CHAPTER-IV

RESERVATION POLICY IN INDIA : IMPACT AND EVALUATION

A. GENERAL

In pre-independence era, society was divided on the basis of caste, creed, religion and sex. Therefore, to get rid off these inequalities prevailing in society, the idea of equality was evolved in the post-independence era.

‘Equality was considered to be the basis by founding fathers of Indian Constitution at the time of framing the fundamental rights. Right to equality was also incorporated as a fundamental right in the Indian Constitution.

In this Chapter an attempt has been made to analyze, examine and evaluate the provisions relating to the Prohibition of discrimination on grounds of Religion, Race, Caste, Sex & Place of Birth. Article 15 consists of Clause (4). Clause (1) & Clause (2) prohibits state to make any discrimination on grounds of Religion, Race, Caste etc. Whereas Clause(3) and Clause(4) are two exception to general rule laid down under Article 15(1) & 15(2). Therefore, through Article 15(3) & (4), State is empowered to make any provisions for the benefit of Women & Children’s and for the advancement of Backward Classes.

Article 14 of the Constitution guarantees the general rule of equality and Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances.\(^1\) Article 15 of the Constitution is more general than Article 16, the later being confined to matters relating to employment or appointment to any office under the State.\(^2\)

In subsequent chapter a discussion on equality of opportunity in public employment under Article 16 of the Constitution is made. Now it will be pertinent to discuss the provisions of Article 15 which prohibits the State to discriminate against citizens on the grounds only of religion, race, caste, sex, place of birth or any of them.


\(^2\) General Manager, S. Railway v. Rangachari, AIR 1962 SC 36.
The untouchables were the victims of gross political, social and economic inequalities. They were subject to deprivation of their rights in all the spheres of life. Means of earning were under the control of the higher castes and their social life was much more miserable and apathetic. Untouchables were looked down upon by the superior castes and were exploited in their social life by the elite section of society. They were not given and kind of opportunity to do any job. The concept of equality was not even a dream for them. In the same way tribal groups due to geographical and cultural reasons, were severely deprived of political and economic power.

After independence, the framers of Indian Constitution considered the very miserable and apathetic conditions of the depressed section and made some specific provisions for them, in order to bring them at par with the other sections of the society. The framers of the Indian Constitution took to safeguard the interests of the deprived section, to give them a sense of security, to protect them against any discrimination and to help them to get integrated in the main stream of national life. With this in view, a number of provisions have been incorporated in the Constitution for safeguarding specifically the social, economic and educational interests on the deprived groups.

The founding fathers of our Constitution have designedly couched Articles 14, 15 and 16 in comprehensive phraseology so that the frail and emancipated section of the people living in poverty, rearing in obscurity, possessing no wealth of 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 subject to any prohibition of discrimination of grounds of religion, race, caste, seed or place of birth.3

The objectives of reservation may be spelt out variously. As the US Supreme Court has stated in different celebrated cases, viz., Oliver Brown et. Al. v. Board of Education of T Topeka et. Al.,4 Spottswood Thomas Bolling et. Al. v.

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3 Per S. ratnavael Pandian, J., Indra Sawhney v. Union of India, 125 1993 SC 477 at p. 590.
4 347 US 483.
C. Melvin Sharpe et. Al.,\(^5\) Marco Defunis et. Al. v. Charles Odegard\(^6\) reservation or affirmative action may be undertaken to remove the persisting or present and continuing effects of past discrimination, to life the limitation on access to equal opportunity, to grant ‘opportunity for full participation in the governance’, of the society, to recognize the discharge ‘special obligations’ towards the disadvantaged and discriminated social groups, to overcome substantial chronic under-representation of a social group, or to serve the important Government objectives.\(^7\) What applies to American society, applies expropriety vigor to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous. Unlike in America, the all pervasive discrimination here is against a vast majority.

B. ART 15 : NO DISCRIMINATION ON GROUNDS OF RELIGION, RACE, CASTE ETC.

Article 15 of the constitution of India provides:

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

(ii) No citizen shall, on grounds only of religion, race, caste, 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 general public.

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

(iv) Nothing in this article or in clause 920 of Article 29 shall prevent the State from making any special provision for the advancement

\(^5\) 347 US 497.
\(^6\) 416 US 312.
\(^7\) Per Sawant, J., Indra Sawhney v. Union of India, AIR 1993 SC 477, at p. 640.
of any special and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.  

Clause (1) of Article 15 of the constitution reveals that the State is prohibited to discriminate between citizens on grounds only of religion, race, caste, sex, place of birth or any of them. Discrimination means to make in adverse distinction or to distinguish unfavorable from others.

This provision is meant to protect persons against the State action. Therefore, it is necessary to examine the term the ‘State’.

(a) **The State**

The term ‘the State’ has been defined in Article 12 of the Constitution of India as follows:

- The Government and the Parliament of India i.e. Executive and Legislature of the Union.
- The Government and the Legislature of each State i.e. Executive and Legislature of States.
- All local and other authorities within the territory of India.
- All local and other authorities under the control of the Government of India.

The above definition that the term ‘the State’ specifies the authorities and instrumentalities functioning within or without the territory of India which shall be deemed to be ‘the State’ for the purpose of Part-III of the Constitutions.

The definition is inclusive and not exhaustive. Therefore, authorities and instrumentalities not specified in it may also fall within, if they otherwise satisfy the characteristics of ‘the State’ as defined in this Article. The authorities and instrumentalities specified in Article 12 of the Constitution are-

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8 Added by the Constitution (First Amendment) Act 1951, S.2.
(1) The Government and Parliament of India;
(2) The Government and Legislature of the each of the States.
(3) All local authorities; and
(4) Other authorities within the territory of India or under the control of the Government of India.

The first two categories are quite specific and self-explanatory. The later two categories are not so specific and therefore require some explanation.

(b) Local Authorities

The expression ‘local authorities’ refers to authorities like Municipalities, District Boards, Panchayats, improvement Trusts, Port-Trusts, mining, Settlement Boards etc. Rashid Ahmad v. M.B. Kairana\textsuperscript{11} is one of the earliest instances where a Municipal Board was held to be a local authority under Article 12 of the Constitution. The expression ‘local authority’ is defined in Section 3 (31) of the General Clauses Act. It takes in all Municipalities, panchayats, and other similar bodies.\textsuperscript{12}

(c) Other Authorities

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.\textsuperscript{13} It would not be reasonable or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides providing in respect of services under the central or State Government.

In electricity Board, \textit{Rajasthan v. Mohan Lal},\textsuperscript{14} the Supreme Court held that ‘Other Authorities’ would include all authorities created by the Constitution or Statute on whom powers are conferred by law. The Court also observed that it was not necessary that the Statutory authority

\textsuperscript{11} AIR 1950 SC 163.
\textsuperscript{12} Per B.P. Jeevan Reddy, J; \textit{Mandal Commission Case}, AIR 1993 SC 477, p.478.
\textsuperscript{13} Ibid.
\textsuperscript{14} AIR 1967 SC 1857.
should be engaged in performing Government or Sovereign functions. The Court also held that ‘other authorities’ would cover bodies created by the purpose of performing commercial activities or for promoting the educational and economic interests of the people.

The definition of law in Article 13(3) (a) of the Constitution makes the aspect more clearer. The words ‘order’, ‘bye-law’ and ‘regulation’ in Article 13 are significant. Reading the definition of ‘state’ in Article 12 and of ‘law’ of Article 13(3) (a) of the Constitution, it becomes clear that a measure of the nature contemplated by Article 16(4) of the Constitution can be provided not only by the Parliament or Legislature but also by the executive in respect of Central or State services and all the local bodies and ‘other authorities’ contemplated by Article 12 of the Constitution 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 or Legislature.

(.) Religion, Race, or Caste

Under clause (1) of Article 15 of the Constitution State is prohibited from making of discrimination only on the grounds of inter-alia, religion, race, or caste.

Under Clause(1) of the Article 15 of the Constitution the State is prohibited from giving preferential treatment to one religion or religions community. State is under an obligation to treat all the religions on equal footing. In the same way, differentiation cannot be made by the State among the people of different races and castes and a differentiation made on the above stated grounds will be unconstitutional.

But laws for the social reforms of Hindus only, i.e. prohibition of bigamy have been held to be valid, since the classification was not based on religion only but also on the social advancement of the Hindus.\(^\text{15}\) Even

\(^{15}\) *Srinivas v. Saraswathi*, AIR 1952 Mad. 193.
where the person in whose favour discrimination is made belong to the backward classes, the discrimination will be void if it is really based on caste consideration and not economic or social backwardness.\textsuperscript{16}

In State of \textit{Rajasthan v. Pratap Singh}\textsuperscript{17} the Supreme Court invalidated a notification under the police Act of 1851 which declared certain areas as disturbed and made and inhabitants of those areas to bear the cost of additional police stationed but exempted all Harijans and Muslims.

(\textbf{\textit{Sex}})

A discrimination made by the State against a man or a woman only on the ground of sex would be violative of Article 15(1) of the Constitution.\textsuperscript{18} The decision of the Bombay High Court\textsuperscript{19} that the rule of Muslim Law which permits polygamy for men but not for women does not offend against Article 15(1) of the Constitution, or that personal laws are outside the ambit of Article 15 is highly questionable, because enforcement of personal law by the State involves ‘State action’ under Article 15, and the provision in question not being for the protection or benefit for women, cannot escape from the bar under clause (1) of Article 15 of the Constitution. But Article 15(3) is an exception to Article 15(1) of the Constitution.

(\textbf{\textit{Place of Birth}})

Place of birth is different from residence. What Article 15(1) prohibits is discrimination based on place of birth and not that based on residence. In \textit{D.P. Joshi v. State of Madhya Pradesh},\textsuperscript{20} it was held by the Supreme Court that a law which discriminates on the ground of residence does not violate article 15(1) of the Constitution.

\textsuperscript{17} AIR 1960 SC, 1208.
\textsuperscript{18} \textit{AIR India v. Nargesh}, AIR 1981 SC 1829.
\textsuperscript{19} \textit{State of Bombay v. Narsu}, AIR 1952 Bom. 84.
\textsuperscript{20} AIR 1955 SC 334.
Place of birth is distinct from residence. Hence it is constitutionally permissible for a State to prescribe that residents of the State would be entitled to a concession in the matter of fees in a State medical College, or to prescribe that admission to a university shall be restricted to persons resident in a particular area in the State.\footnote{Pradeep v. Union of India, AIR 1984 SC 142.}

C. PROTECTION FROM DISCRIMINATION

The crucial word in this article is ‘discrimination’, which means ‘making an adverse distinction with regard to’ or ‘distinguishing unfavourably from others’; \textit{Kathi Raning Rawat v. State of Saurashtra}, (1952) SCR 435, 442. Another crucial word is ‘only’ so that if the discrimination is based on some ground not connected with religion, etc., but with some other rational factor, the discrimination would be valid.

Article 15(2) of the Constitution is a specific application of the general prohibition contained in Article 15(1). Article 15(2) of the Constitution declares that no citizen shall be subjected to any disability, liability, restriction or condition on grounds only of religion, race, caste, place of birth or any of them with regard to (a) access to shops, public restaurants, hotels and places of public entertainment, or (b) the use of wells, tanks, baths, roads and places of public resort, maintained wholly or partly out of State funds or dedicated to the use of general public.

The words “discriminate against” mean “to make an adverse distinction with regard to; to distinguish unfavourably from others”. It involves an element of unfavourable bias.

Discrimination, in the context of Article 15 also means classification among persons or things and also reservations for some of the members of a group or a class.\footnote{Nainsukh Das v. State of U.P., AIR 1953 SC 384.} If any such classification or reservation is based on any of the grounds mentioned in Article 15(1), i.e., religion, race, caste, sex or place of birth, it would be violative of Article 15(1).\footnote{State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.}
In *State of Rajasthan v. Thakur Pratap Singh*, a Notification issued under the Police Act, 1851 provided that in a disturbed area, the expenses incurred by the State for stationing additional police force were to be borne by the inhabitants of that area, but exemption the Harijan and Muslim inhabitants from the payment. The exemption granted on the basis of caste and religion, the prohibited grounds, was struck down as violative of Article 15(1).”

However the right conferred by Article 15(1) is personal. Therefore, a Statute, which restricted a right of a class of citizens in the matter of testamentary disposition, who might belong to a particular religion, would not attract the wrath of Cl. (1) of Article 15.

In *John Vallamattom v. Union of India*, Section 118 of the Indian Succession Act, 1925, which restricted a person, having a nephew or niece or any nearer relative, from bequeathing his property for religious or charitable use. It placed restriction only on Indian Christians. Holding the impugned Section 118 as violative of Article 14, the majority of the Supreme Court held that Article 15 had no application in the case.

Under clauses(1) and (2) of Article 15 of the Constitution, the State shall not discriminate against any persons on grounds only of religion, race, caste, sex, place of birth or any of them. The word ‘only’ used in Articles 15(1) and 15(2) indicates that discrimination cannot be made merely on the ground that one belongs to a particular caste, sex, etc. In other words, if other qualification are equal, caste, religion, sex, etc. should not be a ground for preference or disability. It follows from this that discrimination on grounds other than religion, race, caste, sex or place of birth is not prohibited. It means that a discrimination based on any of these grounds and also on other grounds is not hit by Articles 15(1) and 15(2) of the Constitution of the Constitution.

The Supreme Court was called upon to interpret the word ‘only’ in *State of Bombay v. Bombay Education Society*. In this case the validity of the Bombay Government Order, directing schools having English as medium of

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24 AIR 1960 SC 1208.
25 AIR 2003 SC 2902.
27 AIR 1954 SC 561.
instruction to admit only Anglo-Indians and citizens of Asiatic descent was impugned on the ground that the order was repugnant to the right secured under Article 29(2) of the Constitution. Contended that the impugned order did not deny admission into such schools to any citizen on the ground only of language, but on the ground that such denial will promote the advancement of national language. The Supreme Court held the order invalid since the result of the order whatever be the motive, was the denial of the admission to all pupils whose mother tongue was not English, i.e. they were discriminated on the ground of language only. Discrimination based on one or more of these (religion, race, caste, etc.) grounds and also on other grounds is not hit by Article 15(1) and 15(2) of the Constitution. A discrimination based on only any one of the grounds stated above will be violative of Article 15 of the Constitution.

D. **RESERVATION FOR WOMEN IN CERTAIN CASES**

Reservation of certain posts exclusively for women is valid under article 15(3). Clause (3) of article 15, which permits special provision for women and children, has been widely resorted to and the courts have upheld the validity of special measures in legislation or executive orders favouring women. In particular, provisions in the criminal law, in favour of women, or in the procedural law discriminating in favour of women, have been upheld. The following decisions may be seen in this context:


This Clause is an exception to the rule against discrimination embodied in Clause (1) as well as Clause (2). While, both these Clauses prohibit discrimination on the ground of sex, Clause (3) enables the State to confer special rights upon women, since women are a well defined class.

The word “for” in clause (2) signifies that special provisions can be made “in favour of” women and not against them. Therefore, Clauses (1) to (3) of Article 15, read together would imply that State can discriminate in favour of women against men, but cannot discriminate in favour of men against women. For instance, the plea that a woman belonging to S.C. category, cannot contest for
the post of Sarpanch, reserved for candidates belonging to S.C. category and not reserved for women belonging to that category, would not be tenable.\textsuperscript{31}

Special provision referred to in Clause (3) of Article 15 need not be restricted to measures which are beneficial in the strict sense. The provision making women ineligible for the post of a warden in men’s jail would be covered by Article 15(3) and would be valid, as the position of a woman would become awkward and hazardous while dealing with habitual offenders.\textsuperscript{32}

The “special provision” which the State may under Article 15(3) can be in the form of either affirmative action or reservation.

In the light of the above observation, the Supreme Court in \textit{Government of A.P. v. P.B. Vijay Kumar},\textsuperscript{33} held valid, the State Service Rules, providing preference to women in direct recruitment. It has been ruled that Articles 15(3) and 15(1) have to be read harmoniously with Articles 16(2) and 16(4).\textsuperscript{34}

In \textit{Yusuf Abdul Aziz v. State of Bombay},\textsuperscript{35} the Bombay High Court upheld the validity of Section 497 of Indian Penal Code, 1860,\textsuperscript{36} and said that the impugned Section was justified on the ground that the discrimination was not based on the ground of sex alone, but for other reasons also. The Court explained that women in this country were married at a very young age and that their husbands could have a plurality of wives. The Legislature, therefore, took a lenient and charitable view of the weakness of the women in that particular situation. The Supreme Court, on appeal, ruled down that it was covered by the exception Clause (3) of Article 15.

**Reservation for Women:**

(i) Exclusive women’s educational institutions (e.g. Women’s Colleges, Girls Schools etc. which can be considered as a type of reservation.

\textsuperscript{33} AIR 1995 SC 1648.
\textsuperscript{34} \textit{Mohd. Siddiq Ali v. High Court of A.p.}, AIR 2005 SC 4380, wherein reservation of posts of District Munsifs, for women, was held legal.
\textsuperscript{35} AIR 1954 SC 321.
\textsuperscript{36} Section 497 defines the offence of adultery committed by a man with the lawfully wedded wife of another man.
(ii) Windows and deserted women.

(iii) 40% seat reservation in public bus transport in some States.

(iv) Lower birth reservation in trains for women travelling alone and women above 45 years of age.

(v) There are separately arm contingent for women. In Tamilnadu there is a separate Women Commandos Regiment.

**E. RESERVATION FOR BACKWARD CLASSES**

Clause (4) of article 15 may at the first sight appear to be a blanket provision, protecting any kind of beneficial discrimination in the nature of special provisions for the benefit of the classes mentioned therein. However, apart from questions as to when a particular class can be legitimately regarded as backward class, discriminatory provisions of such a nature may be struck down as unreasonable in the circumstances. This is on the basis that the general right of equality guaranteed by article 14, would override the special provision under article 15(40, in such circumstances. Hence, reservation of an excessively high percentage of seats in technical institutions for each classes would be void. In fact, ordinarily speaking, reservation in excess of 50 per cent of available seats may not be upheld.

In making reservation by executive order by virtue of article 15(4), the State has to take care that it is not unduly wide. Apart from Scheduled Castes and Scheduled Tribes, the other classes eligible or reservation, if made by the State, is the category of “socially and educationally backward classes of citizens”. In article 46, (a directive principle of State policy) it is the obligation of the state 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” which is provided for. By article 335, it is provided that the claim of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency in the administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. But this article does not mention backward classes. Virtually, the Supreme Court has held the element of
efficiency of administration as a limitation on article 16(4). Incidentally, article 16(4) speaks of reservation of appointment of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.

This Clause was added by the Constitution (First Amendment) Act, 1951, as a sequel to the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*.

In this case, the Madras government issued a communal G.O., providing for reservation of seats in the State Medical and Engineering Colleges for different communities in proportion of students of each community. Thus, the seats were reserved on the ground of religion, race and caste. The Order was challenged as violative of Article 15(10 since it discriminated on the grounds of religion, race and caste. The Government contended that the Order was issued in order to promote the Directive Principle of State Policy enshrined in Article 46. The Supreme Court, however, held the Order void as violative of Article 15(1). The Court explained that while fundamental rights were justiciable, the Directive Principles had been expressly declared non-justiciable and that it was their duty to enforce only the justiciable provisions.

In *State of U.P. v. Pradeep Tandon*, the Uttar Pradesh Government made reservation of seats for admission to the medical colleges in the State in favour of candidates coming from: (i) rural areas, (ii) hill areas, and (iii) Uttarakhand areas. The Supreme Court held that the reservation in favour of candidates coming from rural areas was unconstitutional.

As regards reservation for candidates from hill and Uttarakhand areas, the Court said that the fact that these areas in the State of Uttar Pradesh suffered from backwardness, both social and educational, the reservation for candidates from these areas would be constitutionally valid.

37 AIR 1975 SC 563.
38 Jagdish Negi v. State of U.P., AIR 1997 SC 3505, wherein, these areas were held suffering from social and educational backwardness.
The question was considered by a five-Judge bench of the Supreme Court in *K.C. Vasanth Kumar v. State of Karnataka.* The five Judges expressed five separate opinions on the vexed question. The conclusions which may be drawn from these would be that both, caste and poverty, would be relevant factors in determining the backwardness of citizens. Occupations and places of habitation may also be counted in making the determination of backwardness.

In *Indra Sawhney v. Union of India,* the matter seems to have been settled by the majority of the Supreme Court, holding that caste can be an important or even sole factor in determining the social backwardness and that poverty alone cannot be such a criterion.

(i) **When caste may be Sole Basis?**

A major difficulty raised by Art. 15(4) is regarding the determination of who are ‘socially and educationally backward classed,’ This is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determinations come into play in evolving proper criteria for its determination. Art. 15(4) lay down no criteria to designate ‘backward classed’: it leaves the matter to the state to specify backward classes but the courts can go into the question whether the criteria used by the state for the purpose are relevant or not.

**Definition of Backward Class**

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the supreme court’s approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and efficiency and public interest have to be maintained in public services because it is implicit in the very idea of reservation that a less meritorious person is being preferred to a more meritorious person. The Court also seeks to guard against the

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40 *AIR 1993 SC 477.*
perpetuation of the caste system in India and the inclusion of advance classes within the term backward classes.

From the several judicial pronouncements concerning the definition of backwards classes, several propositions emerge. **First**, the backwardness envisaged by Art. 15(4) are social and educational and not either social or educational. This means that a class to be identified as backward should be both socially and educationally backward. “In **Balaji**, the court equated the “social and educational backwardness” to that of the “Scheduled Castes and Scheduled Tribes”, The Court observed: ‘It was realized that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Scheduled Tribes and it was thought that some special provision ought to be made even for them.”

**Secondly,** poverty alone cannot be the test of backwardness in India because by and large people are poor and, therefore, large sections of population would fall under the backward category and thus the whole object of reservation would be frustrated;”

**Thirdly,** backwardness should be comparable, through not exactly similar, to the Scheduled Castes and Scheduled Tribes.

**Fourthly,** ‘caste’ may be a relevant factor to define backwardness, but it cannot be the sole or even the dominant criterion. If classification for special backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society. Also this test would break down in relation to those sections of society which do not recognize caste in the conventional sense as known to the Hindu society.

**Fifthly,** poverty, occupations, place of habitation, all contributes to backwardness and such factors cannot be ignored.

**Sixthly,** backwardness may be defined without any reference to caste. As the Supreme Court has emphasized, Art. 15(4) “does not speak of castes, but only speaks of classes”, and that ‘caste’ and ‘classes’ are not
synonymous. Therefore, exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests.

(a) **Balaji Case**

After the enactment of the above mentioned first constitutional Amendment in 1851, Balaji was the first case which came up before the Supreme Court.

An order the Mysore Government issued under Art. 15(4) reserved seats for admission to the state Engineering College for backward classes and ‘more’ backward classes. This was in addition to the reservation of seats for the Scheduled castes (15%) and for the scheduled tribes (3%). Backward and more backward classes were designated on the basis of ‘Castes’ and ‘communities’.

The Supreme Court characterized Art. 15(4) as an exception to Art. 15(1) [ As well as to Art, 29(2)]. The Court stated-“there is no doubt that Art. 15(4) have to be read as a provision or an exception to Art. 15(1) and 29(2)”.

The Court declared the order bad on several grounds in *Balaji v. State of Mysore*. The first defect in the Mysore order was that it was based solely on cast without regard to other relevant factors and this was not permissible under Art. 15(4), though caste in relation Hindus could be a relevant factor to consider in determining the social backwardness of a class of citizen, it must not be made sole and dominant test in that behalf. Christians, Jains and Muslims do not believe in the castes system and, therefore, the test of caste could not be applied to them. In as much identification of all backward classes under the impugned order had been made solely on the basis of castes, the order was bad. “Social backwardness is in the ultimate analysis the result of poverty to a very large extent.”
Secondly, the test adopted by the State to measure educational backwardness was the basis of the average of student population in the last three high school classes of all high school in the state in relation to a thousand citizens of that community. This average for the whole state was 6.9 per thousand. The Court Stated that assuming that the test applied was rational and permissible to Judge educational backwardness, it was not validly applied. Only a community well below the state average could properly be regarded as backward, but not community which came near the average. The vice of the Mysore order was that it included in the list of backward classes, castes or communities whose average was slightly above, or very near, or just below the state average, eg. Lingayats with an average of 7.1 percent were mentioned in the list of backward communities.

Thirdly, the Court declared that Art. 15(4) does not envisage classification between ‘backward’ and ‘more backward classes’ as was made by the Mysore order. Art. 15(4) authorizes special provisions being made for really backward classes and not for such classes as were less advanced than the most advanced classes in the State. By adopting the technique of classifying communities into backward and more backward classes, 90 per cent of the total State population had been treated as backward. The order, in effect, sought to divide the State population into the most advanced and the rest, and put the latter into two categories - backward and more backward-and the classification of the two categories was not envisaged by Art. 15(4). ‘The interests of weaker sections of society which are a first charge on the State and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserve practically all the seats available in all the colleges that clearly would be subverting the
object of Art. 15(4).” The State has “to approach its task objectively and in a rational manner.”

In Balaji, the Supreme Court sense the danger in treating ‘caste’ as the sole criterion for determining social and educational backwardness. The importance of the judgment lies in realistically appraising the situation when the Court said that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome or social backwardness. The court drew distinction between ‘castes’ and ‘class’. An attempt at finding a new basis of ascertaining social and educational backwardness in place of caste is reflected in the Balaji decision.

The court also ruled that reservation under Art. 15(4) should be reasonable. It should not be such as to defeat or nullify the main rule of equality enshrined in Art. 15(1). While it would not be possible to predicate the exact permissible percentage of reservation it can be stated in a general and broad way that it ought to be less than 50% ; “ How much less than 50% would depend upon the relevant prevailing circumstances in each case”. Also a provision under Art. 15(4) need not be in the form of a law, it could as well be made by an executive order.

(b) After Balaji Case

An order saying that a family whose income was less than Rs. 122 per year, and which followed such occupation as agriculture, petty business, inferior services, crafts etc. would be treated as ‘backward’, was declared to be valid in Chitrakula v. State of Mysore. Here two factor- economic condition and profession- were taken into account to define backwardness, but caste was ignored for the purpose.

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In Balaji, the Supreme court has mentioned castes as one of the relevant factor for determining social backwardness. The order in\textsuperscript{42} the instant case was challenged on the ground that castes had been completely ignored for the purpose. The Supreme court rules that though caste is relevant circumstance in ascertaining backwardness of a class, there is nothing to preclude the authority concerned from determining social backwardness of a group of citizen if it could do so with out reference to caste. Identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste is not bad and would not offend Art. 15(4). \textbf{SUBBA RAO, J., speaking for the majority of the constitution bench 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 individuals may be considered along with other relevant factors in putting him in particular class. We would also like to make it clear within the meaning of Art, 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests. In course of time, the judicial view has undergone some change in this respect and ‘caste’ as a factor to assess backwardness has been given somewhat more importance than in Balaji. The Supreme Court has taken note of the fact that there are numerous castes in the country which are backward socially and educationally and the state has to protect their interests. A caste is also a ‘class’ of citizen and therefore, if an entire caste is found to be socially and educationally backward, as a fact, on the basis of relevant data and material, then inclusion of the caste as such would not violate Art. 15(1). When backwardness is defined with reference to castes, the Court wants to be satisfied that not ‘caste’ alone, but other factors have also been considered for the purpose.

On this basis, the Court upheld a Madras order defining backward classes mainly with reference to castes. Looking at the

\footnote{AIR 1998 SC 2042.}
history as to how the list had come to be formulated, the Court felt satisfied that caste was not taken as the sole basis of backwardness; the main criterion for inclusion in the list was social and educational backwardness of the castes based on their occupations. Castes were only a compendious indication of the classes of people found to be socially and educationally backward.

In Rajendran, WANCHOO, C.J., speaking for the Constitution Bench pointed out that “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 Art. 15(4). 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 favor of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Art. 15(4).”

(c) Backward Classes Commission

Similarly, in Balaram a list prepared by the Backward Classes Commission appointed by the Andhra Government was held valid even though backward classes were enumerated mainly by their caste names because the Court found that Commission had prepared the list after a detailed enquiry and applying several tests like general poverty, occupations, caste and educational backwardness. The Court felt satisfied that the person included in the list was prepared solely with reference to castes, and no material was placed before the Court to show that other factors besides caste had been considered in preparing it, the list was quashed as violative of Art.15(1). The Court observed in Sagar. “In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determining of a class a

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test solely based upon the caste or community cannot also be accepted.

The judicial approach that castes may be listed as backward classes provided they are found to be backward on the basis of some factors other than mere ‘caste’, may possible be more practical in the context of the facts of the Indian life. But there is no doubt that this dilutes, to some extent, the Balaji approach. The danger in this judicial thinking is that it will give a lease of life to the caste system India, and the quest for formulae to define backwardness, delinked from the caste system, will recede into the background. In this way, the goal of evolving a casteless society in India in the foreseeable future will receive a setback.

A government’s order excluded the candidates belonging to socially an educationally backward classes from claiming the benefit of reservation if the aggregate annual family income was Rs. 10000 or over. The order was challenged by a candidate belonging to the backward class, but who was denied the privilege of preferential admission to medical college because her family income exceeded Rs. 10000 annually.

(d) Social Backwardness

The Supreme Court emphasized in *K.S Jayasree v. State of Kerala* that social backwardness is the result of caste and poverty. Poverty or economic standards is a relevant factor in determining backwardness, but cannot be the sole determining factor. Caste cannot also be the sole or dominant test for the purpose. “Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests”. Both of these factors are relevant to determine backwardness.

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44 AIR 1976 SC 2381.
Socially backwardness which results from poverty is likely to be magnified may also be relevant factors for the purpose. With the improvement in economic position of a family, social backwardness disappears. To allow these persons to take advantage of the privileges meant for backward person, will result in depriving the real backward person of their chance to make progress.

In a number of cases, it has been held that a lady marrying a Scheduled Caste/Scheduled Tribe/Other Backward Citizen (OBC), or one transplanted by adoption or any other voluntary act, does not ipso facto become entitled to claim reservation under either Art, 15(4) or Art. 16(4). In Valsamma Paul v. Cochin University the Supreme Court has explained the rationale behind this ruling as follows:

“It is seen that Dalits and Tribes suffered social and economic disabilities recognized by Articles 17 and 15(2). Consequently, they became socially, culturally and educationally backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation’s life by providing them opportunities and facilities…. Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also undergo same handicaps, be subject to the same disabilities, advantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation”. The court went on to say that a person who has had an advantageous start in life having been born in forward caste is transplanted into a backward caste by adoption/marriage/ conversion does not eligible to the benefits of reservation either under Art. 15(4) or 16(4). “Acquisition of the status of SC, etc. by voluntary mobility into

45 AIR 1996 SC 1010.
46 AIR 1999 SC 201
these categories would play fraud on the constitution, and would frustrate the foreign constitution.”

What happened in **Valsamma** was that a Syrian Catholic (a forward Caste) lady married to a Latin Catholic was appointed as a lecturer as a reserved candidate. This was challenged and the Supreme Court ultimately quashed her appointment on the ground that she was not entitled to the benefit of reservation under Art. 16(4) as a lecture as the post in question was reserved for the backward class Latin Catholic Community.

**(e) Yearly Review of Benefits of Reservation**

The Supreme Court has clarified *in jagdish Negi v. Stage of Uttar Pradesh*,\(^{47}\) that no class of citizens can be perpetually treated as socially and educationally backward. Backwardness cannot continue indefinitely. Every citizen has a right to develop socially and educationally. The State is entitled to review the situation from time to time. There is no rule that once a “backward class of citizens, always such a backward class”. Once a class of citizens, it cannot be predicted that in future it may not cease to be so. The State may ‘review the situation from time to time and decide whether a given class of citizens which has been characterized as “socially and educationally backward” had continued to form part of that category or had ceased to fail in that category.

The Supreme Court has observed in *Indra Sawhney*\(^{48}\) case that the policy of reservation has to be operated year-wise and there cannot be any such policy in perpetuity. The State can review from year to year the eligibility of the class of socially and educationally backward class of citizens. Further, it has been held that Art. 15(4)\(^{49}\) does not mean that the percentage of the population of the backward classes to the total population. It is in

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\(^{47}\) *AIR 1997 SC 3505.*
\(^{49}\) *AIR 1999 SC 2085.*
the discretion of the State to keep reservation at reasonable level into consideration all legitimate claims and the relevant factors.

(ii) **Backward and More Backward Class**

*Balaji v. State of Mysore*[^50] is a leading decision of the Supreme Court on the principles relating to reservations. Though the case arose in the context of admissions to the professionals colleges, the principles stated are equally valid in respect of government posts. Pursuant to the report of the Mysore Backward Classes Committee, popularly known as the Nagan Gowda Committee, the Mysore State passed an order to govern the admissions to technical colleges and government services. According to the impugned order, 68 per cent of the seats were reserved and 32 percent were to be filled by open competition. Of the 68 percent of the seats, 18 percent of the seats were reserved for the scheduled Casts and scheduled Tribes and the rest for other backward classes. The other backward classes were again divided as ‘more backward classes’ and ‘backward classes’. Twenty-two percent of the seats were reserved for more backward classes and 28 percent for backward classes. The Committee took the stage average of the student population in the last three High School classes as index. The Stage average was 6.9 per thousand. The Satanis, Nayars and Zoroastrains whose average was 7.0 were regarded as forward. Lingayats whose average was 7.1 were classified as backward owing to political pressures even though the NaganGowda Committee did not recommended them as backward. Similarly Bhunts who formed part of Vokkiligas and had an average of 7.1 were classified as backward.

The Supreme Court struck down the order as a “fraud” on the constitution. Gajendragadkar, J. pointed out that social and educational backwardness is in the ultimate analysis the result of poverty to a very large extent. “The classes of citizens who are deplorably poor automatically become socially backward. Further the court observed:

[^50]: AIR 1963 SC 649.
“There are some occupations which are treated as inferior according to conventional beliefs and casts of citizens who follow these occupations are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons.51 “The court stressed the fact that articles 15(4) and 16(4) used the words “backward classes” and not “backward casts” of citizens,. A classification based solely on casts fails to take into account backwardness amongst Muslims and the Christians. Further it is not open to the State to classify the backward classes into more backward and backward. The Supreme Court in the Balaji are stated that the reservation provided under article 15(40 is in the nature of an expectation and, therefore, should be below 50 percent of the seats.”

Formerly the rules framed by the Jammu and Kashmir Government provided for a reservation of 50 percent in favour of Muslims who constitute a majority in the state. The Supreme Court struck down the order as invalid.52 Subsequently the Jammu and Kashmir Government appointed a commission of inquiry under the chairmanship of Dr. P.B. Gajenderagadkar, who delivered the judgment in Balaji’s case. The commission recommended the adoption of the “multiple tests” for adjusting social and economic backwardness:53

(1) The economic backwardness of the class. For this purpose suitable adhoc figure of annual income may be adopted).
(2) The occupation or occupations pursued by that class of citizens.
(3) Their place of habitation.
(4) The average student population per thousand in that class.
   (This should be substantially below the State average).
(5) Caste in relation to Hindus.

There was a slid back from the principle laid down in the Balaji’s case in two later cases, namely, the Rajendran’s case and the

51 Ibid.
54 AIR 1968 SC 1012.
Periakaruppan’s\textsuperscript{55} case. In the Rajendran’s case the Madras Government listed as backward classes, casts which in its opinion were socially and economically backward. The list of castes was originally drawn up in 1906 and with subsequent modifications has been followed. The argument of the State was that members of the castes specified in the list were as a whole backward. The Madras list of backward classes was upheld on the ground that “caste is also a class of citizens”. The same view was reiterated in the second case by stating: “A caste has always been recognized as a class.”

These statements of the highest court overlook a rudimentary distinction that exists in sociology between “class” and “caste”, namely, that class is an open category, whereas caste is a closed category. One remains throughout life in the caste into which one is born whereas one may change one's class in one’s lifetime.

The existing policies on identification of the backward classes reveal three models. First is to ascertain backward classes wholly on the test of castes. The second is to ascertain the group on the basis of caste \textit{cum} income, that is, to confine the benefits of reservations in a caste to members whose income does not exceed a predetermined figure. The third is to determine backwardness on the basis of income only ignoring the castes of the beneficiaries altogether.

The first had been adopted by the British in the former province of Madras and by the rules of Mysore in the State of Mysore. \textit{Balaji’s} case rejects this approach but the subsequent decisions seem to revalidate the test on the ground that caste is also a class. The est enables the forward groups in the backward castes to monopolize the jobs at the expense of the weaker sections of their own community. The danger that a caste test might defeat the objective of social justice, underlying reservations, has been brought out in the \textit{Chiralekha} case.\textsuperscript{56} Pointing out that caste cannot be the sole test, Justice Subba Rao stated:

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\textsuperscript{55} 1 SCC p.38, 1971

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To illustrate, take a caste in a State which is numerically the largest therein. It may be that through a majority of the people in that caste are socially and educationally backward, and effective minority may be far more advances than another small sub caste the total number of which is far less than the said minority. If we interpret the expression “classes” s “castes”, the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve.

To put it differently, reliance on averages relating to education and income in large castes groups will be misleading as it tends to suppress the fact that some sub-groups within that caste are not socially and educationally backward. To allow such advanced sub-groups to have the privileges conferred on group for its backwardness will be prejudicial to the equality of opportunity of individuals belonging to non-backward groups who might be more meritorious. It will result in advanced sub-groups depriving the opportunities of the really socially and educationally backward members of the caste. Lastly, it will impair the principle of efficiency in services.

The quantum of reservation in favour of Other Backward Classes, if based on caste, is open to a serious weakness. The Central Government, in order to discourage casteism, has di-continued the caste enumeration in censuses except in the case of the Scheduled Castes and the Scheduled Tribes. Therefore, the State Government are relying upon the projections of castes figures of the old censuses. For examples, in Andhra Pradesh, for the collection of caste wise statistics in the Telengana area, 1931 figures were taken as the base and in the Andhra area 1921 figures were taken as the base. It my be noted that the reports of the Andhra Pradesh and Karnataka Backward Classes Commissions gave the regressive and

questionable suggestion that enumeration should be made caste-wise at the censuses.\textsuperscript{58}

It may be mentioned that Shri Havanur, who was the Chairman of the Karnataka Backward Classes Commission, is a staunch advocate of “equality of castes” and supports appointments or reservations on the basis of caste. An intriguing question arises out of his thesis: Why should the “equality of castes” be confined to jobs why? Why not to other forms of wealth, especially land?

K. Subba Rao, who was nce the Chief Justice of India, Pointed out yet another defect in the present method of reservations. When a caste is taken as an index of backwardness, no attempt is made to give them representation in proportion to their numerical strength. For example, in the State of Andhra Pradesh the strength of Budabukkalas, a caste of nomadic beggars, is estimated at 3073 and the Jogis whose traditional occupation is begging at 18,363. The Lambadas or Banjaras who were formerly classified as a criminal tribe are estimated at 3,85,604. Hypothetically, if owing to urbanization the first two castes were to take a disproportionately large number of jobs, it will retard the upward mobility of the Lambadas.

Coming to the caste-cum-income test under the second model, this has been adopted in Kerala. Under it persons belonging to enumerated castes or communities and who are members of families with an annual income of less than 10,000 rupees s given the benefits of reservations. This test also shares the faults of a castes-test in many directions, but mitigates the defect of other policies where the affluent sections in a backward class take away the benefits meant for the underprivileged members of the community. This model ignores the disadvantaged among the forward castes. The test fails largely in the case of Muslims and Christians.

In \textit{Jayasree v. State of Kerala}\textsuperscript{59} the fixation of income limit of Rs. 6000 under the caste-cum-income test was challenged as arbitrary and

\textsuperscript{58} The Karnataka Backward Classes Commission Report, Vol. 1, 151 (1975)
unconstitutional. The Supreme Court upheld the imposition of the ceiling and cited with approval the following passage.\textsuperscript{60}

If a group in those castes/communities were able to advance socially and educationally and economically, to make reservations for them would be deprive the chances of the really socially and educationally backward classes of people in those communities/castes.

The third based on income only is conceptually attractive. The strong argument in its favour is the explicit use of the word “socialist” in the preamble to the constitution. Socialism whatever may be its form or variety can only recognize classes bases on income but not castes. Another point in its favour is, as stated in the Balaji case, that the caste test fails in the case of Muslims and Christians. But the income test presents problems in actual operation. The actual incomes of individuals are hard to ascertain in the Indian context and are liable to be suppresses. In addition there is a possibility under this test that the economically weaker sections belonging to the socially advanced group might take the benefits at the expense of the socially and educationally backward groups. Perhaps a multiple test, based on actual occupations, literacy of the parents and the income of the family may eliminate these drawbacks.

(iii) Quantum of Special Reservation

After defining the ‘socially and educationally backward’ classes, the question comes up as unto what extent the preference might be given to the backward classes. There is a difference of opinion among the various High Courts on the question of reservation. Mysore government was confronted with series of cases regarding the problem of determining “backwardness” and the limits on the percentage of population designated for preferential treatment under Articles 15(40 of the Constitution of India.
In *Balaji v. State of Mysore*, under the order of Mysore government, 68% of the seats available for admission to the Engineering and Medical Colleges and other Technical Institutions specified therein were reserved on the following basis: Backward Classes – 28%, more backward Classes – 22%, Scheduled Caste – 15%, Scheduled Tribes – 3%. The petitioner challenged the validity of the order on the ground that the classification of the backward of the order on the ground that the classification of the backward and more backward classes was made almost solely on the basis of caste and in such a manner as to exclude, particularly Brahmins.

The Supreme Court stated that Article 15(4) referees to ‘classes of citizens’, not to castes and while ‘the caste or a group of citizens may be relevant its importance should not be exaggerated. Caste cannot be the sole or dominant test. Backwardness must be both social and educational. The court also held that the classification of ‘backward and ‘more backward’ is neither justified nor warranted by Article 15(4) and that generally speaking special provisions should be less than 50%. Decline in quality, the Court contended, is the ‘inevitable consequence of reservation’ and the interests of nation would be seriously jeopardized if special provisions for the backward were not held within reasonable time. Thus the court strict down the reservation of 68% as constitutionally invalid. But the question left open was whether 50% was the maximum limit of reservation.

This question came for consideration in *T. Devadasan v. Union of India*. In this case the Central government had reserved a little over 64% of vacancies for Scheduled Castes and Scheduled Tribes by adopting the principle of carry-forward in the second and third year. By a majority of two to one, the Supreme Court held that Article 16 of the constitution conferred a right on each individual citizen seeking employment or appointment to any office under the State and that “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

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61 AIR 1964 SC 179.
as to create a monopoly or to disturb unduly the legitimate claims of other communities.

After citing the observations made in Balaji’s case on Article 16(4) the Supreme Court said that what was laid down about reservation of seats in educational institutions applied equally to reservation of posts under Article 16(4) namely, that generally speaking the reservation ought to be less than 50%. On the other hand, Subha Rao, J. (as he then was) in his dissenting judgement was of the view that the ‘reasonable number’ of reservations should be measured by its relation to the total cadre of strength and not on the basis of seats reserved on one particular occasion. He expressed the view that the government is as free to use any method of reservation including the reservations of one hundred percent of posts until the prescribed level was reached.

In *Triloki Nath and others v. State of J&K*62 the appellant challenged the State’s direction of posts to Muslims, Jammu Hindus and Kashmiri Hindus in the ratio of 50:40:10, as volatile or Article 16(4). The Supreme Court held that though the State was empowered to make provision for reservation of appointments in favor of backward classes, the distribution of total number of posts or appointment on the basis of community or place of residence was contrary to the constitutional guarantee under clauses(2) and (4) of Article 16 and was not saved by Clause (4) of Article 16.

It is evident that in these cases the courts have provided ample protection to the rights of the backward classes in the matters of service under the State, without at the same time jeopardizing the rights of the other classes in this regard.

Exempting the Scheduled castes and scheduled tribes from the necessity of passing the departmental test for promotion in service was challenged in the case of N.M. Thomas v. State of Kerala.63 It was brought to the notice of Kerala government that a large number of

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63 AIR 1976 SC 490.
government servants belonging to Scheduled Castes and Scheduled Tribes were unable to get their promotion because of want of test qualifications for promotion from lower division clerks to upper division clerks in the registration department. In order to given relief to the backward class of citizens, the government incorporated rule 13A under the Kerala State and Subordinate Service Rules 1958, enabling the Government to grant exemption to these employees for a specific period. Consequently an order was made under the rule giving to these backward class employees an exemption for a period of two years from passing the necessary test. As a result, 34 out of 51 posts were filled up by the members of the Scheduled Castes and Scheduled Tribes without passing the test.

N.M. Thomas, a lower division clerk, was not promoted as an upper division clerk despite his passing the test. He filed a petition for a declaration that Rule 13AA was volatile of Article 16 of the Constitution. The Kerala High Court declared the impugned rule invalid on the ground that it was beyond the permissible limit of Article 16(10 of the Constitution. It held that by virtue of carry forward rule, the Government had promoted 62% of the clerks belonging to the backward groups and had made an uncalled for discrimination between the members of the same services.

The Supreme Court a majority of five out of seven upheld the impugned rule as a valid protective discrimination Ray, C.J. and Mathew, Krishna Iyer and Martaza Fazal Ali, JJ. Approved the classification made by the rule as permissible under Article 16(10, but Beg, J., justified the rule under Article 16(4) as constituting a ‘conditional’ or partial reservation in favor of backward classes.

The majority in this case authorized the State of Kerala to adopt any methodology of protective discrimination by making proper classification, thus it is submitted is clearly in conflict with the earlier rulings of the Supreme Court according to which preference can be given to the backward classes only by method of reservation under Article 16(4) which is an exception to Article 16(1) of the Constitution.
Until Thomas case, the usual practice was that in a particular year, recruitment of backward classes should not exceed 50% of the total number of seats filled in that year. But in this case, it was held by the supreme Court that this ratio was not sacrosanct and may exceed in a given case. Ray C., felt that the question of the extent of preference should be considered in the context of total position of the promotions in service.

In *A.B.S.K. Sang (Rly.) v. Union of India* the Supreme Court following Thomas Case, upheld the validity of the Railway Board Circular under which reservations were made in selection posts for scheduled castes and scheduled tribe’s candidates. The Court held that under Article 16(1) itself the State might classify groups or class based on substantial differentia. So the fundamental right to equality or opportunity has to be read as justifying the categories of scheduled castes and scheduled tribes separately from rest of the community for the purpose of ‘adequate representation’ in the services under the State. Thus the classification between scheduled castes and scheduled tribes candidates from rest of the community of the purpose of reservation is just and reasonable because they constitute a class by themselves because of their social backwardness. The Supreme Court also upholds the ‘carry forward rule’ under which 17% posts were reserved for those categories. The carry forward rule was extended from 2 to 3 years. As a result of this rule the reservation quota came to about 64.4 percent but the Supreme Court held that this was not excessive as mathematical precision could not be applied in dealing with human problems. Some excess will not affect the reservation but substantial excess will void the selection, said Mr. Justice Krishna Iyer. In this case the reservation of 64.4 percent was not considered by him excessive.

Chinnappa Reddy, J., had gone to the extent of ruling that the rule of 50% laid down in earlier cases was only for the guidance of judges and they were not bound by it. Pathak J., however, dissented from the
majority and said that rule of 50% as laid down in earlier cases was fair and reasonable, but he was not very emphatic in his dissent and said that in view of the majority decision in Thomas case\(^6\) he was bound to hold the impugned ruled as valid. The majority decision thus permits reservation beyond 50% but subject to judicial approval. Into the present case the Supreme Court held that the reservation of 64.4% was not excessive. As a result of the decision of the court in Thomas\(^7\) and A.B.S.K. Sangh\(^8\) case, Balaji\(^9\) and Devadasan\(^10\) cases have been impliedly overruled. It is submitted that Balaji and Devadasan cases were rightly decided and has laid down correct principles relating to reservation for the Scheduled Castes and Scheduled Tribes in Government Services.

Mandal Commission has recommended for the reservation of 27% of Central Government jobs socially ad educationally backward classes. Already 22½ percent of Central government jobs are reserved for the members of Scheduled Castes and Scheduled Tribes in the Centre. Since according to the decision of Supreme Court (Mandal Case\(^11\)) the overall limit of reservation cannot exceed belong 50% therefore the Commission recommended for the reservation of 27% posts for backward classes.

Upholding the validity of total 49.5% reservation (22.5% for scheduled castes and scheduled tribes and 27% for socially and educationally backward classes) in Mandal Commission Case,\(^12\) the Supreme Court has held that barring any extra-ordinary situation reservation should not exceed our mentioned of a far flung remote area whose population needs special treatment for being brought in the mainstream. For such cases the Court suggested extreme in the mainstream. For such cases the Court suggested extreme caution and making out a special treatment for being brought in the mainstream. For such cases the Court suggested extreme caution and making out a special

\(^6\) AIR 1976 SC 490.  
\(^7\) AIR 1976 SC 490.  
\(^8\) (19810 1 SCC 246.  
\(^9\) AIR 1963 SC 649.  
\(^10\) AIR 1964 SC 179.  
\(^11\) AIR 1993 SC 477.  
\(^12\) AIR 1993 SC 477.
case. The 50% limit, however, applies to all reservation, including those which can be made under Article 16(1), i.e. altogether the reservation should not exceed 50% limit. But this limit applies only to reservation and not to exemptions, concessions, relaxation. For the application of 50% rule a year should be taken as the limit and not the entire strength of the cadre, service or the unit, as the case may be.

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 provisions have to be harmonized keeping in mind the provisions have to be harmonized keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14.\textsuperscript{73} The provisions under Article 16(4) – conceived into 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.\textsuperscript{74} It is relevant to point out that Dr. Ambedkar himself contemplated reservation being “confined to minority of seats. 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.\textsuperscript{75} From the above discussion, the irresistible conclusion that follows is that the reservation contemplated in clause (4) of Article (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 populating inhabiting those areas night, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristically to them, need to be treated in different ways some relaxation in this strict rule may become imperative.

\begin{itemize}
\item \textsuperscript{73} AIR 1993 SC 477, at p. 490.
\item \textsuperscript{74} Ibid.
\item \textsuperscript{75} Ibid.
\end{itemize}
In doing so extreme cautions to be exercised and a special case made out.

(iv) Medical Colleges

The Indian Constitution permits reservation of seats (and other similar special privileges) for persons belonging to Scheduled Castes and Tribes, it does not make it obligatory that such reservation should be made in every case for Government service or for admission to educational institutions. It is because of this position, that the Gujarat High Court held in *Sujal Atul Munshi v. State of Gujarat*, that government is not bound to reserve seats for such persons in payment seats for admission to medical educations. Mr. Justice S.M. Soni, held that, if reservation is to be made in payment seats, it would strike at the very purpose of reservation. If students of reserved category are not available, then less meritorious students may take advantage of payment seats.

(v) Reservation Within Reservation

Allotment of a quota of seats (in post graduate medical course) for candidates to be selected out of persons in Government service sponsored by the State Government is not a “reservation”. It amounts to laying down a source for filling up the seats and is “classification” within article 15(10. Hence, reservation for SC/ST in the Government quota is not reservation within reservation. It is permissible.

(vi) University-wise Reservation

(a) University-wise preference is valid if it is reasonable.
(b) Domicile-wise preference is valid if it does not exceed reasonable limits.
(c) College-wise preference is bad

(vii) Area-wise Reservation

Area-wise reservation (article 371D0 prevails over reservation under article 15(4), *D. Rajesh Babu v. Nizem Institute of Medical Sciences*.
(viii) **Minimum Qualifying Marks**

A Division Bench of the Supreme Court in *Sadhna Devi v. State of U.P.*,\(^{76}\) has quashed the decision of the Uttar Pradesh Government dispensing with the requirement by the candidates belonging to special categories, of obtaining minimum qualifying marks in written examination held for admission to Post-Graduate and Diploma Courses in Medicine and Surgery.

The Court explained that it was open to the Government to admit candidates belonging to special categories even in a case when that had obtained lesser marks than the general candidates, provided they had got the minimum qualifying marks, to fill up the reserved quota of seats for them. A five-Judge Constitution bench of the Apex Court, headed by Hon’ble Chief Justice K.G. Balakrishnan, on October 14, 2008, clarified that the maximum relaxation in the marks for the O.B.C. quota students would be 10 per cent.

(ix) **Effect of Adoption, Marriage and Conversion**

In *Valsamma Paul v. Cochin University*,\(^{77}\) the Supreme Court explained that the Dalits (SC) and Tribes (ST) had suffered social and economic disabilities recognized by Articles 17 and 15(20 and as a consequence, they had become socially, culturally and educationally backward. The object of reservation permissible under Article 15(4) and Article 16(4), the Court said, was to remove these handicaps. The Court, however, cautioned that acquisition of the status of Scheduled Caste, etc. by voluntary mobility into these categories, would play fraud on the Constitution and would frustrate the benign constitutional policy under Articles 15(40 and 16(4) of the Constitution.\(^{78}\)

The Court, thus, ruled that a candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but was transplanted in backward caste by adoption or marriage or

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\(^{76}\) AIR 1997 SC 1120.


\(^{78}\) *S. Pushpa v. Sivachanmugavelu*, AIR 2005 SC 1038.
conversion, would not become eligible to the benefit of reservation, either under Article 15(40 or 16(40, as the case might be.79

(x) **Special Provisions Relating to Admission in Educational Institutions**

The Constitution (Ninety-third Amendment Act, 20005 has inserted a new Clause (5) after Clause (4) in Article 15. The new Clause enables the state, to make, by law, special provisions, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes, in so far as, such special provisions relate to their admission to educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions, referred to in Clause (1) of Article 30.

F. **EQUALITY IN MATTERS OF PUBLIC EMPLOYMENT**

Article 16 of Constitution of India provides quality of opportunity in matters of public employment. It states as follows:

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 80 (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 favor of any backward

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79 Infra 467-71, Articles 341-42.
80 Substituted by the Constitution (Seventh Amendment) Act 1956, S. 29.
class or citizens which in the opinion of the State, is not adequately represented in the services under the State.

5. 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.

6. 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 of 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. 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.

Article 16 is an instance of the application of the general rule of equality before law laid down in Articles 14 of the prohibition of discrimination in Article 15 (10 with respect of the opportunity for employment or appointment to any office under the State. Explaining the relative scope of Article 14, 15 and 16, Das, j. said:

“Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in favor of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment to any office under the State. Article 15

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81 Inserted by the Constitution (seventy Seventh Amendment) Act, 1995, S.2.
83 Ibid.
does not mention descent as one of the prohibited grounds of discrimination as Article 16 does”.

Clause (1) of Article 16 of the Constitution of India lays down the general rule that there shall be equal opportunity for citizens in matters relating to ‘employment’ or ‘appointment to any office’ under the State. Article 16 (40 expressly permits the State to make a provision for the reservation of appointment or posts in favor of any backward classes of citizens which, in the opinion of the State, are not adequately represented in the services under the State. It may be noted that Article 16 (4) does not qualify backward classes of citizens’ as does Article 15 (4) by the words ‘socially and educationally.’

(i) **Object**

The main object of article 16 is to create a constitutional right to equality of opportunity and employment in public offices. This article is confined to citizens as distinguished from other persons. Further, it is confined to employment or appointment to an office ‘under the State’.

Certain exceptions to the right created by clause (1) and clause (2) of article 16 flow from clauses (3), (4) and (5) of the article. These relate, respectively, to a requirement of residence if sanctioned by Parliamentary legislation, reservation for backward class of citizens, if not adequately represented in the State services and prescription of profession a particular religion or belonging to a particular denomination, if the office is in connection with the affairs of any religious or denominational institution.

The reservation for the SC’s and ST’s in Civil posts and services by the Constitution is not just to provide some jobs to some persons belonging to these communities and thereby increase their representation in the services, but to uplift these people socially and educationally and make some place for them in the society. This was the more important objective of reservations, which included reservation in legislatures also. To achieve the objective, the Constitution envisaged in the Directive Principles of State Policy and elsewhere in the Directive Principles of
State Policy and elsewhere, economic and educational development of the weaker sections, particularly, the SCs and STs.\textsuperscript{84}

Since ‘reservation’ is only one of the various other means to promote equality for the weaker element of the society we must first understand the meaning of ‘equality’ itself. In the next chapter we shall attempt to find a clear answer to the meaning of constitutional equality and its compatibility with the policies of compensatory discrimination. It is examined here the Indian scheme to ensure equality to the weaker sections and the approach of the Indian Supreme Court in interpreting the equality clauses of the Indian Constitution. Our main emphasis would be on the 1976 decision of the Court in \textit{State of Kerala v. N.M. Thomas}\textsuperscript{85} in which the Court has perhaps for the first time applied ‘equality’ to ‘protective discrimination’.

The framers of the Indian Constitution were aware of the political, social and economic inequalities which existed in the country due to historical reasons and were anxious to remove these inequalities by positive State measures even if these measures imposed unequal burdens on those individuals who had hitherto enjoyed undue advantages. They were aware of the prevailing miserable and appalling conditions of the backward groups who had remained far behind and segregated from national and social life and had continued to be socially oppressed and economically exploited for centuries due to various types of disabilities. They believed that in a caste-ridden society like ours where due to “the historical reasons certain castes and classes were for decades socially oppressed, economically condemned to live the life of penury and educationally coerced to learn the family trade or occupation and to take to education set out for each caste and class by the society” a doctrinaire insistence on formal equality would in fact aggravate and perpetuate inequality.\textsuperscript{86}

\textsuperscript{84} C. Chellappan “Reservation in Public and Private Sector” 217-218.
\textsuperscript{85} AIR 1976 SC 490.
It became imperative, therefore, to adopt a policy of “compensatory” or ‘protective discrimination’ as an equalizer to those who were made too weak to compete with the advanced sections of the society in the race of life Consonant with its resolve in the Preamble to secure to all citizens. “Justice, social, Economic and Political… Equality of status and opportunity”, the Constitution guarantees to every person a right to “equality before the law and equal protection of laws: In order to give effect to general right to equality under article 14, the Constitution secures to all citizens a freedom from discrimination on grounds of religion, race and caste in the specific application of this equality guarantee; the State is further forbidden to discriminate against any citizen on grounds of place of birth, residence, descent, class, language and sex. Untouchability has been abolished and the citizens are protected against discrimination even on the part of private persons and institutions. The constitution secures political equality to all citizens by providing special privileges to the political powerless groups in the legislative bodies such as the scheduled castes, scheduled tribes. Reservations in the Legislatures for these desperate groups in the spirit of real equality of opportunity to these people who are lacking in political consciousness and political experience.

(ii) Distinction Between Article 15 and Article 16

Article 16 is applicable only in case of employment or appointment to an office under the State.

Article 16 is similar to Article 15 in one respect, i.e. both these provisions prohibit discrimination against citizens on specified grounds. However, Article 15 is wider in operation than Article 16. While, Article 16 prohibits discrimination only in respect to one particular matter, i.e., relating to employment or appointment to posts under the State, Article 15 lays down a general rule and prohibits discrimination in respect to all or any matters. In one respect, Article 16 is wider than Article 15 i.e., the grounds on the basis of which discrimination is prohibited. While, Article 15 prohibits discrimination on any of the five grounds, i.e., religion, race,
caste, sex or place of birth, Article 16 contains seven prohibited grounds, i.e. religion, race, caste, sex. Descent, place of birth or residence. Article 15 does not contain “descent” and “residence” as the prohibited grounds of discrimination. However, both these Articles can be invoked by citizens only.

(iii) **Scheme**

Article 16(4) is not an exception to article 16 but gives a permissible basis; *Indra Sawhney v. Union of India*.

(iv) **Seniority**

In *Jagdish Ch. Patnaik v. State of Orissa*\(^87\), it has been held that seniority cannot be claimed from the date when vacancy accrues but will be fixed of date when actual appointment is made. Actual year of appointment governs seniority. Year in which vacancy arose and against which recruitment is made is irrelevant in determining the inter-se seniority, between directs recruits and promoters.

(v) **Probationer**

A probationer or a temporary servant is also entitled to certain protection and his services cannot be terminated arbitrarily nor can those services be terminated in a punitive manner without complying with the principles of natural justice.\(^88\)

In *V.P. Ahuja v. State of Punjab*\(^89\) the appellant was appointed as Chief Executive in the established of Punjab Cooperative Cotton Marketing and Spinning Mills Federation on the probation for a period of two years. His services were terminated on the ground of unsatisfactory work. This order was passed without holding a regular inquiry and without giving him an opportunity for hearing. The Supreme Court held that the termination of the appellant’s services, a probationer, was illegal.


\(^88\) Dipti Prakash Banarjee v. Satendra Nath Bist National Centre for Basic Sciences, Calcutta, AIR 1999 SC 983.

\(^89\) AIR 2000 SC 1080.
as he was not given an opportunity of hearing which is an essential requirement of natural justice.

(vi) **Pension and Gratuity**

In *Rameshwari Devi v. State of Bihar* the fact was that there arose a dispute regarding payment of family pension and death cum-retirement gratuity between two wives of one Narain Lal who died in 1987 while posted as Managing Director, Rural Development Authority of the State of Bihar. The appellant is the first wife. Narain Lal had married second time with Yogmaya Devi on April, 1963 while the appellant was still alive. From the first marriage he had one son and from the second marriage he had four sons. The learned Single Judge held that Children born to Narain Lal from the wedlock with Yogmaya Devi were entitled to share family pension and death cum-retirement gratuity till they attain majority. The High Court also held that the second wife Yogmaya Devi was not entitled to anything. Appeal by the first wife Rameshwari Devi was dismissed by the Division Bench. According to her there was no marriage between Narain Lal and Yogmaya Devi and Children were therefore, not legitimate. Rameshwari Devi filed the special leave petition in the Supreme Court. The Supreme Court held that the children born to deceased Hindu employee from second marriage during the existence of first are entitled to share in family pension and gratuity. Under Section 16 of the Hindu Marriage Act, 1955 children of void marriage are legitimate. Under the Hindu Succession Act, 1956 property of a male Hindu dying intestate devolves firstly on heirs in clause 91) which includes widow and son among the widow and son they all get shares. The second wife taken by deceased Government employee during the existence of the first wife cannot be described a widow of deceased employee, their marriage being void. But the sons of the deceased employee from his second wife being legitimate will be entitled to the property of the deceased employee.

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90 AIR 2000 SC 735.
Viva voce test not sole Test for Appointment:— In *Praveen Singh v. State of Punjab*, the Supreme Court has held that the recruitment to the post of Block Development Office cannot be made on basis of viva voce test only having regard to the nature and requirement of the concerned job. Even the Service Commission has recognized a written test as also viva voce test. In this case the facts were that the Punjab Public Service Commission issued an advertisement for 28 to 44 vacancies of Block Development and Panchayat Officers. About 4500 people appeared in the test and subsequently roll members of 130 candidates only were published being eligible to appear in viva voce test. After the viva voce the final result was announced and name of candidates found suitable for appointment were published. The petitioner’s name did not figure in the merit list. The petitioner thereafter challenged the selection process in the writ petition before the High Court which was rejected. He then filed the present appeal in the Supreme Court. The Court held that the appointment could not made solely on the basis of viva voce test unless he obtained 33% marks in each paper and 45% marks in aggregate. Under the rules specific marks were earmarked for written examinations of various subjects together with totality of marks for viva voce test. As a matter of facts out of 450 marks were allotted for interview by the Service Commission. When the Commission in clear and categorical language recorded that 450 marks would the total marks for the examination and out of which only 50 marks were earmarked for viva voce. It could not be said that the Commission desired that these 50 marks would be relevant and crucial and the other 400 marks would be rendered totally superfluous and of no effect at all. A close 100 at the qualification as prescribed clearly showed that the question of having written test written off in the matter of selection did not and could not arise. Had it been the intent of the Service Commission then in that event question of there being totality of marks would not have been included therein neither there would have any requirement of qualifying marks nor there would have any aggregate marks as noticed above. Further, in the event, the interview was the sole criteria and the written test being treated as qualifying test the Public

91 AIR 2001 SC 158.
Service Commission ought to have clearly stated that upon competition of
the written elimination test selection would be made on the basis of the
viva voce test only as available in the decision of Ashok v. State of
Karnataka.  

The Court held that interview should not be the only method of
assessment of the merit of candidates. The vice of manipulation cannot be
ruled out in viva voce test. Though interview undoubtedly is a significant
factor in the matter of appointment. It plays strategic role but in also
allows creeping in of lacuna rendering the appointment illegitimate.
Obviously it is an important factor but ought not to be the sole guiding
factor since reliance thereon only may lead to a “sabotage of the purity of
the proceedings”.  

There is always a room for suspicion for the common
appointments if the oral interview is taken up as the only criteria. Of
course, there are posts and posts where interview can be a safe method of
appointment but to the post of a Block Development Officer or a
Panchayat Officer wherein about 4500 people applied for 40 posts,
Interview cannot be said to be a satisfactory method of selection though
however it may be a part thereof.  

The Court therefore held that the action of the respondent
Commission was wholly unreasonable, unfair and not in accordance with
the declared principles. The Commission was directed to complete the
process of selection in terms of the existing rules so that both the written
test and the viva voce test be taken into consideration for the purpose of
making appointments.

(vii) Compulsory Retirement

Equality of opportunity for all citizens in matters relating to
employment is not violated by provisions for compulsory retirement of
Government servants in public interest after the completion of qualifying

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(1992) 1 SCC, 28.
service or attainment of a certain age because compulsory retirement does not involve any civil consequences.\(^93\)

(viii) **Appointment on Compassionate Ground**

Recruitment on compassionate ground cannot be made when vacancy is not available due to total ban imposed on recruitment even if relevant recruitment rules provided for appointment of a candidate on compassionate ground.\(^94\)

(ix) **Origin and Residence**

It is to be noted that the two additional grounds “descent” and “residence” not included in Article 15 have been added to Article 16(2). No discrimination can be made on these grounds. This is just to assure that parochialism and nepotism is eliminated in the matters of appointment in Government services. The Provincial slogan madras for Madrasis’, ‘Bengal of Bengalis’, Mysore for Mysoreans’ are most unhealthy for the ‘growth of a truly federal democracy’. The system of the British era have to be eliminated in independent India and hence this provision in Article 16(2). ‘Descent’ is another spot for individual discrimination. In *Dasaratha Rama Rao v. State*,\(^95\) the Supreme Court held that the office of the village Munif was an office under the state; and selection 6(1) of the Madras Act which required the Collector to select persons from among the last holder of the office discriminated on the grounds of descent only and hence void for contravening Article 16(2).

In *Pradeep Jain v. Union of India*\(^96\) the Supreme Court has held that although in view of Article 16(2) and earlier decisions of the Court the residential requirement for admission to a medical college in a State is valid and constitutional but its validity can be tested on the touchstone of Article 14 and if it violates Article 14 it will be unconstitutional and void.

\(^94\) AIR 1997 SC 123.
\(^95\) AIR 1961 SC 564.
(x) **Minimum Qualification and other Conditions**

Article 16 does not prevent the State from prescribing the requisite qualifications and the selection procedure for recruitment or appointment. It is further open to the appointing authority to lay down such pre-requisite conditions of appointment as would be conducive to the maintenance of proper discipline amongst government servants.\(^97\) The qualifications prescribed may, therefore, besides mental excellence, include physical fitness, sense of discipline, moral integrity, loyalty to the State.\(^98\)

However, the qualifications or the selective test must not be arbitrary. These must be based on reasonable ground and must have nexus with the efficient performance of the duties and obligations of the particular office or post. Also, that the qualifications cannot be altered and applied with retrospective effect.\(^99\)

In *Pandurangarao v. Andhra Pradesh Public Service Commission*,\(^100\) the Rule relating to qualifications for the appointment to the posts of District Munsiffs, by direct recruitment prescribed that “the applicant must have been practicing as an Advocate in the High Court and he must have actually practicing in the Courts of Civil or Criminal jurisdiction in India for a period not less than three years.” The High Court in this context meant Andhra Pradesh High Court. The object was that the persons to be appointed to the posts of District Munsiffs must be having knowledge of local laws as well as knowledge of the regional language and adequate experience at the bar. The application of the petitioner, qualified in all other respects except that he was not at that time, practicing as an Advocate in the Andhra High Court but in Mysore High Court, was rejected.

The Supreme Court held that the Rule which requires that only a lawyer practicing in the Andhra Pradesh High Court, had introduced a

\(^{97}\) *Union of India v. Vinod kumar*, AIR 2008 SC 5.
classification between one class of Advocates and the rest and the said classification was irrational inasmuch as there was no nexus between the basis of the said classification and the object intended to be achieved by the relevant Rule, i.e., “knowledge of local laws as well as regional language and adequate experience at the “bar.” The Rule was struck down as unconstitutional and ultra vires.

(xi) Employer–Employee Relationship

A three-Judge Bench of the Apex Court in *Union Public Service Commission v. Jamuna Kurup,* \(^{101}\) has ruled that in the absence of any restrictive definition, the term ‘employment’ would include permanent/regular or short term/contractual and the term “employee” likewise, would include permanent or temporary, regular or short-term, contractual or ad hoc.

(xii) Appointment – Employment

The words “matters relating to employment or appointment” explain that Article 16(1) is not restricted to the initial matters, but applies to matters both prior and subsequent to the employment, which are incidental to the employment and form part of the terms and conditions of employment. Article 16(1), therefore, would have application in the matters relating to initial appointments, subsequent promotions,\(^{102}\) termination of service, abolition of posts,\(^{103}\) salary periodical increments, grant of additional increment, fixation of seniority, leave, gratuity, pension,\(^{104}\) age of superannuation, compulsory retirement, etc. The expression “appointment” is said to take in, direct recruitment, promotion or transfer. The principle of equal pay for equal work, has also been interpreted to be the constitutional goal of Article 16(1).

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101 AIR 2008 SC 2463.
104 *B.S.N.L. v. Rajesh Kumar Saxena,* AIR 2008 SC 2952. Pension although is held not a bounty, the entitlement thereto is only under a statute.
(xiii) Date of eligibility

It is well settled, supported by several decisions of the Apex Court\textsuperscript{105} that the cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is—

(1) the date appointed by the relevant service rules;

(2) if there be no cut-off date appointed by the rules, that such date as may be appointed for the purpose, in the advertisement calling for applications; that

(3) if there be no such date appointed then the eligibility criteria shall be applied, by reference to the last date appointed, by which the applications have to be received by the competent authority.

In case of Ashok Kumar Sonkar v. Union of India, it is trite that, ordinarily, the qualifications or extra-qualifications, laid down for the recruitment should be considered as on the last date for filling of the application.\textsuperscript{106} In Dipitimayee Parida v. State of Orissa,\textsuperscript{107} an applicant for the post of Anganwadi Worker was not held entitled to “3 marks” reserved for married woman, since she was not married on the last date of filing of application but got married after the date.

(xiv) Process of Selection

Recruitment to public services should be held strictly in accordance with the rules of advertisement and the recruitment rules, if any. Deviation from the rules allows entry to ineligible persons and deprives many others who could have competed for the post. It is ruled that public contracts are not largesse.\textsuperscript{108}

\footnotesize{\textsuperscript{105} S.P. Bhattacharjee v. S.D. Majumdar, AIR 2007 SC 2102.}
\footnotesize{\textsuperscript{106} AIR 2007 SC 1746.}
\footnotesize{\textsuperscript{107} AIR 2009 SC 935.}
As regards the process of selection the Apex Court in *Lila Dhar v. State of Rajasthan*,\(^{109}\) pointed out that the object of any process of selection for entry into public service was to secure the best and the most suitable person for the job, avoiding patronage and favouritism.

**(xv) Written Test and Oral Test**

Holding that it was not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for interview test, the Court in *Lila Dhar v. State of Rajasthan*,\(^{110}\) said that the marks must be minimal so as to avoid charges of arbitrariness, though not necessarily always. The Court opined that rigid rules could not be laid down in these matters and that the matter might more appropriately be left to the wisdom of the experts.

As regards the allocation of marks for viva voce vis-à-vis the marks for written examination, it has been held that there cannot be any hard and fast rule of universal application. It would depend upon the post of nature of duties to be performed.\(^{111}\)

**(xvi) ACR**

In *Dev Dutt v. Union of India*,\(^ {112}\) the apex Court, holding that fairness and transparency in public administration required that all entries whether, poor, fair, average, good or very good, in the ACT, must be communicated ruled that non-communication of even a single entry which might have the effect of destroying the career of an officer, would be arbitrary and as such violative of Article 16 read with Article 14.

In the instant case, the appellant was denied promotion because he was not communicated “good” entry in one year during five years under consideration. It denied him the opportunity of making representation for upgradation of entry to “very good” which was a condition for promotion under the Service Rules.

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\(^{112}\) AIR 2008 SC 2513.
(xvii) **Filling of Posts and Advertised**

The practice of selecting and preparing large list as compared to vacancy position by the Service Selection Board, has been deprecated by the Supreme Court in various decisions. Selection of more candidates than mentioned in the requisition has been held without jurisdiction.\(^{113}\) It has held that appointment on additional posts, would deprive candidates who were not eligible for appointment to the posts on the last date for submission of application, of the opportunity of being considered for appointment, on the additional posts.\(^{114}\)

It is trite that the State cannot make appointment to posts over and above than the number of posts advertised.\(^{115}\)

In *Mukul Saikia v. State of Assam*,\(^{116}\) the Assam Public Service Commission (APSC) advertised 27 posts of Child Development Project Officers (CDPOs.). Pursuant to it a selection process was held. The final select list prepared and published by the Commission contained the names of 64 candidates far in excess of the notified vacancies. The Apex Court, referring to their earlier pronouncements,\(^{117}\) held appointment could be made only to 27 posts and the selection list got exhausted when all the 27 posts were filled.

The Supreme Court, in *Madan Lal v. State of J. & K.*,\(^{118}\) held that since the requisition in the present case was to fill only 11 posts, and the Commission had selected 20 candidates, the appointments to be effected out of the said test would be on 11 posts and not beyond 11 posts.

However, mere calling more number of candidates for interview than prescribed under the rules does not vitiate the selection.\(^{119}\)

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\(^{116}\) AIR 2009 SC 747.


Further that the Government is under no obligation to fill up all the posts for which requisition and advertisement are given.\textsuperscript{120}

It has been held to be a matter of policy with the Government to make the appointments or not.

**(xviii) Regularization of Ad Hoc Employees**

The Supreme Court has deprecated the regularization and absorption of persons working as part-time employees or on ad hoc basis,\textsuperscript{121} as it had become a common method of allowing back door entries.\textsuperscript{122}

In *State of U.P. v. Ram Adhar*,\textsuperscript{123} the Apex Court ruled that a temporary employee had no right to the post. There was no principle of law, the Court said, that a person appointed in a temporary capacity had a right to continue till regular selection. Long continuance of such employees on irregular basis, would not entitle them, to claim equality with regularly recruited employees.\textsuperscript{124} In a catena of cases, it has been ruled that a daily-wager does not hold a post.\textsuperscript{125}

In *State of Haryana v. Shakuntla Devi*,\textsuperscript{126} respondents were the widows of employees appointed on ad hoc basis or temporary basis by the appellant. Holding that ad hoc/temporary employees did not hold status of Government servant, the Apex Court ruled that the respondents, the dependants of the said employees were not entitled to family pension.

**(xix) Religion, Race, Caste etc : Basis of Selection**

The expression “discriminated against” the word “only” in Article 16(2) bear the same meanings as in Article 15. Therefore, if the differentiation and bias are based on any of the grounds mentioned in

\textsuperscript{120} Director, *SCTI for Medical Science and Technology v. M. Pushkaran*, AIR 2008 SC 559.
\textsuperscript{121} For detailed discussion, Narender Kumar, *Service Law*, 2008, 172-189.
\textsuperscript{122} *Ashwani Kumar v. State of Bihar*, AIR 1997 SC 1628.
\textsuperscript{124} *Government of A.P. v. K. Brahma\textsuperscript{1}manandam*, AIR 2008 SC 3170; *State of Karnataka v. Umadevi* (3), AIR 2006 SC 1806.
\textsuperscript{126} AIR 2009 SC 869.
Article 16(2), the impugned law or State action becomes ipso facto repugnant to the Constitution.

Where discrimination is based, partly on the grounds contained in Article 16(2) and partly on other consideration, there will be no contravention of this Clause. Also, where discrimination is based on grounds other than those mentioned in Clause (2), it would not attract this Clause, but the case will have to be weighed and judged in the light of the general principle laid down in Clause (1) of Article 16.

In Gazula Dasaratha Rama Rao v. State of Andhra Pradesh, the Supreme Court struck down Section 6(1) of the Madras Hereditary Village Offices Act, 1895 which had required the Collector to appoint Village Munsiffs from amongst descendants of the last holders of the offices, “Descent” being a forbidden ground of classification.

In C.B. Muthamma v. Union of India, the Supreme Court held Rule 8(1) of Indian Foreign Service (Conduct and Discipline) Rules, 1961 and Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre Seniority and Promotions) Rules, 1961, as discriminatory against women. Rule 8(1) provided that a woman member of the service would obtain permission of the Government, in writing, before her marriage was solemnized and could be required to resign from service after her marriage, if the Government was satisfied that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties as a member of the service. Rule 18(4) stood in her way to promotion to Grade I of the service. The Court, however, laid down:

We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the

127 AIR 1961 SC 564.
128 AIR 1979 SC 1868.
129 Maya Devi v. State of Maharashtra, 1986(1) SCR 743, wherein the requirement that a married woman should obtain her husband’s consent before applying for public employment was held invalid as unconstitutional.
sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectively. But save where the differentiation is demonstrable, the rule of equality must govern.

(xx) **Requirement as to Residence in a State**

Clause (3) constitutes an exception to Clause (1) and Clause (2) of Article 16. Clause (3) empowers the Parliament to make “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, and requirement as to residence within that State or Union territory prior to such employment or appointment”.

It may be noted that it is the Parliament and not the Legislature of a State, who can make any law under Clause (3) of Article 16.

Since, Clause (3) constitutes an exception to Article 16(1) and (2), it has to be construed strictly.

In the exercise of the power conferred by Clause (3) of Article 16, Parliament enacted the Public Employment (Requirement as to Residence) Act, 1957. The Act repealed, all the laws in force, prescribing any requirement as to residence, within a State or Union Territory, for employment or appointment in that State or union Territory. However, exception was made in the case of Himachal Pradesh, Manipur, Tripura and Telengana (the area transferred to the State of Andhra Pradesh from the erstwhile State of Hyderabad). This exception was made keeping in view the backwardness of these areas. It was to expire on March 21, 1974.

In *Narasimha Rao v. State of A.P.*,\(^\text{130}\) the Apex Court struck down Section 3 of the Public Employment (Requirement as to Residence), Act, 1957, which related to Telengana part of Andhra Pradesh, as ultra vires the Parliament. Clause 93) of Article 16, the Court explained, used the word “State”, which signified “State” as a unit and not parts of a State as districts or other units of a State. Therefore, Parliamentary law could

\(^{130}\) AIR 1970 SC 422.
provide for residence in the whole of Andhra Pradesh and not in Telengana, which was a part of the State.

(xxi) **Reservation of Post for Backward Classes**

Article 16(4) is the second exception to the general rule embodied in Article 16(1) and (2). It empowers the State to make special provision for the reservation of appointments of posts in favour of any backward class of citizens which is the opinion of the State are not adequately represented in the services under the State. Thus, Article 16(4) applies only if two conditions are satisfied:

1. The class of citizens is backward; and
2. The said class is no adequately represented in the services of the State.

The second test cannot be the sole criterion.

In Balaji’s case the Supreme Court has held that the ‘caste’ of a person cannot be the sole test for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. Though the caste of a person cannot be the sole test for determining the backwardness of a class, but if an entire caste is found to be socially and educationally backward it may be included in the list of Backward classes. However, the Court said that it does not mean that once a caste is considered backward class then it should continue to be backward for all the times. The Government should review the test and if a class reaches the state of progress where reservation is not necessary it should delete that class from the list of the Backward Classes.

Article 16(4), must be interpreted in the light of Article 335 which says that he claims of the scheduled castes and the scheduled tribes shall be taken into consideration consistently with the maintenance of efficiency of administration. The reservation for backward classes should

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not be unreasonable. It should be considered having regard to the employment opportunities to the general public.

The scope of Art. 16(4) was considered by the Supreme Court in Devadason v. Union of India. In that case the constitutional validity of the “carry forward rule” framed by the Government to regulate appointment of persons of backward classes in Government services was involved. This rule provided that if sufficient numbers of candidate belonging to the scheduled castes and scheduled tribes were not available for appointment to the reserved quota, the vacancies that remained unfilled would be treated as unreserved and filled by the fresh available candidate; but a corresponding number of posts would be reserved in the next year for scheduled caste and Scheduled Tribes in addition to their reserved quota of next year. The result was to carry forward the unutilized balance, that is unfilled vacancies in the second and third year at one time. In actual effect 68 percent of the vacancies were reserved for Scheduled Caste and Scheduled Tribes. The Supreme Court by a majority of 4 to 1 struck down the “carry-forward rule” 16(4) could not be exercised so as to deny reasonable equality of opportunity in matters of public employment for members of classes other than backward. The Court said that each year of recruitment must be considered by itself and the reservation for the backward communities each year should not be excessive so as to create a monopoly or to interfere unduly with the legitimate claims of other communities. Accordingly, the Court held that the reservation ought to be less than 50 per cent, but how much less than half would depend upon prevailing circumstances in each case.

In the Mandal case, the Supreme Court has overruled Devadason v. Union of India on this point. It was held that the ‘carry forward rule’ is valid so long as it does not in a particular year exceed 50 percent of vacancies. The 50 percent limit can only be exceeded in an extraordinary situations prevailing in a State, i.e. (far flung States Nagaland etc.).

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134 Indra Sawhney v. Union of India, AIR 1993 SC 477.
In the matter of filling selection posts, the question of seniority is not relevant. The selection is made solely on the basis of merit.\textsuperscript{135}

In \textit{State of Kerla v. N.M. Thomas},\textsuperscript{136} the important question which came up for consideration of the Court was whether it was permissible to give preferential treatment to S.C.’s and S.T.’s under clause (1) of Article 16, that is, outside the exception clause (4) of Article 6. The Kerala Government framed rules for promotion of employees working in the Registration Department from the lower division clerks to the higher posts of upper division clerks. The promotion depended on passing departmental tests within two years. Rule 133-A, however, empowered the State Government to further exempt for a specified period members of the Scheduled Castes and scheduled Tribes from passing the test. Pursuant thereto the Government passes the impugned order granting exemption for two years more to Scheduled Castes and Scheduled Tribes candidate to pass the test. This exemption was challenged as discriminatory under Article 16(1). A 7-member Bench of the Supreme Court by a majority of 5:2 held that the classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an expended period of two years for passing tests for promotion from other classes of employees was a just and reasonable classification ‘having rational nexus to the object of providing equal opportunities for all citizens in matter relating to employment or appointment to the public office. The temporary relaxation of test qualification made in favour of Scheduled Castes and Scheduled Tribes was warranted in the services in view of their over-all backwardness. The above Rules do not impair the test of efficiency in administration inasmuch as members of Scheduled Castes and Scheduled Tribes who are promoted will have to acquire the qualification of passing the test ultimately. The only relaxation is that they are granted two years’ more time to acquire the qualification. Thus according to the majority reservation for backward classes may be made even outside the scope of clause(4) of Article 16. The rules and the Order

\textsuperscript{135} Dr. J.N. Mishra v. State of Bihar, AIR 1971 SC 1318. \\
\textsuperscript{136} AIR 1976 SC 490:2 (1976) SCC 310.
were, therefore, not violative of Articles 14, 16(2) and valid. This is a new interpretation of Article 16(1) of the Constitution.

In *A.B.S.K. Sangh (Rly) v. Union of India*, the Supreme Court, following *Thomas* case, upheld the validity of the railway Board Circular under which reservations were made in selection posts of the S.C.’s and S.T.’s candidate. The Court held that under Article 16(1) itself the State might classify groups or classes based on substantial differentia. So the fundamental right to equality of opportunity has to be read as justifying the categories of SCs and STs separately from rest of the community for the purpose of adequate representation’ in the services under the State. Thus the classification between SCs and STs candidates from the test of the communities for the purpose of reservation is just and reasonable because they constitute a class by themselves because of their social backwardness. The court also upheld the ‘carry forward rule’ under which 17% posts are reserved for those categories. The carry forward rule was extended from 2 to 3 years. As a result of this rule the reservation quota came to about 64.4% but the Court held that this was not excessive as mathematical precision could not be applied in dealing with human problems. Some excess will not affect the reservation, but substantial excess will void the selection said, Mr. Justice Krishna lyer. In the present case the reservation of 64.4% was not considered by him excessive. Chinnappa Reddy, J., had gone to the extent of ruling that the rule of 50% laid down in earlier case was only for the guidance of Judges and they were not bound by it. Pathak, J., however, dissented from the majority and said that the rule of 50% as laid down in earlier cases was fair and reasonable, but he was not very emphatic in his dissent and said that in view of the majority decision in Thomas case he was bound to hold the impugned rule as valid.

The majority decision thus permits reservation 50% but subject to judicial approval. In the present case the Court held that the reservation of 64.4% was not excessive.

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137 AIR 1981 SC 298.
As a result of the decisions of the court in *Thomas* and *Akhil Bhartiya Soshit Karamchari Singh* cases *Balaji* and *Devadarsan* cases have been impliedly overruled. It is submitted that *Balaji* and *Devadarsan cases* were rightly decided and had laid down correct principles relating to reservation for the S.C.’s and S.T.’s in Government services. Reservation at the initial stage is less harmful than reservation at the stage of promotions. It creates lot of resentment amongst persons who are denied promotions and thereby affects efficiency in the administration. Besides, politicians can take undue advantage of the rulings in the above two cases and create disharmony and dissensions amongs members of different classes of society. This would not be in the interest of the nation. The whole policy of reservation is in fact a politically motivated policy coming down from British days-the divide and rule policy. It is against the interest of the nation and it can only be desired by those vested interests who wish to see people fighting each other. It has provoked a caste war which threatens to tear our social fabric. Thus both legally and socially the policy of reservation cannot be justified.138

In *K.C Vasanth Kumar v. Karnataka*,139 the States of Karnataka had asked the Supreme Court to give clear guidelines to be followed in the matter of reservation for S.C.’s and S.T.’s. Although the Judges of the Supreme Court expressed five separate opinions but a clear guideline is discernible from their opinion. They are follows:-

(1) The reservation in favour of the SCs and S.T’s must continue as at present, that is, without the application of means test, for a further period of 15 years will make it 50 from the commencement of the Constitution, a period reasonably long for these classes to overcome the baneful effects of social oppression, isolation and humiliation;

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138 Happenings in Parasbigha and Dohal Village of Jahanabad sub-division of Bihar and the anti reservation movement in Gujarat in 1981 and in 1985 and in 1990 in all the States of Northern India violent anti-reservation agitations in which several lives were lost and State property damaged.

139 AIR 1985 SC 1495.
(2) The means test, that is, the test of economic backward ought to be applicable even to the SCs. And STs. After 15 years (after 2000 AD);

(3) So far other backward classes are concerned two tests should be applied:

- That they should be comparable to the SCs and STs. In the matter of their backwardness;
- That they should satisfy the means test such as the State Government may lay down, in the context of prevailing economic conditions;

(4) The policy of reservation in employment, education and legislative institutions should be reviewed every five years or so. This will afford an opportunity:

- To the States to rectify distortions arising out of particular facts of the reservation policy.

(a) *Indra Sawhney v. Union of India*\(^{140}\) - The Mandal Case

The scope and extent of Article 16(4) has been examined thoroughly by the Supreme Court in the historic case of *Indra Sawhney v. Union of India*, popularly known as the Mandal case.

The facts of the case were as follows. On January 1, 1979 the Government headed by the Prime Minister Sri Morarji Desai appointed the second Backward Classes Commission under Art. 340 of the Constitution under the Chairmanship of Sri B.P Mandal (MP) to investigate the society and educationally backward classes within the territory of India and recommend steps to be taken for their advancement including desirability for making provisions for reservation of seats for them in government including desirability for making provisions for reservations of seats for them in government jobs. The Commissions submitted its report in December 1980. It has identified as many as 3743 castes as socially and educationally backward classes and recommended for reservation of 27 percent Government’s jobs for them. In the

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\(^{140}\) AIR 1993, SC 477.
meantime the Janta Government collapsed due to internal dissensions and the Congress Part headed by the Prime Minister Smt. Indira Gandhi came to owner at the Centre. The congress Government did not implement the Mandal Commission report till 1989. In 1989 the Congress Party was defeated in the Parliamentary elections and the Janta Dal again came to power and decided to implement the Commission’s report as it had promised to the electorate. Accordingly, the Government of India, headed by Prime Minister Sri V.P. Singh issued the Office Memoranda (called O.M.) On August 13, 1990 reserving 27 percent seat for backward classes in government services on the basis of the recommendations of the Mandal Commission. The acceptance of the report of the Mandal Commission threw the nation into turmoil and a violent anti-reservation movement rocked the nation for nearly three months resulting in huge loss of persons and property.

A writ petition on behalf of the Supreme Court bar Association was filed challenging the validity of the O.M. and for staying its operation. The Five Judge Bench of the Court Stayed the operation of the OM till the final disposal of the case on October 1, 1990 Unfortunately the Janta Government again collapsed due to defections and in 1991 Parliamentary elections the Congress Party again came to power at the Centre.”


(i) by introducing the economic criterion n granting reservation by giving preference to the poorer sections of SEBCs in the 27% quota, and (ii) reserved another 10% f vacancies for the other socially and educationally Backward Classes (SEBCs) economically backward
sections of higher castes. The economic criterion was to be specified separately. The five Judges Bench referred the matter to a special Constitution Bench of 9 Judges view of the importance of the matter to finally settle the legal position relating to reservations in several earlier judgments the Supreme Court have not spoken in the same voice on this issue. Despite several adjournments the Union Government failed to submit the economic criteria as mentioned in official Memoranda of September 25, 1991.

The 9 Judge constitution Bench of the Supreme Court by 6-3 majority (Justice B.P. Jeeven Reddy, C.J.M.H. Kania, M.N. Venkatachaliah, A.M. Ahmadi with S.R. Pandian and S.B. Sawat concurring by separate judgments held that the decision of the Union Government to reserve 27% Government jobs for backward classes provided socially advanced persons-Creamy layer among them –are eliminated, is constitutionally valid. The reservation of seats hall only confine to initial appointments and not to promotions and the total reservation shall not exceed 50 percent. The Court accordingly partially held the two impugned notifications (OM) dated August 13, 1990 and September 25, 1991 as valid and enforceable but subject to the conditions indicated in the decision that socially advanced persons-Creamy layer-among BC’s are excluded. However, the Court struck down the Congress Government’s OM reserving 10% Government jobs for economically backward classes among higher classes. The majority also held that the reservation should not exceed 50 percent. While 50 percent shall be the rule but it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and people. In such situation, some relaxation of this rule may be necessary.”

In view of this the majority did not express any opinion on the correctness of adequacy of the mandal report. The dissenting
judgment was given by Justice T.K. Thommen, Kuldip Singh and R.M Sahai. The minority struck down the two OM issued by the Union Government as unconstitutional. It held also the Mandal Report is unconstitutional and recommended for the appointment of another Commission for identifying the SEBC’s of citizens.

The Court examined the scope and extent of Art. 16(4) in detail and clarified various aspects on which there were different of opinion various earlier judgments. The majority opinion of the Supreme Court on various aspect of reservations provided in Art 16(4) may be summarized as follows:-

1. Backward class of citizen in Art. 16(4) can be identified on the basis of cast and not only on economic bases.

The majority held that a caste can be and quite often is a social class in India and if it is backward class for the purpose of Att.16(4). There are classes among non-Hindus, Muslims, Christians and Sikhs and if they are backward socially they are entitled for reservation under Art. 16(4). Although urbanization has to some extent broken this caste occupation relationship but not wholly and is still predominant in rural areas.”

The majority held that neither the Constitution nr 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. The court said that it must be left to the authority appointed to identify. It can adopt such method as it thinks convenient and so long as it covers the entire population no objection can be taken to it. Identification of Backward classes can certainly be done with reference to castes among, and along with other occupation of groups or with some other groups. Caste will have to be considered among and along with other criteria as the test o f
backwardness. Caste alone cannot be taken into consideration for purpose of identification of backwards classes. A similar process can be adopted for occupational groups, communities and classes.

2. Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be made under Art. 16(1).

The majority held that Art.16(4) is not an exception to Art. 16(1) but an independent clause. Reservation can be made under clause (1) of Art.16 on the basis of reasonable classification. The Court accordingly overruled its decision in Balaji v. State Mysore. In which it was held that Art. 16(4) is an exception to Art. 16(1). The court approved the decision in States of Kerela v. N.M Thomas. Where it was held that Art. 16(4) is not an exception of Art.16(1), but a facet of the doctrine of equality enshrined in Art.14 and permits reasonable classification just as Art.14 does.

3. Backwards Classes in Art. 16(4) are not similar tp as socially and educationally backward in Art. 15(4).

The majority held that the backward class of citizens contemplated in Art. 16(4) is not the same as socially and educationally backward classes referred to in Art 15(40. It is much wider. Clause (4) does not contain the qualifying words “socially and educationally” as does clause (4) of Art 15. The “backward classes of citizens including the socially and educationally backward classes. Thus, certain classes may not qualify for Art 15(4) but they may qualify for Art 16(4). Accordingly, the court overruled the Balaji case on this point in which it was held that the backward class of citizens in Art 16(4) is the same as the socially and educationally backward classes, Scheduled
Castes and Scheduled Castes and Scheduled Tribes mentioned in Art 15(4). The Court held that it is not necessary for a class to be designed as a backward that it is situated similarly to the SC’s and ST’s.

4. Creamy layer must be excluded from backward classes. The majority held that while identifying the backward classes the socially advanced persons- the creamy layer,- among them should be excluded. The court directed the Government of India to set up a commission within four months from the decision specifying the basis applying the relevant and requisite socio-economic criteria to exclude socially advanced persons that is, the creamy layer among backward classes. The court held that the basis of exclusion of advanced sections, creamy layer, form other backward classes for the purpose of reservation should not be merely economic unless the economic advancement is so high that it necessarily means social advancement. While the income of a person can be taken as a measure of his social advancement, the limit prescribed should not be such as to result in taking away with one hand what is given with the other. But the court said that there are certain positions of which can be treated as advanced without further inquiry. For example, if a member of designated backward class becomes a member of IAS or IPS 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 realize their potential they are in no way handicapped in the rase of life. His salary is also such that he is above want. It is not logical that his children should be given the benefit of reservation. For giving them the benefit of other reservation disadvantage members of the backward class may be deprived of that benefit. The majority said that while the
rule of reservation cannot be called antimeritian there are certain services and posts to which it may not be advisable to apply the rule of reservation. For example technical posts in research and development organization; departments institutions in specialities and super specialities in medicine, engineering and establishments connected therewith. Similarly in the case of post of the higher echelons e.g. Professor (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application.

5. Article 16(4) permits classification of backward classes into backward and more backward classes.

On this point the court has overruled the Balaji case in which it was held that the sub-classification between backward classes and more backward classes was unconstitutional. In the Mandal Case the court held that the classification is necessary to help the more backward classes, otherwise the advanced sections of backward classes might take all the benefits of reservations.

6. A backward classes of citizens cannot be identified only and exclusively with reference to economic criteria.

It was held that it would defeat the very object of Article 16(4) to give adequate representation to backward classes in the services. Article 16(4) is not aimed at economic upliftment or alleviation of poverty. It is specifically designed to give a due share in the state power to those who have remained out of it mainly on account of their social and therefore, educational and economic backwardness.

7. Reservation shall not exceed 50 percent.

The majority held that the maximum limit of reservation can not exceed 50 percent. However, no extraordinary situation it may be relaxed in favour of people
living in far flung and remote areas of country who because of their peculiar conditions and characteristic need a different treatment. But in doing so the court said extreme caution is to be exercised and a special case made out. *On this point the majority affirmed Balaji and Deavdasan cases* in which the 50% rule was laid down and overruled the *State of Kearla v. N.M Thomas and K.C Vasanth Kumar v. State of Karnataka* cases. The court relied on the speech of Dr. AMBEDKAR in the Consistuent Assembly where he said that “reservation must be confined to a minority of seats”. Art 16(4) speaks of adequate representation and not proportionate representation. If a member of SCs/STs is selected on the open competition on the basis of merit they will not be counted against the reserved quota. However the rule of 50% shall be applicable only to reservations proper, they shall not be applicable to exemption, concessions or relaxations if any provided to Backward classes of citizens under Art 16(4).

The court also overruled the decision in *Devadasan v. Union of India* and held that the ‘carry forward rule’ is valid provided it should not result in breach of 50% rule. The 50 percent limit can only be exceeded in extraordinary situations prevailing in a far fluns States (e.g Nagaland, Tripura etc).

8. Reservation can be made by “Executive Order”.
   
The majority held that the reservation under Art 16(4) cannot be made by an executive order. It need be made by Parliament or Legislature.

9. No reservation in promotions.
   
The majority held that the reservation under Art 16(4) cannot be made in promotions. The reservation is
confined to initial appointments. However, it shall not effects promotions already made. Such reservations may continue for a period of five years: within this period, the authorities will revise, modify or re-issue the rules relating to reservation. On this point the court has “thus” overruled the following cases: General Manager, Southern Rly. v. Rangachari, State of Punjab v. Hira Lal\(^\text{141}\); Akhil Bharatiya Shoshit Karamchari Sangh v. Union of India and Comptroller and Auditor General of India, Gian Parksh v. K.S jagannathan.\(^\text{142}\) This is consistent with the object enshrined in Art 335. At the initial stage reservation can be made for them but once they enter the service, efficiency demands, that these members too complete with others and earn promotions like all other the court said.

10. Permanent Statutory body to examine complaints of over-inclusion/under-inclusion. The Court directed the Union Government, State Governments and Union territories to appoint a permanent statutory body to examine complaints of ‘wrong inclusion or non-inclusion of groups’, classes and sections in the list of other backward classes. Its advice should ordinarily be binding upon the Government. It can also be consulted in the matter of periodic revision of lists of OBCs as suggested by the court in Vasanth Kumar Case. Within four months the Government of India shall specify the bases applying the relevant and requisite socio-economic criteria to exclude socially advance person/sections/creamy layer form other backward classes.

This direction shall however not apply to States where reservation in favour of backward classes are already in operation. They can continue to operate them.

\(^{141}\) 1970, 3 SCC 567.
\(^{142}\) 1986, 2 SCC 279.
Such state shall however evolve the said criteria with six months and apply the same to exclude the socially advanced/sections from the other backward classes.


The majority held that in view of the guidelines laid down in its decision there is no need to express any opinion on the correctness or adequacy of the exercise done by the Mandal Commission. Pandain, J., held that the report is valid and can be implemented. The minority held that the report is invalid and recommended for appointment of a fresh commission for identifying to backward classes.

12. Dispute regarding new criteria can be raised only in the Supreme Court. The majority it clear and directed that all objections to the criteria evolved by Central and State Government to exclude socially advanced persons, creamy layer, from other backward class shall be preferred only before the Supreme Court and not before any High Court or tribunal. Similarly, any petition challenging the validity operation or implementation of the two OM’s shall be filled only before the Supreme Court and not before any Court. The majority Judgment in the Mandal case was welcomed by all of sections as it was able to defuse the crisis which the nation was facing since the declaration made by the V.P Singh Government implementing the Mandal Commission report reserving 27 percent Government jobs for the socially and educationally backward classes (SEBC’s). Despite certain drawbacks, the Supreme Court deserves to be complemented as it has clarified issues relating to reservation problem.

The most welcome aspect of its verdict is that reservation will not apply promotions in service. This
aspect of the Mandal Commission report was aimed at perpetuating caste tension within offices for ever. The Court rightly struck it down. Another important aspect of the Judgment is that the total reservation shall not exceed 50 percent.

Some of the States, where the reservation was more than 50 percent were directed to reduce it to 50 percent with five years. Thus, the Court has made a bold attempt to strike a balance between the interest of society and educationally backward classes and persons belonging to the general category in matters of Government employment. The third aspect of the Judgment is that although the court upheld Central Government’s decision to reserve the 27 percent Government jobs for backward classes advanced –creamy layer- among them or eliminated. The court struck down the economic criterion for reservation on the ground that Art. 16(4) does not mention it. The court held that caste could be used for the purpose of identifying the Backward Classes. It is submitted that the rejection of economic criterion for determining backwardness will create serious problems in identifying the backward sections (among backwards) for whom Supreme Court wants jobs to be reserved. In fact, this can only be done on the basis of economic yardsticks.

The Judgment of the court in the Mandal case has been criticized by an eminent jurist, Nani A. Palhiwala, on the ground that it will revive casteism which the Constitution emphatically intended to end. He quotes Dr. Ambedkar’s words who also was opposed to caste consideration in matters of reservation. Dr. Ambedkar said:-
“Fraternity means a sense of common brotherhood of all India……..castes are anti-national; in the first place they bring about separation in social life. They are anti-national also because they generate jealously and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity- equality and liberty will be no deeper than coast of paint.”

The minority judgment of justice Thoman, Kuldip Singh and R.M Sahai according to Palkhiwala state the correct law. They had held that casteism can never be the basis of reservation for employment under the Government. He sad;

“The basic structure of the Constitution envisages a cohesive, unified, castles society- in which casteism petrified and ossified for centuries should become merely the dust on the shelf of India History. By ensuring a fresh lease of life to the cancer of catechism for a long and indefinite future, the judgment fractures the nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into two- forward and backward-and open up new vistas for internecine conflicts and fissiparous forces; and make backwardness a vested interested. It will undo whatever has been achieved since independence towards creating a unified integrated nation”.

While nobody will disagree with Palkhiwala’s criticism of the Mandal case on this point (determination of backwardness on the sole ground of the caste), it is however, submitted that despite certain drawbacks the decision of the court is to be welcomed as it has been able to clarify certain important points on the issue of reservation. It has put a limit
on the percentage of reservation which can not be more than 50 percent. Secondly, it has held that there while upholding the decision of the Government reserving 27 percent Government jobs for backwards classes it has put a rider that it can be implemented only when “creamy layer” among them are eliminated. If the decision in Mandal case is honestly implemented it would solve many problems relating to reservation issue. The court’s judgment direction Government to eliminated “creamy layer” among backward classes is aimed at giving benefit of reservation to the poorest among backward. Unfortunately the politicians have started flouting the judgment of the court. The Tamil Naidu Government the Karnataka Government has increased the reservation quota from 73 percent to 80 percent. All this is being done in clear violation of the Supreme Court Judgment and with a view to keeping vote bank intact in their favour. But the type of politicians as obtaining in India, it is futile to hope so. In the circumstances, the criticism of Mr. Palkhiwala is not unjustified.

(b) Position After Mandals Case

As has been discussed above, the Mandal case decision has laid down a workable and reasonable and reasonable solution to the reservation problem. But the politicians are still trying the dilute the effect of the Mandal decision in order to make their vote bank intact. The Court has laid down that there shall be no reservation in promotions in government jobs. But the government has enacted the Constitution 77th Amendment Act, 1995 in order to bypass the Court’s ruling on this point.

The Constitution 77th Amendment Act, 1995.- This amendment has added a new clause (4-A) to Art. 16 of the Constitution which provides that “Nothing in this article shall prevent the State from making any provision for reservation in
matters of promotions to any class or classes of posts in the services of the State in favour of the Scheduled Castes and Scheduled Tribes which in the opinion of the State, are no adequately represented in the services under the State.”

This means that reservation in promotion in Government jobs will be continued in favor of SC’s & ST’s even after the Mandal case if the government wants to do so. This is thus clearly intended to nullify the effect of the decision of the Supreme Court in Mandal case. The evil of reservation in promotions was abolished by the Supreme Court as it caused a lot of bitterness and disappointment among employees of the same category who were bypassed by their colleagues having less merits. There was no demand for it from any section of SC’s & ST’s but in due course a demand for such reservation can be made for other OBC’s also.

The Supreme Court has to interview again. In Union of India v. Virpal Singh. The Supreme Court has tried to mitigate to some extent the inequity that reservation in general has to represent by holding that caste criterion for promotion is violative of Art. 16(4) of the Constitution. The case was concerned with the legality of the extension of reservation to promotions in Railway Service which enable specified groups(SC’s & ST’s) not only to get jobs on their caste labels but also get promotions on the same basis. The Supreme Court rightly held that seniority between reserved category candidates and general shall continue to be governed by their panel position prepared at the time of selection.

The fact of the case is that among the category of guards in the Railway Service, there are four categories viz…. grade ’C’ but not in any stage of promotion. The total quota reserved for SC’s & ST’s was 22.5% percent to give effect to the rule of reservation a roster was prepared in which certain points were reserved for SC’s & ST’s. For Scheduled Caste candidates they 4, 17 and 31.
In the year 1986, some general candidates were promoted on an ad hoc basis to grade A Special but were subsequently reverted and members of SC & ST’s were promoted. They challenged this ad hoc as illegal, arbitrator and unconstitutional. They contended that once the quota reserved for a reserve category is satisfied the rule of reservation or the forty percent roster prepared to give effect to the said rule cannot be applied or followed any longer. It may provide accelerated promotion but it cannot give seniority also to a reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position. Under Art. 16(4) 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 fact and requirement of each case. In Indra Sawhney’s case it has been held that larger concept of reservation takes within its sweep all supplemental and ancillary provisions as also lessor type of Special provisions like exemptions concessions and relaxations consistent no doubt with requirement of maintenance of efficiency of administration - the administration of Art. 355-1. Therefore it is open to the State to provide that the candidate promoted earlier by virtue of rule of reservation roster system 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 is promoted he will regain his seniority over the reserved candidate not withstanding that he is promoted subsequent to the reserved candidate.

The ruling of the Court puts a question mark on the validity of the recent constitution amendment permitting reservations in promotions to SC’s & ST’s.

In a significant judgment on reservation in promotions, the Supreme Court has held that any post in cadre falling vacant, after reserved posts were filled, is to be filled from the same category of persons whose retirement or resignation caused the vacancies.
The five Judge Bench of the Court, however, made it clear that the ruling of the Court on the working of the roster shall be operative prospectively.

Clarifying the law, the Court said, suppose in a cadre consisting of 100 posts including 16 percent posts reserved were filled in accordance with roster by December 31, 1994. Thereafter, in the year 1995, 25 general category candidates (out of total 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. In such a case, the Scheduled Caste and Backward Classes could not claim 16 percent share out of the 50 vacancies because if eight vacancies were given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16 percent to 24 percent which was not permissible in law as per the decision of the Supreme Court in the Mandal case.

Lapsed vacancies due to non-availability of reserved category candidates cannot be revived retrospectively – In S.B.I SC/ST/ST Employer Welfare Association v. State Bank of India\(^\text{144}\) SC/ST Employer Welfare Association Chandigarh has challenged the reservation policy framed by the SBI reserving certain posts for employees belonging SC/ST’s in promotion. The two Circulars issued by the SBI provided a scheme for reservation in promotion for the above categories of employees. Under the Schemes 15 percent reservation was made in favour of STs and 7½ percent in favour of ST’s. The rules also provided that the number of vacancies which could not be filled would be carried forward from one year to the next year up to a period of three years. If after end of three years, such vacancies could not be filled, it will be treated as lapsed. However it provided that the maximum reservation in any year would not exceed 50 percent. The Circular gave a further relaxation in service norms, that is, the relaxation to continue for 5 years of service. The court held that
the policy of reservation in promotion was no violative of Art. 16(4) and (4A) and the vacancies lapsed due to non-availability of reserved category candidates with required length of service could not be revived and filled retrospectively, Art. 16(4) is an enabling provision and confers discretionary power on the State to make reservation at the stage of initial recruitment or at the stage of promotion in favour of a Backward Class of citizens which in the opinion of the State is not adequately represented in the services of the State. Art. 16(4) does not impose a duty on the government to make such reservation. Hence no person can claim it as a matter of right.

(xxii) “Creamy Layer” : Justice Ram Nandan Committee

In accordance with the direction given by the Supreme Court of union government had appointed an expert committee known as the Justice Ram Nandan Committee to identify the creamy layer among the socially and educationally backward classes (SEBC). The expert committee submitted its report on March 16, 1993 which was accepted by the Government of India.

1. However, it says that certain constitutional posts qualify for the rule of exclusion e.g. posts of President, Vice President, Judges of the Supreme Court and High Courts, Chairman and members of UPSC and State PSC, Chief election Commissioners, Comptroller and Auditor General of India Governors, Ministers and membership of Legislatures.

2. The rule of exclusion covers class I officers of Central and State Services (direct recruits) public sector undertakings, armed forces and para military forces, professional class including trades, business and industrya and property owners.
3. It excludes those having gross annual income of Rupees one Lakh and above.

4. In the service category the rule of exclusion will apply if either the husband or wife is a class I officer. Where both are class I officers and one dies the rule of exclusion, applies. But if both die, then the rule does not apply. Permanent incapacitation is treated as death and the rule of exclusion does not apply.

5. The committee says that if before the death of either of or both spouses occurs, either of the spouses has had the benefits of employment in any international bodies like the United Nations, IMF, World Bank for a period of five years, then the exclusion rule would continue to apply to their children.

6. If a lady belonging to SEBC marries to a class I officer then she would be entitled to get the benefit of reservation.

**Group B. Class II (direct recruitment)**

1. The report says that if both spouses are class II officers then the rule of exclusion would apply to their offspring. If only one of the spouses is a class II officer it would not apply but if male officer from class II category gets into class I category at the age of 40 or earlier then the rule of exclusion would apply to his offspring.

2. Where both are class II officers and one of them dies then the rule of exclusion would apply to their children.

3. Where the husband is a class I officer and wife is class II officer and the husband dies, the rule of exclusion will not apply. Also when the wife is a class I and the husband is class II and the wife dies, the rule of exclusion would not apply but if the husband dies the rule of exclusion would
apply on principle that one of the parents namely, the mother continues to be a class I officer.

4. The above service category criteria also applies to officer holding equivalent or comparable posts in public sector undertakings, banks, insurance organizations, universities and also equivalent or comparable posts and positions under private investment.

5. As regards armed forces including para military forces (not persons holding civil posts) the exclusion rule would apply at the level of Colonel and above in the Army and to equivalent post in the Navy and Air Force and para military forces. If the wife of an armed forces officer is herself in the armed forces the rule of exclusion would apply, only when she herself has reached the rank of Colonel, the service ranks below Colonel of husband and wife shall not be clubbed together. Even if the wife of an officer in the armed forces is in civil employment this will not be a ground for applying the rule of exclusion unless she falls in the service category.

6. Professional class and those engaged in trade, business, and industry the exclusion will be determined on the basis of income and wealth criteria.

7. For property owners the committee says if a person belongs to a family (father, mother and minor children) which owns irrigated land and the extent of irrigated land is equal to or more than 65% of the statutory ceiling area the rule of exclusion would apply. The rule will not apply to persons belonging to families owning only unirrigated land irrespective of the area of such land. In the case of members of a family owning both irrigated and unirrigated lands, the exclusion rule would apply where the

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precondition exists that the irrigated area is 40% or more of statutory ceiling limit for irrigated land.

However, the exclusion rule on the basis of land holding will not apply to the States of Nagaland, Mizoram, Meghalaya, Arunachal Pradesh and Goa and in the Union territory of Andaman and Nicobar Island, Lakshadweep, Daman and Diu where there is no ceiling law.

8. Residuary category – The committee says that persons having gross annual income of one lakh rupees or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act would be excluded from the benefit of reservation.

(xxiii) Reservation in Super-Specialities

In Indra Sawhney v. Union of India,146 the majority of the Supreme Court had opined that there were certain services and positions where, either an account of the nature of duties attached to them or the level (in the hierarchy) at which they were obtained, merit alone would count. It, therefore, meant that the rule of reservation would not be applied in cases of super-specialties.

In K. Duraisamy v. State of Tamil Nadu,147 the Supreme Court in this respect, observed:

“It is by now a proposition well settled, that at the super specialty level in particular and even at the Post-Graduate level reservations of the kind known as ‘protective discrimination’ in favour of those considered to be backward should be avoided as being not permissible.

(xxiv) Reservation in Promotion

The question whether the benefit of reservation, under Articles 15(4) and 16(4), will be given in the case of promotion was decided by

146 AIR 1993 SC 477.
147 AIR 2001 SC 718.
the Supreme Court in Mandal Commission Case.\textsuperscript{148} In this case the court found it difficult to agree with the view in Rangachari’s\textsuperscript{149} case 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 of backward class of citizens, but this questions has not to be answered on a reading of Article 16(4) alone but on combined reading of Article 16(4) and Article 335. The Court held that reservation of appointments or posts theoretically and conceivably means some impairment of efficiency. There can be no justification to multiply ‘the risk’ by holding that reservation can be provided even in the matter of promotion. While it is certainly just to say at 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 carrier. That would mean creation of a permanent separate category apart from the mainstream – a vertical division of the administrative apparatus. The member of reserved categories need not have to complete with others but only among themselves. There would be no will to work, complete 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.

The Supreme Court further observed: “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 complete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their “birth-mark”. It is wrong to think denying reservation in matters of promotion does not have the effect of confining the backward class of citizens to the lowest cadre. It is well known that direct

\textsuperscript{148} AIR 1993 SC 477.
\textsuperscript{149} AIR 1962 SC 36.
recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III.”

It would be permissible for the State to extend concessions and relaxations to members of reserved categories in the matters of promotion without compromising the efficiency of the administration. 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 compromises the efficiency of administration.

The Supreme Court seeing conscious of the fact that this (no reservation in promotion) being departure from settled law-settled for more than 30 years – directed that its decision on this aspect of reservation shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It was 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 reservation shall continue in operation for a period of five years from the date of judgement.

(xxv) Carry-Forward Rule

Article 16(4) of the Constitution empowers the State to make a provision for the reservation of appointments or posts in favor of any backward classes of citizens which, in the opinion of the State are not adequately represented in the services under the State In Devadasan v. Union of India, the Supreme Court upheld the validity of the above stated ‘carry forward’ rule. But the court held that the power vested in the State Government under Article 16(4) can not be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of classes other than backward.

150 AIR 1964 SC 179.
In a very recent case of *Malkhan Singh v. Union of India*,\(^{151}\) the Supreme Court has discussed the ‘carry forward rule’. If sufficient number of Scheduled Castes and Scheduled Tribes candidates fit for appointments against reserved vacancies is not available, such vacancies can be transfer after following the prescribed procedure for degeneration and such reserved vacancies can be filled by candidates for other communities. After such dereservation, reservations are carrying forward to subsequent three recruitment years. Recruitment year shall mean a calendar year and for purpose of three years, limit for carry forward to reserved vacancies shall mean the year in which recruitment is actually made. Exchange of reservation between Scheduled Castes and Scheduled Tribes – while vacancies reserved for Scheduled Castes and Scheduled Tribes may continue to be reacted as reserved for the respective community only, Scheduled Tribes candidates reserved for Scheduled Castes candidates or vice versa. Where such a vacancy could not be filled by Scheduled Castes or Scheduled tribes candidate even in the third year to which the reservation is vary forward. The normal provision is that the exchange is permissible only for the reservations which have been carried forward to thirty and subsequent year of recruitment.

(\(\text{xxvi}\)) Catch-up Rule

In *Ashok Kumar Gupta v. State of Uttar Pradesh*\(^{152}\) the Supreme Court explained that Article 16(4A) read with Articles 16(10 and 14), guaranteed a right to promotion to Dalits and Tribes as a fundamental right where they had not got adequate representation consistently with the efficiency of administration.

The judgements in Virpal case\(^{153}\) and Ajit Singh II case\(^{154}\) adversely affected the interest of the Government servants belonging to

\(^{151}\) AIR 1997 SC 538.
\(^{152}\) JT 1997 (4) SC 251. Also *Suresh Chandra v. J.B. Aggarwal*, AIR 1997 SC 2487.
the Scheduled Castes and the Scheduled Tribes, in the matter of seniority or promotion to the next higher grade.\textsuperscript{155}

To negate the effect of the above judgements Article 16(4A) has been amended by the Constitution (85\textsuperscript{th} amendment) Act, 2001. In the amended Clause 4A of Article 16, in place of the words “in matter of promotion to any class” the words “in matter of promotion with consequential seniority to any class” have been substituted.

**(xxvii) Single and Isolated Post**

A five-Judge Constitution Bench in the Supreme Court in Post Graduate institute of Medical Education and Research, *Chandigarh v. Faculty Association*,\textsuperscript{156} reiterated with approval, the view held in *Chakradhar Paswan v. State of Bihar*,\textsuperscript{157} and ruled that there would have to be plurality of posts for reservation. Allowing a review petition moved by the Faculty Association of the P.G.I., Chandigarh, the Court held that any attempt at reservation, by whatever means in a single post cadre, even through the device of rotation of a roster, was “bound to create 100% reservation in such cadre”. Holding that there was need for reservation for the members of the SCs/STs and OBCs, and that such reservation was not confirmed to the initial appointment in a cadre but also to the appointment in promotional post, the Court explained: “In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of citizens”.

Earlier, the Supreme Court in *Union of India v. Madhav Gajanan Chaubal*,\textsuperscript{158} had held that a rule providing reservation in a single post would not be unconstitutional. Overruling Madhav’s case, the Constitution Bench held:

In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such single

\textsuperscript{155} The Objects and Reasons attached to the Constitution (85\textsuperscript{th} Amendment) Act, 2001.
\textsuperscript{156} AIR 1998 SC 1767.
\textsuperscript{157} AIR 1988 SC 959 (Emphasis added).
\textsuperscript{158} AIR 1997 SC 3074.
post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework.

A Division Bench of the Supreme Court in State of Karnataka v. Govindappa,\textsuperscript{159} relied upon the decision in PGI case\textsuperscript{160} and held that in the cadre of lecturers single and isolated posts in respect of different disciplines could exist as a separate cadre. Since there was no scope for inter-changeability of posts in the different disciplines, each single post in a particular discipline had to be treated as a single post for the purpose of reservation within the meaning of Article 16(4). Rule of reservation, therefore, would not apply to such single isolated post, the Court ruled.

(xxviii) \textbf{Religious Qualification can be Prescribed for Incumbent of Religious Institutions}

Article 16(5) is the third exception to the general rule laid down in Article 16(1) and (2) which forbids discrimination in public employment on the ground of religion. Article 16(5) says that a 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 shall not be treated to be repugnant to this Article.

G. \textbf{REVIEW}

The constitution of India provides special provisions for the advancement of backward classes in the country. Articles 15(4) and 16(4) permit the state to make reservations in educational institutions and in services to realize the objectives of advancement. Article 340, makes provision for the appointment of commission to carry on the programme of reservation. Article 335, makes categorical provision of arranging reservations for the Scheduled Castes and

\textsuperscript{159} AIR 2009 SC 618.

\textsuperscript{160} \textit{P.G.I. v. Faculty Asstn.}, AIR 1998 SC 1767.
Scheduled Tribes in the country. The constitutional provisions, therefore, are not uniform for the entire backward classes including SC/ST. The Constitution is unambiguous and emphatic on the issue of granting preferential treatment to the Scheduled Castes and Scheduled Tribes whereas the same is ambiguous about other Backward Classes (OBC). Such ambiguity lies in the identification of beneficiary groups, in specifying the types of benefits and also in the implementation of the policy of preferential treatment. This has given rise to controversy that for SC/ST there is clear cut provision of reservation whereas for OBC the entire case has to be investigated afresh. The Central Government, therefore, has escaped making any policy of reservation for OBCs are not entitled for reservation since these Articles refer directly to SC and ST but refrain to make references to OBCs. A large number of law suits have been fought on this question in the courts of law. However, an expert opinion is that there are two factors behind these Articles. “The first is the attainment of equality of all castes by extending protective discrimination. The other is ascertainment of the extent of backwardness with references to the size of the population of each caste”. The obvious implications of these two are that adequacy of reservation is relatable to the size of population with references to castes.

Several commissions and Committees have gone into the question of reservation under Articles 15(4) and 16(4) appointed by the Central and the State Governments. The Kelkar commission (1953) and Mandal Commission(1979) were appointed by the Central Government whereas 17 Commissions and Committees have so far been appointed by the State Governments for determining the quantum of reservation and the identification of eligibility for reservation. All these recommendations can be divided in two categories; first, those which went for economic criteria. The two Commission appointed by the Centre opted for caste whereas out of 17 state appointed committees four (Karnataka, Jammu and Kashmir, West Bengal and Gujarat) made economic criteria as the basis of reservation. A brief account of Mandal Commission Report and Rane Committee Report (Gujarat), representing two opposite stands on the issue of reservation, are presented here.

Mandal Commission worked on two aspects of reservation; first, the criteria for eligibility, and second, the quantum of reservation. It evolved
indicators grouped under three heads of social, educational and economic, for determining social and economic backwardness of people. It worked under the hypothesis that economic deprivation is not the cause but the result of social and educational backwardness. In a society of inflexible caste system “poverty is only a direct consequence of these crippling caste based handicaps.” Though caste has lost on the ritual front, it has more than gained on political front. The new situation has shifted the emphasis rather than any decline in casteism. In India, the government service has always been looked upon as a seat of power and privilege. Through this power the allocation of resources, and opportunity are influenced in society. By making representation of OBCs in government service, a feeling of participation in the governance of this country is imparted in them. Caste, therefore, is the sole criterion of granting reservation. Similarly, the quantum of reservation should be in proportion to the population of OBCs. Since the court does not favour to raise reservation more than 50 percent, the commission under this constraint, recommended only 27 per cent to 3,743 castes of the country even though their population was 52 per cent, twice the figure of recommended reservation. Thus, the Commission worked on the idea of caste based proportional representation in the jobs of the government and in the educational institutions. The criteria of caste have also been advocated by Kelkar commission and most of the Commission appointed by the State Governments.

By the middle of March 1985, the report submitted by Justice Rane was placed before the State Assembly of Gujarat. The main recommendation of the Rane Committee is that caste can not be a viable criterion for determining backwardness. “It will not be totally unrealistic but also unpatriotic to make any attempt to assess social backwardness on the basis of caste.” The drawback of caste based reservation is that it leaves out certain classes in the case of non-Hindu communities. It would create bitterness in society if caste is the sole criterion of reservation. Since the upper strata of all castes have already come up, some due to reservation, caste based reservation will benefit those who have already crossed the barriers of deprivation and therefore the need is that only those who are poor and still left behind should be brought in the scheme of reservation. The changed social and economic realities require that a new look should be given to this issue. The commission, therefore suggests that new
criteria should be adopted for determining backwardness for the purposes of reservation. The Commission, therefore, suggests that family income and occupation should be the sole criteria for determining social and educational backwardness for the purposes of reservation in jobs and education. In the conditions of Gujarat 63 occupations and income below Rs. 10,000 have been identified as the basis of eligibility for preferential treatment in education and jobs.

The implementation of the policy of reservation has been a perpetual matter of concern in the country. Though the policy of preferential treatment was adopted with almost a complete understanding just after independence for SC and ST, the upper castes have gradually realised that this scheme is against their sectional interest. This is reflected in the elite understanding of the entire programme of protection for those who are “Accordingly, the new dispensation seeks to promote economic and to adopt social policies that favour uniform social codes privatization by the new government. In the beginning of independence, the declared goal was that of a socialist pattern in which public sector was supposed to have the commanding height.

The policy of reservation to SC and ST was accepted in the beginning which is going on in the centre and the States. But even this policy appears to be an eye sore of those who are the sole custodian of power and privilege in the society. The result is that its implementation is half hearted. The achievement, therefore, of the scheme of reservation is very poor. “Even percent of Scheduled Castes and only one percent of tribal officers can be found in the class one category of government services. The low rates of utilization (of quota in jobs) are indicative of the poor performance of the entire policy; for utilization is essentially a function, not of availability of benefits, but of the capacity of the potential beneficiaries to receive the benefits” Neither the ground work is encouraging nor the perception of power elites are favorable to the policy of reservation, the result being that the whole issue is under uncertainty.

The backward castes of the country have been expecting preferential treatment in power generating structure of society from the beginning but their road to success has been much more difficult. The central government have not
implemented any scheme of reservation for OBCs, though they have never categorically rejected it. The result is that at the national scale their representation is negligible. The States, however, under the pressure of political expediency, have accepted the policy of reservation in the jobs and in the education. The system of reservation is not uniform among all states. The table attached to this section indicates the magnitude of quota in the respective states. Some states, like Tamil Nadu and Karnataka have adopted higher reserve quota for OBCs, SC and ST. In recent years the enhancement of quota to OBCs has been vehemently opposed by the upper castes. The lower castes want the quota to have some resemblance to their size of population where as the upper castes assert the retention of merit and efficiency. The judgement of the Supreme Court on Balaji case in 1963 and of the Andhra Pradesh High Court on the GO of the State government in 1986 have raised the issue of the size of quota a burning controversy around the rationality of the policy of reservation and also of the advisability of the ceiling of reservation. The agitations in Gujarat, Andhra Pradesh and Karnataka are examples of the new dimension of problem associated with the policy of reservation.

RESERVATION – NOT ANTI – MERITARIAN - The issue whether reservations are anti-meritarian has been considered by the Supreme Court in several cases. In Balaji case, it was assumed that reservations are necessarily anti-meritarian. Similarly, in Janaki Prasad case, it was held that it is implicit in the idea of reservation that a less meritorious person may be preferred to another who is more meritorious. In Thomas case, Krishna Iyer, J., of the Supreme Court, said deficiency 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 segment of “We, the people of India”. A similar view was expressed in Vasant kumar case by Chinnappa reddy, J., when he observed that “the mere securing of high marks of 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 large segment of population
consisting the weaker sections of the people. And, who better than the one belonging to those very sections’.

In Mandal Commission case, the Supreme Court has held that ‘may be efficiency, competence and merit are not synonymous concept; 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. Ven 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 recognize 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 complete 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 antimerititian’.

However, the Supreme Court opined 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 alone counts. In such situations, it may not be advisable to provide for reservations. Some of the services and posts to whom application of the rule of reservation may not be advisable are :

(a) Defense Services including all technical posts therein but excluding civil posts,
(b) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defense equipments,
(c) Teaching posts of Professors – and above, if any,
(d) Posts in super-specialties in Medicine, engineering and other scientific and technical subjects
(e) Posts of Pilots (and co-pilots) in Indian Airlines and Air India.
The list given above is merely illustrative and not exhaustive.

**Controversial aspect of reservation** - Reservation in public sector education and employment is a particularly (but not uniquely) Indian practice enshrined in the Constitution, a legal form of affirmative action designed to provide greater opportunities to communities and social groups that have been traditionally deprived and excluded. While the quotas in public sector employment and education that are allocated for scheduled castes (SCs) and scheduled tribes (STs) are now taken for granted in most discussions, the current debate is around the recent decision of the ministry of human resource development to provide quotas for backward castes in all institutions of higher learning funded by the central government.

There is no question that this is a highly emotive subject; the current protests leave no doubt about the passions that are around by what may appear to be one of the less significant of government policies in terms of the number of people it directly affects. Indeed, it is interesting to find that so much very strong reaction has been generated among people who otherwise would automatically condemn public action such as strikes, demonstrations, etc, and are hardly ever involved in them, or aroused by “public” issues. Not only that, but the (relatively few) strikes and street protests by those who are against reservation have received disproportionate attention and coverage in both electronic and print media.

Those who oppose the policy of reservation operate primarily with the following arguments:

- It does not address the basic problem of inadequate expansion and poor quality of public education at elementary and secondary levels.
- It militates against “merit” and allows degrees and qualifications to be awarded with less than deserving aptitude and performance.
- It is “inefficient” compared with openly competitive and therefore implicitly “market-based” systems.
- It creates perceptions of “victimhood” and democratically undesirable identity politics.
• Inequalities within the specified communities allow a “creamy layer” to take advantage of the reservations and benefit unduly while depriving the rest of the community.
• The rigid and inflexible nature of the instrument of reservation does not allow for more creative modes of affirmative action.
• It privileges caste-based discrimination and therefore ignores other and possibly more undesirable forms of exclusion.
• It compresses the notion of social justice into only reservation, instead of encompassing broader socio-economic policies such as land reform and other asset redistribution, strategies of income generation, etc.

There is certainly some relevance to each of these points. Certainly no one would deny that the system that has operated in India thus far has been inadequate not only in addressing these issues, but even in achieving the goals set in terms of filling the allocated quotas for SCs and STs in public education and employment. It is also true that caste-based quotas are relatively crude and blunt instruments to address a very complex socio economic reality.