CHAPTER III

JUDICIAL INTERPRETATION OF CONSTITUTIONALLY ENSHRINED SOCIAL JUSTICE

3.1 Preamble to the Constitution and 42nd Amendment

Unlike the Constitutions of Australia, Canada or the U.S.A., the Constitution of India has an elaborate Preamble. The Constitution makers gave to the Preamble ‘the place of pride’. It embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime.1

The Preamble to the Constitution lays down the goals of politico-socio-economic democracy for the citizens of India. The Preamble emphasizes that India should be a Sovereign Socialist Secular Democratic Republic. The Preamble further states that the people of India have given the Constitution to themselves to secure all its citizens justice – social, economic and political; liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and Fraternity assuring the dignity of the individual. The three concepts liberty, equality and fraternity constitute a trinity, one can not be isolated from the other.

The Supreme Court of India has emphasized in Keshavananda2 that the Preamble to the Constitution contains the philosophy of equality as basic to the Constitution which no legislature in India can transgress. Even an amendment of the Constitution offending a basic structure of the Constitution is ultra-vires. However, it is to be mentioned that in India, the concept of equality is regarded not as a static, but a dynamic concept. It permits every process of equalization and protective discrimination. Progressive measures to eliminate group disabilities and promote collective equality are not regarded as antagonistic to the concept of equality on the ground that every individual is entitled to equality of opportunity based purely on merit. Such an approach would perpetuate existing inequalities. Those who are unequal, in fact, can not be treated by identical standards. That may amount to

2. ibid.
equality in law, but it would certainly not real equality. It is necessary to take into account *de-facto* inequalities which exist in society and to remove which affirmative action needs to be taken. Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating *de-facto* inequalities³.

Further, the Constitution-makers rightly perceived that mere political democracy would be meaningless in a country of the poor millions without economic justice. The ideals stated in the Preamble are reinforced through the Directive Principles of State Policy which spell out in greater detail the goal of economic democracy, the socio-economic content of political freedom, the concept of a Welfare State. The Directive Principles thus supplement the Preamble to the Constitution.

The principles have been characterised as ‘basic to our social order’ as they seek to build a social justice society. These principles have been drafted in flexible and general language and leave enough leeway to the various Governments in the country to frame their policies from time to time in accordance with the contemporary needs and circumstances of the society to achieve the goals set out therein. These principles do not impose any particular socio-economic philosophy on the country.

These principles have played a crucial role in legislative and administrative policy-making in the country. They have inspired the idea of socialist pattern of society; the process of planning has been oriented towards achieving the goals contained in them; agrarian economy has been reconstructed; right to property has been very much deluted; public industrial and economic sector has been extended and a pervasive system of Government regulation of private economic enterprise has been created. Constant efforts are being made to improve the position of backward and economically weaker sections of society. However, despite of the endeavours to fulfil these principles, there have been deficiencies in the implementation of the policies framed for the purpose and most of these policies remain to be done⁴. While laws are enacted to promote the programmes and policies envisaged by the Directive Principles, there is failure on the part of the administration by way of non-administration, mal-administration and mis-administration of these laws.

Originally, the word ‘Socialist’ was not inserted in the Preamble. In 1976, the Preamble was amended by the 42nd Constitution Amendment to give socialist

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³ Valsamma Paul v. Cochin University, AIR 1996 SC 1011, 1015.
⁴ Austin, Granville, The *Indian Constitution: Cornerstone of a Nation*, Pp.-75-83.
orientation to the Indian Polity. India is now declared as ‘Sovereign Socialist Secular Democratic Republic’. The term ‘Socialist’ has been brought to the Constitution to establish an egalitarian social order through rule of law as its basic structure. In *Air India Statutory Corpn.* case there is an expression of judicial opinion defining socialism. The main emphasis is on the establishment of an egalitarian social order through rule of law.

In *Minerva Mills* the Supreme Court considered the meaning of ‘Socialism’ as to crystallise a socialistic State securing to its people socio-economic justice by interplay of the Fundamental Rights and the Directive Principles. In *Nakara*, the Supreme Court has stated that democratic socialism achieves socio-economic revolution to end poverty, ignorance, disease and inequality of opportunity. This idea has been reiterated by the Supreme Court of India in a number of its pronouncements. The basic framework of socialism provides a decent standard of life to the working people.

In *Ranganath Reddy*, the Supreme Court has stated that the aim of socialism is the distribution of the material resources of the community in such a way as to subserve the common good. In *Sanjeev Coal* the Supreme Court held that the broad egalitarian principle is implicit in every Directive Principle. The law ought to be designed so as to promote broader egalitarian social goals to do economic justice for all.

The Preamble to the Constitution read with Directive Principles in Arts. 38, 42, 43 and 48-A promotes the concept of social justice. The aim of social justice is to attain a substantial degree of social, economic and political equality. Social justice is a device to mitigate the sufferings of the poors, weaks, tribals and the deprived sections of the society and to elevate them so that they can live with dignity.

In course of time the Court has raised social and economic justice to the high level of a Fundamental Right. All state actions should be such as to make socio-

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11. *Air India Statutory Corpn. case, supra note 5.*
economic democracy with liberty, equality and fraternity, a reality to all the people through democratic socialism under the rule of law. Right to social and economic justice has now been held to be a Fundamental Right. The Preamble, the Fundamental Rights and the Directive Principles have been characterized as the ‘trinity’ of the Constitution.

3.2 Equality

Articles 14 to 18 of the Constitution of India guarantee the right to equality to every citizen of India. Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons. Article 14 embodies the idea of equality expressed in the Preamble. The succeeding Articles 15, 16, 17 and 18 lay down specific application of the general rules laid down in Article 14. Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 guarantees equality of opportunity in matters of public employment. Article 17 abolishes untouchability. Article 18 abolishes title.

Article 14 declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Thus, Article 14 contains two expressions ‘equality before the law’ and ‘equal protection of the law’. The phrase ‘equality before the law’ finds a place in almost all written Constitutions that guarantees fundamental rights. Both these expressions have, however, been used in the Universal Declaration of Human Rights.

The first expression ‘equality before the law’ is of English Origin and the second expression ‘equal protection of the law’ has been taken from the American Constitution. Both these expressions aim at establishing what is called ‘equality of status’ in the Preamble of the Constitution.

‘Equality before the law’ is somewhat a negative concept implying the absence of any special privilege in favour of individuals and the equal subject of all classes to the ordinary law of the land. “Equal protection of the law” is a positive concept implying equality of treatment in equal circumstances. However, one dominant idea common to both the expressions is that of equal justice. In State of

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13. Article 7 of the Universal Declaration of Human Rights says: “All are equal before the law and are entitled without any discrimination to equal protection of the law”.
West Bengal v. Anwar Ali Sarkar\textsuperscript{15}, PatanjaliSastri, C.J., has rightly observed that the second expression is corollary of the first and it is difficult to imagine a situation in which the violation of equal protection of laws will not be the violation of equality before law. Thus, in substance, the two expressions mean one and the same thing.

The concept of equality does not mean absolute equality among human beings which is physically not possible to achieve. It is a concept implying absence of any special privilege by reason of birth, creed or the like in favour of any individual and also the equal subject of all individuals and classes to the ordinary law of the land. As Dr. Jennings puts it: “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue or be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence”\textsuperscript{16}.

The guarantee of equal protection of laws is similar to one embodied in the 14\textsuperscript{th} Amendment to the American Constitution\textsuperscript{17}, which is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences of circumstances. Equal protection of laws does not postulate equal treatment of all persons without distinction. It postulates the application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political influence\textsuperscript{18}.

The Supreme Court has explained in Srinivasa Theatre v. Govt. of Tamilnadu\textsuperscript{19}, that the two expressions ‘equality before law’ and ‘equal protection of law’ do not mean the same thing even if there may much in common between them. ‘Equality before law’ is a dynamic concept having many facets. One facet is that there shall be no privileged person or class and that none shall be above law. Another facet

\textsuperscript{15}.  AIR 1952 SC 75.
\textsuperscript{16}.  Jennings, Law of the Constitution, 3\textsuperscript{rd} ed., P. 49.
\textsuperscript{17}.  The 14\textsuperscript{th} Amendment of the American Constitution declares: “No State shall deny to any person within its jurisdiction the equal protection of the laws”.
\textsuperscript{19}.  AIR 1992 SC at 1004.
is ‘the obligation upon the State to bring about, through the machinery of law, a more equal society...for, equality before law can be predicated meaningfully only in an equal society.’

Article 14 prescribes equality before law. But the fact remains that all persons are not equal by nature, attainment or circumstances and therefore, a mechanical equality before the law may result in injustice. Thus, the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances or conditions\textsuperscript{20}. The varying needs of different classes or sections of people require different and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and for that purpose of distinguishing, selecting and classifying persons and things upon which its laws are to operate.

The principle of equality before law does not mean that the same law should apply to everyone, but it means that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. In the landmark judgment of \textit{Gauri Shankar\textsuperscript{21}} the Supreme Court of India observed: “Equals should not be treated unlike and unlike should not be treated alike. Likes should be treated alike”.

Article 14 thus means that ‘equals should be treated alike’; it does not mean that ‘equals ought to be treated equally’. As all persons are not equal by nature or circumstances, the varying needs of different classes or sections of people require differential treatment. This leads to classification among different groups of persons and differentiation between such classes. Accordingly, in a particular manner, the Court has evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory\textsuperscript{22}.

A legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on an equal footing. Thus, the Supreme Court of India has underlined this principle\textsuperscript{23}. “Article 14 of the Constitution ensures equality

\textsuperscript{20} \textit{Chiranjeet Lal v. Union of India}, AIR 1951 SC 41.
\textsuperscript{21} \textit{Gauri Shankar v. Union of India}, AIR 1995 SC at 58.
\textsuperscript{22} \textit{Ashutosh Gupta v. State of Rajasthan}, (2002) 4 SCC 34.
among equals; its aim is to protect persons similarly placed against discriminatory
treatment. It does not however operate against rational classification. A person setting
up a grievance of denial of equal treatment by law must establish that between
persons similarly circumstanced, some were treated to their prejudice and differential
treatment had no reasonable relation to the object sought to be achieved by the law”.

Article 14 forbids class legislation; it does not forbid reasonable classifications
of persons, objects and transactions by the legislature for the purpose of achieving
specific ends. Classification to be reasonable should fulfill the following two tests:

(i) It should not be arbitrary, artificial or evasive. It should be based on an
intelligible differentia, some real and substantial distinction, which
distinguishes persons or things grouped together in the class from others left
out of it.

(ii) The differentia adopted as the basis of classification, must have a rational or
reasonable nexus with the object sought to be achieved by the statute in
question.\footnote{Laxmi Khandasari v. State of Uttar Pradesh, AIR 1981 SC 873, 891.}

It is necessary that there must be a substantial basis for making the
classification and that there should be a nexus between the basis of classification and
the object of the statute under consideration. In other words, there must be some
rational nexus between the basis of classification and the object intended to be
achieved. Therefore, more differentiation or inequality of treatment dose not per se
amount to discrimination within the inhibition of the equal protection clause. To
attract Art. 14, it is necessary to show that the selection or differentiation is
unreasonable or arbitrary; that it does not rest on any rational basis having regard to
view in making the law in question.\footnote{Jaila Singh v. State of Rajasthan, AIR 1975 SC 1436.}

As the Supreme Court has explained: “The differentia which is the basis of the classification and the Act are distinct things and
what is necessary is that there must be a nexus between them.”\footnote{re Special Courts Bill, 1978, AIR 1979 SC 478.}

In Thimmappa\footnote{K. Thimmappa v. Chairman, Central Board of Directors, AIR 2001 SC 467.} the
Supreme Court has observe that mere differentiation does not per se amount to
discrimination within the inhibition of the equal protection clause. To attract the
operation of the clause it is necessary to show that the selection or differentiation is
unreasonable or arbitrary.
Further, the Supreme Court reiterated that differentiation is not always discriminatory, if there is a *nexus* on the basis of which differentiation has been made and then such differentiation is not violative of Art. 14 of the Constitution\(^\text{28}\).

The Supreme Court of India has however warned against over-emphasis on classification. The Court has explained that the doctrine of classification is only a subsidiary rule evolved by the Courts to give practical content to the doctrine of equality, over emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. The over emphasis on classification would inevitably result in substitution of the doctrine of classification for the doctrine of equality…..lest, the classification would deny equality to the larger segments of the society\(^\text{29}\).

Whether a classification adopted by a law is reasonable or not is a matter for the Courts to decide. The question of reasonableness of classification has arisen in innumerable cases. The twin tests applied for the purpose are, however, quite flexible. The Courts show a good deal of deference to legislative judgment and do not lightly hold a classification unreasonable. There is no closed category of classification; the extent, range and kind of classification depend on the subject matter of the legislation, the conditions of the country, the economic, social and political factors work at a particular time.

A classification to be a valid one, it is not necessary that its basis must always appear on the face of the law. To find out the reasons and the justification for the classification, the Court may refer to relevant materials, e.g., objects and reasons appended to a Bill, parliamentary debates, affidavits of the parties, matters of common knowledge, the background circumstances leading to the passage of the Act etc\(^\text{30}\).

When a person seeks to impeach the validity of a law on the ground that it offends Art.14 the *onus* is on him to plead and prove the infirmity. If a person complains of unequal treatment, the burden lies on him to place before the Court sufficient material from which it can be inferred that there is unequal treatment, the burden lies on him to place before the Court sufficient material from which it can be

\(^{28}\) *Union of India v. M.V. Valliappan*, AIR 1999 SC 2526.

\(^{29}\) supra note 12 at 1818, 1822.

inferred that there is unequal treatment. A mere plea that he has been treated differently is not enough. He must produce necessary facts and figures to establish that he has not only been treated differently from others, but he has been so treated from persons similarly situated and circumstanced without any reasonable basis and that such differential treatment has been made unjustifiably. The initial presumption is in favour of the validity of the law, and if the person fails to adduce sufficient evidence in support of his challenge to the law in question, his plea of the provision in question being violative of Article 14 can not be entertained. The State can lean on the initial presumption of validity of the law.

In *Deepak Sibal v. Punjab University*\(^{31}\) the Supreme Court has pointed out that a classification need not be made with ‘mathematical precision’. But if there is little or no difference between the persons or things which have been grouped together and those left out of the group, the classification can not be regarded as reasonable. The Court has also pointed out that to consider reasonableness of classification it is necessary to take into account the objective for such classification.

### 3.3 Reservation for Socially and Educationally Backward Classes

Art. 15 (1) specifically bars the State from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth or any of them.

Art. 15 (2) prohibits subjection of a citizen to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex or place of birth with regard to –

(a) access to shops, public restaurants, hotels and places of 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.

Under Art. 15 (3) the State is not prevented from making any special provision for women and children.

Art. 15 (4) or Art. 29 (2) does not prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.


\(^{31}\) *Deepak Sibal v. Punjab University*, AIR 1989 SC 903.
Just as the principle of classification applies to Art.14 so it does to Art.15(1) as well. The combined effect of Art.14 and 15 is not that the State can not pass unequal laws, but if it makes unequal laws, the inequality must be based on some reasonable ground (Art.14) and that, due to Art.15(1) religion, race, caste, sex or place of birth alone and can not be reasonable ground for discrimination.

Under Art.15(4), the State can make special provisions for certain sections of the society which are socially and educationally backward or which are belonging to the Scheduled Castes and Scheduled Tribes. But for any section of population not falling under Art.15(4), special provisions can be made if there is reasonable classification.

The word ‘discrimination’ in Art.15(1) involves an element of unfavorable bias. The use of the word ‘only’ in Arts.15(1) and 15(2) connotes that what is discountenanced is discrimination purely and solely on account of any of the grounds mentioned. A discrimination based on any of these grounds and also on other grounds is not hit by Arts. 15(1) and 15(2) though it may be hit by Art.14. If religion, sex, caste, race or place of birth is merely one of the factors which the Legislature has taken into consideration, then it would not be discrimination only on the ground of that fact. But if the Legislature has discriminated only on one of these grounds and no other factor could possibly have been present, then undoubtedly the law would offend against Art.15(1). Art. 15 is a facet of Art.14. Like Art. 14, Art. 15(1) also covers the entire range of State activities. But, in a way the scope of Art.15 is narrower than that of Art.14 in several respects.

Art.15(3) and 15(4) constitute exceptions to Arts. 15(1) and 15(2). Arts.15(1) and 15(2) prevent the State from making any discriminatory law on the ground of gender alone. The Constitution is thus characterized by gender equality. The Constitution insists on equality of status and it negates gender bias. Nevertheless by virtue of Art.15(3) the State is permitted, despite Art.15(1), to make any special provision for women, thus curving out a permissible departure from the rigours of Art.15(1).

Art.15(3) recognizes the fact that, the women in India have been socially and economically discriminated for centuries and as a result thereof, they can not fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of Art.15(3) is to eliminate this socio-economic backwardness of women and to empower them in such a manner as to bring about effective equality between men.
and women. The object of Art.15(3) is to strengthen and improve the status of women. Art.15(3) thus relieves the State from the bondage of Art. 15(1) and enables it to make special provisions to accord socio-economic equality to women.

The scope of Art.15(3) is wide enough to cover the entire range of State activity including that of employment. Art.15(3) is a special provision in the nature of a proviso qualifying the general guarantees contained in Arts.14, 15(1), 15(2), 16(1) and 16(2).

In common parlance, a doubt arises whether Art.15(3) saves any provision concerning women, or saves only such a provision as is in their favour. The better view in this respect is that while the State can make laws containing special provisions for women and children, it should not discriminate against them on the basis of their gender only. This appears to be the cumulative effect of Arts.15(1) and 15(3). Regarding Arts.15(3) and 15(1) together, it seems to be clear that while the State may discriminate in favour of women against men, it may not discriminate in favour of men against women. However, only such provisions can be made in favour of women under Art.15(3).

One of the most significant pronouncements on Art.15(3) is the Government of Andhra Pradesh v. P.B. Vijay Kumar. In the instant case the Supreme Court of India has ruled that under Art. 15(3), the State may fix a quota for appointment of women in Government services. Also, a rule saying that all other things being equal, preference would be given to women to the extent of 30% of the posts was held valid with reference to Art.15(3).

It was argued that reservation of posts or appointments for any backward class women and so no reservation can be made in favour of women as it would amount to discrimination on the ground of sex in public employment which would be violative of Art. 16(2). Rejecting this argument the Supreme Court has ruled that posts can be reserved for women under Art.15(3) as it is much wider in scope and covers all State activities. While Art.15(1) prohibits the State from making any discrimination inter alia on the ground of sex alone, by virtue of Art. 15(3), the State may make special provisions for women. Thus, Art. 15(3) clearly craves out a permissible departure from the rigours of Art.15(1).

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32. AIR 1995 SC 1648.
The Court has emphasized that an important limb of the concept of gender equality is creating job opportunities for women. Making special provisions for women in respect of employment or posts under the State is an integral part of Art. 15(3). This power conferred by Art.15(3) is not withheld down in any manner by Art.16.

The ‘special provision’ which the State may make to improve women’s participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. Thus, Art. 15(3) includes the power to make reservations for women. Talking about the provision giving preference to women, the Court has said that this provision does not make any reservation for women. It amounts to affirmative action. It operates at the initial stage of appointment and when men and women candidates are equally meritorious. Under Art.15(3), both reservation and affirmative action are permissible in connection with employment or posts under the State. Art. 15 is designed to create an egalitarian society.

The Supreme Court has explained the relationship between Arts.15 and 16. Art.15 deals with every kind of State action in relation to Indian citizens. Every sphere of the State activity is controlled by Art.15(1) and, therefore, there is no reason to exclude from the ambit of Art.15(1).

Art.15(1) would have come in the way of making favorable provisions for backward sections of society. This can be illustrated with the help of some remarkable observations of the Supreme Court of India.

The Madras Government issued an order (popularly known as the Communal G.O.) allotting seats in the State Medical Colleges community-wise as follows: Non-Brahmins (Hindus), 6; Backward Hindus, 2; Brahmins, 2; Harijans, 2; Anglo-Indians and Indian Christians, 1; Muslims, 1.

This G.O. was declared invalid because it classified students merely on the basis of ‘caste’ and ‘religion’ irrespective of their merit. A seven Judge Bench of the Supreme Court struck down the classification as being based on caste, race and religion for the purpose of admission to educational institution on the ground that Art.15 did not contain a clause such as Art.16(4).

In another case, a Government Order requisitioning land for construction of a colony for Harijans was held to be discriminatory under Art.15(1), because the

facilities were being given to them as a ‘community’ as such when other members of
the public were equally in need of similar facilities.\footnote{Jagwant Kumar v. State of Maharashtra, AIR 1952 Bom 461.}

To tide over the difficulties created by such decisions in the way of helping
backward classes by making discriminatory provisions in their favour, Art.15(4) was
added to the Constitution in 1951. Under Art. 15(4), the reservation of seats for
Scheduled Castes, Schedules Tribes and Backward Classes in engineering, medical
and other technological colleges has been upheld. Reservations are possible under
Art. 15(4) for the advancement of any backward class of citizens or for Scheduled
Castes and Scheduled Tribes. Rejecting the argument that Art. 15(4) envisages
‘positive action’ while Art. 16(4) is a provision warranting programmes of ‘positive
discrimination’, the Supreme Court has observed in \textit{Indra Sawhney v. Union of India}\footnote{AIR 1993 SC 477.}:

“We are afraid we may not be able to fit these provisions into this
kind of compartmentalization in the context and scheme of our
constitutional provisions. By now it is well settled that reservation in
educational institutions and other walks of life can be provided under
Art. 16(4). If so, it would not be correct to confine Art. 15(4) to
programmes of positive action alone. Art. 15(4) is wider than Art.
16(4) and as much as several kinds of positive action programmes
can also be evolved and implemented thereunder (in addition to
reservations) to improve the condition of SEBCs (Socially and
Educationally Backward Classes), Scheduled Castes and Scheduled
Tribes, whereas Art. 16(4) speaks only of one type of remedial
measure, namely, reservation of appointments/posts”.\footnote{M.R. Balaji v. State Mysore, AIR 1963 SC 649.}

For the first time, in \textit{Balaji}\footnote{M.R. Balaji v. State Mysore, AIR 1963 SC 649.}, the question was raised before the Supreme
Court relating to the extent of special provisions which the States can make under Art.
15(4). In this case reservation upto 68\% was made by the State of Mysore for
backward classes for admission to the State medical and engineering colleges. The
break-up of the reservation was as follows: 50\% seats for backward and more
backward classes; 15\% seats for Schedules Castes and 3\% seats for the Scheduled
Tribes. In fact, 68\% seats were reserved in medical, engineering and other technical
colleges for the weaker sections of the society, leaving only 32% seats for the merit pool.

The State even argued that since Art. 15(4) does not contain any limitation on the State’s power to make reservation, cent percent reservation could be made in favour of backward classes in the higher education institution if the problem of backwardness in a State so demand. The Supreme Court rejected this extreme argument. The Court also rejected the rule of 68% reservation.

The Court agreed, on one hand that Art. 15(4) must be read with Art. 46, a directive principle, and steps ought to be taken to redress backwardness and inequality from which the backward class, Scheduled Caste and Scheduled Tribes suffer, otherwise for them political freedom and Fundamental Rights would have little meaning. On the other hand, the Court insisted that Art. 15(4), being a special provision cannot denude Art. 15(1) of all its significance. Art. 15 (4) is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. In *Balaji* the Court observed: “It is because of the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorizes special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). It would be extremely unreasonable to assume that in enacting Art. 15(4) Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting of the rest of the society were to be completely ignored”.

The Court emphasized that a special provision contemplated by Art. 15(4) must be within reasonable limits of the weaker sections of society have to be adjusted with the interest of the community as a whole. The Court insisted that considerations of national interest and the interests of the community or the society as a whole can not be ignored in determining the reasonableness of a special provision under Art. 15(4).

The Supreme Court set its face against excessive reservation under Art. 15(4), for it may affect efficiency, by eliminating general competition. The general principle laid down by the Court is that the maximum limit of reservation should not be more than 50% for all classes under Art. 15 (4), viz., backward classes, Scheduled Castes
and Scheduled Tribes. Thus, reservation of 68% was declared void in *Balaji*. The Court observed that the interests of weaker sections of the society need to be adjusted with interests of the society as a whole.

In *Balaji*, the Supreme Court clearly indicated that in giving effect to reservation for SCs, STs and OBCs a balance ought to be struck so that the interests of the backward classes, STs and SCs are properly balanced with the interests of other segments of the society. In order to safeguard the interest of the reserved classes, the interests of the community as a whole can not be ignored. It has to be remembered that Art. 15(4) is an enabling provision and its objective is to advance the interests of the weaker elements in society. Reservation under Art. 15(4) must be within a reasonable limit. If a provision under Art. 15(4) ignores the interests of the society as whole, it would be outside the purview of Art. 15(4). It may be noted that the overall limit of 50% reservation is only for the categories mentioned in Art. 15(4); there could be additional reservation for other classes.

For admission to the State medical colleges, the Madhya Pradesh Government made the following reservation of seats: Scheduled Caste 15%; Scheduled Tribes 15%; women candidates 15%; children of military personal 3%; nominees of the central Government 3% and nominees of Jammu & Kashmir Government 3%. The scheme was challenged but the Supreme Court upheld it in *State of Madhya Pradesh v. Nivedita Jain*37.

The question of reservation has become a very knotty socio-political issue of the day. Because of the keen competition for limited opportunities available in a country, Governments are pressurized to indulge in all kinds of reservations for all kinds of groups apart from reservations for Scheduled Castes, Scheduled Tribes and backward classes.

Under Art. 15 reservations in educational institutions can be made for:

(i) Women under Art. 15 (3);

(ii) Socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes under Art. 15 (4) and

(iii) Other groups not falling under Art. 15(3) and 15(4).

37. AIR 1981 SC 2045.
In *Dr. Preeti Sagar Srivastava v. State of Madhya Pradesh*[^38]38, the Supreme Court has rendered a momentous decision. Herein this case the Court has *iter alia* pointed out that Arts.15(3) and 15(4) permit compensatory or protective discrimination in favour of certain classes. Every policy pursued under Art. 15(4) makes a departure from the equality norm for the benefit of the backward. Therefore, it has to be disfigured and worked in a manner conducive to the ultimate building of an egalitarian non-discriminatory society. That is final constitutional justification. Therefore, programmes and policies for compensatory discrimination under Art. 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time, these programmes can not be unreasonable or arbitrary, nor can they be executed in a manner which undermines other vital public interests or the general good of all. All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good ...Art. 15(4) also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests consideration of national interest and the interests of the community or society as a whole can not be ignored in determining the reasonableness of a special provision under Art. 15 (4).

Any special provision under Art. 15 (4) has to balance the importance of having, at the higher levels of education. Students who are meritorious and who have secured admission on their merit, as against the social equity of giving compensatory benefit of admission to the SC/ST candidates who are in a disadvantaged position. Selection of the right calibre of the students is essential in the public interest at the level of specialized post-graduate education. Special provisions for SC/ST candidates at the speciality level have to be minimal. In the interest of selecting suitable candidates for specialized education, it is necessary that the common entrance examination be of a standard and qualifying marks are prescribed for passing that examination.

According to the Constitution 93rd Amendment Act, 2005 there is an amendment of Art. 15 in terms of insertion of clause (5) to this Art. which lays down that nothing in this Article or in sub-clause (g) of clause (1) of Art. 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or

[^38]: AIR 1999 SC 2894.
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 Art.30.

The driving force and the hurry for the 93rd Constitution amendment was the landmark judgment of *P.A. Inamdar & Ors. v. State of Maharashtra & others*\(^{39}\), given unanimously by a 7 (seven) judges bench of the Supreme Court of India on 12\(^{th}\) August 2005, declaring that the State can not impose its reservation policy on minority and non-minority unaided private colleges, including professional colleges. All political parties without exception were unhappy with this judgment delivered by the Supreme Court and there was a consensus among all political parties for amending the Constitution to the State’s reservation policies on the private unaided colleges too.

Art. 16 (1) is a facet of Art. 14 which are closely inter-connected. Art. 16 (1) takes its roots from Art 14. But an important point of distinction between these two is that while Art. 14 applies to all persons, citizens as well as non-citizens, Art. 16 applies only to citizens and not to non-citizens. Art. 16 (1) guarantees equality of opportunity to all citizens ‘in matters relating to employment’ or ‘appointment to any office’ under the State. According to Art. 16 (2), no citizen can be discriminated against, or be ineligible for any employment or office under the State, on the grounds only of religion, race, caste, sex, descent, place of birth or residence or any of them. Art 16 (2) is also an elaboration of a facet of Art. 16(1). These two clauses thus postulate the universality of Indian citizenship.

Under Art. 16 (4), the State may make reservation of appointments or posts in favour of any ‘backward class’ of citizens which, in the opinion of the State, is not adequately represented in the public services under the State. Explaining the nature of Art. 16 (4), the Supreme Court has stated in *Mohan Kumar Singhania v. Union of India*\(^{40}\), that it is ‘an enabling provision’ conferring a discretionary power on the State for making any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately

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\(^{39}\) 2005 (6) SCC 537.

\(^{40}\) AIR 1992 SC1, 26.
represented in the service of the State. Art. 16 (4) neither imposes any constitutional duty nor confers any Fundamental Right on any one for claiming reservation\textsuperscript{41}.

Under Art. 16 (4), it is incumbent on a State Government to reach a conclusion that the backward class/classes for which the reservation is made not adequately represented in State services. While doing so, the State Government may take the total population of a particular backward class and representation in the State services. When the State Government after doing necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed strictly. If some Scheduled Caste or backward class candidates are appointed or promoted against the general posts, they are not to be counted against the reserved posts. The number of reserved posts can not be reduced on this account. The State may, however, on an overall view of the situation review the matter and refix the percentage of reservation\textsuperscript{42}. Further Art. 16 (4) has to be interpreted in the background of Art. 335 of the Constitution.

The term ‘Backward Class’ as used in Art.16 (4), takes within its fold Scheduled Castes and Scheduled Tribes. Art. 15 (4) speaks about ‘socially and educationally backward classes of citizens’. Art. 16 (4) speaks only of ‘any backward classes of citizens’. However, it has been settled by a series of judicial pronouncements that the expression ‘backward classes of citizens’ in Art. 16 (4) means the same thing as the expression ‘any socially and educationally backward classes of citizens’ in Art.15 (4). Thus, to qualify for being called a ‘backward class citizen’ under Art. 16 (4), one must be a member of a ‘socially and educationally backward class’.

It has been emphasized that the expression ‘backward class’ is not synonymous with ‘backward caste’ or ‘backward community’. In determining whether a section of population forms a Backward Class for purposes of Art. 16(4), a test solely based on caste, community, race, religion, sex, descent, place of birth or residence can not be adopted because it would directly be violative of Art. 16 (2)\textsuperscript{43}.

Art.16. (4) does not envisage any reservation in services independent of backwardness. Reservation of posts was made in a State on the basis of various castes and communities like Harijans, Backward Hindus, Muslims, Hindu Brahmans, Non-

\textsuperscript{41} Indra Sawhney v. Union of India, AIR 2000 SC 498.
\textsuperscript{43} State of Uttar Pradesh v. Pradip Tandon, AIR 1975 SC 563.
Brahmins and Christians. The Supreme Court ruled in *Venkataraman*\(^{44}\) that Art. 16 (4) expressly permits reservation of posts in favour of any backward classes but not with regard to those who are not regarded as backward. While reservation of posts in favour of any backward class citizens can not be voided, reservation of posts between Hindus, Muslims, and Christians infringes Arts. 16(1) and (2)\(^{45}\). This is not reservation for backward classes but distribution of posts on the basis of community is a ground prohibited by Art. 16(2). The expression ‘backward class’ used in Art. 16 (4) is not synonymous with backward caste or backward community. To determine whether a section of the population forms a ‘class’ for purposes of Art. 16 (4), a test solely based on castes, community, race, religion, sex, descent, place of birth or residence cannot be adopted.

In *Rangachari*\(^{46}\) the validity of the circulars issued by the Railway Administration providing for reservation in favour of the Scheduled Castes/Scheduled Tribes in promotions (by selection) was questioned. The argument was that Art. 16 (4) was confined to direct recruitment only and did not comprehend reservation in the matter of promotion as well. The Supreme Court ruled by a majority of 3:2 that under Art. 16(4), reservation in Government services can be made not only at the initial stage of recruitment, but even in the matter of promotion from a lower to a higher post or cadre. Thus, selection posts can also be reserved for backward classes.

The Court has interpreted Art. 16(4) liberally because the Constitution attaches great importance to the advancement of backward classes. However, reservation should not be excessive for two reasons:

Firstly, Art. 335 enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in making of the appointments in connection with the affairs of the Union or a State, the policy of the State should be consistent with ‘the maintenance of efficiency of administration’. Further the Court observed that it must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration.”

Secondly, because Art. 16(4) forms an exception to Art. 16(1) and 16 (2), Art.16 (4) could not be given such an operation as to destroy the main Articles.

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Reservation for backward classes could not be so excessive while would in effect efface the guarantee under Art. 16(1) of equal opportunity in the matter of public employment, or at best make it illusory.

3.3.1 Balaji

In Balaji\(^{47}\), the Court attempted to impose a constitutional limit on the extent of preference, not on the 'narrower ground of reservation, but on the broader grounds of policy'. The Court spoke of adjusting the interests of the weaker sections of society with the interest of community as a whole. The Court declared that a formula must be evolved which would strike a reasonable balance between the several relevant considerations while striking down as unconstitutional a Government order by which 68% of the seats in educational institutions were reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes on the ground of excessive reservation and as a fraud on the Constitution, the Court observed that a special provision should be less than 50% and how much less than 50% would depend upon the relevant prevailing circumstances in each case.

3.3.2 Devadasan

In Devadasan\(^{48}\) the Court observed: “The overriding effect of cl. (4) of Art. 16 on cl. (1) and (2) could only extend to the making of a reasonable number of reservations of appointments and posts in certain circumstances. A reasonable number is one which strikes a reasonable balance between the claims of the backward classes and those of other citizens”.

The Court emphasized that each year of recruitment has to be considered separately by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities. Reservation for vacancies upto 45% in a year has been held valid in the instant case.

3.3.3 Thomas

In State of Kerela v. N. M. Thomas\(^{49}\), the Supreme Court held that it was permissible to give preferential treatment to Scheduled Castes/Tribes under Art. 16 (1) outside Art. 16 (4). In Devadasan, the majority had taken the view that Art. 16 (4) was an exception to Arts. 16(1) and 16 (2). This was the view expressed in Balaji and

\(^{47}\) supra note 36

\(^{48}\) T. Devedasan v. Union of India, AIR 1964 SC 179.

\(^{49}\) AIR 1976 SC 490.
Rangachari. On the other hand in Devadasan, in a dissenting opinion, Subha Rao, J., had expressed the opinion that Art. 16(4) was not an exception to Art. 16 (1), but was a legitimate device by which the framers of the Constitution had sought to preserve a power untrammeled by the other provisions of the Article. It was a facet of Art. 16 (1) as it fosters and furthers the idea of equality of opportunity with special reference for under-privileged and deprived classes of citizens.

In Thomas, the majority accepted this view of J., Subha Rao. Thomas marks the beginning of a new judicial thinking on Art. 16 and leads to greater concession to SC, ST and other backward persons. If the Supreme Court had stuck to the view propagated in earlier cases that Art. 16 (4) was an exception to Art. 16 (1), then no reservation for any other class, such as army personnel, freedom fighters, physically handicapped, could have been made in services. Thomas, represents a new trend – a high watermark on the question of reservation in services for grant of other concessions to the backward classes.

3.3.4 After Thomas

In Akhil Bharatiya Soshit Karmachari Sangha (Railway) v. Union of India\textsuperscript{50}, the Supreme Court again went into the question of reservation in public services vis-à-vis Art. 16. The Court upheld reservation of posts at various levels and making of various concessions in favour of the members of the Scheduled Castes and Scheduled Tribes.

The Court reiterated the Thomas proposition that under Art. 16 (1) itself, the State may classify, based upon substantial differentia, groups or classes for recruitment of public services and this process does not necessarily spell violation of Arts. 14 to 16.

Art. 16 (2) expressly forbids discrimination on the basis of ‘caste’. Scheduled Castes and Scheduled Tribes are not castes within the ordinary meaning of caste. These are backward human groups. There is a differentiation between these persons and the rest of the community. As Scheduled Castes suffer from socio-economic backward status, the fundamental right of equal opportunity justifies categorization of Scheduled Castes and Scheduled Tribes separately for the purpose of ‘adequate representation’ in the State services. This is constitutionally sanctioned in terms of Art. 16 (4) and 46 specifically. The Court emphasized that equality of opportunity of

\textsuperscript{50}. AIR 1981 SC 298.
employment means equality in between members of the same class of employees and not equality between members of separate and independent classes.

It has been ruled by the Supreme Court in Chakradhar Paswan v. State of Bihar\(^1\), that where there is only one post in the cadre, there can be no reservation for the backward classes (ST, SC and OBC) with reference to that post either for recruitment at the initial stage or filling up a future vacancy in respect of that post. A reservation which would come under Art. 16 (4), pre-supposes the availability of at least more than one post in that cadre. According to Devadasan, “No reservation could be made under Art. 16 (4) so as to create a monopoly. Otherwise, the guarantee of equal opportunity contained in Arts. 16 (1) and 16 (2) would be rendered wholly meaningless and illusory”.

A single promotional post can not be reserved. The constitution Bench of the Supreme Court upheld this in Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association\(^2\). Hence, until there is plurality of posts in a cadre, the question of reservation does not arise.

\[3.3.5 \textbf{The Mandal Commission Case: India Sawhney v. Union of India}\]

\textit{Indra Sawhney v. Union of India}\(^3\) is a very significant pronouncement of the Supreme Court on the question of reservation of posts for backward classes. The Court has dealt with this question in a very exhaustive manner.

The Mandal Commission was appointed by the Government of India in terms of Art. 340 of the Constitution in 1979 to investigate the conditions of socially and educationally backward classes. One of the major recommendations made by the Commission was that, besides the SCs and STs, for OBCs which constitute nearly 52% component of the population, 27% Government jobs be reserved so that the total reservation for all - SCs, STs, and OBCs amounts to 50%.

No action was taken on the basis of the Mandal Report for long after its submission, except that the discussions in the Houses of Parliament twice, once in 1982 and again in 1983. On Aug. 13, 1990, the V. P. Singh Government at the Centre issued an office memorandum accepting the \textit{Mandal Commission} recommendation and announcing 27% reservation for the socially and educationally backward classes in vacancies in civil posts and services under the Government of India.

\(^1\) AIR 1988 SC 959.
\(^2\) AIR 1998 SC 1767.
\(^3\) AIR 1993 SC 477, popularly known as \textit{Mandal Commission Case}.
This memorandum led to widespread disturbances in the country. In 1991, the Narashimha Rao Government modified the above memorandum in two respects:

(i) the poorer sections among the backward classes would get preference over the other sections;

(ii) 10% vacancies would be reserved for other ‘economically backward sections’ of the people who were not covered by any existing reservation scheme.

Ultimately, the constitutional validity of the memorandum came to be questioned in the Supreme Court through several writ petitions. The question of constitutional validity of the memorandum was considered by a Bench of nine Judges. Six opinions were delivered. The leading opinion was delivered by Jeevan Reddy, J.; on behalf of himself, Kania, C.J.; Venkatachalia and Ahmadi, JJ.; Two judges- Pandian and Sawant, JJ., in separated opinions concurred with Reddy J.; three judges - Thommen, Kul dip Singh and Sahai, JJ., in separate opinions dissented from Reddy, J. on several points.

After referring to the previous decisions of the Supreme Court on Arts. 15 and 16\(^54\) and also after taking note of some of the decisions of the U.S. Supreme Court on racial discrimination, Reddy, J., in his elaborate judgment answered the several questions which emerged in the instant case. Some of the significant points emerging from Reddy, J.’s opinion are noted below:

(i) A measure of the nature contemplated by Art. 16(4) can be provided not only by the parliament/legislature but also by the executive through administrative instructions in respect of Central/State services and by the local bodies and ‘other authorities’ as contemplated by Art. 12, in respect of their services.

(ii) The provision made by the executive under Art. 16 (4) becomes effective and enforceable by itself without its being enacted into a law made by a legislature.

(iii) The Court has reiterated the view, expressed by it earlier in Thomas, that Art. 16(1) permits classification for ensuring attainment of equality of opportunity assured by Art. 16(1) itself. Art. 16(1) is a facet of Art. 14. Just as Art. 14 permits reasonable classification so does Art. 16 (1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Art. 16(1) appointments and/or posts can be reserved in favour of a class.

\(^54\) Reference was made inter-alia to the following cases: State of Madras v. Champakam Doriarajan, supra note 33; State of Kerela v. N.M. Thomas, supra note 49 etc.
Art. 16 (4) is not an exception to Art. 16(1), but only an instance of classification implicit and permitted by Art. 16(1). Even without Art. 16(4), the State could have classified ‘backward class of citizens’ in a separate category for special treatment in the nature of reservation of posts/appointments in Government services. Art. 16(4) merely puts the matter beyond any shadow of doubt in specific terms.

(iv) Art. 16(4) permits reservation in favour of any ‘backward class of citizens’. Backward classes having been classified by the Constitution itself as a class deserving special treatment, and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Art. 16(4).

In one sense, the Court has given a broad interpretation to Art. 16(4). The Court has broadly interpreted the word ‘reservation’ therein. ‘Reservation’ does not mean ‘reservation *simpliciter*’ but takes in ‘other forms of special provisions like preferences, concessions and exemptions’. ‘Reservation is the highest form of special provision while ‘preference, concession and exemption are lesser forms’, and the former included the latter. Thus, the Court has observed:

“The constitutional scheme and context of Art. 16(4) induces us to take the view that larger concept of reservation takes within its sweep all supplemental and ancillary provisions and also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Art. 335”.

This means that all supplemental and ancillary provisions to ensure full availment of provisions for reservations can be provided as part of reservation itself under Art. 16 (4) and there is no need to fall back upon Art. 16(1) for this purpose as was done in Thomas. In this sense, Art. 16 (4) is exhaustive of the special provisions that can be made in favour of the backward classes. The Court has observed in this regard:

“Backward classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Art. 16”.
(v) Even under Art. 16(1), reservations can not be made on the basis of economic criterion alone.

(vi) What is the meaning of the expression ‘backward class of citizens’ used in Art. 16(4)? What does the expression signify and how should such classes be identified? The accent of Art.16(4) is on social backwardness. From a review of the previous case law in the area, the Court has concluded that the judicial opinions emphasize the integral connection between caste, occupation, poverty and social backwardness. Social, educational and economic backwardness are closely intertwined in the Indian context. As regards identification of backward classes, caste may be used as a criterion because caste often is a social class in India. But, caste can not be the sole criterion for reservation. Reservation is not being made under Art. 16 (4) in favour of a caste but a backward class. Once a caste signifies the criteria of backwardness, it becomes a backward class for purposes of Art. 16(4). “Besides castes (whether found among the Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens”. Reddy, J. has observed in this connection that the classification is not on the basis of the caste but on the ground that caste is found to be a backward class not adequately represented in the services of the State.

Among the non-Hindus, there are several occupational groups, sects and denominations which, for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Art. 16(4).

(vii) Backwardness under Art. 16(4) need not be social as well as educational as is the case under Art. 15 (4). Art. 16(4) does not contain the qualifying words ‘socially and educationally’ as does Art. 15(4). It is not correct to say that ‘backward class of citizens’ in Art. 16(4) are the same as the ‘socially and educationally backward classes’ in Art. 15(4). “Saying so would mean and imply a limitation into a beneficial provision like Art. 16(4)” “Backwardness contemplated by Art. 16(4) is mainly social backwardness”.

A backward class can not be identified only and exclusively with reference to economic criterion. A backward class may however, be identified on the basis of
occupation-cum-income without any reference to caste. There is no constitutional bar in the State categorizing the backward classes as ‘backward’ and ‘more backward’.

(viii) The Court has left the task of actually identifying backward classes to the Commission/Authority to be appointed by the Government. This body would evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria.

(ix) A very important recommendation made by the Court is that the ‘creamy layer’, the socially advanced members of a backward class, should be excluded from the benefit of reservation. Such exclusion would benefit the truly backward people and thus, more appropriately save the purpose of Art. 16(4). But the real difficulty is how and where to draw the line? “For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other”. Reddy, J., has opined that the basis of exclusion should not merely be economic, unless, of course, “the economic advancement is so high that it necessarily means advancement”.

There are however certain positions, the occupants of which can be treated as socially disadvantaged without any further inquiry. Thus, when a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children get full opportunity to realize their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For giving them benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.

However, instead of itself laying down finally, the test to identify the ‘creamy layer’ the Court has directed the Government to specify the basis of exclusion—whether on the basis of income, extent of holding or otherwise.

This ruling aims at ensuring that the benefit of reservation reaches the proper and the weakest section of the backward class. For the idea of excluding the ‘creamy layer’ of a backward class from the benefit of reservation reference may be made to the opinion of Krishna Iyer. J., in Thomas.

(x) Not only should a class be a backward class for meriting reservation, it should also be inadequately represented in the services under the state. This matter lies within the subjective satisfaction of the State under Art. 16(4). However,
there must be some material upon the basis of which the opinion is formed by the State.

(xi) The total reservation can not exceed 50% in any one year. Art 16(4) speaks of ‘adequate representation’ and not ‘proportional representation’. The power under Art. 16(4) must be exercised in a fair manner and within reasonable limits. Therefore, reservation under Art. 16(4) should not exceed 50% of the appointments or posts ‘barring certain extraordinary situations’ as explained hereafter. Accordingly, 27% reservation in favour of backward classes together with reservation in favour of Scheduled Castes and Scheduled Tribes, comes to a total of 49.5%.

(xii) The extraordinary situations meriting exceptions from the 50% rule have been explained thus by Reddy. J.:

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

(xiii) Further, if a member belonging to, say, a Scheduled Caste gets selected in the open competition on basis of his own merit, he will not be counted against the quota reserved for the Scheduled Castes; he will be treated as open competition candidate.

(xiv) The Court has divided the total reservation of 50% into ‘vertical’ and ‘horizontal’ reservations. The reservation in favour of S/C, S/T and Other Backward Classes under Art. 16(4) may be called vertical reservation whereas reservation made in favour of physically handicapped under Art. 16(1) can be referred to as horizontal reservation. Horizontal reservations cut across the vertical reservations what is called interlocking reservations.

(xv) A year is to be taken as a unit for the purposes of applying the 50% rule. The Court has now overruled the Devadasan case which ruled out the ‘carry forward’ rule. Thus, reserved posts remaining unfilled in one year may be
carried forward to the next year but subject to the over-all limit that over-all reservation in any one year ought not be more than 50%.

(xvi) A significant point made by the Court is not to apply the rule of reservation to promotions. Under Art. 16(4), reservation is permissible only at the stage of entry into the State service, i.e., only at the initial stage of direct recruitment and not at the subsequent promotional stage. The Court has now disagreed with the proposition that Art. 16(4) “contemplates or permits reservation in promotions as well”. The Court has reached this conclusion as a result of the combined reading of Art. 16(4) and Art. 335. Reddy, J., has observed on this point:

“While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceotable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream a vertical division of the administrative apparatus…All this is bound to affect the efficiency of administration…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; They are expected to operate on equal footing with others…”

Thus, the Court now overruled Rangachari which had held the field for the last thirty years. To soften the adverse impact of the new ruling, the Court directed that it would be operative only prospectively and wherever reservations had been provided in promotions it would continue for a period of five years.

The Court has also ruled that “it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration”.

(xvii) For the reserved category in service, minimum standards can be prescribed. In fact, Art. 335 demands that some such standards be prescribed. In the words of Reddy, J.:

“It may be permissible for the Government to prescribe a reasonable lower standard for Scheduled Castes/Scheduled Tribes/Backward
Classes— consistent with the requirement of efficiency of administration— it would not be permissible to prescribe any such minimum standard at all, while prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public also should be kept in mind”.

(xviii) For certain services and certain posts, it may not be advisable to apply the rule of reservation. These are posts where merit alone counts. The Court has included the following posts in this category:

(a) Defence 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 defence equipment;
(c) Teaching posts of Professors and above, if any;
(d) Posts in Super Specialties in Medicine, Engineering and other specific and technical subjects;
(e) Posts of Pilots (and Co-Pilots) in Indian Airlines and Air India;
(f) These are some of the posts mentioned. The above list is only illustrative and not exhaustive. It has been left to the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply. Justifying exclusion of certain posts from the rule of reservation, Reddy, J. has observed:

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

(xix) It is open to the Government to notify which classes among the several designated OBCs are more backward and apportion reserved vacancies/posts among ‘backward’ and ‘more backward’.
The Court has rejected the reservation of 10% posts (made by the Narasimha Rao Government) in favour of other economically backward sections of the people who are not covered by any existing schemes of reservations. Such a category can not be related to Art. 16(1). Even so, the Court could not sustain it. Reservation of 10% vacancies among open competition candidates on the basis of income/property-holding means exclusion of those who are above the demarcating line from those 10% seats. It is being permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Art. 16(1).

The Court has directed that there ought to be established a permanent body—Commission or Tribunal, both at the Centre and in each State, which can look into the complaints of wrong inclusion or non-inclusion of groups, classes and sections in the list of OBCs. Such a body would go a long way in redressing genuine grievances. A body of this type can be created under Art. 16(4) itself. Persons aggrieved can approach it for appropriate redress.

There should be a periodic revision of lists of OBCs so as to exclude those who have ceased to be backward or to include new classes. The above mentioned body may be consulted in this exercise.

In Indra Sawhney, the Supreme Court has taken cognizance of many complex but very momentous questions having a bearing on the future welfare and stability of the Indian society. The Supreme Court has delivered a very thoughtful, creative and exhaustive opinion dealing with various aspects of the reservation problem. Basically, reservation in government services is anti-meritocracy, because when a candidate is appointed to a reserved post, it inevitably excludes a more meritorious candidate. But reservation is now a facet of life and it will be the ruling norm for years to come. The society may find it very difficult to shed the reservation rule in the near future. But the Court’s opinion has checked the system of reservation from running riot and has also mitigated some of its evils. Three positive aspects of the Supreme Court’s opinion may be highlighted:

One, the overall reservation in a year is now limited to a maximum of 50%.
Two, amongst the classes granted reservation, these who have been benefited from reservation and have thus improved their social status (called the ‘creamy layer’ by the Court), should not be allowed to benefit from reservation over and
over again. This means that the benefit of reservation should not be misappropriated by the upper crust but that the benefit of reservation should be allowed to filter down to the lowliest so that they may benefit from reservation to improve their position.

This proposition raises the ticklish question of finding suitable socio-economic tests to identify the ‘creamy layer’ among the backward classes. The Court admits that identifying the elite classes may not be an easy exercise. Accordingly, the Court has left the task of chalking out the criteria for the purpose to the Government concerned. However, the Court has given one clear indication of its thinking on this issue. The Court has said if a member of a backward family becomes a member of IAS, IPS or any other All India Service, his social status raises; he is no longer socially disadvantaged. This means that, in effect, a family can avail of the reservation only once.

(c) Three, an element of merit has now been introduced into the scheme of reservation. This has been done in several ways:

- Promotions are to be merit-based and are to be excluded from the reservation rule.
- Certain posts are to be excluded from the reservation rule and recruitment to such post is to be merit-based.
- Minimum standards have to be laid down for recruitment to the reserved posts. In fact, the Court has insisted that some minimum standards must be laid down even though the same may be lower than the standards laid down for the non-reserved posts.

3.3.6 After Indra Sawhney

The Court has not been able to completely eliminate the caste factor in identifying the backward classes. However, the Court has sought to keep the caste factor within limits. Caste can be one of the factors, but not the sole factor, to assess backwardness.

Reservation has become the bane of the contemporary Indian life. More and more sections of the society are demanding reservation for themselves in Government services. Then politicians are also vying among themselves for demanding reservations to all sundry groups whether deserved or not. Needless to say, reservation
is inequitable insofar as a meritorious candidate may have to be passed over in favour of a much less meritorious candidate in the reserved category.

Reservation normally implies a separate quota which is reserved for a special category of persons. Within that category, appointments to the reserved posts may be made in order of merit. However, the category for whose benefit reservation is provided is not required to compete on equal terms with the open category. Their selection and appointment to the reserved post is made independently on their *inter se* merit and not as compared with the merit of candidates in the open category. The very purpose of reservation is to protect the weak category against competition from general category candidate. The Supreme Court has explained in *Indra Sawhney* that the very idea of reservation implies of a less meritorious person. The only justification for reservation is social justice. It is a constitutionally recognized method of overcoming backwardness. This may adversely affect efficiency in administration.

But, for the present, the system of reservation has to be accepted as necessary. However, while accepting reservation upto a point as a present day politico-sociological necessity, it does not mean that it must not be kept within strict limits. The defects of the system of reservation ought not to be minimized as far as possible.

The Supreme Court’s opinion in *Indra Sawhney* makes a signal contribution to this end. For example, there should be prescribed some minimum qualifications for the candidates of the reserved categories. Also, the list of services where merit will prevail may be enlarged. Above all, it seems to be essential that reservation for more than 50% ought to be declared unconstitutional as adversely affecting the ‘basic feature’ of the Constitution, viz., equality, so that reservation may not be increased beyond 50% even by a constitutional amendment. This is necessary to contain the growing demand of politicians for more and more reservation in favour of groups they seek to represent.

What is needed for the future socio-economic development of the nation, as a whole, is progressively lessening, not increasing reservation, so that ultimately meritocracy may have some chance to prevail over mediocrity. Art. 335 lays down the ideal of ‘efficiency of administration’. It is suggested that Art. 335 should be treated not only as a ‘directive principle’ but also as an ‘operative and binding constitutional principle’ so that any move towards reservation, and any administrative decision concerning reservation, should be assessed by the Court on the touchstone laid down in Art. 335, viz., ‘efficiency of administration’.
Art. 335 refers only to the Scheduled Castes and Scheduled Tribes. There is no specific provision insisting on the need for maintenance of efficiency of administration so far as the backward classes are concerned. But the Supreme Court has insisted in *Indra Sawhney II*\(^55\) that the principle of efficiency of administration is equally paramount and is implied in Arts. 14 and 16 of the Constitution so far as backward classes are concerned. To hold otherwise would not only be irrational but even discriminatory between the two classes of backward citizens, viz., Scheduled Castes/Scheduled Tribes and Other Backward Classes. Therefore, considerations underlying Art. 335 prevail even while making provisions in favour of Other Backward Classes under Art. 16(4).

Reservation even for backward classes can be made only if it will not undermine the efficiency of the administration in the particular department\(^56\). The Supreme Court has observed in *Ajit Singh v. State of Punjab (II)*\(^57\) that in the matter of due representation in services for Backward Classes, maintenance of efficiency in administration is of paramount importance.

The Court has also suggested a periodic review of the list of Backward Classes. The Court has opined that inclusion of castes in the list of Backward Classes should not be done without adequate relevant data. Forward castes should not get included in this list. The process of periodic review of the list of OBCs may lead to the exclusion of a Backward Class if it ceases to be socially backward or if it is adequately represented in the services. The maxim ‘once backward, always backward’ is not acceptable.

### 3.4 Creamy Layer – Removal of

In the *Mandal Case*, the Supreme Court has clearly and authoritatively laid down that the ‘socially advanced’ members of a backward class, the ‘creamy layer’, has to be excluded from the backward class and the benefit of reservation can only be given to the ‘class’ which remains after the exclusion of the ‘creamy layer’. This would more appropriately serve the purpose and object of Art. 16(4).

The reason underlying this approach is that an effort be made so that the most deserving section of the backward class is benefited by reservation under Art. 16 (4). At present, the benefits of job reservations are mostly chewed up by the more effluent

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\(^55\). AIR 2000 SC 498.

\(^56\). *ibid.*

\(^57\). AIR 1999 SC 3471.
sections of the backward class and the poorer and the really backward sections among them keep on getting poorer and more backward. The jobs are few in comparison to the population of the backward classes and it is not possible to give them adequate representation in State services. Therefore, it is necessary that the benefit of reservation should reach the poorest and the weakest section of the backward class.

In his opinion in *Indra Sawhney*, Jeevan Reddy, J., emphasized that upon the member of a backward class reaching an ‘advanced social level or status’, he would no longer belong to the backward class and would have to be weeded out. The Court has opined that exclusion of creamy layer, i.e., socially advanced members, will make the class a truly backward class and would more appropriately serve the purpose and object of Art. 16(4). There are sections among the backward classes who are highly advanced socially and educationally, and they constitute the forward sections of the community. These advanced sections do not belong to the true backward class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward class.

A line has to be drawn between the forward in the backward class and the rest of the backward. If the creamy layer is not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefit of reservation. If the creamy layer among backward classes were given same benefits as backward classes, it will amount to treating un-equals equally which amounts to the violation of the equality clause.

According to Reddy, J., the exclusion of creamy layer must be on the basis of economic interest alone. It is difficult to draw a line where a person belonging to the backward class ceases to be so and becomes part of the ‘creamy layer’. It is not possible to lay down the criteria exclusively. But Reddy, J., specifically laid down one criterion. In a big country like India, norms differ from State to State or from region to region. Accordingly, the Court has directed that a body be constituted both at the Centre and at the State level to identify the creamy layer within the backward classes.

The Supreme Court has observed in this connection that the backward class under Art. 16(4) means the class which has no element of ‘creamy layer’ in it. It is mandatory under Art. 16(4), as interpreted by this Court that the State must identify the ‘creamy layer’ in a backward class and thereafter by excluding the ‘creamy layer’ extend the benefit of reservation to the class which remains after such exclusion.
There has been a good deal of resistance on the part of the States to the idea of excluding the creamy layer. The States have adopted various devises to continue to confer benefits of reservation on the creamy layer. The reason may be that the policy making power vests in the creamy layer and such persons do not like to curtail their own privileges.

3.5 Impact of Ashoka Kumar Thakur

In *Ashoka Kumar Thakur v. State of Bihar* the Supreme Court has assessed the validity of unrealistically high levels of income or holding of other conditions prescribed by the legislatures of Uttar Pradesh and Bihar as criteria to identify the creamy layer. For example, while the Supreme Court in the *Mandal Case* has categorically said that the children of IAS or IPS etc. without anything more could not avail the benefit of reservation in the scheme drawn in UP and Bihar, a few more conditions were added for falling in the creamy layer, such as he/she should be getting a salary of Rs. 10,000/- per month, or more; the wife or husband to be a graduate and owning a house in an urban area. Or, if a professional doctor, surgeon, lawyer, architect etc., he should be having an income not less that Rs. 10 lacs, his/her spouse is a graduate and having family property worth Rs. 20 lacs. Similar conditions were added in case of others, such as traders, artisans etc.

The Supreme Court has quashed these conditions as discriminatory. The Court has ruled that these conditions laid down by the two States have no *nexus* with the object sought to be achieved. The criteria laid down by the two States to identify the creamy layer are violative of Art. 16 (4), wholly arbitrary, violative of Art. 14, and against the law laid down by the Supreme Court in the *Mandal Case*, where the Court has expressed the view that a member of the All India Service without anything more ought to be regarded as belonging to the ‘creamy layer’.

The Kerela legislature passed an Act in 1995 declaring that there was no creamy layer in the State of Kerela. The validity of the State Act was challenged in the Supreme Court. In *Indra Sawhney v. Union of India (II)*, the Court has explained further the rationale underlying the rule of exclusion of ‘creamy layer’. As the ‘creamy layer’ is not entitled to the benefits of reservation, non-exclusion thereof will be discrimination and violation of Arts. 14 and 16 in as much as unequals can not be

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58. AIR 1996 SC 75.
59. supra note 55. Also known as *Kerela Creamy Layer* case.
treated as equals, i.e., equal to the rest of the backward class. Therefore, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will amount to violation of Arts. 14, 16 (1) and 16(4).

In the instant case, the Court has declared the Kerela Act, declaring that there are no socially advanced sections in any backward class in the State as unconstitutional as being violative of Arts. 14 and 16(1). According to the Court, the Act has shut its eyes to the realities and facts; it has no factual basis. The declaration is a mere cloak and is unrelated to facts in existence. The Court has emphasized the Constitution and neither Parliament nor any State Legislature can transgress this principle. Non exclusion of creamy layer will not only be a breach of Art. 14 but also of the basic structure of the Constitution and therefore, totally illegal. The Court has criticized the attitude of the State of Kerela in this matter as being against Rule of Law and amounting to deliberate violation of the directions of the Court.

The Court has directed the State to make provision for the exclusion of the creamy layer among the backward classes in the State.

Just as the Court has insisted on the exclusion of the creamy layer from the backward classes, so also the Court has insisted on the exclusion of the forward classes. The Court has again referred to this matter in Indra Sawhney (II). This exclusion is necessary with a view to confer full benefits of reservation on the real backward classes. If forward classes are included in the list of backward classes, most of the benefits will be knocked away by the forward classes and the same will not reach the really backward among the backward classes. That will leave the truly backward, backward forever. The Court has emphasized that to include a forward class as a backward class will amount to treating unequals as equal and this will amount to violation of Arts. 14 and 16.

3.6 Art. 16(4)—A Transitory Provision

Commenting on Art. 16(4), the Supreme Court has observed in Preeti Sagar that the Constitution permits preferential treatment for historically disadvantaged groups in the context of entrenched and clearly perceived social inequalities. This is why Art. 16(4) permits reservation of appointments or posts in favour of any backward class which is not adequately represented in the services under the State. Reservation is linked with adequate representation in the services. Reservation is thus

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60. supra note 38.
a dynamic and flexible concept. The departure from the principle of equality of opportunity has to be constantly watched. So long as the backward group is not adequately represented in the services under the State, reservations should be made.

From the above, it is clear that the mechanism of reservation has been considered as a transitory measure which enables the backward to enter and to represent adequately in the State services against the backdrop of prejudice and social discrimination. But, finally as the social backdrop changes – and a change in the social backdrop is one of the constitutional imperatives, as the backwards are able to secure adequate representation in the services, the reservations may not be required.

Art. 335 enters a further caveat on reservations, viz., while considering the claims of the Schedule Castes and Schedule Tribes as well as backward classes, for appointments, the maintenance of efficiency of administration is to be kept in sight.

### 3.7 Reservation in Judicial Services

In *State of Bihar v. Bal Mukund Sah*\(^{61}\) the Supreme Court declared a State Act seeking to make reservation for SCs, STs and OBCs in subordinate judiciary unconstitutional, as the State enacted the Act without any consultation with the concerned High Court.

The Court has insisted that Art. 16(4) must be read with Art. 335. This means that maintenance of efficiency of administration in making of appointments to services and posts is a *sine qua non* before considering the case for reservation in judicial services. Further, the High Court must be consulted before enacting any such law as according to Art. 235, the High Court is entrusted with full control over subordinate judiciary. The Supreme Court has asserted that ‘independence of judiciary’ and ‘separation of powers between the Legislature, Executive and the Judiciary’ are the two principles which constitute the ‘basic structure of the Constitution’ and thus these principles can not be violated by any law.

### 3.8 Constitutional Amendments to Art. 16(4)

After *Indra Sawhney*, two Constitutional Amendments have been incorporated in Art. 16(4) to somewhat tone down impact of the Supreme Court pronouncement.

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\(^{61}\) AIR 2000 SC 1296.
3.8.1 ART. 16(4A)

In Rangachari⁶², the Supreme Court by majority had held that Art. 16(4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection post. This proposition was reiterated in several subsequent pronouncements by the Supreme Court⁶³. The Court had thus interpreted the term ‘appointment’ in Art. 16 liberally as including initial appointment as well as promotion. This position continued till the Indra Sawhney pronouncement.

In Indra Sawhney, eight out of nine judges opined that Art. 16(4) was confined to initial appointments only and it did not permit or warrant reservations in the matter of promotion as such, as this gave rise to several untoward and inequitos results. The Court however permitted the existing rules in that behalf to operate for a period of five years from the date of the judgment. Thus, Rangachari decision was overruled.

Since then, however, the 77th Constitutional Amendment has been brought into effect permitting reservation in promotion to the Scheduled Castes and Scheduled Tribes. The following clause (4A) has been added to Art. 16 in 1995 ---

“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 services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State”.

The Constitutional Amendment was brought into effect before the expiry of the time-limit set by the Supreme Court, viz., five years from the date of the judgment for the rule permitting reservation in promotion to end Art. 16(4A) came into force from 17/06/1995.

Thus, by amending the Constitution, Parliament has removed the base as interpreted by the Supreme Court in Indra Sawhney that ‘appointment’ does not include ‘promotion’. Art. 16(4A) thus revives the interpretation put on Art. 16 in Rangachari. Rule of reservation can now apply not only to initial recruitment but also to promotions as well where the State is of the opinion that the Scheduled Castes and

⁶² supra note 46.
⁶³ For example, State of Kerela v. Thomas, supra note 49; Akhil Bharatiya Soshit Karmachari Songha (Railway) v. Union of India, supra note 50 etc.
Scheduled Tribes are not adequately represented in promotional posts in services under the State.\(^{64}\)

It may however be noted that Art.16(4A) permits reservation in promotion posts only for the members of the Scheduled Castes and Scheduled Tribes but not for Other Backward Classes. This means that the position taken by the Supreme Court in *Indra Sawhney* still prevails as regards OBCs in respect of promotion posts. No reservation can be made in promotion posts for the OBCs.

The Supreme Court has emphasized that Art. 16(4A) ought to be applied in such a manner that a balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes as well as for other members of the society.\(^{65}\) It has also been held that Art. 16(4A) is enabling provision. If the State makes no reservation, the High Court has no Jurisdiction under Art. 226 of the Constitution to issue any direction therefore.\(^{66}\)

Art. 16(4) or Art. 16(4A) imposes no Constitutional duty on the State and confers no Fundamental Right on any one. It is necessary to balance Art. 16(1) and Arts. 16(4) and 16 (4A). The interests of the reserved classes must be balanced against the interests of other segments of society.

The doctrine of equality of opportunity in Art. 16(1) is to be reconciled in favour of backward classes shall not unreasonably encroach upon the field of equality. It is necessary to strike such a balance so as to attract meritorious and talented persons to the public services. It is also necessary to ensure that the rule of adequate representation in Art. 16(4) for the backward and the rule of adequate representation in promotion for SC/ST under Art. 16(4A) do not adversely affect the efficiency in administration as warranted by Art. 355.

When a reserved candidate is recruited at the initial level he does not go through the same normal process of selection which is applied to a general candidate. A reserved candidate gets appointment to a post reserved for his group. He is promoted to a higher post without competing with general candidates. The normal


\(^{65}\) *P.G. Institute of Medical Education and Research v. Faculty Association*, AIR 1998 SC 1767.

\(^{66}\) *A.P. Sarpanch Association v. Govt. of A.P.*, AIR 2001 AP 474.
seniority rule, viz. from the date of continuous officiation to the date of promotion applies when a candidate is promoted in the normal manner and not to the promotion of a reserved candidate.\(^{67}\)

In *M.G. Badappanavar v. State of Karnataka*\(^ {68}\), the Supreme Court has again confirmed its earlier ruling in *Ajit Singh II* and directed that the seniority lists as between the general and reserved promotees, promotions be reviewed in the light of the ruling in that case. The Court directed that the seniority of the general candidates be restored accordingly.

### 3.8.2 Art. 16 (4B)

The Constitution (Eighty First Amendment) Act, 2000, has added Art. 16(4B) to the Constitution. Art. 16(4B) runs as follows:

“Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year”.

The Amendment envisages that the unfilled reserved vacancies in a year are to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year. The rule of 50% reservation laid down by the Supreme Court is to be applied only to the normal vacancies and not to the post of backlog of reserved vacancies. This means that the unfilled reserved vacancies are to be carried forward from year to year without any limit, and are to be filled separately from the normal vacancies.

This Amendment also modifies the proposition laid down by the Supreme Court in *Indra Sawhney*. The Amendment increases the employment opportunities for the SC, ST and OBC candidates.

### 3.8.3 Constitution (85th Amendment) Act, 2001

This Amendment has substituted in clause 4A of Art. 16, for the words ‘in matters of promotion to any class’ the words ‘in matters of promotion, with

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\(^{68}\) *AIR 2001 SC 260.*
consequential seniority, to any class’. This Amendment aims at extending the benefit of reservation in favour of SC/ST in matters of promotion with consequential seniority.

It is strange that while the politicians are so keen to increase the reservation to absorbed level, there is hardly any effort on their part to implement a crucial aspect of the Supreme Court’s verdict on the *Mandal* report calling for excluding the ‘creamy layer’ from among the beneficiaries but again the concept of vote politics comes into play to pamper those who want to eat their cake and have it too.

The Judiciary has been always interpreting the reservation provisions of the Constitution in an objective and fair manner. It has tried to harmonise the interests of the truly backward and the rest of the people who are striving to progress on the basis of their own merits. The Supreme Court has also suggested that the government should specify certain services and positions like technical posts in Research and Development Organisation (RDO) in specialties and super specialties in medicine and engineering, in areas of nuclear and space application in the field of aviation etc. where reservation may not be advisable because of the highly technical nature of job.

The Government has not yet taken any action on this advice. Not only this, but also rulings of the Court have not been liked by some organizations of the backward class employees and some political parties who look at it only for their vote bank to be intact and do not care for the national interest. The real intention behind reservation was to help the backwards and not to punish the rest. The excessive use of powers of reservation would go against the basic intentions of the Constitution and distort its values.

3.9 Art. 243D— Reservation of Seats in Panchayats

Art. 243D(1) provides that in every Panchayat seats shall be reserved for the Scheduled Castes and Scheduled Tribes. The number of seats so reserved shall be, as nearly as may be, in the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the SCs and STs in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

Out of total number of seats reserved under clause (1) of Art. 243D not less than 1/3 seats shall be reserved for women belonging to the SCs and STs[clause (2)]. Out of total number of seats to be filled by direct election in every Panchayat not less than 1/3 (including the number of seats reserved for SCs and STswomen) seats shall
be reserved for women. Such seats may be allotted by rotation to different constituencies in a Panchayat [clause (3)].

The office of the Chairpersons in the Panchayats at the village or any other level shall be reserved for SCs, STs and women in such manner as the Legislature of a State may, by law, provide. But, the number of offices of Chairpersons reserved for the SCs and STs in the Panchayats at each level in any State shall be, as nearly as possible, in the same proportion to the number of the such offices in the Panchayats at each level in promotion of total population of the SCs and STs in the State. However, not less than 1/3 of the total number of the offices of Chairperson in the Panchayat at each level shall be reserved for women. The number of offices reserved under this clause shall be allotted by relation to different Panchayats at each level.

The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clauses (4) shall cease to have effect on the expiration of the period (50 years) specified in Art. 334 [clause (5)].

The Legislature of a State is empowered under clause (6) to make provision for reservation of seats in any Panchayat or office of Chairpersons in the Panchayats at any level in favour of backward classes of citizens.

3.10 Art. 243T—Reservation of Seats in Municipalities

Art. 243T provides for the reservation of seats for the members of Scheduled Castes and Scheduled Tribes in every Municipality. The number of seats reserved for them shall be as nearly as may be, in same proportion to the total number of seats to be filled by direct election in that municipality as the population of the SCs and STs in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

Out of total number of seats reserved under clause (1), 1/3 seats shall be reserved for belonging to the SCs and STs, as the case may be. Out of total number of seats (including the number of seats reserved for women belonging to the SCs and STs), to be filled by direct election in every Municipality. 1/3 seats shall be reserved for women. Such seats may be allotted by rotation to different constituencies in a Municipality. 69. The office of the Chairpersons in Municipalities shall be reserved for

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69. Clauses (2) and (3) of Art. 243T.
the SCs and STs and women in such manner as the legislature of a State may, by law, provide.

In Saraswati Devi v. Shanti Devi\(^{71}\), the appellant and the respondents were both Scheduled Castes women. Elections were held to Loharu Municipal Committee. For the purpose of election for the members, the Loharu Municipal area was divided into 11 wards. Out of 11 wards, three wards namely wards no. 1, 4 and 5 were reserved for Scheduled Castes. Out of these three wards, ward no. 5 was reserved for Scheduled Castes women, and ward no. 2 was reserved for Backward Classes and ward no. 8, 10 and 11 were reserved for general women. Election to Loharu Municipal Committee was held under the provisions of Haryana Municipal Act, 1973. In the said elections the appellant was elected from ward No.11 which was reserved for general women. As per Section 10, sub-section (5) of the Act, the office of the President in the Municipality shall be filled from amongst the members belonging to general category, Scheduled Castes, Backward Classes and women by rotation and by castes in the manner prescribed. Rule 10, sub-rule (4) of the Haryana Municipal Election Rules, 1978 prescribes the manner in which the election to the office of the President of Municipality could be held. The Government by notification in 1995 declared in terms of Rule 70 (4) of Election Rules that the seats of President of Municipal Committee, Loharu shall be filled from the members belonging to Scheduled Castes category. The respondent contended that as she was also an elected member belonging to Scheduled Caste category, she was entitled to contest for the Presidentship of the Municipality. In view of the claim the Government by its order dated 11\(^{th}\) Feb, 1995 clarified that where there was a single member of Scheduled Caste category in a Municipality elected from reserved ward, the office of the president was to be filled up from the amongst members belonging to Scheduled Caste category, such member (man and woman) belonging to Scheduled Castes category shall be deemed to have been elected as President of such Municipality. This clarification put the Respondent no. 1 out of contest for the Presidentship as she was elected not on Scheduled Castes seat but on a seat available for general category women. Consequently, she filed a writ petition in the Haryana High Court for quashing the aforesaid Government Order. Pending this petition the Government by a

\(^{70}\) Clause (4) of Art. 243T.

\(^{71}\) AIR 1997 SC 145.
notification appointed the appellant as President, Municipal Committee, Loharu as according to the Government the post was by rotation and there was only solitary candidate the appellant who was elected as Scheduled Castes women from ward no. 5. The Supreme Court held that, the respondent was not entitled to contest the election of President of Municipality as she was not elected on a seat reserved for Scheduled Castes women but on a seat reserved for general category women from ward no. 11. In ward no. 5 from where the appellant contested, general category women could not have contested and SCs women could have contested and in that context appellant emerged successful. Thus, the post of the President, Loharu Municipality was subject to double reservation of being available only to an elected member who was a Scheduled Caste woman. She must have been elected on the Scheduled Castes seat from the ward reserved for such Scheduled Castes candidates. In view of Art. 143 and Section 10 (5)\textsuperscript{72} and Rule 70(4)\textsuperscript{73} it is clear that offices of the President are to be filled from among members belonging to different categories by rotation and by lots. The post of the President of Loharu Municipal Committee was reserved for SCs women. Since the appellant was the sole candidate who was elected from ward no. 5 belonging to SCs category her appointment as the President of Loharu Municipal Committee was Constitutional and valid.

3.11 Reservation of Seats for Backward Class of Citizens— Art. 334

The legislature is empowered to make provisions for reservation of seats in any Municipality or office of Chairpersons in the Municipalities in favour of backward class of citizens.

All kinds of reservation of seats shall cease to have effect on the expiration of the period specified in Art. 334 that is upto 50 years from the commencement of the Constitution.

3.12 Reservation of seats in Lok Sabha and State Assemblies –Arts. 330 and 332

Art. 330 provides for the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People except the Scheduled Tribes in the autonomous District of Assam. Similarly, Art. 332 provides for the reservation of seats for Scheduled Castes and Scheduled Tribes (except the Scheduled Tribes in the Autonomous District of Assam) in the Legislative Assemblies of every State.

\textsuperscript{72} Section 10 (5) of the \textit{Haryana Municipal Act}, 1973.

\textsuperscript{73} Rule 70(4) of the \textit{Haryana Municipal Election Rules}, 1978.
The 51st Amendment of the Constitution makes it clear that reservation of seats in Assam Assembly for Scheduled Tribes will be made from the whole of the State except the Autonomous District of Assam. Seats shall be reserved also for the Autonomous District in the Legislative Assembly of the State of Assam. The number of seats reserved in any State or Union Territory for such Castes and Tribes will be made on the population basis. The expression ‘population’ means the population as ascertained at the last proceeding census of which the relevant figures have been published. Prior to the Constitution 84th Amendment Act 2001, the reference to population was to be construed as a reference to the 1971 census. The Constitution 84th Amendment Act has amended the explanation to Art. 330 and Art. 332 and substituted for the figures “2000” the figures “2026”. Thus, the expression ‘population’ means ‘the population as ascertained on the basis of 1991 census’. The Constitution 87th Amendment in the years 2003 has amended the proviso to Art. 330 and substituted the figures ‘2001’ for the figures ‘1991’. This means that the expression ‘population’ for this purpose will be ascertained on the basis of 2001 census. The allocation of the seats in the Lok Sabha for SC and ST shall be frozen till the years 2026. This means that there will be no increase in the strength of Lok Sabha till the year 2026.

The Constitution 90th Amendment Act, 2003 has added a new proviso to Art. 332 after clause (6) of the Constitution. It has been necessitated due to the creation of Bodoland Territorial Areas District within the State of Assam. It provides that the representation of Scheduled Tribes included in the Bodoland Territorial Areas District shall not affect the representation of Scheduled Tribes and non-Scheduled Tribes in the Legislative Assembly of the State of Assam.

The Constitution 58th Amendment Act, 1987 has amended Art. 332 of the Constitution which provides for reservation of seats for the Scheduled Tribes in Arunachal, Meghalaya, Mizoram, and Nagaland. It provides that if all the seats in the Legislative Assembly of these States in existence on the date of coming into force of this Amendment, were held by members of the Scheduled Tribes all the seats except one shall be reserved for Scheduled Tribes.

Originally, under Art. 334 the reservation for these castes was made for ten years from the commencement of the Constitution. Since then this duration has been extended from time to time. The word ‘twenty’ was substituted by the Constitution (8th Amendment) Act, 1959, for the words ‘ten years’. Again, the word ‘thirty’ was
substituted by the Constitution (23rd Amendment) Act, 1969 for the word ‘twenty’. The word ‘forty’ was substituted by the 45th Amendment Act, 1980 for the word ‘thirty’ in Art. 334 of the Constitution. Now, the word ‘fifty’ has been substituted by the Constitution (62nd Amendment) Act, 1989 for the word ‘forty’ extending the reservation of seats for SCs and STs and Anglo-Indians in the Lok Sabha and in the State Assemblies upto 50 years from the commencement of the Constitution.

The Constitution (79th Amendment) Act, 1999 has substituted the word ‘sixty’ for the word ‘fifty’ in Art. 334, extending the reservation of seats for SCs/STs and Anglo-Indians in the Lok Sabha and in the State Assemblies upto 60 years from the commencement of the Constitution i.e., beyond January 2000. Although seats are reserved for them, yet they are elected by all the voters in the constituency. There is no separate electorate for Scheduled Castes and Scheduled Tribes. Art. 325 expressly provides that there be one general electoral roll. This means that a member of Scheduled Castes and Scheduled Tribes may contest for any seat other than reserved, i.e., general seat74.

Presently, the earlier ‘sixty years’ in Art. 334 has been substituted by the Constitution (ninety-fifth Amendment) Act, 2009 by inserting ‘seventy years’ w.e.f. 25th January, 2010.

3.13 Art. 335 – Claims of SCs/STs must be Consistent with Efficiency of Administration

Art. 335 makes it clear that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. This Article in a way puts a limit on the extent of reservation. It must not go beyond that limit so as to affect the efficiency of administration. The framers of the Constitution, had visualized such a situation, wherein this provision could be used in further for lowering the efficiency of administration. Their doubts have now come to be true. The Constitution 81st amendment Act, 2000 has added a new provision to Art. 335 which provides that “nothing in this Article shall prevail in making of any provision in favour of the members of SCs and STs for relation in qualifying marks in any examination or lowering the standards of evaluation to any class or classes of services or posts in connection with the affairs of the Union or of a State”.

74. V.V. Giri v. D.S. Dora, AIR 1959 SC 1318.
This amendment is intended to restore the relation in qualifying marks and standards of evaluation in both job reservation and promotions to SCs and STs which had been set aside by a Supreme Court’s judgment in 1996 that the relaxation in the matter of reservation was not permissible under Art. 16(4) of the Constitution in view of the command contained in Art. 335 of the Constitution.

3.14 Abolition of Untouchability

Art. 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of ‘untouchability’ is to be an offence punishable in accordance with law.

Abolition of untouchability in itself is complete and its effect is all pervading applicable to State action as well as acts or omissions by individuals, institutions or juristic body of persons. The main object of Art. 17 is to ban the practice of untouchability in any form. To give effect to Art. 17, the Parliament enacted The Untouchability (Offences) Act, 1955, prescribing punishments for practising untouchability in various forms. In 1976, the Act was renamed as the Protection of Civil Rights Act, 1955.

The word ‘untouchability’ has not been defined either in the Constitution or in the Act because it is not capable of any precise definition.

It has, however, been held that the subject matter of Art. 17 is not untouchability in its literal or grammatical sense but the ‘practice as it had developed historically in the country’. Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do not come within the purview of Art. 17. It is concerned with those regarded as untouchables in the course of historic development. Thus, instigation of a social boycott of a few individuals, or their exclusion from worship, religious services or food etc. is not within the contemplation of Art. 17. It is not clear whether Art. 17 would prohibit outcasting or ex-communication of a person of higher caste from his caste.

The State Legislature passed a law to improve the conditions of living of untouchables. Accordingly, the Act provided for acquisition of land for constructing a colony for them. It was argued against the validity of the law that the construction of a

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colony would not be in conformity with Art. 17. The Madras High Court rejected the argument. The Court stated that what Art. 17 prohibits is singling out the Harijan community for hostile treatment as a socially backward community. By no process of reasoning could Art. 17 be held to prohibit the State from introducing a scheme for improving the condition of living of such persons. The Court also referred to Art. 15(4) in this connection.

The Parliament has also enacted The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in order to— (i) prevent the commission of atrocities against the members of the Scheduled Castes and Scheduled Tribes; (ii) provide for setting up of special courts for the trial of offences under the Act and, also (iii) provide for the relief and rehabilitation of victims of such offences.

Art. 15 (2) also helps in the eradication of untouchability as it provides that no person shall on the grounds only of religion, race, caste, sex, place of birth or any of them, be denied access to shops etc.

An interesting point to note is that while the Fundamental Rights, generally speaking, are restrictions mainly on Government activities, Arts. 17 and 15(2) protect an individual from discriminatory conduct not only on the part of the State but also on the part of private persons in certain situations.

The Supreme Court has stated that whenever any Fundamental Right like Art. 17 is violated by a private individual, it is constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the Fundamental Right by the private individual who is transgressing the same. The State is under a constitutional obligation to see that there is no violation of the Fundamental Right of such person.

The Directive principles, especially Arts. 38 and 46 oblige the State to render socio-economic and political justice to dalits and improve the quality of their life. “The abolition of untouchability is the arch of the Constitution to make its Preamble meaningful and to integrate the dalits in the national mainstream”.

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78. K. Ramaswamy, J., in Appa Balu Ingale.