CHAPTER-V

RESERVATION POLICY AND JUDICIAL RESPONSE

A. GENERAL

Indian Judiciary has pronounced some Judgments upholding reservations and some Judgments for fine tuning its implementations. Lots of Judgments regarding reservations has been modified subsequently by Indian Parliament through Constitutional amendments. Some judgments of Indian judiciary have been flouted by State and Central Government.

Reservation of India is the process of setting aside a certain percentage of seats (vacancies) in government institutions for members of backward and under-represented communities (defined primarily by caste and tribe). Reservation is a form of quota-based affirmative action. Reservation is governed by constitutional laws, statutory laws, and local rules and regulations. Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC) are the primary beneficiaries of the reservation policies under the Constitution-with the object of ensuring a “level” playing field.

Provisions which providing reservation for the welfare of depressed classes in India. The concept of untouchables was not practiced uniformly throughout the country; the identification of OBCs is not an easy task. What is more, the practice of segregation and untouchables prevailed more in the southern parts of India and was more diffused in Northern India. An additional complexity is that there are certain castes/communities, which are considered as untouchables in one province but not in other provinces. Some castes, based on traditional occupations, find place in birth Hindu and non Hindu communities. Listing of castes has had a long history, starting from the earliest period of our history with Manu. Medieval chronicles contain description of communities located in various parts of the country. During the British colonial period, listings were undertaken after 1806, on an extensive scale. The process gathered momentum in course of the censuses from 1881 to 1931. The Backward Classes movement also first gathered movement in south India particularly in Tamil Nadu. The continuous efforts of some of the social reformers of the country viz.
Periyar, Jyotiba Phule, Babasaheb, Ambedkar, Chhatrapati Sahu ji Maharaj and others, completely demolished the wall created by the upper classes between them and the untouchables. India is divided into many endogamous groups, or Castes and sub-castes, as a result of centuries of practicing a form of social hierarchy called the caste system. Proponents of reservation policy says that the traditional caste system, as it is practiced, leads to severe oppression and segregation of the lower castes and limited their access to various freedoms, including education.

B. RESERVATION POLICY

Mandal Commission’s recommendations in August 1990. The Supreme Court’s judgement on this issue in November 1992, raising of reservation quota to 69 per cent and even to 80 per cent in some states in 1994, and the amendment of Constitution by the parliament in May 1995 to extend reservation even to ‘promotion cases (against the directions of the Supreme Court) will always be sadly referred to by the future historians in failing to establish an egalitarian system in India. All these measures have resulted into such situations whose consequences are bound to be disastrous. A few important effects have been: (1) Casteism has been granted a fresh lease of life. (2) Merit and calibre have been replaced by mediocrity. (3) Politicians’ definition of ‘creamy layer’, excluding political posts from this category, and the attempts to include more and more castes/classes in the list of OBCs, have changed the social and economic landscape beyond recognition. (4) Tremors let off in some states for anti-reservation agitation have increased violence in the society. (5) Migration of students and other people to those regions where they have greater possibilities of getting job reservation benefits has increased. (6) There is increase in discontent among people of advanced castes. Surprisingly, the Supreme Court also accepted the idea of reservations in government service on caste basis. Is the idea of reservation on caste basis not erroneous for our country? Will it not leave the nation into two categories of people – forward and backward – and open up new vistas for mutually destructive conflicts and fissiparous forces and make backwardness a vested interest? Will it ensure real social justice in society? Will it create an egalitarian system? Will it develop a cohesive and an integrated society?
The demand for special concessions and privileges to the underprivileged are matters of right and not of charity or philanthropy. All the commissions and the committees that have examined this issue, like the Millere Committee appointed by the erstwhile Mysore state or the Kalelkar Commission appointed by the Government of India, have accepted the need for compensatory discrimination to a certain limit. Some of the courts also in hearing the cases that have come up before them have examined the issue. One hon’ble judge pointed out that the reservation policy has generated a spirit of self-denigration, each caste and community competing to be more backward than others. In another case, the former Chief Justice of the Supreme Court (Shri Chandrachud) had directed that the reservation policy should be reviewed every five years so that the state can rectify distortions and people – both backward and non-backward – can ventilate their views in public debates on the practical impact of the reservation policy, or protective discrimination, a logical and useful strategy for ensuring justice and equal opportunity to the economically exploited and socially oppressed groups?

The first argument is that reservation in educational institutions and government jobs, by itself cannot achieve much. In fact, if extended to (Dube, September, 1990). At best, reservations are ‘palliatives’ and no decisive transformations can take place unless such a measure is accompanied by structural changes in the nation’s production relations, and most crucially until land reforms become a reality, and educational support systems are so buttressed that candidates from all social groups are available for higher level jobs.

The second argument is that our country is already divided into various groups. Reservation will further divide the population artificially of fifteen years only, but continuing them forever will produce vested interests and separatism, and will lead to a caste-war and the disintegration of the country. Sometimes back, it was ordered that caste will not be continued for SCs, STs and OBCs, the applicants will have to mention their caste, otherwise how will they be known? This will fragment the Hindu society into pieces. The third argument is that when the reservation policy was implemented after the Independence, there were only a few SC and ST people in the administrative set-up. Later on, Jagjivan Ram introduced reservations even in promotions when he was the Railway Minister,
so that the superiors were passed over by their subordinates belonging to SCs and STs. This not only politicized the civil services but also affected the efficiency of the administration. Just as at the time of partition of the country, the Muslim members of the administrative were working for Pakistan and the non-Muslims for India, similar to the reservation policy, most of the officers are now working on the basis of caste and creed. If this goes on even for 10–15 years more, there will be total disruption. It is time that the beneficiaries and society should reconsider the issue of reservations. The society should immediately think of bringing about conditions where all jobs and admissions are decided only on merit in an open competition, in which all aspirants are assured of a fair chance.

The fourth argument is that our experience in the last 50 years has shown that the reservation policy has not delivered the desired results. A large number of Scheduled Caste and Scheduled Tribe representatives in Lok Sabha and Vidhan Sabhas have not been able to adequately articulate the grievances and needs of people of their constituencies. Reservation in jobs and in educational institutions has benefited only a flits and tensions. The seventies, the eighties and the first six years of the nineties witnessed countrywide waves of violent protests. Budgetary allocations earmarked for the development of the Scheduled Castes and Scheduled Tribes were Frittered away in non-essential projects that contributed little to the process of self-generating growth.

There is another school of thought which favours reservations. The supporters of this school maintain that there is a wide gulf between the social order that people of the India were promised by a political party led by Gandhiji, and the one that has actually been established since Independence. The oppression of the weaker section of society (including lower and backward castes and tribes) by the stronger (upper castes) section has not ended. In fact, it has been aggravated. A new era of social justice and quality still remains a dream to be achieved. The benefits of development have been appropriated by about 20 per cent of the population at the top. The English-speaking educated middle class has come to control and operate levers of state power. It has emerged as the ruling class of country. By accepting the reservation policy, the government will only be working for the establishment of a new social order that would secure to
the underprivileged sectors of our society justice in social relations and equality of opportunity to rise in social scale.

There is one school of thought which favors reservations but wants economics need and not caste as the basis of reservation. Almost all political parties, except the Janta Dal, implicitly or overtly have supported this idea of reservation on the economic – need basis. They hold that this will help the deserving poor of all classes and castes to rise in society. The disadvantaged groups do need protection but it cannot be extended masse and for all time to come. The poor should get special weightage but a watchdog body should keep an eye on their progress. As soon as it is found that they no longer need the crutches of reservations, all jobs should be declared open to all.

Whatever may be the theoretical arguments against the reservation policy, in practice reservation policy will continue to be supported by all political parties because of the electoral mileage they derive from this issue. The vote banks are more important to them than the future of the country. Earlier politicians never bothered about such vote-banks. Even intellectuals like B.R. Ambedkar were against the caste politics. In Ambedkar’s words: “Fraternity means a sense of common brotherhood of all Indians, of Indians being one people. Castes are anti-national. They bring about separation in social life and generate jealousy and antipathy between caste and caste. If we wish to become a nation in reality, we must oppose caste feeling.” Kaka Kalelkar also had written a letter forwarding his report to the president in 1955: “I am definitely against reason that the reservation in government services for any community for the simple reason that the services are not meant for the servants but they are meant for the service of the society as a whole “. Nevertheless, Kalekar’s report had listed 2,399 castes (against Mandal listing 3,743 castes) as backward, and the then government had rejected this list saying that “if the entire community is regarded as backward, the really needy would hardly receive any special attention or adequate assistance”. Pandit Jawaharlal Nehru too had written a letter to Chief Ministers on June 27, 1961 saying, “I dislike any kind of reservation, more particularly in service as it will lead to inefficiency and second-rate standards. The only real way to help a backward group is to give opportunities for good education”.
It will not be out of place here to refer to the desperate tale of the forward caste woman in Kerala who, merely with a view to gaining admission for her son in a medical college, deposed before a magistrate in the presence of her husband that the son was her illegitimate offspring by a Harijan. Such ideas and actions will result into disaster for the country. Public opinion needs to be mobilized against the policy of reservation, and the government and the politicians have to be made to realize that it is not in the national interest to continue the system of caste quotas. A political party may get a few votes by pursuing populist policies like caste reservation but such policies will only replant the poisonous weed of casteism which will harm the country for hundred years to come.

Reservation among the SCs, STs and OBCs has led to the emergence of the elite class which has been cornering the benefits of reservation for itself and has become self–perpetuating. Time has come to introduce some changes in the reservation policy. Some of these changes could be as follows: (1) Safeguarding, the true meaning of ‘reverse discrimination’ and applying the principle in such a manner that the really deserving get the benefits and SCs, STs, and OBCs are protected from their own self-serving leaders. (2) No state should be allowed to cross the limit of 50 per cent reservations. Those states which have fixed quota more that this should be given a time – limit of two- three years to fall in line and bring reservation quota to 50 per cent. (3) We should incorporate the principle of limiting the benefit of reservations to one generation only, i.e., if a person has taken advantage of reservations to get a job, his children will not be entitled to the benefit of reservation. (4) There should be no reservation in ‘promotion’. This would avoid category employees and check heartburn and demoralization of people for recruitment at all levels. In no case should the minimum standards for recruitment at all levels. In no case should the minimum standards be the need of the day so that those castes may be delisted which have generally caught up with the so-called forward ones. In Tamilnadu, 34 seats in three major professional courses. Further, in this ‘creamy layer’ set apart for backward castes. This ‘creamy layer’ among the backwards is also the ‘creamy layer’ in the emerging Tamil Nadu social order (The Hindustan Times, July 7, 1994). Will the continued retention of such castes in the list of backward castes not be detrimental to the interests of large majority of other backward castes?
While framing the Constitution of India, Ambedkar had suggested three propositions: (i) there should be equality of opportunity for all citizens; (ii) there ought to be no reservations of any sort for any class or community at all, i.e., all qualified persons should be placed on the same; there should be reservations for a limited period in favour of certain communities which have so far been outside the administration. These three seem to be the workable propositions even today for our society, so that we tackled all problems of reservation with sanity and rationality.

What are the youth to do then? The youth in India have to realize that reservation of OBCs is not the only crucial problem to fight for or against. The real problem is India’s political elite who work only for vested interests and whose attitudes and obscurantist notions have corrupted the thinking of our society and brought the country to its present critical condition. Instead of fighting against the Mandal Commission’s report and challenging those present political leaders who, only because of being in power and having the authority of getting laws enacted/amended, talk of high and higher reservation quota and even reservation for Muslims as well as in ‘promotions’ etc. the youth have to fight the corrupt political system. If they want to protect their future, if they want to be the future elite of the nation, they have to raise their voice against the self-centered political leaders. They have to widen their perspective to encompass the crucial problems of our society instead of focusing on one aspect of reservation for backward castes/classes etc. Instead of raising the issue of vested interests of the political parties and leaders versus the logical interests of society in general and youth in particular. They can propose certain amendments in the reservation policy to ensure that instead of benefit a large number of deserving people belonging to both the forward and the backward castes. Second, there should be no compromise on quality and efficiency. Third, they have to take the youth of the backward castes/classes with them on this issue and be able to convince them of their stance.

C. JUDICIAL RESPONSE: A CRITICAL STUDY

THE JUDICIAL PRONOUNCEMENTS with regard to the backward classes of citizens have centered round on two points. The first is the
identification of the backward classes of people and sex and is the fixation of quantum of reservation in the employment of Government services. Who are the backward classes of the people with regard to Article 16(4) of the Constitution and what should be the basis of identification of these backward classes was discussed by the Supreme Court for the first time in *Venkataramana v. State of Madras*\(^1\). Prior to this case the Supreme court has already held the communal Government Order with regard to the seats in Medical and Engineering Colleges in the State of Madras as Violative of Articles 15(1) and 29(2) of the Constitution in *State v. Champakam Dorairajan*\(^2\), the Court had pointed out that while in the case of employment under the State, Clause 4 of Article 16 provides for reservations in favour of any back-ward class of citizen, no such provision was made in Article 15 of the Constitution. This judgement necessitated the first amendment of the constitution and a new Clause, Clause 4, was inserted in Article 15 of the Constitution which is as follows:

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

The very object of the newly introduced Clause 4 to Article 15 was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 of the Constitution to make it constitutionally valid for the State to reserve seats for Backward Classes of citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions as well as to make other special provisions as may be necessary for their advancement.

The first judicial pronouncement with reference to Article 16 is *Venkataramana* case. This case was decided prior to the first amendment of the constitution which has inserted Clause (4) in Article 15. In that case a Communal Government Order in the matter of appointment to public services prior to the Constitution was challenged on the ground that it was violative of Article 16(1) and (2) of the Constitution. In that communal Government Order the appointment were to be made from the various castes, religions and communities specified.

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\(^1\) AIR 1951 SC 229
\(^2\) AIR 1951 SC 226
In Government Order. In 1949, the Madras Public Service Commission advertised 83 posts of District Munsifs were distributed as follows:

(i) Harijans 19
(ii) Muslims 5
(iii) Christians 6
(iv) Backward Hindus 10
(v) Non-Brahmin Hindus 32
(vi) Brahmans 11

Mr. Venkataraman, the petitioner appeared at the interview and he could have been selected if the provisions of the said Government Order were to be disregarded but because of the said Government Order he was not selected because he was a Brahmin.

The Supreme Court struck down the said Government Order while holding that reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional. But the ineligibility “created by the communal Government Order does not appear to us to be sanctional by Clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16(1) and (2). The communal Government Order, in our opinion, is repugnant to the provisions of Article 16 and is as such void and illegal”.

However, the Court in Venkataramana’s case noticed that list of backward classes mentioned in Scheduled III to part I of the Madras Service Rule, 1942 and clearly held that backward classes were enumerated on the basis of caste/race. Thus, the Court supported the identification of backward classes in the basis of caste in the first case on Article of the Constitution. The Court was of the view that as far as the vacancies reserved for backward classes of Hindus were concerned, they were not based on the grounds necessary to make a provision for reservation of such posts in favour of backward class of citizens. The Court allowed the Petition on the ground that the allocation of vacancies to and among communities other than Harijans and backward classes of Hindus cannot be sustained in view of Clauses (1) and (2) of Article 16 of the Constitution. Thus, the Court accepted the proposition that Harijans and
backward Hindus are to be given special treatment and they are, Hindus of any of the communities, mentioned in the Schedule. This simply means that the caste can be an important criterion for the identification of backward class of citizens. Caste, therefore, has been held to the basis for the identification.

The problem of identification of social backwardness again cropped up in *M.R. Balaji v. State of Musour*[^3]. This was the first case after the first amendment which inserted Clause (4) in Article 15 of the Constitution. Though the decision in this case was rendered with reference to Article 15, it also contained certain observations with respect to Article 16.

The Supreme Court in Balaji Case[^4], recognised that caste may be a relevant factor in determining the social backwardness of a case of the empathetic view that caste can not be sole and dominant test in determining the social backwardness of a class of citizens. The Court was of the view that “Christians, Jains and Muslims do not believe in caste system; the test of caste cannot be applied to them.”

Thus, the Court invalidated the order which had identified all backward classes solely on the basis of caste.

It is clear that caste was not recognised as the sole basis for the identification of backwardness, yet its importance as a relevant factor in that process was not denied. In *Chitrakekha v. State of Mysore*[^5], the caste was excluded in the identification process of backwardness and occupation and income were made the basis for identification. It was surprising that the order of Mysore Government was challenged on the ground that identification of backwardness had been done without taking the caste into consideration hence, it was bad in law. However, the court ruled that identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad in law and it also does not offend Article 15 (4). Though this case was not with regard to Article 16, yet the process of identification and the role of caste were the two points with regard to Article 16(4) which were also

[^3]: AIR 1963 SC 649.
[^4]: Ibid.
[^5]: AIR 1964 SC 1823.
decided by the Court. Again in 1968 in *P. Rajandra v. State of Madras*, the court considered the question of identification of SEBCs with reference to caste. The Court observed that:

> It must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such as caste on the ground that it is a socially and educationally backward class of citizens within the meeting of Article 15(4).... It is true that in the present case the list of socially and educationally backward classes has been specially by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens. ..... As it was found socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purpose of Article 15(4).... In this State of the Pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included there in are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail.

This judgement, thus, shows a shift in the approach with regard to the caste as a basis for identification of SEBCs. The court now began to emphasize that a caste is also a class of citizens and if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste. The burden of proof was placed upon the petitioners to prove that the identification made on the basis of caste was bad. Since, the petitioner in the present case failed to prove that any caste mentioned in the list was not socially and educationally backward the identification made by the State on the basis of caste was upheld by the apex court.

The Supreme Court took the similar view in *Triloki Nath v. State of J&K* in 1971, Hon’ble justice Hegde held that:

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5 AIR 1968 SC 1012.
There is no gain saying the fact that there are numerous caste in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life.\footnote{Peeriakaruppan v. State of Tamil Nadu (1971) 1 SCC 38 at p. 49.}

The identification of socially and educationally backward classes on the basis of caste was again upheld by the Court in \textit{State of A.P. v. Blaram}.\footnote{1972, 1 SCC 660.}

The Court observed that: Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the commission and the reason given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of backward classes is warranted by Article 15(4).

Thus, the Court clearly acknowledge that caste is one of the various tests for the ascertaining or the socially and educationally backwardness of a class. However, in \textit{State of U.P. v. Pradeep Tondon}\footnote{1975, 1, SCC 660.} the Court clearly ruled that: The socially and educationally classes of citizens are groups other than groups based on caste.

It seems that the then Chief justice Mr. A. N. Ray overlooked the facts in pronouncing the judgement that a larger bench of the Supreme Court in \textit{P. Rajendran v. State of Madras} has clearly held that the socially and educationally backward classes of citizens are the members of certain caste who are socially and educationally backward and that the caste is basis for identifying them.

However, the learned C.J. Ray was ready to accept caste as a relevant test in identification of the backward classes in \textit{K.S. Jayshree v. State of Kerala}.\footnote{1976, 3 SCC 730.} The learned Chief Justice was of the view that the caste might be a relevant but not be an exclusive test for identification and that neither caste not poverty could be the sole determinant of social and educational backwardness. In State of Kerala V. N.M. Thomas,\footnote{AIR 1976 SC 490.} the Court gave a new thinking on Article 16 of the constitution, though the seed of this thought is to be found in the dissenting
opinion of Subbarao, J. as he then was, in *T.Devadasan v. Union of India*.

Chief Justice Ray held in Thomas case that Article 16(1), being a face of Article 14, Permits reasonable classification. Article 16(4) clarifies and explains the classification on the basis of backwardness, classification of Scheduled Caste does not fall within the mischief of Article 16(2) since Scheduled Caste, historically oppressed and backward, are not castes. The concession granted to them is permissible and legitimate for the purposes of Article 16 (1). The rule giving preference to an unrepresented or under-represented backward community does not contravene Article 14, 16(1) or 16(2). Any doubt on this score is removed by Article 16(4).

Thus, the Court in Thomas case clearly held that Scheduled Caste are not caste within the meaning of Article 16(2) but they are a collection of caste, races and groups. Article 16(4), according to Thomas ruling, is one mode of reconciling the claims of backward people and the opportunity of free competition for which the forward sections are ordinary entitled. *K.C. Vasanth Kumar v. State of Karantaka*, is another important case with regard to the problem in question. Chinappa Reddy, J. opined that:

Caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person’s caste. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that preditioners of other religious faiths and Hindu dissentients are some time as rigid adherents to the system of caste as the conservative Hindus. We find Christian Harijans, Christian Madras, Christain Reddys, Christian Kammas, Mujbi Sikhs, etc. In Andhra Pradesh there is a community known as Pinjaras or Dudekulas (known in the North as ‘Rui Pinjaras Wala’; Professional cotton beaters) who are really Muslims, but are treated in rural society, for all practical purpose, as a Hindu caste. Several other instances may be given.

A.P. Sen, J. was of the view that: Caste or a sub-caste or group should be used only for purposes of identification of persons comparable to Scheduled Caste or Scheduled Tribes, till such members of backward classes attain a state of

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12 AIR 1964 SC 179.
13 AIR 1985 SC 1495.
enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life.

Mr. Justice Venkatramaiah agreed with Mr. Justice Chinappa Reddy in that very case that identification of backward classes can be made on the basis of caste. The learned Judge observed that:

An examination of the question in the background of the India social conditions shows that the expression ‘backward classes’ used in the constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward. It is clear, therefore, the right from Venkataramana to K.C. Vasantha Kumar the Supreme Court has emphasized that there is an integral connection between caste, occupation, poverty and social backwardness. The Court has clearly recognised that in Indian context the lower castes are to be treated as backward classes. Thus, these judgements, specially the opinions of Chinnappa Reddy and Venkataramiah, JJ. in K.C. Vasantha Kumar case, constitute important milestones on the road to recognition of relevance and significance of caste in the context of Articles 16 (4) and 15(4) of the constitution. The last and most important case on this point is *Indra Sawhney v. Union of India*.14 In this case Mr. Justice Jeevan Reddy has opined that the pre-constitution rules operating in various States, treatises and reference works and dictionaries go to show that in pre-independence India the expressions ‘class’ and ‘caste’ were used interchangeably and that caste was understood as an enclosed class. He has relied upon the Constituent Assembly debates to ascertain the original intent underlying the use of words ‘backward class of citizens’ and has agreed with the speech of Dr. Ambedkar which he gave at the time of First Amendment of the constitution that: backward classes are nothing else but a collection of certain castes.

The learned judge, therefore, concludes that class is not antithetical to caste and that a caste can be a class and it can be made a basis for the identification of the backward class of citizens because the word ‘class’ in Article 16(4) is used in the sense of social class and not in the Marxian sense. The learned Judge observes that:

14 AIR 1993 SC 477.
Indeed there are very good reasons why the constitution could not have used the expression “castes” or “caste” in Article 16(4) and why the word “class” was the natural choice in the context. The constitution was meant for the entire country and for all time to come. Non-Hindu religions like Islam, Christianity and Sikh did not recognize caste as such though, as point out here in above, casts did exist even among these religions to a varying degree. Further, a Constitution is supposed to be a permanent document expected to last several centuries. It must surely have been envisaged that in future many classes may spring up answering the test of backwardness, repairing the protection of Article 16(4). It therefore follows that from the use of the word “class” in Article 16(4), it cannot be concluded either that “class” is antithetical to “caste” or that such can never be taken as a backward class of citizens. The word “class” in Article 16(4), in our opinion, is used in the sense of social class – and not in the sense it is understood in Maxist Jargon …………… a caste is nothing but a socially homogeneous class.

In his concurring judgement Sawant J. is of the view that casteism has been the bane of entire Indian society and even among Sikhs, Muslims and Christians casteism prevail in varying degrees in practice. Thus, difference among the various religions with regard to caste is in its degree of rigidity. Therefore, according to the learned Judge, the backward class of citizens referred to in Article 16(4) is the socially backward class of citizens whose educational and economic backwardness. A caste by itself may constitute a class. However, in order to constitute a backward class the caste concerned must be socially backward and its educational and economic backwardness must be on the account of its social backwardness. The learned Judge observes that: What is, however, required to be done for the purposes of Article 16(4) is not classification but identification. The identification is not the backward classes of citizen, …… Any factor – whether caste, race, religion, occupation, habitation etc. – which may have been responsible for the social and educational backwardness, would naturally also supply the basis for identifying such classes not because they belong to particular religion, race, caste, occupation, area, etc. but because they are socially and educationally backward classes …… it can hardly be argued that caste is also a backward class. A caste has all the attributes of a class and can
from a separate class. If, therefore, a caste is also a backward class within the meaning of Article 16(4), there is nothing in the said article in any other provision of the constitution, to prevent the conferment of the special benefits under that article on the said caste. Hence, it can hardly be argued that caste in no circumstantial may from the basis of be a relevant consideration for identification of backward class of citizens.

Mr. Justice S.R. Pandian also concurs with this view and observes that: The expression, ‘backward class of citizen’ occurring in Article 16(4) is neither defined nor explained in the Constitution. However, the backward class or classes can certainly be identified in Hindu society with reference to caste along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc. and in communities where caste is not recognised by the above recognised and accepted criteria except caste criterion.

Thus, the Indra Sawhney case, popularly known as Mandal case, clearly upholds the caste as primary and dominant factor in the identification of backward classes. It negatives the observations of Kaka Saheb Kalekar, the Chairman of First Backward Classes Commission, that to make caste as the basis for identification will not be in tune with the goal of building a casteless society. On the other hand, the Court, in Indra Sawhney case has rejected the argument that making caste as a basis for the identification of backward classes will perpetuate casteism in the society. The Court has held that caste has been the dominant factor in Indian society and it cannot be kept out of the process of identification for the purposes of Article 16(4). The Court is of the considered view that once a caste satisfies the criteria of backwardness it becomes a backward class for the purpose of Article 16(4). It maintains that when caste is made as the basis for identification that identification is not made on the basis of caste but it is made on the ground that caste is found to be backward class of citizens not adequately represented in the services of the State. The Court has expressed in the view that if a Commission begins its process of identification with caste it cannot, by that reason alone, be said to be unconstitutional. There is no rule of law, according to the Court that a test to be applied for the identification of backward classes should be only one or uniform. It is not practicable in the vast country like India. The real object should be to discover
and locate backwardness and if such backwardness is located in a caste, it can be treated as backward. If that backwardness is also found in any section, class or group, such class, group can also be treated as backward. Thus, identification of backward class can be done along with other occupational groups or classes in whose case caste may not be relevant at all, Agricultural labourers, rickshaw-pullers, drivers, street-hawkers etc. may be designated as backward classes without making any reference to their caste. The central idea, according to the court, should be to consider all available groups, sections and classes in society, since caste represents an existing, identifiable social group-class encompassing an overwhelming minority of the country’s population, one can well begin with it and then go to other groups, sections and classes. Thus, the judicial padyatra has turned the relevancy of caste as a criterion for identification of backward classes in dominancy.

(i) Caste Criteria

The Supreme Court has clearly indicated in Indra Sawhney case that there is an integral connection between caste, occupation, poverty and social backwardness, that the caste is social class. Its social status and standing depends upon the nature of the occupation followed by it, and that lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. According to the Court caste, occupation poverty cycle is an ever present reality. The social standard of a person is measured by the caste to which he belongs, the occupation to watch he is linked. Thus, the caste – occupation nexus subsists even today.

It is thus clear that making the caste as the basis for identification of backward classes the Supreme Court has accepted its predominance in that process. The Government of India has accepted the majority judgement and by doing so it has deviated from its own path which it perused in 1951. It is to be remembered that the Government of India had rejected the recommendations of Kaka Saheb Kalekar Commission on the very ground that the commission has recognized the caste as the basis for identification of backward classes. The caste according to the Government of India was derogatory to democratic system and antithesis to casteless society. However, in Indra Sawhney case the Supreme Court has accepted the caste in the sense rank or standing as a measure of
backwardness. Prior to this case the Court has been able to make a distinction between caste in the sense of corporate group or as a unit of classification and caste as a measure of backwardness. The Court has been using the term ‘caste-based reservations’, ‘caste criterion’ without clarifying whether it has used caste as a unit or caste as a measuring rod. The failure of the courts to clarify this distinction has led to “considerable confusion and, in particular, it has obscured and diffused the original commitment to overcome the heritage of caste distinctions.”

The judicially created doctrinal puzzle with regard to the caste and class has been to a large extent done away with the categorical declaration of the Supreme Court in Indra Sawhney that the stark reality of the Indian society is only that a man born, brought up and he dies in his caste backward in the strains of backwardness. Thus, the Court has rectified the mistakes pointed out by Marc Galanter. The Court has relied upon the observations of Venkatramiah and Chinappa Reddy, JJ. In K.C. Vasanth Kumar case. Thus, it no longer remains a doctrinal puzzle.

It must, however, be borne in mind that taking birth in higher caste does not entitle a person to be forward. Many people born in Shudra’s caste have been kings and chieftains in South India and Madhya Pradesh. Thus, lower caste in the hierarchy may not be a measure for determining backwardness. The horrible situations in which many members of the forward castes spend their life should be the eye-opener for the courts to reconsider the propriety of making caste-based identification. They have also suffered the stresses and strains of backwardness in terms of money, agricultural lands and social status. The Court should appoint a special Study Group to find out the social position of such person. Only then a reasonable basis of classification can be recommended. There must be delicate balance between ideals and ground realities of life.

Shri M.N. Buch, a retired I.A.S. Officer, has given the examples of Betul district in Madhya Pradesh. According to him in Betul Tashil Kunbis predominate and in Multai Tahsil Pawars predominate. There these two

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15 Marc Galanter : Competing Equalities : Law and Backward Classes in India, 1984, p. 535; See also, Parmanand Singh, Caste and Classes : A Doctrinal Puzzle from Balaji to Vasanth; (1986) 1 SCC (jour) 36 at pp. 37-38.
communities dominate agricultural landscape and also hold the key to political power. How can then these communities be termed as backward and why their children should be given privileges in government services. In Bihar, the Yadavas and Kurmis wield more political power and announcement of such political powers from public platforms that the members of upper would be reduced to the level of hewers of wood and drawers of water is a gross abuse of political power. The learned author, thus, observed:

The virtual monopolization of power by Brahmans, Rajputs and Kayasthas has been commented upon by many authorities. Such a monopoly, however, can only survive under feudal rule in which society is stratified. Democracy, however, is a game of numbers and as power shifts to elected rather than appointed officials, the dominant caste in politics would naturally be the most numerous rather than the one which is highest in the social hierarchy.

(ii) Economic Criteria

The Court has concluded in Indra Sawhney v. Union of India that means test, i.e. an economic criterion, cannot be the only and exclusive basis for the identification of socially and educationally backward classes. It may however, be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. The Court has, however, explained that the economic advancement can be made a basis for the rule of exclusion. The Court terms it ‘means-test’ and has explained that the ‘means-test’ signifies imposition of an income limit for the purpose of excluding ‘creamy layers’ of backward classes from the backward class. The income of a person can be taken as a measure of his social advancement but his economic advancement should be so high that it necessarily means social advancement.

Thus, the Court in this case has emphasized that the means test should be applied with care. A realistic line must be drawn between those who are socially and educationally advanced and who are not so.

The provision for reservation in appointment under Article 16(4) of the Constitution according to Mr. Justice Sawant is not aimed at economic upliftment

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or alleviation of poverty. Article 16(4) is specifically designed to give a due share in the State power to those who have remained out of it mainly on account of their social and therefore, educational and land, in effect, to the virtual deletion of Article 16(4) from the Constitution. Poverty by itself is not the test of backwardness. However; the dissenting opinions favour the ‘means-test’ to be applied for the identification of backward classes. Mr. Justice Thommen thus, observes: It is not sufficient that the persons meant to be protected are backward merely by reasons of illiteracy, ignorance and social backwardness. If they have, in spite of such handicaps, the necessary financial strength to raise themselves, the Constitution does not extend to them the protection of reservation.

Mr. Justice Kuldip Singh is also of the same view. The learned judge says: The protective discrimination in the shape of job reservations has to be programmed in such a manner that the most deserving section of the backward class is benefited. Means–test ensures such a result.

Mr. Justice R.M. Sahai declares that while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the animal income of the parents beyond which one could not be considered to be backward.

A careful perusal of the judgements of the Supreme Court prior to the Indra Sawney case makes it evidently clear that barring a few exceptions the Court has been uniform in reaching the conclusion that caste and economic criteria are the relevant factors for identification of the Other Backward Classes and that neither can be the sole or dominant criteria for that very purpose. Poverty is not linked with the members of lower caste only, they may also be economically better and strong than some of the members of forward castes. Therefore, caste, poverty and occupation must be taken into consideration and the ‘means-test’ must vary from time to time so that the change economics scenario must be taken care of. However, both these tests have been held to have a relative value. The Indra Sawhney case has made the caste as a dominant factor ignoring its relevancy.

Mr. Justice Sawant has opined that the backward classes can be further divided into backward and more backward or most backward classes. He thus,
observed: Article 16 (4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of economic consideration alone. If backward classes are classified into backward and more or most backward classes, separate quotes of reservations will have to be kept for each of such classes. In the absence of such separate quotes, the reservations will be illegal. It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other consideration. The test of advancement lies in the capacity to complete with the forward classes. If the advanced section in a backward class is so advanced section from the backward class no longer belongs to the class and should cease to be considered so and denied the benefit of reservations under Article16 (4)

Thus, Mr. Justice Sawant has disapproved M.R.Balaji case on this point though this decided in that case in the context of Article 15(4). He has relied upon the observation of Mr. Chinappa Reddy, J. in K.C. Vasanth Kumar case that:

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

Thus, the Supreme Court in Indra Sawhney case held that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward, though it is not being suggested that it ought to be done.

The Indra Sawhney case has finally decided that Clause (4) of Article is not an exception to Clause (1) of Article 16 of the Constitution. Article 16(4) of the constitution is an instance of classification implicit in and permitted by Clause (1) , or an emphatic way of stating a principle implicit in Article16(1) . Thus , the court has disapproved the decisions of Balaji and Devadasan, in which it has been held that Article 15(4) and 16(4) are exception to
Article 15(1) and 16(1) of the Constitution. The Court has relied upon the Thomas case that Article 16(4) is not an exception to Article 16(1) of the Constitution but that it is merely an emphatic way of stating a principle implicit in Article 16(1). However, the Court has not cited *Akhil Bharatiya Soshit Karmchari Sangh (Railway) v. Union of India*\(^\text{17}\) in which Mr. Justice Krishna Iyer, who formed the majority in Thomas case has gone back upon his view and has held that Article 16(4) is an exception to Article 16(1) and (2) of the constitution. The Supreme Court in Indra Sawhney case has relied upon the speech of Dr. Ambedkar\(^\text{18}\) and has held that Clause (4) of Article 16 is not an exception and that it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointment/post in favour of backward classes even without Clause (4) of Article 16. Clause (4) merely puts the matter beyond any doubt in specific terms.

D. **IMPORTANT JUDICIAL TRENDS**

In this chapter we have discussed about reservation cases. In this chapter we are going to discuss the role of courts in the evolvement of reservation. Indian Judiciary has pronounced some Judgments upholding reservations and some judgments for fine tuning its implementations. Lot of judgments regarding reservations have been modified subsequently by Indian parliament through constitutional amendments. Some judgments of Indian judiciary has been flouted by state and central Governments. Given below are the major judgments given by Indian courts:

(i) **Reasonable Classification**

*In the case of State of Kerala Vs N.M Thomas:* The SC held that the classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing the special tests for promotion is a just and reasonable classification sharing rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public offices.

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\(^{17}\) AIR 1981 SC 298.

\(^{18}\) CAD Vol. 7. P.701.
Articles 14, 15 and 16 form part of a string of constitutionally guaranteed rights. These rights supplement each other. Article 16 is incident of guarantee of equality contained in Art. 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to the objects to be achieved. Under Art. 16 there can be a reasonable classification of the employees in matters relating to employment or appointment.

(ii) Carry Forward Rule

In case Devadasan v Union: The SC held that the “Carry forward rule”, as a result of which applicants belonging to Scheduled Castes or Tribes could get more than 50% of the vacancies to be filed in a particular year, is unconstitutional.

Article 14 of the Constitution of Indian prohibits the State from denying to any person equality before the law or the equal protection of laws. This means equality among equals. The Article does not provide for an absolute equality of treatment to all persons in utter disregard in every conceivable circumstance of the differences such as age, sex, Education and so on. A provision made by the State for the reservation of a certain proportion of appointments and posts for backward classes in the public services of the State in order to provide them with an opportunity equal to that of the members of the more advanced classes, does not infringe Art. 14 of the Constitution of India provided that the reservation is not so excessive as to practically deny a reasonable opportunity for employment to members of other communities.

(iii) Backward class and backward community

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

(iv) **Burden of proof**

In case State of Punjab Vs. Hira Lal: Article 16(1) provides for equality of opportunity to all citizens in relation to appointment to any office in the service of the State subject to the exception in Art. 16(4) that the State may make reservations in favor of backward classes. The reservation contemplated by Art. 16(4) can be made not merely to initial recruitment but also to Posts to which promotions are to be made. Every such reservation under Art. 16(4) does introduce an element of discrimination and promotion of junior officers over seniors; but the Constitution makers thought fit, in the interests of society as a whole, that backward classes should be afforded some protection. If, however, the reservation under Art. 16(4) makes the rule in Art. 16(1) meaningless the decision of the State would be open to judicial review; but the burden of establishing that particular reservation is offensive to Art. 16(1) is on the person who takes the plea.

(v) **Scheduled castes are “castes”**

In case Akhil Bhartiya Soshit Karamchari Sangh Vs. Union: The SC held that the state may classify, based upon substantial, groups or classes and this process does not necessarily spell violation of Articles 14 to 16. Therefore, in the present case if the Scheduled Castes and Scheduled Tribes stand on a substantially different footing they may be classified groups wise and treated separately.

The fundamental right of equality of opportunity has to be read as justifying the categorization of Scheduled Castes and Scheduled Tribes separately for the purpose of “adequate representation” in the services under the State. The object is constitutionally sanctioned in terms as Article 16(4) and 46 specifically. The classification is just and reasonable.
Apart from Article 16(1), Article 16(2) expressly forbids discrimination on the ground of caste and here the question arises as to whether the Scheduled Caste and Tribes are castes within the meaning of Article 16(2). Assuming that there is discrimination, Article 16(2) cannot be invoked unless it is predicated that the Scheduled Castes are “castes”.

There are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. They may be something more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group.

Article 14 to 16 from a Code by themselves and contain a constitutional fundamental guarantee. The Directive Principle which are fundamental in the governance of the country enjoin upon the state the duty to apply that principle in making laws. Article 46 obligates the State to promote with special care the educational and economic interests of the weaker sections of the people in particular of the Schedule Caste and the Schedule under the State does not violate the fundamental right to equality of opportunity for all citizens in such matters guaranteed by Art. 16(1). The reservation in favor of backward classes of citizens, including the members of the Scheduled Caste and Scheduled Tribes, as contemplated by Art. 16(4), can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made.

(vi) Creamy Layer

In case *INDIRA SAWHNEY & ORS V. UNION OF INDIA*: The SC in this case the Supreme Court considered these complex questions, which would have its effect on the future welfare and stability of the Indian society. The Supreme Court delivered a very elaborate, exhaustive and thoughtful opinion on various issued related to reservation. The Supreme Court admitted that reservations are anti-meritocracy but in the same breath also stated that this cost is necessary if the promise of the Constitution to deliver social justice is to be fulfilled.

The court while upholding the constitutional validity of reservations for the backward classes, held that Art. 14 allows reasonable
classification and 16(4) is not an exception to 16(1) but is only a classification permitted by Art. 16(1). Thus the state may provide special treatment/affirmative discrimination in favor of the backward classes and it will be within the scope of reasonable classification. Further it was state that Constitution itself provides for the backward classes as class deserving special treatment. It further held that the Constitution framers were aware of the historic injustices and the inequities afflicting the society. They were also aware of the fact that poverty, low status in the Hindu caste system and low occupation formed a vicious circle and so, as a solution to all these problems, had provided for reservations for the backward classes of the society. The court also held that ‘the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the scheduled castes and scheduled tribes and to protect them from social injustice and all forms of exploitation’.

(vii) Reservation : Extent and Percentage

In case R K Sabharwal Vs State of Punjab: The SC held that Art. 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favor of any backward class of citizen which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the States Services. When the State Government after doing the necessary exercises makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class under then the percentage has to be followed strictly.

The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed/promoted against the general seats. As mentioned above the
roster point which is reserved for a backward class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. The fact that considerable number of members of a backward class have been appointed or promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/Rules providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number classes against the general category posts the given percentage has to be provided in addition.

(viii) **Roster System**

In case Union of India Vs Varpal Singh : The Supreme Court has tried to mitigate to some extent the inequity that reservation in general has to represent by holding constitution. The supreme court rightly held that seniority between reserved category candidates and general candidates shall continue to be governed by their panel position prepared at the time of selection.

It was also held that a roster point promotes getting the benefit of accelerated promotion would not get consequential seniority and the seniority between the reserved category candidates and general candidates in promoted category shall be governed by their panel position.

(ix) **Promotion to post or Class**

In case Ashok Kumar Gupta Vs State of Uttar Pradesh: The SC held that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post a class of posts depends upon the operation of the conditions of service. Art. 16(4A) read with Art. 16(1) and 14 guarantees a right to promotion to Delits and Tribes as fundamental right where they not have adequate representation consistently with the efficiency in administration. The Mandal’s case, has prospectively overruled the ratio in Rangachari’s case i.e., directed the decision to be operative after 5 years form the date of the judgment; however, before expiry thereof, Art. 16(4A) has come into force from June 17, 1995. Therefore, the right to promotion continues as a
constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribes on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favor of the Dalits and Tribes to give effect to the Constitutional goals.

(x) **Equal Opportunity**

In case *Ajit Singh Januja & Ors Vs State of Punjab & Ors*:
The SC held that Art. 14 and Art. 16(1) are closely connected. They deal with individual rights of the persons. Art.14 demands that the “States shall not deny to any person equality before the law or the equal protection of the laws”. Art. 16(1) issues a positive command that “there shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State”. It has been held repeatedly by this Court that sub-clause (1) of Art.16 is a facet of Art.14 and that it takes its roots from Art.14. The said sub-clause particularizes the generality in Art. 14 and identifies, in a constitutional sense “equality opportunity” in matters of employment and appointment to any office under the State. The word ‘employment’ being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Art. 16(1) provides to every employee otherwise eligible for promotion. Equal opportunity here means the right to be “considerd” for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be “considered” for promotion, which is his personal right. “Promotion” based on equal opportunity and ‘seniority’ attached to such promotion are facets of fundamental right under Art. 16(1): Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Art. 16(1). For Example, if the promotion is by rule of ‘seniority-cum-suitability’, the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from
the date of such promotion because they get promotion through a process of equal opportunity.

Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered for promotion and the ‘seniority’ attached to such promotion become important facets of the fundamental right guaranteed in Art. 16(1). Right to be considered for promotion is not a mere statutory right. The question is as to whether the right to be considered for promotion is mere statutory right or a fundamental right. Learned senior counsel for the general candidates submitted that in Ashok Kumar Gupta Vs. State of U.P., it has been laid down that right covered by Art. 16(4) and 16(4A) are “fundamental rights”. Such a view has also been expressed in Jagdish Lal and some other cases where these cases have been followed.

Hence Court observed that Art. 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the government to make reservation for Schedule Castes and Scheduled Tribes, either at the initial stage or at the stage of promotion. In other words, Art. 16(4) is an enabling provision and confers discretionary power on the State to make a reservation of appointment in favor of backward class of citizens which, in its opinion, is not adequately represented in the services of the State.

(xi) Services Rule

*Indian drugs and pharmaceuticals Ltd. v. Workmen*: The supreme court reiterated that regularization cannot be a mode of appointment. A post must be created or sanctioned before filling it up. The rules of recruitment can be relaxed and the court or tribunal cannot direct regularization of temporary appointees dehorns the rules, nor can it direct continuation of temporary employee or payment of regular services to them. Orders for creation of posts, appointments on these posts, regularization, fixing pay scales, continuation in service, promotions, etc,
are all executive or legislative functions and it is highly improper for judges to step into these sphere, except in a rare and exceptional case.

(xii) Principle of Equality

In case M. Nagaraj Vs Union of India: The supreme court in Nagaraj Case held that reservation is not in issue in present case. What is in issue is the extent of reservation. Reservation has to be used in a limited sense otherwise it will perpetuate castes in the country. If the extent of reservation is excessive then it makes an inroad into the principle of equality in Art. 16(1). The extent of reservation will depend on the case. In this regard the state concerned will have to show in each case the existence of the compelling reason, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation.

(xiii) Initial Recruitment and Promotions

In case Comptroller & Auditor – General of India, Gian Prakash Vs. K.S. Jaggannathan: By reason of the provisions of Art. 16(4) of the constitution a treatment to the members of the Scheduled Castes and Scheduled Tribes different from that given to others in matters relating to employment or appointment to any office under the State does not violate the fundamental right to equality of opportunity for all citizens in such matters guaranteed by Art. 16(1). The reservation in favor of backward classes of citizens, including the members of the Scheduled Castes and Scheduled Tribes, as contemplated by Art. 16(4), can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made.

(xiv) Policy Decision

Recently The court observed in case of Anupam Thakur v. State of Himachal Pradesh, Constitution of India, Article 15(4) provides reservation those candidates belonging to backward area policy decision taken by govt. of Himachal Pradesh not providing reservation of any seats in IGMS Shimla for candidate belong to Backward area as seats increase from 65 to 100. No more seats were available to candidate belonging to
all categories also because to all large scale developing area of backward area from not reduced from 55-11 seat for candidate from backward area were withdrawal only from IGMC Shimla. But it was given in two other university of state. Hence in such circumstances there was no unconstitutionally in policy decision of state government to do anything with reservation for candidate belonging to backward area & therefore court cannot issue any mandamus for providing reservation.

In another case the supreme court held that in case of Salauddin Ahmad vs. Samta Andola Justice Altamas Kabir observed that observation made in the said order with regard to the directions given in M.Nagaraj case for collection of the quantifiable data before giving effect to the provision of Article 16 (Y-A) of the constitution. The learned attorney general has also emphasized that in order to give effect to the second port of the Judgement and order of the Division Bench of the Rajasthan High Court and the directions given in paragraph 68 of the Judgement in Suraj Bhan Meena’s Case (Supra).

(xv) **Reservation in Unaided Private Institutions**

The Supreme Court in *TM.A. Pai Foundation v. State of Karnataka* had held that citizens have a right to establish educational institutions under article 19(1)(g) of the Constitutions. The controversy related to state-imposed reservation in unaided private educational institutions had its genesis in the controversial paragraph 68 in the decision of the Supreme Court in TMA. Pai Foundation. This paragraph was paraphrased by the Supreme Court in *Islamic Academy v. State of Karnataka* into seven parts to clarify that unaided professional colleges should also make provisions for students from the poor and backward sections of society wherein the government could prescribe the percentage of seats according to local needs, and different percentages could be fixed for minority and non-minority institutions.

The Supreme Court in *P.A Inamdar v. state of Maharashtra* paraphrased paragraph 68 into just two parts and held that it was constitutionally impermissible to impose any seat-sharing quota or
reservation policy by the state on unaided private professional ‘colleges.’ The court also added that any state-imposed reservation in unaided private educational institutions would be an unreasonable restriction in the exercise of a fundamental right under article 19(1)(g). Pratap Bhanu Mehta criticized the Court’s approach in P.A. Inamdar.

On 21 December 2005 the Constitution (Ninety–third) Amendment Act, 2005 inserted clause (5) in article 15 of the Constitution. After this amendment, the parliament enacted the Central Education Institutions (Reservation in Admission) Act, 2006 with the avowed purpose of facilitating greater access to higher education by providing for 27 per cent reservation for OBCs in the educational institutions controlled by the central government. The Act did not give effect to the mandate of the newly introduced clause (5) under which special provisions relating to admissions could have been enacted for both aided and unaided private educational institutions.

The petitioners unsuccessfully challenged the validity of clause (5) in Ashoka Kumar Thakur v. Union of India on the ground that it violated the basic structure doctrine. The majority did not express any opinion on the constitutionality of the imposition of reservation on unaided private educational institutions as no such institution had approached the court. The only judge to do so was Bhandari J. who opined that the imposition of any reservation on unaided private educational institutions was volatile of the basic structure doctrine. Several eminent constitutional law experts have criticized the majority for not expressing any opinion on the issue. It is inevitable that the question will be agitated before the court in the future and the opinion of Bhandari J. remains the only expression from the court on the issue.

The present piece seeks to analyze the opinion of Bhandari J. in light of the decisions of the court in M. Nagaraj and I.K. Cvelbo v. State of Tamilnadu. The first part of the paper explains the decision of the Supreme Court in M. Nagaraj. The second part discusses the decision of the court in Coelho and explains its nexus with the decision in M.
Nagaraj. The third part discusses the opinion of Bhandari J. in Ashoka Kumar Thakur and argues that Coelho’s rights test simplicity cannot be used to check the constitutionality of reservations in private unaided educational institutions. The fourth part seeks to address other arguments that have been raised against the constitutionality of reservations in private unaided educational institutions.

**The decision in M. Nagaraj – Mathew J.’s test affirmed**

The Constitution Bench of the Supreme Court in M. Nagaraj was confronted with the question as to whether the amendments to the Constitution which introduced new provisions in article 16 regarding reservations in public employment were violative of the basic structure of the Constitution in 1995 inserted clause (4A) to article 16 authorizing reservations in promotions for scheduled castes and scheduled tribes to remove the limitation indicated in *Indira Sawhney v. Union of India* which held that there could be no reservations in promotions. The eighty-first amendment inserted clause (4B) to article 16 authorizing that the carry-forward vacancies were to be ignored while calculating the ceiling limit of fifty percent. The eighty-fifth amendment to the Constitution was required to undo the decision in *Ajit Singh (II) v. State of Punjab* where in it was held that despite the insertion of clause (4A) in article 16, the seniority of the reserved category promotes could not be counted in the promoted category form the date of their continuous officiating in the promoted post as compared to the candidates belonging to the general category who were senior to them in the lower category but were promoted at a later date. The eighty-fifth amendment introduced in 2001 granted consequential seniority to reserved category candidates who had acquired accelerated promotion.

The two grounds of challenge against these amendments were that the parliament had amendment article 16 to overcome judicial decisions thereby damaging the basic feature of judicial review and the amendments had enlarged the scope for reservation thereby damaging the basic feature of equality.
TWO TESTS ADOPTED IN M. NAGARAJ'S CASE:

The court in M. Nagaraj adopted two tests, namely the ‘width test’ and the ‘identity test’, which were to be applied disjunctively, to ascertain if the impugned amendments were violative of the basic structure.

It is important to explore as to why Bhandari J did not use the width and identity test in A.K. Thakur, particularly when the 93rd amendment was concerned with the equality code indicated in articles 14, 15 and 16 of the Constitution. Bhandari J. preferred to follow the rights test that had evolved out of a nine-judge bench decision in Coelho. One plausible explanation could be that Bhandari J felt compelled to apply the rights test as a bench of a larger quorum had rendered the decision in Coelho. It is appreciate the difference, if any, between the tests developed by the court in M. Nagaraj suggests that it was conscious of the distinction between equality as a fundamental right and equality as a basic feature of the Constitution. A careful reading of the judgement in M. Nagaraj suggests that the court has advocated the application of essence of rights test before using the width and identify the constitutional principles that the ‘width test’ seeks to protect. The court stressed that some of the constitutional principles may be so important and fundamental that they become part of the basic structure of the Constitution.

The court stated that it was only by linking constitutional provisions to such overarching principles that one would be able to distinguish essential from less essential provisions of the Constitution. The court held that in order to qualify as an entrenched part of constitutional law after which it could be examined whether the principle was fundamental enough to bind even the amending power of the parliament. After employing the “essence of rights test, the court in M. Nagaraj reduced the concept of equality, which is delineated over several articles, to the equality code indicated by articles 14, 15 and 16 of the constitution as it embodies the foundational value of equality.
The underlying theme of the opinion in M. Nagaraj suggests that first, the constitutional principle, which is a part of the basic structure, and whose violation by means of an amendment has been challenged, must be identified. Second, the constitutional principle might be delineated over several articles but it has to be seen in the context of the placement of specific articles of the Constitution that embody its foundational value. Third, the width and identify test will enable the identification of constitutional limitations whose obliteration will lead to the obliteration of the constitutional principle and hence the basic structure of the Constitution.

The test of overarching or essence of rights test is not a new test developed by the court in M. Nagaraj. Its foundation could be traced to the opinion of Mathew J in *Indira Gandhi v. Raj Narain*. In Indira Gandhi, the short question before the court was whether clauses (4) and (5) of article 329-A transgressed the basic structure of the Constitution. Chandrachud J. was of the opinion that the right to equality conferred by article 14 was a part of the basic structure of the constitution. Thereupon, Chandchud J employed the classic nexus test as enunciated by Das J in *Anwar All Sarkar v. State of West Bengal* to conclude that any differential treatment of the elections to the office of prime minister from elections of other member of parliament would be violative of article 14.

In Indira Gandhi, Mathew J opined that article 14 was not a feature of the basic structure of the Constitution and asserted that whether a particular feature forms part of the basic structure has to be determined on the basis of the specific provisions of the Constitution. Chandrachud J had asserted four unamendable features which formed part of the basic structure, two of which were mentioned verbatim in the preamble. Mathew J was of the opinion that tough the preamble enumerates great concepts embodying the ideological aspirations of the people but those concepts were particularized and their essential features delineated in various provisions of the Constitution. Mathew J. was emphatic in rejecting the articulation of the basic structure in abstract magnificent obsessions and emphasized that:
It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the preamble. The specific provision of the Constitution are the stuff from which the basic structure has to be woven. The court came to the conclusion\textsuperscript{124} that the impugned amendments to article 16 furthered equality and were not violative of the basic structure of the Constitution. It has been suggested that the decision of the court reiterates the special nature of constitutional commitment accorded to the scheduled castes and the scheduled tribes in the matter of job reservation. Despite the enunciation of the overarching principle or the essence of rights test, the court in M. Nagaraj scrutinized the impugned amendments against the text of article 16 (4).

E. REVIEW

Seats in educational institutions and jobs are reserved based on a variety of criteria. The quota system sets aside a proportion of all possible positions for members of a specific group. Those not belonging to the designated communities can compete only for the remaining positions, while members of the designated communities can compete for all positions (reserved and open). The following are the types of reservation on the basis of which seats are reserved.

Seats are reserved for Scheduled Castes, Scheduled Tribes, and Other Backward Castes (based chiefly on caste at birth) in varying ratio by the central government and state government. This caste is decided based on birth, and can never be changed. While a person can change his religion, and his economic status can fluctuate, the caste is permanent. In central government funded higher education institution, 22.5 percent; of available seats are reserved for Scheduled Caste (Dalit) and Scheduled Tribe (Adivasi) students(15 percent; for SCs, 7.5 percent; for STs). This reservation percentage has been raised to 49.5 percent; by including and additional 27 percent; reservation for OBCs. In AIIMS 14 percent; of seats are reserved for SCs, percent; for STs. In addition, SC/ST students with only 50 percent; scores are eligible. This ratio is followed even in Parliament and all elections where few constituencies are earmarked for those from certain communities.
The Tamil Nadu government has allotted 3.5 percent of seats each to Muslims and Christians, thereby altering the OBC reservation to 23 percent; from 30 percent; since it excludes persons belonging to Other Backward Castes who are either Muslims or Christians. The government argument is that this sub-quota is based on the backwardness of the religious communities and not on the religious themselves.

Andhra Pradesh’s administration has introduced a law enabling percent; reservations for Muslims. This has been contested in court. Kerala Public Service Commission has a quota of 12 percent; for Muslims. Religious minority status educational institutes also have 50 percent; reservation for their particular religions. With few exceptions, all jobs under state government are reserved to those who are domiciles under that government. In reserved to those who are domiciles under that government. In PEC Chandigarh, earlier 80 percent; of seats were reserved for Chandigarh domiciles and now it is 50 percent;

Some reservation are also made for Sons/Daughters/Grands ons/Grand daughters of Freedom Fighters, Physically handicapped, Sports personalities, Non-resident Indians (NRIs) have a small fraction of reserved seats in educational institutions. They have to pay more fees and pay in foreign currency, Candidates sponsored by various organizations etc.