of the rules of reservation. In the absence of any explanation from the authorities, the best we can do is to ascribe it as faulty implementation of the rule of reservation. In other words, not only have the Railways not observed the principle that the reservation must be vis-a-vis posts and not vis-a-vis vacancies but they had also not kept in mind the rule of seniority in the promotion posts enunciated in the Railway Board's circulars referred to supra. Yet another

principle which the authorities appeared to have not observed in practice is that once the percentage reserved for a particular reserved category is satisfied in that service category or grade (unit of appointment) the rule of reservation and the roster should no longer be followed. Because of the breach of these three rules, it appears, the unusual situation complained of by the general candidates has come to pass. The learned counsel for general candidates is right that such a situation is bound to lead to acute heart-burning among the general candidates which is not conducive to the efficiency of administration. Be that as it may, the question is can the said situation be rectified. Probably not, until we direct all the promotions to be reviewed and re-done. This may not be advisable at this distance of time. The enormity of the exercise should deter any one from launching upon such a course. It is evidently for this reason that the Constitution Bench has directed in R.K. Sabharwal that the rule affirmed by them should be applied only prospectively. There is yet another circumstance: the Scheduled Castes/Scheduled Tribes candidates cannot be barred from competing for general posts. We are constrained to remark that it is the application of rule of reservation in the matter of promotions -which entitles a reserved category candidate to avail of the benefit of reservation any number of times which is mainly responsible for such a situation.

45. While referring to the Railway Board's circulars/letters in civil appeals No.9272/95 (arising from S.L.P.(C) No.6468 of 1987 and batch), we had referred to the Railway Boards circular/letter dated January 19, 1972 dealing with promotion to selection posts. (Para-3 of the said letter is in the same terms as Para-4 of the Railway Board's circular/letter dated August 31, 1982 referred to supra.) The said Para-3 reads: "(3) The seniority of candidates belonging to Scheduled Cates and Scheduled Tribes vis-a-vis others will continue to be determined as at present, i.e., according to the panel position in the case of categories where training is not provided and in accordance with the merit position in the examination where training is provided." But inasmuch as the post of Station Superintendent/T.I. in the scale of Rs.2375-3500/- is a selection post, the panel referred to in the said circulars/letters would mean the panel prepared at the time of making selections for promotion to the said post (Rs.2375-3500/-) - and not the panel/select list prepared at the time of entry into the initial grade, viz., Assistant Station Master (Rs.1200-2-40/-). It also means that members in one panel take precedence over the members in the next panel. The application of the rule of seniority referred to in the said circular/letter - and other circulars/letters referred to supra most of which do not make any distinction between selection and non-selection posts - has to be subject to the said limitation.

46. It may be noticed that of the five grades in the Station Masters' category, two are non-selection posts while the remaining three are selection posts. While in the case of non-selection posts the rule enunciated in the main opinion (Virpal Singh Chauhan) would be applicable, in the case of selection posts, the rule explained herein has to be followed. We may clarify that Rules (i) and (ii) in Para 28 of Virpal Singh Chauhan apply to both selection and non- selection posts. Rule (iii) also applies to both but subject to the above rider. As explained in the main opinion, while there is no question of a "panel" being prepared at the time of promotion to non-selection posts, a panel has to be prepared for promotion to selection posts.

47. This appeal is accordingly allowed and the matter remanded to the Tribunal with a direction to dispose of the original application afresh in the light of the principles enunciated herein. No costs.

CIVIL APPEAL NO.9275 OF 1995

ARISING OUT OF S.L.P.(C) NO.4102 OF 1994:

48. Delay condoned. Leave granted.

49. The respondent [petitioner before the Central Administrative Tribunal (Allahabad Bench), Sri Mohd. Sabir, joined the Railways as an Office Clerk on December 20, 1957. He was promoted as Head Clerk and then as an Assistant Superintendent. His promotion to the post of Assistant Superintendent was on March 12, 1985. The next promotion is to the post of Superintendent. He approached the Tribunal complaining that when two vacancies arose in the category of Superintendents, the Railway Authorities called certain Scheduled Castes/Scheduled Tribes candidates for interview in preference to him though they are far juniors to him. He gave three instances, viz., (1) Sri A.P. Pramanik, who joined the service twenty years after him and who was promoted as Assistant Superintendent only on February 22, 1988. (2) Sri Kamal Kishore, who was initially appointed as Class IV employee but who is being treated as senior to the petitioner and (3) Sri Amrendra Kumar Das, who was appointed as an Office Clerk twenty two years after his appointment and who came to be promoted as Assistant Superintendent on February 25, 1986. The grievance of Sri Mohd. Sabir is this: the total sanctioned strength of the category of Superintendents (Grade Rs.2000-3200/- RPS) is thirteen. There are three vacancies. Of the remaining ten, only two are general candidates and the remaining eight belong to Scheduled Castes. In spite of the same, the candidates now being considered for promotion are again Scheduled Castes candidates which is likely to result in an almost total reservation in the said category in favour of the Scheduled Castes/Scheduled Tribes candidates. The case of the appellants (respondents in the original application) is that they are considering the senior most candidates for the vacancies arising in the category of Superintendents and, therefore, no objection can be taken with the said course by any one.

50. The Tribunal has allowed the original application in the following terms:

"It appears that some mathematical mistake occurred on the part of the department in making the promotion and deciding the seniority. According to learned counsel in view of Vir Pal Singh Chauhan's case these candidates are to be reverted. Whether they are to be reverted or not that is the matter for the respondents to decide all such observations which have been made in Vir Pal Singh's case, but the respondents are directed to promote the members of the general community to the extent they are entitled to by adhering to the seniority. Accordingly, since the matter is not decided finally by the Hon'ble Supreme Court, However those persons who have already been promoted, keep them for the post of Supdt. and will adjust the seniority list accordingly in accordance with Vir Pal Singh's case. Let all these be done within the

period of 3 months from the date of communication of this order. No order as to the costs."

51. This appeal is liable to be dismissed applying the principle enunciated in R.K. Sabharwal. It is evident that out of the cadre-strength of thirteen, there were three vacancies on the date of filing of the original application before the Tribunal and of the remaining ten posts, only two were occupied by the general candidates and the remaining eight were occupied by the members of Scheduled Castes. Since the representation of Scheduled Castes is already far beyond their quota, no further Scheduled Castes candidates could have been considered for the remaining three vacancies. This means that the Scheduled Castes candidates can be considered only as and along with general candidates but not as members belonging to a reserved category. The appeal is accordingly dismissed with the aforesaid clarification.

CIVIL APPEAL NO.9274 OF 1995

ARISING OUT OF S.L.P.(C) NO.6924 OF 1988:

52. Delay condoned. Leave granted.

53. This matter pertains to promotion to the posts of Office Superintendents Grade-I, Office Superintendent Grade- II and Head Clerk. The original application was filed by three candidates belonging to general category. Their grievance was that the representation of Scheduled Castes/Scheduled Tribes candidates has already exceeded the percentage reserved for them and inspite of that the Scheduled Castes candidates are again being considered for the vacancies arising in the said categories. By way of illustration, they pointed out, the sanctioned strength of the category of Head Clerks is six. Four are filled up and there are two vacancies. Out of the four posts already filled up, two are held by general category candidates and two by the members of Scheduled Castes. The claim of the original petitioners (respondents in this appeal), which has been upheld by the Calcutta Tribunal, is that the remaining two vacancies should go only to general candidates. Similar direction has been made with respect to other two categories as well. The Tribunal further directed that the rule of reservation must be applied with reference to posts and not with reference to vacancies. The main contention of the Union of India and the Railway Authorities in this appeal is that the rule of reservation in favour of Scheduled Castes/Scheduled Tribes should be applied to vacancies and not to total number of posts in the cadre. It is submitted that the Tribunal was in error in holding that the rule of reservation should be so applied as to ensure that the posts held by Scheduled Castes/Scheduled Tribes do not exceed the prescribed percentage. It is submitted that this was never the intention of the Constitution or the rule of reservation.

54. The only contention urged by the appellants herein is concluded against the appellants by the decision of this Court in R.K. Sabharwal, referred to hereinbefore. Following the said decision this

appeal is dismissed with the clarification that the members of Scheduled Castes/Scheduled Tribes can also compete as general candidates. The appellant shall follow and apply the said decision. No costs.

-----X-----X----- Before parting with these appeals, we feel obliged to reiterate the principle affirmed in Indra Sawhney that providing reservation in promotion is not warranted by Article 16(4). The facts of these cases illustrate and demonstrate the correctness of the said holding. They also bring home the intractable problems that arise from such provision - problems that defy solutions. No more need we say on this aspect. The decision in Indra Sawhney speaks for itself.



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The Constitution (Eighty-fifth Amendment) Act, 2002

•

[4th January, 2002.]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-second Year of the Republic of India as follows:-

1. Short title and commencement.-(1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June, 1995.

2. Amendment of article 16.-In article 16 of the Constitution, in clause (4A), for the words "in matters of promotion to any class", the words "in matters of promotion, with consequential seniority, to any class" shall be substituted.

SUBHASH C. JAIN,

Secy. to the Govt. of India.



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Last reviewed and updated on 12 Oct, 2012

No.36012/45/2005-Estt. (Res.)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training

*North Block
New Delhi- 110001.*

Dated the 10th August, 2010.

OFFICE MEMORANDUM

Subject: Reservation in promotion – Treatment of SC/ST candidates promoted on their own merit.

The undersigned is directed to refer to this Department's O.M.No.36028/17/2001-Estt. (Res.) dated 11th July, 2002 which clarified that SC/ ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will be adjusted against un-reserved points of the reservation roster and not against reserved points. It was subsequently clarified by this Department's O.M. No.36028/17/2001-Estt. (Res.) dated 31.1.2005 that the above referred O.M. took effect from 11.7.2002 and that concept of own merit did not apply to the promotions made by non-selection method.

2. Central Administration Tribunal, Madras Bench in O.A. No.900/2005 [S. Kalugasalamoorthy v/s. Union of India & Others] has set aside the O.M. No.36028/17/2001-Estt. (Res.) dated 31.1.2005 and held that when a person is selected on the basis of his own seniority, the scope of considering and counting him against quota reserved for SCs does not arise. The High Court of Judicature at Madras in the matter of UOI v/s. S. Kalugasalamoorthy [WP No.15926/2007] has upheld the decision of the Central Administrative Tribunal.

3. The matter has been examined in the light of the above referred judgments and it has been decided to withdraw O.M. No. 36028/17/2001-Estt. (Res.) dated 31.1.2005 referred to above. It is clarified that SC/ST candidates appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications will be adjusted against unreserved points of reservation roster, irrespective of the fact whether the promotion is made by selection method or non-selection method. These

orders will take effect from 2.7.1997, the date on which post based reservation was introduced.

4. These instructions may be brought to the notice of all concerned.



(K.G. Verma)

Director

Tele: 23092158.

To

1. All Ministries/Departments of the Government of India.
2. All Officers and Sections in the Ministry of Personnel, Public Grievances and Pensions and all attached/subordinate offices of this Ministry.
3. Department of Financial Services (Banking Division), New Delhi.
4. Department of Economic Affairs, North Block, New Delhi.
5. Department of Public Enterprises, New Delhi.
6. Ministry of Railways (Railway Board), Rail Bhawan, New Delhi.
7. Union Public Service Commission/Supreme Court of India/ Election Commission/ Lok Sabha Secretariat/ Rajya Sabha Secretariat/ Cabinet Secretariat/ Central Vigilance Commission/ President's Secretariat/ Prime Minister's Office/ Planning Commission.
8. Staff Selection Commission, CGO Complex, Lodi Road, New Delhi.
9. National Commission for SCs, Lok Nayak Bhavan, New Delhi.
10. National Commission for STs, Lok Nayak Bhavan, New Delhi.
12. National Commission for Backward Classes, Trikoot-I, Bhikaji Cama Place, R.K. Puram, New Delhi.
13. Office of the Comptroller and Auditor General of India, 10, Bahadurshah Zafar Marg, New Delhi – 110002.
14. CBI, LBSNAA, ISTM, PESB, Central Sectt. Library, MHA Library.
15. Information and Facilitation Centre, DOPT, North Block, New Delhi.
16. NIC (Computer Cell) – with the request to upload on this Department's website.

No.36028/17/2001-Estt.(Res.)

GOVERNMENT OF INDIA
MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
DEPARTMENT OF PERSONNEL AND TRAINING
NEW DELHI

Dated: July 11, 2002

OFFICE MEMORANDUM

Subject: Reservation in promotion – Treatment of SC/ST candidates promoted on their own merit.

...

The undersigned is directed to say that this Department has been receiving references from various Ministries etc. regarding adjustment of SC/ST candidates promoted on their own merit in the reservation rosters introduced vide DOPT's OM No.36012/2/96-Estt.(Res) dated 2.7.1997. While it is clear from the OM dated 2.7.1997 that the SC/ST/OBC candidates appointed by direct recruitment on their own merit and not owing to reservation will be adjusted against unreserved points of the reservation roster, doubts have been raised about SC/ST candidates promoted on their own merit. It is hereby clarified that:-

- (i) The SC/ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against unreserved points.
- (ii) If an unreserved vacancy arises in a cadre and there is any SC/ST candidate within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on the plea that the post is not reserved. Such a candidate will be considered for promotion alongwith other candidates treating him as if he belongs to general category. In case he is selected, he will be appointed to the post and will be adjusted against the unreserved point.
- (iii) SC/ST candidates appointed on their own merit (by direct recruitment or promotion) and adjusted against unreserved points will retain their status of SC/ST and will be eligible to get benefit of reservation in future/further promotions, if any.

- (iv) 50% limit on reservation will be computed by excluding such reserved category candidates who are appointed/promoted on their own merit.

2. All Ministries/Departments are requested to bring the contents of this OM to the notice of all authorities under them for information and compliance.



(K.G. Verma)

Dy. Secretary to the Govt. of India

To

1. All Ministries/Departments of the Government of India.
2. Comptroller and Auditor General of India
3. Department of Economic Affairs (Banking Division), New Delhi
4. Department of Economic Affairs (Insurance Division), New Delhi
5. Department of Public Enterprises, New Delhi
6. Ministry of Railways (Railway Board)
7. Union Public Service Commission/Supreme Court of India / Election Commission/ Lok Sabha Secretariat / Rajya Sabha Secretariat/ Cabinet Secretariat/ Central Vigilance Commission/President's Secretariat/ Prime Minister's Office/Planning Commission.
8. Staff Selection Commission, CGO Complex, Lodi Road, New Delhi.
9. Ministry of Social Justice & Empowerment, Shastri Bhavan, New Delhi.
10. Secretary, Staff Side, National Council, New Delhi
11. National Commission for SCs & STs, Lok Nayak Bhawan, New Delhi
12. National Commission for Backward Classes, Trikoot-I, Bhikaji Cama Place, R.K. Puram, New Delhi.

No.36012/16/2019-Estt. (Res.)
 Government of India
 Ministry of Personnel, Public Grievances and Pensions
 Department of Personnel and Training
 North Block, New Delhi-110 001
 Date: 12th April 2022

Office Memorandum

Subject : Reservation in promotions – procedure to be followed prior to effecting reservations in the matter of promotions by all departments of the Central Government.

The undersigned is directed to bring to your notice the judgement dated 28.01.2022 of the Supreme Court of India in the case of **Jarnail Singh and Ors. V. Lachhmi Narain Gupta and Ors.** (Civil Appeal No. 629 of 2022 arising out of SLP (C) No. 30621 of 2011) and other connected matters. Pursuant to this judgement, the Ld. Attorney General for India has rendered his considered opinion in the matter.

2. In the judgement dated 28.1.2022, the Supreme Court has set out the conditions that are to be satisfied by the Government for the purpose of implementing the policy of reservation in promotions. These conditions are :

- (i) Collection of quantifiable data regarding inadequacy of representation of Scheduled Castes and Scheduled Tribes;
- (ii) Application of this data to each cadre separately; and
- (iii) If a roster exists, the unit for operation of the roster would be the cadre for which the quantifiable data would have to be collected and applied in regard to the filling up of the vacancies in the roster.

This judgement currently holds the field.

3. All the Ministries/Departments are required to ensure that the above conditions are complied with before implementing the policy of reservation in promotions and carrying out any promotions based thereon.

4. For this purpose, all Ministries/Departments are also required to ensure the following:

- (a) In terms of DoPT OM No.43011/153/2010-Estt (Res.) dated 4.1.2013, the Liaison Officer shall ensure that the reservation rosters are strictly maintained as per the instructions/guidelines, laid down in DoPT OM No. 36012/2/96-Estt (Res.), dated 2.7.1997.
- (b) In order to ensure maintenance of efficiency of administration, the DPC shall carefully assess the suitability of the officers, being considered for promotion.



- (c) The Appointing Authority shall issue the appointment/promotion orders only after satisfying itself that the conditions mentioned in paragraph 2 and sub-para (a) & (b) of this paragraph have been fully complied with.

5. Since the **Jarnail Singh** batch of cases is pending in the Supreme Court of India, any promotion order issued shall be subject to further orders that may be passed by the Supreme Court in the said batch of cases.

6. All Ministries/Departments are requested to urgently bring these instructions to the notice of all their attached/subordinate offices as also the Public Sector Undertakings and Statutory Bodies etc. for adherence and strict compliance.


(Sandeep Saxena)

Deputy Secretary to the Govt. of India

To

1. The Secretaries of all the Ministries/Departments of the Govt. of India for ensuring strict compliance of the above instructions.
2. The Secretary, Department of Financial Services, New Delhi.
3. The Secretary, Department of Public Enterprises, New Delhi.
4. The Secretary, Railway Board, Ministry of Railways, Rail Bhawan, New Delhi.
5. The Secretary, Union Public Service Commission
6. The Secretary, Staff Selection Commission
7. Office of Comptroller and Auditor General of India, 10, Bahadurshah Zafar Marg, New Delhi.
8. Supreme Court of India/Election Commission of India/ Lok Sabha Secretariat/ Rajya Sabha Secretariat/ Cabinet Secretariat/ Central Vigilance Commission/ President's Secretariat/ Vice President's Secretariat/ Prime Minister's Office/ Niti Ayog
9. National Commission for Scheduled Castes, Lok Nayak Bhawan, New Delhi
10. National Commission for Scheduled Tribes, Lok Nayak Bhawan, New Delhi
11. National Commission for Backward Classes, Trikot-1, Bhikaji Cama Place, R. K. Puram, New Delhi
12. The Director, ISTM.
13. NIC, DoPT with the request to upload the same on the website of the Department.

No. 36012/18/95-Estt.(Res.) Pt.II
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training

--

North Block, New Delhi,
Dated the 13th August, 1997.

OFFICE MEMORANDUM

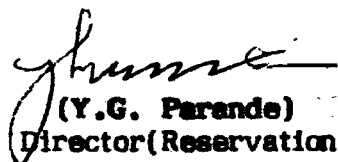
Subject:- Reservation for the SCs/STs in promotion.

The undersigned is directed to invite attention to this Department's O.M. No. 36012/37/93-Estt.(SCT) dated 19.8.1993 clarifying that the Supreme Court had, in the Indira Sawhney case, permitted the reservation, for the Scheduled Castes and the Scheduled Tribes, in promotion, to continue for a period of five years from 16.11.1992.

2. Consequent to the Judgement in Indira Sawhney's case, the Constitution was amended by the Constitution (Seventy-Seventh Amendment) Act, 1995 and Article 16(4A) was incorporated in the Constitution. This Article enables the State to provide for reservation, in matters of promotion, in favour of the Scheduled Castes and the Scheduled Tribes, which in the opinion of the State are not adequately represented in the Services under the State.

3. In pursuance of Article 16(4A), it has been decided to continue the reservation in promotion, as at present, for the Scheduled Castes and the Scheduled Tribes in the services/posts under the Central Government beyond 15.11.1997 till such time as the representation of each of the above two categories in each cadre reaches the prescribed percentages of reservation whereafter, the reservation in promotion shall continue to maintain the representation to the extent of the prescribed percentages for the respective categories.

4. All Ministries/Departments are requested to urgently bring these instructions to the notice of all their attached/subordinate offices as also the Public Sector Undertakings and Statutory Bodies etc.


(Y.G. Parande)
Director(Reservation)

To

1. All Ministries/Departments of the Government of India.
2. UPSC, Dholpur House, New Delhi.
3. SSC, CGO Complex, Lodi Road, New Delhi.

4. Department of Economic Affairs (Banking Division), New Delhi for necessary action in regard to Nationalised Banks.
5. Department of Public Enterprises, New Delhi for necessary action in regard to Public Sector Undertakings.
6. Department of Economic Affairs (Insurance Division), New Delhi for necessary action in regard to Insurance Corporations.
7. National Commission for Scheduled Castes and Scheduled Tribes, Lok Nayak Bhavan, New Delhi.
8. National Commission for Backward Classes, Trikot-I, Bhikaji Cama Place, R.K.Puram, New Delhi.
9. Ministry of Welfare, Shastri Bhavan, New Delhi.

No.20011/1/2001-Estt.(D)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training

....
New Delhi, dated the 21st January, 2002.

OFFICE MEMORANDUM

SUBJET: Seniority of SC/ST Government servants on promotion by virtue of rule of reservation/roster.

....
The Seniority of a person appointed to a post is determined according to the general principle 5(i) contained in MHA OM No.9/11/55-RPS dated 22.12 1959 and para 2.2 in DOPT OM No.22011/7/86-Estt.(D) dated 3.7.1986 read with DOPT OM No.20011/5/90-Estt.(D) dated 4.11.1992 (copy enclosed). Seniority of such persons is determined by the order of merit indicated at the time of initial appointment and seniority of persons promoted to various grades is determined in the order of selection for such promotion. Thus, as per the aforementioned instructions, persons appointed through an earlier selection would enbloc be senior to those promoted through subsequent selection.

2. This position was reviewed subsequent to the judgment of the Supreme Court dated 10.10.1995 in the case of Union of India Vs. Virpal Singh Chauhan etc. (JT 1995(7) SC.231) and it was decided vide DOPT OM No. 20011/1/96-Estt.(D), dated 30.1.1997, to modify the then existing policy by addition of the proviso to general principle 5(i) contained in MHA (now DOPT) OM No.9/11/55-RPS dated 22.12 1959 and para 2.2 in DOPT OM No.22011/7/86-Estt.(D) dated 3.7.1986, which stipulated that if a candidate belonging to the Scheduled Caste or the Scheduled Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior general/OBC candidate who is promoted later to the said immediate higher post/grade, the general/OBC candidate will regain his seniority over such earlier promoted candidate of the Scheduled Caste and the Scheduled Tribe in the immediate higher post/grade.

3. The Government have now decided to negate the effects of the DOP&T OM dated 30th January, 1997 by amending Article 16(4A) of the Constitution right from the date of its inclusion in the Constitution i.e. 17th June, 1995, with a view

to allow the Government servants belonging to SCs/STs to retain the seniority in the case of promotion by virtue of rule of reservation. In other words, the candidates belonging to general/OBC category promoted later will be placed junior to the SC/ST Government servants promoted earlier even though by virtue of the rule of reservation.

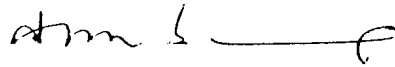
4. Therefore, in pursuance of the aforementioned Constitution (Eighty-fifth) Amendment Act, 2001, it has been decided as follows:

- (i) (a) SC/ST Government servants shall, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also; and
 - (b) the above decision shall be effective from 17th June, 1995.
- (ii) The instructions contained in DOPT O.M.No20011/1/96- Estt.(D) dated 30.1.1997 as well as the clarifications contained in DOPT O.M.No.20011/2/97-Estt.(D) dated 21.3.1997 shall stand withdrawn w.e.f. 30.1.1997 itself.
- (iii) Seniority of Government servants determined in the light of O.M. dated 30.1.1997 shall be revised as if that O.M. was never issued.
- (iv) (a) On the basis of the revised seniority, consequential benefits like promotion, pay, pension, etc. should be allowed to the concerned SC/ST Government servants (but without arrears by applying principle of 'no work no pay').
 - (b) For this purpose, senior SC/ST Government servants may be granted promotion with effect from the date of promotion of their immediate junior general/OBC Government servants.
 - (c) Such promotion of SC/ST Government servant may be ordered with the approval of Appointing Authority of the post to which the Government servant is to be promoted at each level after following normal procedure of DPC (including consultation with UPSC).
- (v) Except seniority other consequential benefits like promotion, pay etc. (including retiral benefits in respect of those who have already retired)

allowed to general/OBC Government servant by virtue of implementation of O.M. dated 30.1.1997 and/or in pursuance of the directions of CAT/Court should be protected as personal to them.

5. All Ministries/Departments are requested to bring the above decisions to the notice of all concerned for guidance and compliance. Necessary action to implement the decisions contained in para 4 (iii) above may be completed within three months from the date of issue of these instructions and necessary action to implement the decision at para (iv) above may be completed within 6 months from the date of issue of these instructions.

6. Hindi version will follow.



(Alok Saxena)

Deputy Secretary to the Government of India

To

All Ministries/Departments of the Govt. of India

Copy to:

1. The Comptroller and Auditor General of India.
2. The Secretary, Union Public Service Commission.
3. Rajya Sabha Secretariat
4. Lok Sabha Secretariat
5. All State Governments/Union Territory Administrations
6. All Attached/Subordinate offices under the Department of Personnel and Training/Ministry of Home Affairs.
7. Ministry of Railways (Railway Board).
8. National Commission for SCs/STs, New Delhi
9. National Commission for OBCs, New Delhi.
10. The Secretary, Staff Side, National Council
11. The Registrar General, The Supreme Court of India
12. All Officers/Sections of DOP&T.
13. Principal Information Officer, Ministry of I&B.
14. Facilitation Centre, DOP&T-20 spare copies.
15. NIC (DOPT Branch) for placing this O.M. on the web site of DOPT.
16. Establishment (D) Section (500 copies).

1. CATCH-UP RULE

Catch-Up Rule was introduced by Virpal Singh Chauhan judgement and implemented vide DoP&T O.M.20011/1/96-Estt(D) dated 30.01.1997 which states as under:

“If a candidate belonging to Scheduled Caste or Scheduled Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior general/OBC candidate who is promoted later to the said immediate higher post/grade, the general/OBC candidate will regain his seniority over such earlier promoted candidate of the Scheduled Caste and the Scheduled Tribe in the immediate higher post/grade.”

Effect of the said judgement was negated by the Parliament of India, vide 85th **(Eighty-Fifth) Amendment** whereby the term consequential seniority was added in Article 16(4A). This was effected by DoP&T vide OM No. 20011/1/2001-Estt.(D) dated 21.01.2002. Thereafter, the constitutional validity of Articles 16(4A) and 16(4B) was under challenge in M. Nagaraj case in which Hon'ble Apex court has held that the concerned State will have to show in each case the existence of the compelling reasons, namely, **backwardness** (*This was made redundant by Hon'ble Apex court*), **inadequacy of representation** and **overall administrative efficiency** before making provision for reservation. Now, Hon'ble Apex Court in its recent judgement dated 28.01.2022 in Jarnail Singh case laid down that M. Nagaraj would have prospective effect. Consequent upon the judgement dated 28.01.2022, DoP&T issued an O.M. No. 36012/16/2019-Estt. (Res.) dated 12.04.2022, wherein it has clarified to all the Ministries to comply with the following conditions before implementing policy of reservation in promotions:

- (i) Collection of quantifiable data regarding inadequacy of representation of Scheduled Castes and Scheduled Tribes;
- (ii) Application of this data to each cadre separately; and
- (iii) If a roster exists, the unit for operation of the roster would be the cadre for which the quantifiable data would have to be collected and applied in regard to the filling up of vacancies in the roster.

2. **OWN MERIT**

The concept of 'own merit' was introduced vide DoP&T O.M. No. 36028/17/2001-Estt (Res), dated 11.07.2002. The O.M dated 11.07.2002, inter- alia, provided that SC/ST candidates appointed on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. In this matter, further instructions were issued by the DoPT vide O.M.36012/11/2016-Estt.(Res.), dated 30.09.2016 vide which it was clarified that no further promotions of reserved category persons to unreserved posts will be made based on the DOPT OM dated 10.8.2010. Further, DoP&T issued instructions to all Ministries/Department vide O.M. 36012/11/2016- Estt.(Res-I) {Pt-II}, dated 15.06.2018, to carry out promotions in accordance with the directions of the Hon'ble Supreme Court dated 17.05.2018, in the matter related to SLP (C) No. 30621/2011 which states as under:

“It is directed that the dependency of this Special Leave Petition shall not stand in the way of Union of India taking steps for the purpose of promotion from ‘reserved to reserved’ and ‘unreserved to unreserved’ and also in the matter of promotion on merits. Post for further orders after summer vacation.”

The matter is under litigation and is still Sub-judice before the Hon'ble Supreme Court. This is one of the stumbling stone in the way of conducting DPC from the grade of Superintendent to Assistant Commissioner.

3. PANKAJ NAYAN CASE

OA No. 3405/2014 was filed by Pankaj Nayan & Ors. in the Hon'ble CAT, Principal Bench, New Delhi seeking the benefit of DoP&T OM No. 14017/12/88-Estt.(RR) dated 25.03.1996 which stipulates as under:

“Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying /eligibility service by more than half of such qualifying/eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade alongwith their juniors who have already completed such qualifying/eligibility service.”

The Hon'ble CAT, New Delhi vide Order dt. 12.05.2016 passed in OA no. 3405/2014 filed by Pankaj Nayan & Ors allowed the benefit of Sr. Jr. clause even when such a clause did not exist in the statutory RRs in vogue at that time. As both DoP&T and DoLA advised against filing of SLP in the matter, the Hon'ble CAT judgement was implemented on in-personam basis by reviewing the DPC for year 2014 to extend the benefit of Sr. Jr. clause to the applicants w.e.f. 14.10.2014. Subsequently, a number of cases are being filed by the similarly placed officers and in some cases, the benefit has been extended. Considering the implication and adverse judgements being received, in order to minimize litigation, Sr. Jr. clause in terms of DoP&T OM dt. 25.03.1996 has already been inserted in RRs of Superintendent of Central Excise & Superintendent of Customs (Preventive) w.e.f. 13.12.2018 & 10.06.2019 respectively.

Now, Board vide letter dated 24.03.2022 has taken final decision in the matter of in-rem implementation of Pankaj Nayan judgement dated 12.05.2016 and communicated the same to all CCAs.

4. ZONE OF CONSIDERATION

It came to the notice of the Board that divergent practices for drawl of zone of consideration (ZOC) while conducting DPC was followed in different zones. The matter was taken note of by the Board and consulted with DoP&T & DoLA. After consultation with DoP&T and DoLA, the Board vide letter F.No. 10A60/2/2020-Ad.IIB dated 19.01.2022 issued Guidelines for preparation of Zone of Consideration (ZOC). Board vide the said letter has clarified that 'eligible Officers' means the officers in the feeder cadre having requisite eligibility service as required in the relevant RRs of promotion post. Board further advised the CCAs to examine the issues arising thereof, including the need to conduct review DPC as a consequence and Court cases, if any.

5. RELAXATION IN THE ELIGIBILITY SERVICE — CHANGE IN THE CRUCIAL DATE I.E. 1ST JANUARY

{DOP&T O.M. ISSUED F. NO. AB-14017/17/2018-Estt. RR DATED 12.08.2021}

As per instructions contained in DoPT's OM No.2201 1/4/2013-Estt.(D) dated 8.5.2017, Ministries/Departments, which were mostly following Financial Year (April - March) based vacancy year system till 2017-18 for promotion to various grades, were required to shift to Calendar Year (January to December) based vacancy year from the year 2018 onwards. Consequently, the crucial date for determining eligibility also changed from 1st April to 1st January.

Due to the shift in the vacancy year and consequent change in the crucial date for determining eligibility, employees, who were completing eligibility service as on 1st April of the vacancy year, were not becoming eligible for consideration for promotion in that vacancy year and that such these employees were becoming eligible for consideration for promotion for vacancies arising only next year w.e.f 1st January, subject to fulfillment of other conditions.

With a view to enable timely holding of DPCs, where the recruitment has been shifted from financial year-wise to calendar year-wise, in the light of DoPT's OM dated 8.5.20 17, it has been decided by DoPT in consultation with the Union Public Service Commission and approval of the competent authority, to delegate powers to the Administrative Ministries and Departments (Cadre Controlling Authorities) to relax the eligibility service prescribed in the Recruitment Rules/Service Rules (RRs/SRs) for these posts/cadre, as on the crucial date viz. 1st January, 2021, for upto a maximum period of 3 months. Relaxation in eligibility service is to be accorded in such cases where the employees would have been eligible for being considered for promotion as on 1st April, 2021, but due to change in the crucial date to 1st January, 2021, they become ineligible for being considered for promotion during 2021. Similar relaxation is permitted for vacancy years 2022 and 2023.

DoP&T has been granting relaxation, on case to case basis, for the Vacancy Years 2019, 2020 and 2021.

6. PWD RESERVATION ISSUE

In compliance with Order dated 28.09.2021 of the Hon'ble Supreme Court delivered in the '*Application for Clarification*' in the matter of '*Siddaraju vs. State of Karnataka*' Civil Appeal No. 1567/2017 DoP&T has issued O.M. No. 36012/1/2020-Estt.(Res-II) dated 17.05.2022 vide which instruction for grant of reservation in promotion to PwBDs, in the posts and services of the Central Government, as defined under Section 2(r) of the Rights of Persons with Disabilities Act, 2016 notified by the Department of Empowerment of Persons with Disabilities (DEPwD) has been issued.

In case of promotion, DoP&T vide the aforesaid OM has granted four per cent of the total number of vacancies in the cadre strength within Group 'C', from Group 'C' to Group 'B', within Group 'B' and from Group 'B' to the lowest rung of Group 'A' shall be reserved for PwBDs. Reservation in promotion shall be applicable in the cadres in which the element of direct recruitment, if any, does not exceed 75%.

7. BRIEF ON P.AYYAMPERUMAL'S CASE

Shri P. Ayyamperumal, ADG, Chennai retired on **30.6.2013** on attaining the age of superannuation. As Shri P. AyyamPerumal retired on superannuation on 30.06.2013 and he was not in service on 01.07.2013, he was not found eligible for one increment from 01.07.2013 as per Rule 10 of the Central Civil Services (Revised Pay) Rules, 2008.

2. Shri P. Ayyamperumal filed the O.A. No. 310/00917/2015, before the Central Administrative Tribunal Madras Bench and vide order dated 21.3.2017, the Tribunal rejected the claim of the petitioner on the ground that an incumbent is only entitled to increment on 1st July, if he continued in service on that day.

3. Thereafter, Shri P. Ayyamperumal filed a writ petition No. 15732 of 2017 in the Hon'ble High Court, Madras against the order dated 21.3.2017 of the Hon'ble Tribunal. The Hon'ble High Court of Madras vide order dated 15.09.2017 allowed Writ Petition No. 15732 of 2017 with following direction:-

“The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs.”

II. Implication of High Court's Order

The order dated 15.09.2017 of the Hon'ble High Court of Madras was against the policy of the Government of India in Rule 10 of the Central Civil Services (Revised Pay) Rules, 2008 issued by Department of Expenditure and therefore, DoPT advised that the said order dated 15.09.2017 should be challenged before Hon'ble Supreme Court of India by way of filing SLP in the matter.

III. Advice of DOE/DoP&T and DOLA

1. The matter was referred to DoE and DoP&T. DoP&T advised to explore the option of filing SLP in consultation with DoLA. DoLA advised that it appears to be a fit case for agitating the matter before the Hon'ble Supreme Court. After advice of Additional Solicitor General of India, the SLP was filed in the Hon'ble Supreme Court vide Dy. No. 22283/2018, which was dismissed vide order dated 23.07.2018.

2. After dismissal of SLP by the Hon'ble Supreme Court, on the basis of advice of Ld. Solicitor General, Review Petition (C) was filed in the Hon'ble Supreme Court vide

Diary No. 23721/2019. Hon'ble Supreme Court passed the order dated 08.08.2019 in the instant review petition which reads as under:

Delay in filing the Review Petition is condoned. The review petition is dismissed on merits in terms of the signed order. Pending application filed in the matter also stands disposed of.

IV. Advice of DoPT

Since the apex court dismissed the review petition of the department and no legal recourse was available, therefore, to avoid the contempt proceedings, with the approval of the competent authority, order dated 15.09.2017 of the Hon'ble High Court of Madras was implemented ***in personam*** for the applicant only.

Thereafter, file was referred to DoPT for their opinion. DoPT vide their ID note dated 03.10.2019 informed that Deptt. of Legal Affairs have observed as under:

“It is very clear that the judgment of Hon'ble High Court of Madras passed in the matter of Sh. P. Ayyamperumal is in personam and not in rem, therefore, the Administrative Department may implement the order in personam.”

Thereafter instructions dated 18.10.2019 and 20.11.2020 were issued by the to all the cadre controlling authorities to deal with other similar court cases/representation. Recently, DoP&T has also issued instructions in the matter vide their O.M. F.No. 19/2/2018-Estt (Pay-I) dated 03.02.2021 and held that the judgment dated 15.09.2017 of Hon'ble High Court of Madras in W.P. No.15732 of 2017 in the case of P. Ayyamperumal Vs Union of India & Ors. is '**in personam**' in nature and advised all Ministries/Departments to dispose of all pending grievances seeking notional increment for pensionary benefits and also to defend the various pending Court Cases in this matter. Further, vide their OM F.No. 1453545/2021-Estt (Pay-I) dated 24.06.2021 DoPT has referred to the order dated 05.04.2021 passed by the Hon'ble Supreme Court in SLP(C) No. 4722/2021. DoP&T has informed that in the said case, Hon'ble CAT, Bangalore Bench in OA No. 170/677/2019 allowed grant of notional increment to an employee who superannuated from service on 30.06.2014. M/o Railways challenged this judgment in the Hon'ble High Court of Karnataka in WP No. 146967 of 2020 (S-CAT), which was rejected by the High Court on 22.10.2020. Ministry of Railways filed SLP (C) No. 4722/2021 against the order dated 22.10.2020 of the Hon'ble High Court of

Karnataka. The Hon'ble Supreme Court in its order dated 05.04.2021 has directed as follows:

“Issue notice returnable after three weeks. In the meanwhile, there will be stay of operation of the order dated 18th December, 2019 of the Central Administrative Tribunal, Bangalore Bench in Original Application No. 170/00677/2019, affirmed by the judgment and order impugned. The Petitioners shall, however, in the meanwhile without prejudice to the rights and contentions of parties pay retiral dues of the Respondent computed on the basis of the last pay drawn by him on the date of his retirement, that is, 30.06.2014.”

Said SLP is still pending for decision. Thus, in view of the pending SLP in similar matter, the question of law still remains open, and court cases in this regard are to be agitated in appropriate judicial forum.

8. STEPPING UP OF PAY AT PAR WITH JUNIORS

The Board has come across rising litigations on the issue of stepping up of pay & revision of pension and pensionary benefits arising out of such stepping up. Briefly stated, the root-cause of such litigation is that DR (directly recruited) Inspectors get the benefit of three financial upgradation under MACP scheme. Whereas, the senior PR (promote) Inspectors who have already availed 3 promotions are not entitled for any further financial upgradation. Therefore, by virtue of financial upgradations under MACP scheme, the pay of junior DR Inspectors becomes higher than that of senior PR Inspectors and accordingly PR Inspectors are filing court cases seeking benefit of stepping up of pay at par with their juniors. As per the MACPS (latest being OM No. 35034/3/2015-Estt(D) dated 22.10.2019) no stepping up of pay in the level would be admissible with regard to juniors getting more pay than the senior on account of pay fixation under MACPS.

2. The benchmark judgment which these PR Inspectors are quoting in their favor is the Tribunal judgment in case of Ashok Kumar, wherein LD CAT has held that respondents are entitled for stepping up of pay and the pay may be fixed in appropriate stage and if there is no stage to match the pay drawn by the junior, the difference shall be treated as one of personal pay. The Tribunal judgment in Ashok Kumar case was challenged by the department before higher court forums however the petitions filed by the Department got dismissed and the Tribunal judgment attained finality. The judgment of Ashok Kumar was implemented in personam, and was not to be quoted as precedent. However, in some further cases, In order to avoid contempt, court orders (32 cases of CAT, Chandigarh) were implemented in consultation with DoPT and DOLA. DOPT opined that in normal circumstances, stepped up pay forms part of the basic pay, however stepping up of pay granted in these cases is erroneous. Thereafter, DOLA was reconsulted on the issue who opined that review petition cannot be filed against Tribunal orders on stepping up of pay, due to the delay. However, DOLA advised that earlier Supreme court orders is only affirming the order of Hon'ble High Court without giving any reasons and the law of the Supreme Court as laid down is that one line dismissal of SLP does not mean that the Court has laid down any law. Thus DoLA/DoP&T opined that on the grounds, interalia, that appeal can be filed in those cases which are not time bared. Accordingly, 14 SLPS were filed by the Department on the issue in 2017.

3. Due to rising number of cases on these issues in other zones also, matter was placed before the Board and a decision was taken, (i) to defend all the fresh cases of stepping up of pay where the anomaly has arisen on account of grant of MACP to Junior employees, on lines of pending 14 SLPs and (ii) To accept the order of the Hon'ble CAT Chandigarh Bench on the issue of revision of pension and pensionary benefits by including stepped up pay as regular pay in all the 32 cases where the first issue has attained finality. However, as per extant DoP&T/DoLA guidelines in the matter and Govt Policy on MACPS (latest being OM No. 35034/3/2015-Estt(D) dated 22.10.2019) no stepping up of pay in the level would be admissible with regard to juniors getting more pay than the senior on account of pay fixation under MACPS, all new cases seeking stepping up of pay are being defended.