CHAPTER VI
AFFIRMATIVE ACTION AND JUDICIAL TRENDS

We have analysed the various reports of the Backward Class Commissions and the criteria suggested by them to identify "Socially and Educationally Backward Classes" for the purpose of reservations. The Constitution of India is silent so far as the criteria to be adopted for the identification of Socially and Educationally Backward Classes. The result is that the States have adopted criteria of their own for giving effect to Articles 15(4) and 16(4). The criteria adopted by the States is questioned before the court on various grounds. Further, the Constitution is also silent on the extent or outer limit of the reservations. The result is that each State has fixed a quota of its own, which was impugned on the ground that the quota fixed by the States would affect national interest. Therefore, on two important issues, namely, on the questions of relevant criteria and the extent of reservations, persistence of uncertainty is witnessed. Since the Judiciary has an ultimate say in the matter of interpretation of the Constitution of India, it is necessary to analyse the Judicial verdicts on the two issues of national importance.

6.1 Compensatory Justice and Educational Opportunities;

Article 15(1) of the constitution of India prohibits the state from discriminating against any citizen of India on grounds 'only' of religion, race, caste, sex, place of birth or any of them. Further,
Article 29(2) also guarantees protection to citizens against State action which discriminates admission to educational institutions on grounds of religion, race, caste, language or any of them.¹

This being the position, soon after the coming into force of the constitution, challenges were made to governmental programmes aimed at making special provisions for weaker sections of the society in the field of education. The decision of the Supreme Court in Champakam Dorairajan led to the first-Amendment of the constitution in 1951.

For many years before the commencement of the constitution, admission to professional colleges such as Medical and Engineering Colleges regulated on the basis of religion, caste and race set forth in the communal G.O. For every 14 seats to be filled by the Selection Committee, candidates were selected on the following basis: Non-Brahmins (Hindus) 6, Backward Hindus 2, Brahmins 2, Harijans 2, Anglo-Indians and Indian Christians 1 and Muslims 1. Two Brahmin candidates, one each for Medical and Engineering Colleges respectively, who could not get admission, challenged communal G.O. as being violative of the

fundamental right in Article 29(2). Even though they had academic qualifications, they were refused admission on the basis of religion, race and caste. The Supreme Court speaking through Justice S.R. Das held that the classification in the communal G.O. was based on religion, race and caste which is forbidden under Article 29(2). The court rejected the argument of the state based on Article 46 which enjoins on it to make special provisions for the educational and economic interests of weaker sections of the people, on the ground that the fundamental rights were, "Sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Article in Part-III. In our opinion, that is the correct way in which the provisions found in part-lil and IV have to be understood". The Supreme Court invalidated the communal G.O. on the ground that it classified admission on the basis of religion, race and caste.

Thus, it may be pointed out that it was this decision which led to the amendment of Article 15. The first Amendment incorporated clause 4 to Article 15 empowering the State to make special provisions for the advancement of Socially and Educationally Backward Classes of citizens or for Scheduled Castes and Scheduled Tribes despite Article 15(1) or clause

1. Ibid., at P.227.
(2) of Article 29, The object of the constitutional amendment was to bring Articles 15 and 29 in line with Article 16(4) which empowers the state to make special provisions for the Backward Classes in matters of public employment.

With the inclusion of Article 15(4) in the Constitution, the State has acquired the necessary competence to provide the facilities to weaker sections of the society so as to bring them on par with the main stream of the land. The task, which has been entrusted to the State by the constitution to remove inequalities in the Indian society, was not that easy either at the time of adoption of the Constitution and even after forty years of Constitutional rule. Article 15(4) has empowered to the State to provide for reservations on the lines of Article 16(4) but these reservations are otherwise than the public employment which makes a clear-cut demarcation between the reservations, under 15(4) and 16(4).

Inspite of all the precautions taken by the State Governments in providing reservations to Backward Classes, such reservations were challenged. The court has not only decided the constitutionality but also set the trends on the law relating to reservations. Some of the leading judgment of the Supreme Court and a few decisions of the High Courts are discussed underneath to project the law of reservations in education as a facet of equality and the role of court in shaping it. These decisions throw light on the Judicial perspectives on the law of reservations. They
include: who are socially and educationally backwards? To what extent the reservation should be provided? What should be the quantum of reservation? What are the determining elements of backwardness and other relevant issues?

The first decision of the Supreme Court on the scope of Article 15(4) was Balaji\(^1\) case. In this decision the Supreme Court has dealt with the law of reservation in its constitutional spirit and provision.

Since 1958 the state of Karnataka had been attempting to make special provisions for the advancement of its Socially and Educationally Backward Classes of citizens under Article 15(4) and whenever any order was passed its validity was challenged in the High Court which quashed them. The petitions in this case were filed under Article 32 to challenge the validity of the order of the Mysore government in 1962. The effect of the order was to divide backward classes into two categories (i) Backward Classes and (ii) More Backward Classes. These two categories were specifically recommended by the Nagan Gowda Committee in its report in 1961. The Nagan Gowda Committee had drawn the conclusion in the form of recommendations that in the present circumstances,

the only practicable method of classifying the backward classes in the State is on the basis of castes and communities, and it has specified the criterion which should be adopted for determining the educational and social backwardness of the communities.

The Government of Mysore took out an order to reserve the seats in favour of the Scheduled Castes and Scheduled Tribes as well as the Backward Classes. Under this order, the Backward Classes were divided into two categories (1) Backward Classes, (2) More Backward Classes. The effect of this order was that it had fixed 50 per cent as the quota for the reservations of seats for other Backward Classes; 28 per cent out of this was reserved for Backward Classes and 22 per cent for more Backward Classes. The reservation of 15 per cent and the 3 per cent for Scheduled Castes and Scheduled Tribes respectively continued to be the same. The result of this order was that 68 per cent of seats available for admission to the Engineering and Medical Colleges and to other technical institutions specified in the order were reserved and only 32 per cent was available to the open pool. In other words the percentage of reservation went up to the extent of 68 per cent for Scheduled Castes and Scheduled Tribes and Backward Classes.¹

The validity of the order of Mysore Government was challenged before the Supreme Court, on the ground that it violated the provisions of Article 15 and was not saved by Clause (4) of Article 15.¹

The important issues raised before the Supreme Court are: (1) What are the criteria for determining or identifying the Social and Educational Backwardness? (2) What is the role of "Caste" in determining Social Backwardness? and (3) Is the sub-classification of backward classes into categories valid? While answering these questions, Gajendragadkar C.J., has laid down propositions of far reaching importance. First, he has pointed out that Article 15(4) authorises the state to make a special provision in favour of two distinct categories, namely, "Socially and Educationally Backward Classes of citizens" and "Scheduled Castes and Scheduled Tribes". The latter category has been defined in sub-clauses (24) and (25) of Article 366, but the former has not been defined. So, the Court has to see necessarily whether the state has validity determined as to who should be included in these "Backward classes". According to Justice Gajendragadkar, it is clear that the backward classes of citizens for whom special provisions are to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes.

Besides, the learned Judge has pointed out that Article 341 provides for the issue of public notification specifying the castes, races or tribes which shall be deemed to be Scheduled Castes. Similarly, Article 342 makes a provision for the issue of public notification in respect of Scheduled Tribes. Under Article 338(3) it is provided that references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other Backward Classes as the President may, on receipt of the report of a Commission appointed under Article 340(1), by order, specify and also to the Anglo-Indian Community. Therefore, this provision clearly contemplates that some backward classes may by presidential order be included in Scheduled Castes and Scheduled Tribes. This also helps, according to him, to conclude that the backward classes, for whose improvement special provision is contemplated in Article 15(4), are "in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes."

Secondly, he has stated that the concept of backwardness is not intended to be relative in the sense that any Religion, caste, and sect was not self-evident in the late 19th Century. Reform of social practice was considered appropriate for each constituent group within the society.

1. Ibid., at P.658.
Thus, in his presidential address to the second meeting of the Indian National Congress in 1886, Dadabhai Naoroji explained his objections to making social reform part of the congress programme.

How can thus gathering of all classes discuss the social reforms needed in each individual class? What do any of us know of the internal home life, of the customs, traditions, feelings, prejudices of any class but our own? How could a ... cosmopolitan gathering like this, discuss to any purpose the reform needed in any one class? Only the members of that class can effectively deal with the reforms therein needed.

A National Congress must confine itself to questions in which the entire nation has a direct participation, and it must leave the adjustment of social reforms and other class questions to class congresses.

The class which is backward in relation to the most advanced classes be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Article 15(4). He therefore rejects the relative tests to determine the backwardness.

Then what has to be decided? According to him, it is not either social backwardness or educational backwardness, but it is both social and educational. In this connection he has laid down third proposition. What is the test to determine social backwardness? Justice Gajendragadkar was
of the opinion that the group of citizens to whom Article 15 (4) applies are described as "classes of citizens" and not as "Pastes of citizens". A "class" indicates division of society according to status, rank or caste. The artificial phenomenon arose due to overburdening of the original, functional and occupational basis of caste with considerations of purity based on ritual concepts and it in turn tended to create a feeling of superiority and inferiority and to foster narrow caste loyalties. Therefore he says that in dealing with the question as to whether any class of citizens is socially backward or not, "it may not be irrelevant to consider the caste of the said group of citizens". But, the "special provision" contemplated in Article 15(4) is for "classes of citizens" and not for individual citizen as such, and so, though the caste of the group of the citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens is based "solely on the caste of the citizen", it may not be always logical, for the test would invariably break down in relation to many sections of Indian society, like Muslims, Christians, Jains or even lingayats which do not recognise castes in the conventional sense known to Hindu society. Besides, it may contain the vice of perpetuating the castes. Then, he says that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups of citizens, "it cannot be made the sole of dominant test in that behalf". According to him social backwardness is in the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. Therefore, his conclusion is that though admittedly social
backwardness, which results from poverty, is likely to be aggravated by considerations of caste to which the poor citizens may belong, it only shows "the relevance of both caste and poverty in determining the backwardness of citizens". A careful study regarding of the views of Justice Gajendragadkar would show that he has (1) rejected caste as "the sole of dominant test", (2) made abject poverty as the dominant test, and (3) in relation to Hindus, suggested poverty-cum-caste to determine social backwardness of classes of citizens because consideration of caste is likely to aggravate social backwardness created by abject poverty.¹

It is also interesting to note that Justice Gajendragadkar has mentioned two more factors, which contribute to make classes of citizens socially backward and they are (1) occupation, which are treated as inferior according to conventional beliefs, and (2) place of habitation, particularly rural area where classes of citizens occupy a socially backward position. But, he does not elaborate them, because he rightly feels that the problem of determining who are socially backward classes and of evolving proper criteria for the said purpose is a very complex subject which needs an elaborate investigation, collection of data and examination of the said data in a rational and scientific way.

¹ Ibid., at P.659.
Another question, which the Supreme Court was called upon to decide in Balaji case, was in regard to the educational backwardness of the classes of citizens. The Naganna Gowda Committee Report and the impugned order proceed to deal with this question on the basis of the average of student population in the last three High School Classes of all High Schools in the State in relation to a thousand citizens of that community. On the figures supplied to the committee, which are only approximate figures, the committee came to the conclusion that the State average of student population in the last three High School Classes of all High Schools in the State was 6.9 per thousand. The committee decided that all castes whose average was less than the state average of 6.9 per thousand should be regarded as backward communities. Further, it held that if the average of any community was less than 50 per cent of the state average, it should be regarded as more backward classes. While accepting the aforesaid "state average test", the state made some changes to include lingayats, Ganigas and Muslims in the list of backward classes. The committee had recommended that the lingayats should not be treated as backward classes. The state has decided otherwise and, doing so, the state has taken the view that the figures arrived at by the committee should be corrected to the nearest integer. That is how the state average was raised from 6.9 to 7 per thousand. Even after increasing the state average to 7 the position with regard to lingyayat communities was that its average of students population was 7.1 per thousand according to committee's report. Despite this fact, the lingayats have been held to be educationally backward under the state order. This
result has been achieved by adding 0.1 to the state average and deducting 0.1 from lingayats average. The Ganigas, whose average of student population is 7 per thousand are likewise included in the list of Backward Classes. In regard to Muslims, the majority view in the committee was that Muslim community as a whole should be treated as socially backward. This conclusion was not supported either by data or by reasons. Relying on the basis of the unsubstantiated view of the committee/ Muslims were included in the list of backward classes by the state order.

Dealing with all these matters the Supreme Court, speaking through Justice Gajendragadkar, said that assuming that the state average of 6.9 per thousand students has been properly and correctly arrived at by the committee and assuming further that the state average test to determine educationally backward classes is rational and permissible under Article 15(4), "a community which satisfied the Saud test it us Hyst below the said test cannot be regarded as backward classes". But then the question is when they can be regarded as backward? The court's answer is that it is only communities which are well below the state average that can be regarded as educationally backward classes of citizens. When they can be said to be "well below the state average"? The court's suggestion is that "classes of citizens whose average of student population works below 50 per cent of the state average are obviously educationally backward classes of citizens". So, the court held that the state was not justified in including in the list of backward classes, castes, or communities whose, average of student
population per thousand was slightly above, or very near, or just below the state average. Applying the same reasoning, the court ruled that since the average of student population of Muslim community works out to be at 5 per thousand, it is not so below the state average, as to enable the Muslim Community to be treated as educationally backward classes of citizens.¹

Dealing with the sub-classification made by the state order, the court ruled that such sub-classifications,²

Backward Classes and More Backward Classes, is not justified under Article 15(4). The said Article 15(4) authorises special provision being made for really backward classes. In introducing two categories of Backward Classes what the impugned order in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the state, and that according to the court, is not the scope of article 15(4).³ The incongruity or unjustness of the method adopted by the impugned order is clear from the fact that nearly 90 per cent of the population of the state is treated as backward. The order divides the population of the state into

2. Ibid.,
3. Ibid., at P.661.
two categories of backward and more backward. So, classification of two
categories, according to the court, is not warranted by Article 15 (4).\(^1\)

Certain important principles were laid down in Balaji decision. They
were: (1) the special provision stipulated in Article 15(4) is intended not
for the benefit of "the less advanced classes" compared to "the most
advanced classes" in the state, but, on the other hand, it is intended only
for the benefit of "really backward classes" and Article 15(4) does not give
scope of layers or strata of Backward Classes; (2) the backwardness
contemplated in Article 15(4) is both social and educational; (3) the domi-
nant test to determine social backwardness of classes of citizens generally
is poverty, that is abject poverty; (4) in relation to Hindus, caste may be a
relevant factor in determining social backwardness of classes of citizens
in Hindu social order, for the caste often aggravates the social
backwardness resulting from poverty, and therefore, caste-cum-poverty
test is the appropriate test to determine the social backwardness of
classes of citizens in the Hindu social order; and (5) the educational
backwardness of classes of citizens may be determined first by
ascertaining the State average of student population in High Schools and
then by treating only those communities which are "well below the state
average" of student population, that is those classes of citizens whose
average of student population works below 50 per cent of the state
average, as educationally backward. In other words, "well below

\(^1\) Ibid.,
the state average" of student population, is the test to determine the educational backwardness and this "well below the state average" test has been construed to mean "below 50 per cent of the state average". One important conclusion that emerges from all the aforesaid propositions of Balaji case is that since the backwardness of classes of citizens contemplated in Article 15(4) is both social and educational, the comprehensive test to determine the said social and educational backwardness of classes of citizens is poverty-cum-caste-cum-below 50 per cent of the state average of student population test in relation to Hindus and poverty-cum-below 50 per cent of the state average of student population test in relation to others. This test clearly emerges from the Balaji decision though it is not specifically stated therein, and this can be rightly described as Balaji doctrine or ruling to determine social and educational backwardness of classes of citizens.

6.1.1. Balaji Ruling:

Later the Government of Mysore issued a new order classifying the people into socially and educationally backward classes on the basis of "economic condition" and "occupation". For the purpose of classification the order took "family" as a unit, and according to the order, a "family", whose income is Rs.1,200/- per annum or less and persons or classes following "occupations" of agriculture, petty business, inferior services, crafts or other occupations involving
manual labour, are in general socially, economically, educationally and politically backward.

The order in determining social backwardness of groups or classes of people ignored "caste". This order was challenged before the Mysore High Court in Vishwanath vs Mysore. The High Court upheld the validity of the Government Order. But/ relying on Balaji decision, it observed that the scheme adopted by the state was imperfect and that in addition to the "occupation" and poverty tests, the state should have adopted the "caste" and "residence" tests in making the classification.¹

In Chitralekha vs State of Mysore,² the Supreme Court was requested to explain and clarify the Balaji ruling and to correct the observations of the High Court, test, the state should be forced to change the criteria for ascertaining backward classes under Article 15(4) of the constitution. Subba Rao J. (as he then was), speaking for the majority clarified that the statement made in Balaji. The learned Judge referred to observations in Balaji and that two principles standout prominently, namely (1) the caste of a group of citizens may be relevant circumstances in ascertaining their social backwardness, the social backwardness of a class of citizens,

it cannot be the sole or dominant test in that behalf. Further he said that the caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without referring to caste. While the court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the forced circumstances affording a basis for ascertainment of backwardness of class.

To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons, but if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons, on the basis of other relevant criteria.¹ Proceedings further Justice Subba Rao while referring to Article 46, 341, 342 and 15(4) observed that these provisions recognise the factual existence of backward classes in our country brought about by historical reasons and the sincere attempt to promote the welfare of the weaker sections thereof. They shall be so construed as to effectuate the said policy but not to give weightage to progressive relations of our society under the false colour of caste to which they happen to belong.

¹. Ibid., at P.1833.
². Ibid.,
The important factor to be noticed in Article 15(4) is that it does not speak castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said as they have said in the case of the Scheduled Castes as units of social and educational backwardness. Though it may be suggested that the wider expression "Classes" is used in clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression 'backward classes or castes'. The just position of the expression "backward classes" and "Scheduled Castes" in Article 15(4) leads to a reasonable inference that the expression 'classes' is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to backward classes or not/ his or their "Caste may have some relevance, but it cannot be either the sole or the dominant for ascertaining the class to which he or they belong"

Therefore, the Supreme Court has clearly laid down in the Chitralekha case that caste is not a sole or dominant test, but one among the few tests, like poverty, occupation, etc. for ascertaining the social backwardness of the people. The explanation given in the Chitralekha has not disturbed the Balaji ruling.

(b) Balaji Ruling Devalued:
The Government of Madras prepared a list of backward classes, with reference to caste and reserved seats in Medical Colleges in favour of them. This was challenged in Rajendran vs State of Madras, on the ground that the reservations were made in favour of castes solely on caste considerations and hence it violated Article 15(1), which prohibits discrimination on the ground of caste only. The Supreme Court conceded the point that if reservation in question had been based solely on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But, the court pointed out that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Article 15(4). Besides, the court pointed out that though in the present case the list of socially and educationally backward classes has been specified by caste does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward class of citizens. What are the factors or criteria which indicate that persons specified in the caste constitute socially and educationally

1. Ibid., PP.1833-34.
2. A.I.R., 1968, S.C. P.1012,
backward classes of citizens? In this connection the Supreme Court refers to an explanation offered in the affidavit filed on behalf of the state of Madras. The explanation has stated that the list of backward classes was made as far back as in 1906 and the list has been kept up to date by necessary amendments made therein. It has also been stated that the main criterion for inclusion in the list was the social and educational backwardness of the caste based on occupations pursued by these castes. Because the members of the caste as a whole were found to be socially and educationally backward; they were put in the list. In short, according to the state government/ the castes included in the list are only a compendious indication of the class of people in those castes and these classes of people had been put in the list for the purpose of Article 15(4) because they had been found to be socially and educationally backward.

The Supreme Court has accepted the explanation of the State Government/ and said that in view of the explanation given by the State of Madras/ which has not been controverted by any rejoinder/ it must be accepted that though the list shows certain castes, other than backward castes the members of those castes are the really classes of educationally and socially backward citizens. Then, the court concluded that though the list is prepared caste wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. It is submitted that the explanation accepted by the court in the Rajendran¹ Case is not based on objective criteria. The Balaji² decision has laid down definite tests or criteria to determine social and
educational backwardness of classes of citizens. It is not known whether those criteria have been taken into consideration in determining the social and educational backwardness of the members of those listed castes. The explanation of the State Government is blissfully silent about them and there is nothing in the Rajendran decision to show that those specific criteria have been taken into consideration. The explanation of the Government about the social and educational backwardness of the members of the listed castes, which is not based on objective criteria or tests, can hardly be a substitute for actual determination of the said backwardness of classes of citizens on the basis of specific tests laid down in the Balaji case. The state governments' explanation regarding the social and educational backwardness of the members of the listed castes accepted by the Supreme Court in Rajendran case is as unsupported by data or reasons and as subjective in nature as the conclusion of the committee of Nagama Gowda regarding social backwardness of Muslim Community which was rejected in Balaji case. In as much as the Rajendran decision accepted the post reservation State explanation about social and educational backwardness of the listed castes as a substitute for the actual application of the specific criteria laid down in Balaji case to determine the said backwardness, the Balaji doctrine was not followed by the Rajendran.

Another important case is State of Andhra Pradesh vs Sagar.¹ The case came on appeal to the Supreme Court from the decision of the A.P. High Court in Sagar.² The High Court invalidated the Andhra Government's notification of June, 1966, as modified by an order of July 1966 for the Telangana Region and by an order of August 1966 for the Andhra Region, reserving seats for backward classes in Medical institutions on the ground that the list was prepared solely on the basis of caste. The main issue before the Supreme Court was whether the list of backward classes based solely on caste was legal? As a matter of fact a list of castes prepared in 1963 by the A.P. Government for the purpose of Article 15(4) was struck down by the High Court in Sukhdev vs Government of A.P. Thereafter the list was published under amended rules with some modification, but the basic scheme of the list was apparently not altered. In other words, the new list also was a list of castes and not of classes.

The affidavits, one filed by the Chief Secretary in the High Court and another one filed by the Director of Social Welfare in the Supreme Court, have set out the steps taken for preparing the list of backward classes. In the affidavit of the Director of Social Welfare it is stated that he considered the representations made to him, consulted the law secretary and certain publications relating to the study of backward classes and made his recommendations, which were modified by the sub-committee appointed by the council of ministers and ultimately the council of Ministers prepared a final list of backward classes. But the affidavits do not mention anywhere about the criteria adopted by them for the purpose of determining the backward classes. Therefore, the High Court rightly said that affidavits filed on behalf of the Government do not say what was the material placed before the sub-committee or council of ministers; from which the court could conclude that the criteria laid down by the Supreme Court have been applied in preparing the list of backward classes. Besides, the state contended that expert knowledge was brought to bear upon the consideration of the relevant materials in the preparation of the list and they were satisfied that the correct tests were applied in the determination of backward classes and on that account the list should be accepted by the High court. The High Court has rejected the State contention.

Approving fully the views of the High Court, Justice Shah said that, as pointed out by the High Court, the materials placed on record do not show that criteria laid down by the Supreme Court were applied to determine the backward classes. Application of correct criteria in determining and preparing a list of backward classes is not a matter on which any assumption could be made especially when the list prepared is ex-facie based on castes or communities. Honesty of purpose of those who prepared the list was not challenged and it was not the issue either. Justice Shah has rightly said that the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen. The test of the validity of a law or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence that guaranteed right is not infringed, subsequently the appeal was dismissed.

The significance of the Sagar decision lies in the fact that in this case, unlike in the Rajendran case, the Supreme Court insisted on the evidence of application of the criteria laid down in the Balaji case in determining the backwardness of the members of the listed castes. It has been made clear that neither honesty of purpose of those who prepared the list, nor the satisfaction of the law maker or the executive that what he did was in conformity with the purpose of Article 15(4) would be treated as an effective substitute for the actual application of the Balaji
criteria or tests in determining the backwardness of classes of citizens for the purpose of Article 15(4). The Sagar decision has, therefore, fully revived the Balaji doctrine, which was earlier, badly battered by the Rajendran decision.

The Sagar rule and the Balaji doctrine get a short shift in Periakaruppan vs State of Tamil Nadu. One of the main issues before the court in this case was whether the determination of the Backward Classes on the sole basis of caste was constitutionally valid? Dealing with this question the Supreme Court said that Rajendran case is an authority for the proposition that the classification of Backward Classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. The question, however, is how and by what manner those castes could be shown as socially and educationally backward? Obviously with this question in view, the Supreme Court said "No further material has been placed before us to show that the reservation for Backward Classes with which we are herein concerned is not in accordance with Article 15(4)".

2. Rajendran vs State of Madras, A.I.R., 1968, S.C. P.1012,
It may be remembered that in the Rajendran case the Supreme Court at least referred to the explanation offered by the State Government regarding the social and educational backwardness of the listed castes and accepted it as sufficient for the purpose of Article 15(4). But in the Periakaruppan case the Supreme Court strongly adopted a negative approach to the problem when it said that the reservation for the backward classes was not in accordance with Article 15(4). The negative approach would mean that, while listing the castes for the purpose of Article 15(4), the state is not obliged to ascertain or determine the backwardness of the members of those castes by applying the specific criteria. On the other hand, it is for the party which impugnes the Backward Classes list and reservation made therefore to place all materials before the court to show that the list of backward classes and reservation are not in accordance with Article 15(4). If no such material is placed before the court, then it, according to the negative approach, would mean that list of Backward Classes prepared by the State is deemed to be valid even if it is solely based on castes.

However, one redeeming feature in Periakaruppan decision is the statement of the Supreme Court that the Government should not proceed on the basis. That once a class is considered as a backward class

2. Ibid., P.2310.
3. Ibid., PP.2310-2311.
it should continue to be backward class for all times. Such an approach, according, to the court, would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary. But then who has to decide as to which class of citizens has reached the "take off stage"? The court's suggestion is that it is the Government which should always keep under review the question of reservation of seats so that only the classes which are really socially and educationally backward be allowed to have the benefit. The aforesaid views of the court are really good, provided they are acted upon fully by Governments.

The Balaji doctrine gets a boost once again in State of A.P. vs S.V. Balaraman. Backward Class Commission appointed by the State Government, submitted its report regarding various categories of persons who are to be treated as belonging to socially and educationally backward classes. For the purpose of identifying social and educational backwardness, the commission adopted four criteria, namely

1. Rajendran vs State of Madras, A.I.R. 196R, S. C. P. 1012,


(1) General Poverty of the class or community as a whole; (2) occupations, the nature of which must be inferior, unclean, undignified and unremunerative or one which does not carry influences or power; (3) caste in relation to Hindus; and (4) educational backwardness. Applying the aforesaid criteria, the commission had drawn up a list of backward classes and classified them into four groups. The State Government, by its G.O. of 1973, accepted the Commission's list in toto and declared that the castes and communities specified therein are socially and educationally backward classes for the purpose of Article 15(4) of the constitution. Reservation of seats in the Medical colleges was made in favour of backward classes specified in the list. The listing of backward classes by the Commission and subsequent order of the Government reserving of seats were challenged in the High Court, which held that they were in violation of Article 15(1) and 29(2) and were not saved by Article 15(4), because the "caste" was taken as the basis in listing the backward classes by the commission.

The matter therefore, was brought before the Supreme Court and one of the main issues was whether "caste" could be taken as the basis for the enumeration of backward classes In order to tackle the issue fully, the Supreme Court examined the various efforts made by the commission to ascertain social and educational backwardness of the people. As pointed out by the court, they issued a questionnaire, which referred to various matters regarding the criteria to be adopted
for ascertaining the backwardness of persons as well as the information on matters relating to the social and educational-backwardness. Secondly, the commission called for information from the Heads of all Government Departments regarding number of persons belonging to each class or community employed in their departments. Thirdly, information was sought from the Principals of Colleges, including the professional colleges, regarding the number of students belonging to each class or community in the academic year 1967-68. Fourthly, information was also sought from the Head Masters of all the High Schools regarding the total number of students belonging to each community who studied in those schools during the last 10 years as well as the number of students class-wise and community-wise who studied in Class- VI to XI in 1968-69. Finally, the Commission toured all the Districts and recorded oral evidence on Oath from the representatives of a number of communities or castes.

After referring to the aforesaid efforts of the Commission to ascertain the backwardness of people, the Supreme Court made pointed reference to tests applied by the commission to ascertain educational and social backwardness of the people. Regarding the educational backwardness, as pointed out by the court, the commission adopted the percentage of student population per thousand of particular class or community in standards X and XI with reference to the average on the basis of replies received from the 50 per cent of the institutions which itself comes to nearly more than 1100 Schools, and according to it, the
average student population in classes X and XI in the state works out to be about 4.55 per thousand. On this basis the commission has proceeded to apply the principle that communities whose student population in their standards is "well below the state average" have to be considered as educationally backward. Then regarding the social backwardness, the Court found that after a very exhaustive survey of the trade or occupations carried on by the persons concerned and other allied matters, the commission has indicated that only such persons belonging to a caste or community who have traditionally followed unclean and undignified occupation, can be grouped under the classification of backward classes.

In this connection the commission has adverted to the general poverty of the class or community as a whole, the occupation pursued by the class of citizens, the nature of which is considered inferior and unclean, undignified or unremunerative or one which does not carry influence or power and caste in relation to Hindus, The court took much care to pursue closely the appendix VI and VII of the commission report and said that the traditional occupations of the persons enumerated as backward were of a very low order such as beggars, washermen, fishermen and watchmen at burial grounds.

Further, even on the assumption that the list is based exclusively on caste, it is clear from the materials before the commission and the reasons given by it in its report that the entire caste is socially and economically backward and therefore their inclusion in the list of
backward classes is warranted by Article 15(4).\(^1\) As far as this conclusion is concerned, the Supreme Court relied on its earlier decision in \textit{Trilokinath Tikku vs State of Jammu and Kashmir},\(^2\) Wherein it said that the members of an entire caste or community may in the social, economic and educational scale of values, at a given time be backward and may on that account, be treated as backward classes, but that is not because they are members of caste or community but because they form a class. Besides, the court pointed out that the groups mentioned in the list of backward classes have been included therein because they satisfy the various tests, which have been laid down by the Supreme Court for ascertaining the social and educational backwardness of a class. It is very clear that the pronouncements in this case are very much in consonance with \textit{Balaji}.

\textbf{Area-Cum-Poverty Test;}

This test has come up for discussion in \textit{State of Uttar Pradesh vs Pradsep Tandon}. The main issue before the Supreme Court in this case is whether the instructions framed by the State Government in making reservations in favour of candidates from Hill Areas and Uttarkhand are constitutionally valid. These reservations were made by the State Government for admissions of students to medical colleges in the state of Uttar Pradesh.

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The Uttar Pradesh Government contended that the reservations for rural, Hill and Uttarkhand areas are for socially and educationally backward classes. In support of this contention the State referred to lack of educational facilities, illiteracy, unsatisfactory economic condition, abject poverty and absence of communication and transportation in rural, hill and uttarkhand areas. According to the state the reservations are considered necessary to attract graduates from those areas and to feed the people inhabiting those areas. Thus, the state classified these rural, hill and uttarkhand areas as socially and educationally backward areas and also laid emphasis on the need for reservations in favour of citizens hailing from these areas.

Unhesitatingly the Supreme Court accepted the arguments advanced by the state in support of the reservations made in favour of persons belonging to hill and uttarakhand areas. The court said that the hill and uttarkhand areas in uttara pradesh are instances of socially and educationally backward classes of citizens. Analysing the social backwardness of the said areas, the court said that "backwardness is judged by economic basis that each region has its own measurable possibilities for maintenance of human numbers, standards of living and fixed property".¹ In this connection, the court pointed out that from an economic point of view the classes of citizens are backward (1) When they do not make effective use of resources, (2) when large areas of

land maintain a sparely, disorderly and illiterate population whose property is small and negligible, and (3) when effective territorial specialisation is not possible in the absence of means of communication and technical progress. These facts, according to the court, have made the people in the hill and Uttarkhand areas socially and educationally backward classes of citizens.\(^1\)

But, the Supreme Court pointed out that the same cannot be said about the rural areas. According to the court, some people in the rural areas, may be a few, who are both socially and educationally backward, but it cannot be said that all citizens residing in rural areas are socially and educationally backward.

Thus, for the foregoing reasons the Supreme Court held that the reservation in favour of candidates from rural areas is unconstitutional, but reservation in favour of candidates from the Uttarkhand areas are severable and hence they are valid. In effect, the court accepted the habitation test put forward long back in Balaji case to determine the social and educational backwardness of the people and confined it to hill and other similar inaccessible areas like Uttarkhand in State of Uttar Pradesh.

\(^{1}\) Ibid., at P.567.
Caster Cum-Poverty Test:

Later, in K.S. Jayasree Case the Supreme Court accepted caste-cum-poverty test as a sound basis to determine social and educational backwardness of people for the purpose of Article 15 (4). Relying on report of a Backward Classes Commission, the Government of Kerala issued an order in 1975, which is a modification of an earlier order of 1966, to the effect that only citizens who are members of families which have an aggregate income of less than Rs.10,000/- per annum and which belong to the castes and communities mentioned in the annexure to the Government Order will constitute socially and educationally backward classes for the purpose of Article 15(4). The petitioner in this case belonged to one of the castes mentioned in the annexure to the G.O., but the annual income of the family, to which she belonged, was more than Rs.10,000/- she failed to get a medical seat and her name could not be considered under the reservation quota. She challenged the validity of the G.O. and contended that there is no reason to exclude an insignificant part of the community on the basis of income alone. The petitioner emphasised that if the socially and educationally backward classes are set out in the annexure income cannot be the criterion of admission to determine the benefit of Article 15 (4).²

1. Ibid.,
2. Ibid., at P.568.
The court pointed out that the commission has found on applying the relevant tests that the lower income group of communities mentioned in its report constitute the socially and educationally backward classes.¹ According to the court, in dealing with the question as to whether any class of citizens is socially backward or not/ it may not be irrelevant to consider the caste of the said group of citizens. The special provision is contemplated undoubtedly for classes of citizens and not for individual citizen as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. Therefore, if the classification is based solely on caste of the citizen it may not be logical, for backwardness is the result of poverty to a very large extent. Further it is said that caste and poverty are both relevant for determining the backwardness. But neither caste alone, ² nor poverty alone will be the determining tests. In this connection the court pointed out that when the commission has determined a class to be socially, educationally and economically backward it is, not on the basis of income alone, and the determination is based on the relevant criteria laid down by the court. Besides, the court said that Article 15(4), which speaks of backwardness of "classes of citizens", lays emphasis on "classes of citizens" and not on


1. Ibid., at PP.2385-2386.
"castes of citizens". Therefore, the court came to the conclusion that the classification of backward classes based on economic conditions does not offend Article 15 (4).¹

The Jayasree decision is a full-fledged reiteration of the Balaji doctrine as explained in the Chitralekha case. Thus, the Balaji doctrine gets a boost once again in Balaraman and Jayasree cases and tests laid down in Balaji to determine social and educational backwardness of classes of citizens have become important tests despite occasional aberrations caused to them in the Rajendran and Periakaruppan.

In State of Kerala vs T.p. Roshana¹ Supreme Court has highlighted the process of advancement of educational backwardness in the following words:

"In considering the question of the Educational backwardness of a particular class of people or a particular tract of territory of this state, we cannot forget that the evaluation of human society and its march from backwardness to progress must essentially be a slow and gradual process.

It is not as if, a Governmental or Executive fiat, a class of people or a bit of territory has been condemned to backwardness, and with the lifting of the ban by efflux of time or otherwise, they automatically spring back into a progressive or forward class of people of tract".\(^1\)

The court has stated that the educational advancement is a slow and gradual process. Educational advancement cannot be achieved by the stroke of the pen but by evolutionary process. In other words it is not a thing to be achieved that easily. The court has narrated this aspect in the following words; "If we may add, chronic social disability cannot be amenable to instant administrative surgery and law shall not bury its head, ostrich fashion, in the sands of fiction and assume equality where the opposite is the reality".

The court has pointed out the weakness on the part of the law and administration to deal with the inherent problems of the society. Social and educational backwardness is the part of this inherent unsolved social problem of the Indian society.\(^2\) The efforts of the court to solve it would not be sufficient to eradicate it from the bottom.


\(^2\) Ibid at P.768.
In Jagadish Saran vs Union of India, the Supreme Court has highlighted the relationship between the merit and the reservation by way of abundant caution. In the words of Justice Krishna Iyer:

"A caveat or two may be sounded even in this approach lest exception should consume the rule. The first caution is that reservation must be kept in check by the demands of competence. You cannot extend the shelter of reservation where minimum qualifications are absent. Similarly, all the best talent cannot be completely excluded by wholesale reservations. So, a certain percentage, which may be available must be kept open for meritorious performance regardless of university, state banishment and the like. Complete exclusion of the re country for the sake of a province, wholesale of proven ability to open up, hopefully some dalit talent, total sacrifice of excellence at the altar of equalisation — when the constitution mandates for everyone's equality before and equal protection of the law — may be fatal folly, self-defeating educational technology and anti-national if made a routine rule of state policy. A fair preference, a reasonable reservation, a just adjustment of the prior needs and real potential of the weak with the partial recognition of the presence of competitive merit such is the dynamics of social justice which animates the three egalitarian Articles of the Constitution."

1. Ibid.,
Justice Krishna Iyer has proposed the composition of the reservation and the pattern of it. He is of the opinion that minimum qualification is the essential requirement of the reservation. If reservation is provided without essential qualification then it would amount to a fatal folly. He has stated that excellence should not be sacrificed at the cost of reservation. The reservation should be composed of from (i) A fair preference, (ii) a reasonable reservation, (iii) a just adjustment of the prior needs and real potential of the weak with the partial recognition of the presence of competitive merit. If reservation is composed on these lines, then it would be constitutional and the possibilities of the grievances against the reservations would be reduced to the minimum extent. It is observed from the above discussed cases on Article 15(4) that the Government has provided for the reservation for socially and educationally backward classes in the country. This reservation was provided by the Union Government and the State Governments. As no uniform policy was laid down about the reservations under Article 15(4) the State Governments provided for the reservation as per their respective need and policy. It resulted into variations in the composition of the class, the quantum of reservation and the criteria to determine the backwardness. The court has validated the propositions of the States which were not contrary to the provision of Article 15(4). Whenever the court was of the opinion that the provision of Article 15(4) was constitutional.

1. Ibid., at P.828.
2. Ibid.,
has been violated there the court has declared the proposition of the 
state as unconstitutional.

Again the Supreme Court in Pradeep \(^1\) case permitted institutional 
preference. It allowed 70 per cent institutional preferences in Medical 
School admission.

It is submitted with due respect that the court has not come 
forward to provide the guidelines to the states on this issue of reservation.
In fact, the Union and States were badly in need of the direction and 
guidelines, on this topic of reservation from the court but instead of 
providing those guidelines, the court has stated that it possesses the 
Jurisdiction to decide the justifiability of the norms or propositions laid 
down by the State for reservations under Article 15(4) \(^2\)

This trend of court in not providing the proper guidelines for 
reservations under Article 15(4) has forced the law of reservation into the 
state of abeyance. This state of affairs has commenced from Balaji de-
cision. After Balaji, in a few other decisions the court has repeated that 
the determination of backwardness is a complex matter and that it has

\(^1\) Pradeep Jain vs Union of India, 1984, 3 S.C.C. P.654.

\(^2\) Aparajit J.L., Equality and Compensatory discrimination under the 
to be Decided by the legislature. The legislature has done its best to provide the reservation for backward classes. Not only that, but the legislature has appointed the commissions to provide better deal for reservations. But the recommendations of the commissions could not be taken into consideration by the Government due to some or the other significant reasons.¹

**Vasanthakumar K.. C., - Supreme Court’s View:**

The impact of all these situation resulted into the expectation of the guidelines from the court. Supreme Court has provided the guidelines for the first time in K. C. Vasanthakumar vs State of Karnataka.² The court has provided the guidelines of the issue of reservations only with the purpose to serve as a guideline to the commission which the Government of Karnataka proposed to appoint, for analysing the better deal in the form of educational and employment opportunities to Scheduled Castes, Scheduled Tribes and other Backward Classes. In this case the Supreme Court has reviewed all its earlier decisions on 15(4) and 16(4). This opinion is

1. The Mandal Commission Report which was submitted to the Government on December, 1980.
a very significant and the land-mark opinion of the Supreme Court on the reservation for Scheduled Castes and Scheduled Tribes and Backward Classes. The reservation policy or the concept of backwardness is not static and absolute, on the contrary it is dynamic and relative. It is inextricably interwoven with the living and changing conditions of life. In this case the court has bypassed all these notions which surrounded this concept of backwardness and reservation and provided a new dimension by pronouncing certain propositions boldly. All the five Judges\textsuperscript{1}, in their individual opinions expressed that the time is ripe to spell out the views of the Supreme Court on reservations. Justice Chandrachud has expressed his opinion in the form of four propositions based on the reasoning of the opinions of the other four Judges. The propositions which have been formulated by Justice Chandrachud are as follows:

(1) "The reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present, that is without the application of means test, for a further period not exceeding fifteen years. Another fifteen years will make fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to

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Overcome the baneful effects of social oppression, isolation and humiliation.

(1) The means test, that is to say, the test of economic backwardness, ought to be made applicable even to Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.

(2) In so far as the other backward classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education; one is that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and the other is that they should satisfy the means test such as a state government may lay down in the context of prevailing economic conditions.

(3) The policy of reservations in employment education and legislative institutions should
be reviewed every five years or so. That will at once afford an opportunity.

(i) to the state to rectify distortions arising out of particular facts of the reservations policy and;

(ii) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations".

All the four propositions which are laid down by Chandrachud, J. (as he then was) as the guidelines to the proposed Karnataka Commission clearly indicate that these propositions are in the form of rectifications of the drawbacks of the reservations under the constitution. Whatever the problems and difficulties have been experienced by the Government in implementing the reservations and whatever onslaught the Government has to bear from the people in general due to the reservations have tried to be removed by the court in this decision. Not only that, but whatever the grievances the general public have projected as disadvantageous to them have tried to be eradicated by the court in this opinion. It does not mean that whatever the court has laid down the sound proposition and has to be accepted or implemented.

1. Ibid., at P.1495.
It is significant to note that though the court has taken all its earlier decisions into consideration yet the opinion in the case is bereft of convincing reasons. The time limit prescribed without taking into consideration any specific criterion is also not convincing. To say that fifty years are sufficient for the advancement of backward classes without actually providing the data for it seems to be unrealistic. It is a fact that reservations are provided by the Government but how the Government implemented this policy an aspect which should have been considered by the court in the light of the propositions laid down by the court.

The court has proposed the test of economic backwardness to be applied to Scheduled Castes and Scheduled Tribes after fifteen years. The purpose of this test is to guard the interest of those Scheduled Castes and Scheduled Tribes which are at the lower stratum among themselves and could not derive these privileges though they were meant for them. In fact, this test has been applied by some of the States in determining the backwardness but there was no uniformity or general acceptability to this test. The court's perspective in applying this test seems that these privileges must cover the lowest of the lowly. Those who are better placed amongst the lowly should not monopolise these privileges. For determining the other backward classes the court has proposed two tests:

(i) That the other backward classes should be comparable to Scheduled Castes and Scheduled Tribes in the matter of their backwardness and;
(ii) they should satisfy the means test as prescribed by respective state Governments.

The approach of the court in determining the other backward classes on the touchstone of comparability to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness seems to be appropriate. This comparability element has been taken into consideration by the court for the purpose of determining the constitutionality of the other backward classes. In the constituent assembly debates most of the members expressed themselves that the reservation should be provided for the Scheduled Castes and Scheduled Tribes due to their peculiar position in the society. It means that the main purpose of providing the reservation was for the Scheduled Castes and Scheduled Tribes. But for the purpose of convenience, the words "backward classes" were used in the constitution. Hence the approach of the court in providing the comparability of the backwardness to the Scheduled Castes and Scheduled Tribes in the matter of other backward classes seems to be sound and very much required under the prevailing situation of the society.

The other test for determining the backward classes is the means test. This test is suggested by the court only with the purpose that the benefits of the reservations should reach those who need it most. This is also a good suggestion by the court. If this suggestion works out, then it would certainly keep away all those who do not need the protection of
reservation. The court's proposition of reviewing the policy of reservation after every five years, or so appears to be a befitting one. The Government will have to take into consideration the factors afresh after every five years to determine the reservation policy. This policy of reviewing the reservations after every five years would be beneficial to all. This is beneficial to government because the government can apply a trial and error method and can improve upon its policies. This is also beneficial to the people in general because people would come to know the correct perspective of reservation. This is also beneficial to the backward classes because along with their advancement they can also come out of this backward classes backdrop.

The above discussed guidelines were laid down by the court in this case for the government of Kamataka's proposed commission for examining the question of affording the better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and other Backward classes. It is not a verdict in a dispute between two parties. How far it would be binding on the government or the commission is a doubtful. The Supreme Court of India has acted as an adviser to the Karnataka Government in this case. It is expected that the government of India of its own should take up these guidelines and should provide a viable policy of reservation to that effect.
In Narayana Rao vs State of Andhra Pradesh\(^1\) the full bench of Andhra Pradesh High Court has thrown light on Articles 15(4) and 16(4). The High Court has taken into consideration the guidelines provided by the Supreme Court in K.C. Vasanthakumar.\(^2\) The guidelines provided by the Supreme Court in Vasanthakumar have been further extended on certain points by the High Court of Andhra Pradesh in this case, while reaffirming certain other guidelines of the Vasanthakumar.

The Government of Andhra Pradesh constituted on 22nd January 1982 the one man commission known as "Murali-dhara Rao Commission" to provide a better deal for backward classes and to examine the social and educational backwardness of minority communities for the purpose of including them within the purview of the backward classes of citizens under Articles 15(4) and 16(4) of the constitution.

The Government of Andhra Pradesh has accepted the Muralidhara Rao Commission Report on 15th July 1986. On the strength of it the government issued the government orders (G.Os.) namely G.O.Ms.No.166 and 168, All these G.Os. which include the acceptance of the recommendations of the Commission Report were under challenge in this petition. The Andhra Pradesh High Court has

held 'some of the recommendations as valid and some as invalid. We are concerned with those aspects of this case which cover positively or negatively the spectrum of Vasanthakuraar. Some of the recommendations which were held valid under G.O.Ms.No.166, 167 and 168 were as follows:-

(i) The benefits of reservation for backward classes should be restricted only to those belonging to whose income does not exceed Rs.12,000/- per annum;

(ii) There is no need to provide for any reservations for backward classes with regard to promotions and recruitment by transfer

(iii) The reservations so made shall continue upto 2000 A.D.

(iv) G.O.Ms.No.167 issued on the same day enhances the quota of reservations in favour of Scheduled Castes and Scheduled Tribes to 15 per cent and 6 per cent from 14 per cent and 4 per cent respectively. This is stated to have been done on the basis of 1981 census, according to which the population of Scheduled Castes and Scheduled Tribes is 14.87 per cent and 5.93 per cent respectively. The quota of reservation for backward class is enhanced to 44 per cent from 25 per cent. The total number of reservations is (15+6+44) 65 per cent.

1. Ibid., at P.64.
G.O.Ms. No. 168 issued on the same day prescribed the roster of reservations consistent with the enhancement in the quota of reservation effected in G.O.Ms. No. 166 and 167. The full bench of A.P. High Court\(^1\) has pronounced that the quota of reservations for Scheduled Castes and Scheduled Tribes and Backward Classes is excess i.e. it 65 percentage. Dealing with all these matters the High Court, speaking through Justice Jeevan Reddy, said that a provision made such an exception cannot be such as to eat away the main provision itself. The interests of all other candidates/ and in particular the merit in education and efficiency in administration, should be kept in mind.\(^1\) The reservation of 71 per cent of even 65 per cent amounts to practically eliminating the room for merit-which is bound to tell upon the standards of Education-and efficiency in administration.\(^2\) The court upheld the quota of Scheduled Castes and Scheduled Tribes and invalidated the enhancement quota of Backward Classes. The High Court held that the determination of backwardness need not be comparable to those of Scheduled castes and Scheduled Tribes. The High Court is of the view that the test of comparability of other backward classes with that of Scheduled Castes and Scheduled Tribes is one of the tests. It is not the only test. So to accommodate it/ all other tests should be excluded. The High Court has interpreted it with the wider connotation. Thereby the court

1. Jeevan Reddy K, Ramaswaray and Anjaneyulu, JJ.
2. Ibid., at P.66.
suggested that for determining other backward classes, 'why we should adopt only one manner or way when many ways are open to do so'« The High Court has further stated that "the test of comparability is only a guideline and is not meant to be adhered to, to the exclusion of all other tests".

It is submitted that the perspective of the High Court in visualising the determination of the other backward classes is not convincing but the view of the Supreme Court in Vasanthakumar projects more on the constitutionality of the determination of other backward classes. The A.P.High Court has emphatically corroborated the application of community-cum-means test as laid down by K.C.Vasantha Kumar.

The High Court observed:

"Placing an income limit at a reasonable level i.e. community-cum-means test, and excluding persons/families above that income limit is not only permissible but a highly desirable step. Such a step would also serve to reduce the division of society on the castelines. It is not correct to say that once a caste is identified as backward, it is not permissible to prescribe an income limit, or that placing such a limit amount to further classification. The state would not be unjustified in presuming that economic advancement brings about social advancement, as also educational advancement. It needs no repetition
that in ultimate analysis poverty is the root cause of social and educational backwardness".¹

The view of the High Court in the form of affirmation of the proposition laid down by Supreme Court in Vasanthakumar and Jayasree follow the same line of reasoning. It is submitted that the reservations which are provided for the weaker sections of the society are to some extent monopolised by the privileged sections of the under Privileged. It has resulted in deprivation of protection of reservation to those who are at the lower stratum among the weaker sections. Application of this means test is presently a better solution to deal with the problem of reservation. Hence, even the High court has observed that placing of income limit for availing of benefit is desirable for well being of the society.

The High Court has narrated the relationship and purpose under Articles 15(4) and 16(4) authoritatively. The High Court observed:

"It is true that the language of clause 4 of Article 15 and clause (4) of Article 16 is slightly different, under one it is the social and educational backwardness and under the other it is adequate representation in services under the state; but it would be evident from several decisions of the Supreme Court that the tests relevant for the purpose of both the clauses are treated as the same; no distinction has been made so far".

1. A.I.R. 1987, A.P. PP.94-96,
It is amply clear from the above para that the ultimate purpose of Articles 15(4) and 16(4) leads to provide reservations to backward classes either in education or in employment. The Common element is reservations for Scheduled Castes, Scheduled Tribes and Backward Classes. As a natural corollary what is backward for Article 15(4) has to be backward for Article 16(4).¹

The A.P. High Court has confirmed the proposition of Vasanthakumar on the quantum of reservation. It has observed:

"The total reservations under Article 15(4) or Article 16(4), as the case may be, cannot, as a general rule, exceed 50 per cent, subject to marginal adjustment if the exigencies so require. Situation may/ however, be different where the carry forward rule is applied".²

It is pertinent to note that the apex court has been consistent in maintaining 50 per cent on the outer limit of reservation.³

1. Ibid., at P.89.

2. Ibid., at P.108.

6.1.2. **Protective Discrimination Some Recent Trends:**

No minimum qualifying marks in the pre-medical examination for Scheduled Castes and Scheduled Tribes. This issue came before Supreme Court. In Nivedita Jain\(^1\)' case the Supreme Court upheld the validity of an executive order of the State Government which had completely relaxed the conditions relating to the minimum qualifying marks in pre-medical examination for selection of students to Medical Colleges of the State in respect of Scheduled Castes and Scheduled Tribes candidates.\(^2\)

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2. The total number of seats in six medical colleges of the State were 720, out of which 15% seats were reserved for each category i.e., 108 seats for S.C.students and for S.T.Students. According to Rule 20 the minimum qualifying marks for admission was 50% in the aggregate and and 33% in each subjects respectively; but for S.Cs. and S.Ts. Rule 20 empowered the State Government to relax the minimum qualifying marks in the case of S.C. and S.T. if the required number of candidates were not available in these two categories. In all 9,400 candidates appeared in the test out of which 623 belong to S.C. and S.T. on the result of pre-medical examination only 18 seats for S.Cs. and 2 seats for S.Ts. could be filled up because of the candidates could not secure qualifying marks prescribed by rule 20. Thus, large number of seats remained unfilled after the second relaxation. Thereafter the Government issued the impugned order of 1980 completely relaxing the minimum qualifying marks for these two categories.
The High Court struck down the order as violative of Article 15(4). On appeal, the Supreme Court held that the regulation II of the Medical Council of India relating to conditions of minimum qualifying marks is merely directory and not mandatory and hence the executive order completely relaxing the minimum qualifying marks is not violative of the regulation under Article 15(4).

In another occasion the Supreme Court overruled the full bench decision of the Patna High Court in Amalendu Kumar\(^1\), where it was held that the reduction of the qualifying marks in favour of the S.Cs. and S.Ts, by an executive order first from 45% to 40% and subsequently to 35% on the ground that the seats reserved for those categories would remain unfilled was violative of Article 15(4) and hence un-constitutional.

The Supreme Court also upheld the action of Government i.e., reducing the minimum qualifying marks in Entrance Test, from 35% to 25% for S.Cs. and S.Ts. in Arti Gupta Case. The Punjab Government issued G.O. reserving 100 seats out of total available seats in the M.B.B.S. / B.D. S. courses for Scheduled Castes and, Scheduled Tribes candidates.


And the Government made another G.O. reducing the minimum qualifying marks for these candidates in the entrance examination from 35% to 25%. This G.O. was challenged before the Punjab High Court and the High Court dismissed the petitions. Thereupon this case came before the Supreme Court. The Supreme Court while upholding the action of the Government, maintained that it did not find the total abolition of percentage qualification as either arbitrary or hit by rules of estoppel, servation is not in dispute. The State Government had really intended that 100 seats should go to the Scheduled Castes and Scheduled Tribes candidates.  

In Dinesh Kumar 2 Chief Justice Bhagwati maintained that the Supreme Court did not limit reservations available to S.Cs., S.Ts. and 0. B.C. to 50 per cent. It is open to the State Governments to make reservations without violating constitutional guarantees.

In Deepak Sibal 3 the Supreme Court took another view on reservations. In Punjab University, 64 seats were reserved out of 150 seats available for Scheduled Castes, Scheduled Tribes and Backward Classes, and remaining 86 seats are allotted to general

1. Ibid., at P.484.
students on the basis of merit in morning classes (LL.B. Courses). As well as, in the evening classes, (LL.B. Courses). The remaining 86 seats were also reserved for regular employees of Government/Semi-Government institutions etc. In this case, the validity of the rule for admission in the evening classes of three year LL.B. Degree Course for regular employees of Government Semi-Government Institutions was challenged before the Supreme Court.

The court in this case held that the state will be at liberty to reserve seats for regular or bonafide employees for admission to evening classes, such reservation shall not exceed 50 per cent after deducting the number of seats reserved for Scheduled Castes, Scheduled Tribes and Backward Classes, in M. Chandra Sekhar Rao Supreme Court held:

"Scheduled Castes and Scheduled Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled in order to become equal with others. But equally those who go to other areas should also ensure that they make way for the disadvantaged and disabled of that part of that community who suffer from

1. Ibid.,

2. Ibid., at P.913.
disabilities in those areas. Scheduled Castes and Scheduled Tribes of Andhra Pradesh do require necessary protection as balanced between other communities. But equally the Scheduled Castes and Scheduled Tribes of Maharashtra in the instant case do require protection in the State of Maharashtra/ communities".  

The court further maintained "the state must therefore, resort to compensatory state action for the purpose of making people who are factually unequal".

The Bombay High Court in Ravindra case laid down a very significant rule regarding reservations. It said that all candidates be arranged in order of merit without any consideration for reservation. After this, a separate list be made of the candidates for the reserved

The petitioner belonged to Gowda community which is recognised as S.T. in the constitution (S.T.) order 1950 as amended upto date. The petitioner due to his father's employment in the State of Maharashtra migrated to that state at the age of 9 years. He studied there. After passing the 12th standard the petitioner submitted application for the admission to the respondent Medical" College seeking benefit of reservation in favour of S.Ts. But he was denied admission. His denial of admission was based on the circular dated February 22., 1985, issued by Government of India. The circular stated that S.C./S.T. person who has migrated from the state of Origin to some other state for the purpose of seeking education, employment etc. will be deemed to be a SC./ST. of the state of his origin and will be entitled to derive benefits from the state of origin and not from the State to which he has migrated.

2. Ibid., at P.139.
seats from among the Scheduled Castes and Scheduled Tribes, as the case may be. Persons whose names are included in the merit list should not be counted for the purpose of the list of candidates for the reserved seats.

Medical education continues to attract the most of the writ litigation. In P.S. Joshi, the High Court of M.p. invalidated a rule which gave choice of discipline in Post-Graduate studies only to the children of the State Government employees and of the All-India service officers in the cadre of the State who had been deputed out-side the state and who had obtained their degree outside the state. A rule giving percent reservation in merit quota to students of an institution was also held to be invalid. Similarly reservation of 100 percent of the seats in 'Post-Graduate medical course for those in service of the State was held to be discriminations.¹

Reservation of seats for children of ex-serviceman was valid. However, length of service could be prescribed as criterion for eligibility of an ex-serviceman to such reservation.²

¹ Ravindra vs Cean Grant Medical College, Bombay, A. I. R. 1990, Bombay, P.31.
Very recently the full Bench of Andhra Pradesh High Court comprising Mr. Justice V. Sivaraman Nair, Mr. Justice M.N.Rao and Mr. Justice D. Reddapa Reddy struck down as unconstitutional/Section 3-A of the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Amendment Act, 1992, on September 18, 1992, also quashed the two orders issued by the State Government on July 27 last, under which 12 Medical Colleges and 8 Dental Colleges were permitted. On the first Score, the Bench said that from the Students viewpoint, Section 3-A classifies them into those who can afford to pay capitation fee and those who cannot. "By providing reservation for affluent sections in disregard of merit by classifying students on the basis of consideration of wealth, Section 3-A falls a foul of Article 14".1 In Mohini Jain case the Supreme Court dealing with the right to education under a constitutional scheme ruled that "it is not permissible in Law for any educational institution to charge capitation fee (by whatever name it is called as a consideration for admission to the said institution"

"is concomitant to the fundamental rights enshrined under part-III of the constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens".¹

Justice M.N. Rao speaking for the court observed that while the Directive Principle in Article 46 obliged the State to protect the educational and economic interests of the weaker sections, Section 3-A in its application wiped out to a large extent the existing affirmative action, in favour of Scheduled Castes, Scheduled Tribes % and Backward Classes without any valid reason. The impugned provision was arbitrary.²

In a significant Judgment, Justice &. Subhashan Reddy of A.P.High Court held that the caste status of woman after her marriage would be the caste status of her husband. This Judgment has created an opportunity to a forward caste woman, after her marriage with a backward class man/ can give diverse to her husband and she can enjoy the benefit of reservation which is meant for really deserving backward class person.³

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1. The Hindu, July 31st, 1992, P.I.
6.2. Compensatory Discrimination And Employment Opportunities:

In this chapter the whole emphasis is focussed on Article 16(4). Article 16 of the constitution provides for equality of opportunity in matters of public employment. Article 16 complies with the equality of status and opportunity which our constitution professes to offer to the citizens, by the preamble. The citizens of this country are to be treated alike in matters of offering an opportunity in public employment. Article 16(1) and 16(2) prescribed for all the citizens the opportunity of employment. This opportunity of employment is free from any discrimination or favour. Article 16(4) is the exception to Article 16(1) and 16(2). Under Article 16(4) reservations are provided in employment for % Scheduled Castes, Scheduled Tribes and Backward Classes. Under this chapter the role of the court is analysed and visualised with the help of decided cases of the Supreme Court and High Courts. The role of the Court in deciding the constitutional validity of reservation is significant for the reason that the reservation for the Backward classes has been shaped by the court in the following matters;

(1) What are the components of the backward classes?
(2) What is the criterion laid down for them?
(3) What should be the duration for reservation?
(4) What should be the percentage of reservation?
(5) What are the guidelines laid down by the court?
6.3. Comparison Between Articles 15 (4) and 16(4):

It is interesting to note that the provisions of Articles 15(4) and 16(4) are not exactly the same. The language of clause 4 of Article 15 and clause 4 of Article 16 is slightly different. The criterion for Article 15(4) is socially and educationally backward whereas article 16(4) is inadequacy of representation. But it would be evident from several decisions of the Supreme Court that the tests relevant for the purpose of both the clauses are treated as if they are the same and no distinction has been made so far. The trend of treating both the clauses as same commenced from the Balaji decision. The provisions of Articles 15(4) and 16(4) are treated as same. In this respect it was observed by the court "therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4)". The similar proposition was pronounced by the Supreme Court in Devadasan\(^1\) case:

In A. B. S. Karmachari oangh the Supreme Court reiterated the same proposition in the following words:

"As has been repeatedly pointed out social and educational backwardness, poverty and caste are interlinked and interdependent. True it is that in the ultimate analysis poverty is at the root cause; but in view of the language of Art. 15(4), emphasis has always been not upon poverty alone, but upon the social and education'al backwardness. It is, therefore, not possible for us to accept the proposition that the criteria relevant under Article 15(4) are not relevant under Article 16(4), or vice versa", 1

It is amply clear from the above para that the trend which the court has set up from Balaji, decision has been continuously followed by the court in the matter of treating Articles 15(4) and 16(4) as the same. It means that what is relevant for Article 15(4) is equally relevant for Article 16(4), also. The reservations under 15(4) and 16(4) possess the same perspective This view was reinforced in Narayan Rao vs State of Andhra Pradesh.2

In Venkataraman vs State of Madras Supreme Court has dealt with the scope of Article 16(4). It observed:


"The communal G.O. of the Madras Government which, besides making reservation of posts for Harijans and backward Hindus, as sanctioned by clause (4) of the Article 16 also makes reservation of posts for other communities viz., Muslims, Christians/ Non-^rahmin Hindus and Brahmins is repugnant to the provisions of Article 16 and is as such void and illegal".¹

Under Article 16(4) the reservations are provided for the backward classes. The provision for reservations in employment for backward classes can be found under Article 16(4) and nowhere else. Any attempt on the part of the State to act contrary to this would be declared as bad by the court.²

In General Manager, Southern Railways vs Rangachari Supreme Court has laid down the scope of Article 16 along with Article 16(4). The court was divided on the interpretation of Article 16(4), The majority view was in favour of liberal interpretation of Article 16(4). The court as per the majority observed the scope of Article 16(4) as under:

"For historical reasons which are well known the advancement of socially and educationally backward classes has been treated by constitution as a matter of paramount importance and that may have to be borne in mind in construing Article 16(4). It is common ground that Article 16(4) does not cover the entire field covered by Article 16(1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Art. 16(1) and (2) do not fail within the meaning of non-obstante clause in Art.16(4). The point in dispute is: Is promotion to a selection post which is included in Art.16(1) and (2) covered by Art.16(4) or is it not "The condition precedent for the exercise of the power conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation.

The crux of the above para in the form of the scope of Article 16(4) is that the State is entitled to provide for the reservation in employment/provided the State has satisfied itself that the adequate number of backward classes is not represented in its services.

2. The majority constituted of Gajendragadkar J, on behalf of himself, Sarkar and Das Gupta JJ.
3. Ibid., at P.42.
The majority, therefore, allowed the appeal. The decision of the Madras High Court was reversed and the respondent's application for writ was dismissed.

The minority view of Wenchoo and Ayyangar JJ, however, held the reservation to be outside the limits of Art.16(4) and as such they were of the view that the appeal should be dismissed.

The Supreme Court by a majority of three to two reversed the decision of the Madras High Court and held that the reservation did not exceed the limits of Art. 16(4) and was accordingly valid. Article 16(4) covered both initial appointments and promotions. The reservation can be made both retrospectively and prospectively.

6.4. Carry Forward Rule and Reservation;

In Cevadasan vs Union of India\(^1\) Supreme Court has given a new dimension to the law of reservation. In this case the Government has provided a carry-forward rule for reservation in the employment.\(^1\) This rule was challenged in the court of law and the Supreme Court by majority held it as bad on the ground of exceeding 50% of the reservation. The minority view was pronounced by Justice Subba Rao.

1. Ibid., at P.44.
The majority of the 5 Judges comprising S.K. Cfes, acting C.J., Raghuvir Dayal, N.Rajagopala Ayyangar and J. R.Mudholkar JJ. (Subba Rao J. dissenting) answered the main issue in the affirmative and held the modified carry forward rule to be invalid and unconstitutional.

In the present case, vacancies had been filled, 29 of which went to the reserved category as a result of the modified carry forward rule in 1955. The reservation therefore, accounted for 64.4% of the vacancies filled. The carry forward rule provides that 17% of the total vacancies in a year will be reserved for being filled from amongst candidates belonging to the S.Cs. and S.Ts. It further provides, that if in any year, suitable candidates are not available from amongst such classes the reserved posts will be dereserved filled by candidates from other classes and a corresponding number of posts be carried forward to the next year.\(^1\) If in the subsequent year the same thing happens, the posts unfilled by candidates from S.Cs. and S.Ts. can be carried forward to the third year. In the third year the number of posts to be filled from amongst candidates of S.Cs. and S.Ts. would thus be \(11\frac{1}{2}\%\) of the total vacancies to be filled in that year, plus total unfilled vacancies which have been carried forward from the two previous years. The rule thus permits a perpetual carry-forward of unfilled reserved

\[^1\text{A.I.R. 1964, S.C. P.179.}\]
vacancies in the two years preceding the year of recruitment and provides addition to them of the total vacancies to be filled in the recruitment year. This carry-forward rule resulted in exceeding the 50 per cent reservation. The court in this respect by majority observed:

"This comes to about 64.4% of reservation. Such being the result of the operation of the carry-forward rule, we must on the basis of the decision in Balaji case hold that the rule is bad.

The court further stated that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment whenever it is intended to be filled. In order to effectuate the guarantee, each year of recruitment will have to be considered by itself and the reservation for Backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities".

The court speaking through Mudholkar J. held the carry-forward rule as bad because of two reasons (1) It exceeds the reservation more than 50%; (2) It would take away the guarantee of each year's recruitment of citizens.
the minority view of justice Subba Rao is contrary to the majority view. Subba Rao j. held that the carry forward rule is not violative of the constitution. he has stated that the reservations are to be implemented by formulating a policy by the government. what policy the government should follow is left to the government. In this respect he has observed:
"There are no merits in the contention that the principle of "carry-forward" has resulted in the third year in the selection of candidates belonging to the S.Cs. and S.Ts. to a tune of 80% of the total applicants for that year and, therefore, the selection amounted to destruction of the fundamental rights..... the effect of the operation of the principle of 'carry forward' is practically the same. reservation made in one selection or spread over many selections is only convenient method of implementing the provision of reservation. unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the same castes and tribes it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right".
From the above Para the view expressed by justice Subba Rao on the point of reservation is very clear. he has very specifically stated that when the reservation is provided in the constitution, then how to provide it by policy is left to the government. Whether the government provides it as a whole or by spreading it in parts is also left with the government.

1. ibid., at P.287.
In between the majority and minority views/ the minority view of justice subba rao is more appealing. it becomes necessary to mention that the supreme court while deciding this case, applied the law laid down in balaji case.

6.5. criteria for identifying the backwardness;

In triloki nath vs state of j & k.¹ supreme court has laid down the criterion for determining the backward classes. it was contended that in this case two persons were promoted not on the ground of merit and seniority but purely on the religion, caste and place of birth. it was challenged before the supreme court on the ground of violation of article 16(2).

The court has also laid down the scope of art. 16 as under:
"Clauses (1) and (2) of art. 16 guarantee equality of opportunity to all citizens in matters relating to employment to any office under the state. but if the said clauses of the a Article are literally enforced, instead of giving equality of opportunity to all citizens, it will lead to glaring inequalities. in a country where there are different strata of society ranging from the highly sophisticated to the lowly backward,

the concept of equality will drive the latter on the wall. their condition would become worse than it is. so, in order to give a real opportunity to them to compete with the better placed people, clauses (3) and (4) are introduced in the article...it is' implicit that it shall Bar Counciled with that of reservation in favour of backward classes in such a way that latter while reserving the cause of backward classes shall not unreasonably encroach upon the field of equality".¹

In the aover Para the court has drawn the attention to the fact that if article 16(1) and (2) have been applied literally, it would have created more inequality than equality. article 16(4) is provided only with the purpose of providing equality to the lowly by way of reservation.

In the present case the court has laid down the following proposition to attract Art.16 (4).

"it is, therefore, necessary to satisfy two conditions to attract clause (4) of art. 16, namely, (l) a class of citizens is backward, i.e. socially and educationally, in the sense explained in balaji case and (2) the said class is not adequately represented in the services under the State".

¹ ibid., at p.1285.
For attracting Article 16(4) the court has laid down the proposition which includes something more than the bare provision of Article 16(4) for the reason that it includes a drawback whereby the real backward classes would be excluded from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured have taken to the other avocations of life.

The court has also laid down the criterion for determining the backwardness of affirming the criterion laid down in Balaji case. In Triloki Nath vs State of J & K\(^2\). Supreme Court has pronounced the norms for determining the Backward Classes. The court observed:

"Article 16 in the first instance by clause (2) prohibits discrimination on the ground, inter alia, on religion, race, caste, place of birth, residence, and permits an exception to be made in the matter of reservation in favour of Backward Classes. The expression 'Backward Class\(^1\) is not used as synonymous with 'Backward Caste' or Backward community may in the social, economic and educational scale of values at a given time be backward and may on that account

\(^1\) Ibid., at P.1286.
be treated as Backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression 'class' means a homogenous section of the people grouped together because of certain likeness or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in locality, race, religion and the like. But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the constitution. In this case the court has stated the elements for the backward class. It means that backward class cannot be constituted solely on the basis of caste, community, race, religion, sex, descent, place of birth or residence. If that is done, it would be violative of Article 16(2) and would be declared bad.

6.6. **Degree of Efficiency and the Reservation:**

In C.A. Rajendran vs Union of India Supreme Court has dealt with the efficiency and reservation in the employment. The Government has not provided any reservation for class I and class II services on the ground of want of efficiency but at the same time

1. Ibid., P.3.
time it has provided for reservations in class III and class IV services. The Government has applied this reservation policy to Railways. This policy was challenged by C.A. Rajendran as discriminatory. The Supreme Court after taking into consideration the earlier decisions on the point has pronounced that it is not discriminatory.

As per the earlier decisions of the Supreme Court it is a settled law that reservation is to be provided by the Government not as the right of the backward classes but as per the discretion of the Government based on public policy. In this respect the court observed:

"Our conclusion therefore is that Art. 16 (4) does not confer any right on the petitioner and there is no reservation for S.Cs. and S.Ts. either at the initial stage of recruitment or at the stage of promotion. In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration".  

1. Ibid., at P.513.
2. Ibid., at P.512.
It means that while providing for reservation two aspects of it must be taken into consideration. (1) For the purpose of reservation efficiency should not be sacrificed and (2) reservations should not be provided by hampering general interests of the society.

In this case, the Union Government has taken the plea that after the decision of Rangachari case the Government has reviewed the whole position and decided that there should not be any special treatment to the Government servants belonging to the S.Cs. and S.Ts. In the matter of promotion to class I and class II services which require higher degree of efficiency and responsibility, it is stated that the verdict of the court in this matter of reservation does not sound to be correct. It is expected that the Supreme Court should have called the data of inefficiency of the class I and class II employee of the Government. But the court had not done that, On the contrary, the court has relied on the affidavit filed by the Government without verifying the actual position. Another aspect of this decision which fails to appreciate is that only the class I and class II employees need to be cared for the higher degree of efficiency and responsibility. Is it not applicable to class III 'and Class IV employees? Are they immune from efficiency and responsibility of their duties? It seems that the very approach on which the edifice of efficiency and responsibility is built up in the decision by the court fails to project it uniformly in the employment and hence sounds to be arbitrary.
6.7. *Advantages to Backward Class:*

In *State of Punjab vs Hiralal* the court speaking through Hegde J. upheld the State's appeal and held that the reservation did not violate Art.16(1).\(^1\) It was pointed out that "The mere fact that the reservation made may give extension benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. The court noted that every reservation under Article 16 (4) did introduce an element of discrimination particularly as regards matters of promotion. An inevitable consequence of such reservation was that Junior Officers were allowed to steal a march over their Senior Officers. Some of them might get frustrated "but then the constitution makers have thought fit in the interests of the society as a whole that the Backward class of citizens in this should be afforded same protection"\(^2\). The court has reiterated in the above para that the Backward classes unable to compete with the advanced sections of the society. Whenever the reservation is provided to them, they get some advantage over others. This advantage should not be treated as bad in law by itself. Providing the advantage to backward classes by way of reservation does not amount to violation of Art.16(1) of the Constitution. If any of the reservation violates Art.16(1) of the constitution, it has to be substantially proved by the affected person.

\(^1\) A.I.R. 1971, S.C. P.1777.

\(^2\) Ibid., 1780, 81.
If the effected person takes the plea of violation of Art.16(1) on imaginary possibilities or hypothetical grounds then that would not serve the purpose. In other words one who assails violation of Art.16(1) has to prove it substantially, otherwise it would not carry any meaning in the eyes of law.

6.8. **Concept of Article 16(4) and the Backward Classes**

In Janaki Prasad Vs State of J & K¹ Supreme Court has elaborated the concept of backward class under Art.16(4) while comparing Art.16(4) with that of Art.15(4) the court observed:

‘Art.15(4) speaks about ‘Socially and educationally backward classes of citizens’. However, it is now settled that the expression ‘Backward Class of Citizen’ in Art.16 (4) means the same thing as the expression any socially and educationally ‘backward class of citizens’ in Art.15(4)¹. In order to qualify for being called a ‘backward class of citizen’ he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purpose of both the Articles 15(4) and 16(4). Though Articles 16(4) and 15(5) slightly differ in whatever language the court has interpreted them with the similar meaning. That is whatever meaning is attributed to Art.15(4) is also to be attributed to Art.16(4).

The court has dealt with the socially and educationally backward aspect of reservation. The court has appreciated the verdict of Balaji case in the following words:

“.......... The decision of the Supreme Court in M.R.Balaji Vs State of Mysore (A.I.R. 1963 SC 649) is generally regarded as the locus classicus on the subject’.

That the Judgment of the Supreme Court in Balaji case still prevails as sound law even after almost three decades speaks for itself.¹

In this case the social and educational backwardness has been described on the norms laid down by Balaji. The court observed:

“............... In the determination of a class a test solely based upon the caste or community cannot also be accepted. By clause (4) a special provision for the advancement of citizens or for the S.Cs and S.Ts is outside the purview of clause (1). But clause (4) is an exception to clause(1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of clause (1)..... Reservation may be adopted to advance the interests of weaker sections of society. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth, and the backwardness being social and educational must be similar to the backwardness from which

¹. Ibid., at P.936.,
the Scheduled Castes and Scheduled Tribes suffer. It is not the merely educational backwardness or the social backwardness which makes a class of citizens backward, the class identified as a class as above must be with educationally and socially backward'.

The above norms of determining the backwardness have been stated in the Balaji decision. Balaji decision was so exhaustive that it has left nothing to be decided by the court except leading to disagreement with the norms laid down in it or to overrule it by better propositions. It is pertinent to mention here that whatever guidelines have been given by the court, the State did not care to implement them whole heartedly.

In A.R. Choudhary Vs Union of India Government has provided the reservation by carry-forward rule on 4th December, 1963. This provision of carry-forward rule has been provided as per the proposition laid down in Devadasan.

The memorandum of December, 4, 1963 as amended on September, 2, 1964 stated:

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1.Ibid., at P.937

'In any recruitment year, the number of normal reserved vacancies and the ‘carried forward’ reserved vacancies together shall not exceed 45 of the total number of vacancies. The rules thus are no longer open to the objection that the reservation is so excessive as to create in Government employment a monopoly in favour of backward classes or to disturb unduly the legitimate claims of other communities. The note appended to the roster states expressly that if ‘there are only two vacancies to be filled in an a particular occasion, not more than one may be treated as reserved and if there by only one vacancy, it should be treated as unreserved”.

The petitioner has challenged the reservation under the carry-forward rule the posts of Head-Mistress of the Railway Higher Secondary Schools. The court has upheld the reservation and the carry-forward rule. The court observed:

‘Though each year of recruitment is to be treated separately and by itself, a reserved vacancy has to be carried forward over two years, it is not filled in by the appointment of a reserved candidate. The open class reaped the benefit in 1966-67 when a reserved vacancy was treated as unreserved by

the appointment of an open candidate. If the carry forward rule has to be given by meaning, the vacancy shall have to be carried forward for the benefit of S.Cs and S.Ts until the close of the financial year 1968-1969. The kharagpur vacancy was to be filled in on January 1\textsuperscript{st}, 1969 and hence it cannot go to the petitioner who, admittedly, does not belong to the reserved classes”.\textsuperscript{1} In this case the carry-forward rule has been upheld by the Supreme Court. The reason for upholding it is that the Government has laid down the carry-forward rule as per the norms laid down by the court in Devadasan. In Devadasan the carry-forward rule was declared as bad for exceeding the percentage of reservation.

The protective discrimination is not the right of people, but it is by way of discretion of the Government. The court while interpreting the law on protective discrimination has taken into consideration the constitutional provisions and interpreted the law in such a manner that the protection to protective discrimination should not be detrimental to the people at large.\textsuperscript{2} Not only that, but when the court has observed that the backward classes need the in the form of the right of the backward classes by calling it the ‘compensatory discrimination’. Compensatory discrimination means to provide

\begin{itemize}
\item[1.] Supra Note 31 P.538.
\item[2.] Ibid., P.539.
\end{itemize}
the compensation to the people who have been deprived of the equal opportunities in the society not by their own faults but due to the inherent drawbacks of the prevailing social system. This concept of compensatory discrimination was introduced by the Supreme Court in State of Kerala Vs N.M.Thomas

6.9. Compensatory Discrimination Under the Constitution

The Supreme Court in Thomas case has introduced the concept of Compensatory discrimination. The difference between protective discrimination and compensatory discrimination lies in the approach of looking outwards this specific problem. Under protective discrimination the approach is to provide protection to those who are backward.¹ This protection is not the right of the backward but the discretion of the Government to protect their interest by providing them with additional advantages as against others.² Under compensatory discrimination that approach is not limited to protect but it has travelled beyond that. It is to compensate those who have been deprived of their legitimate opportunities. With the introduction of their new dimension by the court the entire dynamics of the law of reservation has changed.


In Thomas case\(^1\) the majority holds that the State is not confined only to the method of ‘reservations’ for encouraging the backward groups in the area of public employment, it is free to choose any means to achieve equality of opportunity for these classes.\(^2\) The Thomas case involved the validity of a scheme showing favour to the Scheduled Castes and Scheduled Tribes employees by exempting them from the necessity of passing the departmental test for promotion in services. The circumstances leading to the scheme were as follows. It was brought to the notice of the Kerala Government that a large number of Government servants belonging to the Scheduled Castes and Scheduled Tribes were unable to get their promotion from lower division clerk to upper division clerk in the registration department. In order to give relief to the backward classes of citizens, the Government incorporated rule 13AA under the Kerala State and Subordinate Service Rule 1958 enabling the Government to grant exemption to the Scheduled Castes and Scheduled Tribes employees for a period of two years, from passing the necessary tests. As a result of this rule, 34 out of 51 posts were filled up by the members of Scheduled Castes and Scheduled Tribes without passing the test. N.M.Thomas, a lower division clerk was not promoted despite of his passing the test. He questioned Rule 13AA as violative of

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1. Ibid.,

2. Singh P., Dr. Equality, Reservation and Discrimination in India, (First Edition, 1985), P.30
Art.16(1) and not saved by Art.16(4). The Kerala High Court declared the impugned Rule as invalid, under Art.16(1). The impugned scheme resulting in promotion of over 60% of employees of the preferred groups was held to be too excessive and not conducive to the administrative efficiency.

In the Supreme Court for Justices – Ray C.J., Mathew, Krishna Iyer and Murtaza Fazal Ali JJ. Upheld Rule 13 AA as a valid compensatory discrimination under Art.16(1) and not hit by Art.16(2). Beg J. Justified the rule under Art.16(4) as constituting a ‘conditional’ or ‘partial reservation’ in favour of backward classes. Khanna and Gupta JJ. struck down the impugned exemption clause as violative of Article 16(1) and 16(2). On the question whether Art.16(1) permits compensatory discrimination, for justices: Ray C.J., Mathew, Krishna Iyer and Fazal Ali JJ. took the view that Art.16(1) permits reasonable classification just as Art.14 does and as such the State could adopt any method under the former Article to ensure adequate representation of the S.Cs and S.Ts. in public services. To these Justices, ‘equality of opportunity’ in matters of employment demanded favoured treatment to enable the weaker elements to compete with the advanced. These justices held that a catena of the constitutional provision justified favoured treatment to the S.Cs and S.Ts. Besides, the impugned rule in no way affected the efficiency of the administration as the beneficiaries of the rule were given only a temporary and not total exemption from passing the promotional tests.
It is submitted that the holding of the Thomas majority in authorizing the State to adopt any methodology of compensatory discrimination by making property classification is clearly in conflict with the earlier ruling which treat Art.16(4) as an exception to Art.16(1) and thus constitutes an implied overruling of Balaji, Devadasan and Rangachari¹ cases. The dissenting justices² following the earlier holdings held that Art.16(4) created the sole exception to the requirements of equality of opportunity in State Employment. To the majority, Art.16(4) reinforced the conclusion that a State promotion preference for S.Cs and S.Ts, employees did not deny equality of opportunity to the non-favoured employees. Thus the conclusion reached by each of the seven individual Justices that Art.16(4) is an exception or explanation of Art.16(1) was based on their interpretation of Article 16(1) itself as either prohibiting or permitting preference for S.Cs and S.Ts.

Let us first examine the majority’s reasoning in treating Art.16(1) as permitting compensatory discrimination. Ray C.J. thought that Art.16(1) simply clarified and explained that classification based on backwardness did not fall within the meaning of Art.16(2) and was legitimate for the purpose of Art.16(1). To him Art.16(4) only indicated one of the methods of achieving

Equality.\(^1\) Preferential treatment for members of backward classes with due regard to administrative efficiency ‘alone could mean equality of opportunity for all citizens.\(^2\)

Mathew J on being inspired by the American jurisprudential response to the problem of eliminating group inequality, declared that notion of equality enshrined in Art.16(1) could be gauged only by equality attained in the result and not merely numerical or literal equality.\(^3\) On the inter-relationship of Art.16(1) and 16(4) he observed.

‘I agree that Art.16(4) is capable of being interpreted as an exception to Art.16(1), if the equality of opportunity visualized in Art.16(1) sterile one, geared to the concept of numerical equality which takes no account of the social, economic (and), educational background of the members of S.Cs and S.Ts. If equality of opportunity guaranteed by under Art.16(1) means effective material equality, then Art.16(4) is not an exception to Art.16(1). It is only an

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1. Ibid., at P.502.
2. Ibid.,
3. Ibid., at P.519.
emphatic way of putting the extent to which equality of opportunity could be carried viz., ever up to the point of making reservation”.¹

Mathew J. also held that the State can adopt any ‘measure which would ensure the adequate representation in public services of the members of the S.Cs and S.Ts and justify it as a compensatory measure to ensure equality of opportunity for these classes”’.² It did not matter whether the impugned classification was under inclusive as covering only the S.Cs. and S.Ts and not all other backward classes for ‘the law maker should have liberty to strike the evil where it is felt most”’.³ Article 16(1) was only a part of a comprehensive scheme to ensure equality in all spheres. It was an instance of the larger concept of equality under the law embodied in Articles 14 and 15.⁴

Krishna Iyer J. thought that articles 14, 15 and 16 were a common code of guaranteed equality, the first laying down the broad doctrine, the other two applying it to ‘ sensitive areas of historically important and politically significant issues’.

¹. Ibid.,
². Ibid.,
³. Ibid.,
⁴. Ibid.,
polemical in a climate of communalism and jobbery”.¹ As to interrelationship of articles 16(1) and 16(4) he said:

‘To my mind, this sub-article (Art.16(4)) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to…. True, it may be loosely said that Art.16(4) is an exception but closely examined, it is an illustration of constitutionally satisfied classification... Art.16(4) need not be a saving clause but put in due to the over-anxiety the draftsman to make matters clear beyond possibility of doubt’”.²

To Fazal Ali J. also Article 16(4) was an explanation containing exhaustive and exclusive provision regarding ‘reservation’ which is one of the forms of classification, other forms of classification being always permissible under Art.16(1) itself.³

Interesting enough, the majority in the Thomas case approves the view stated by Subba Rao J. (As he then was) in his dissenting opinion in Devadasan.

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1. Ibid., at P.536.
2. Ibid., at P.535-536
3. Ibid., at P.553.
'The expression ‘nothing’ in this Article is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammeled by the other provisions of the Articles”.

It is submitted that the majority holding in Thomas that constitutional equality as a constructive concept interprets the intention of the framers in the light of changed social conditions. This holding supports our earlier conclusion that constitutionally guaranteed equality means something more than a narrow formalistic and individualistic equality which merely requires the state to apply uniform standards to dissimilarly situated groups. Equality of opportunity makes sense only if the State measures enable the backward groups to have a faire share in the opportunity structure of the society by having more than a mere equal chance. The equality guarantee does not prevent the state from giving favoured treatment to the backward groups for achieving ‘actual’ equality. Equality is furthered both by laying down uniform

1. Devadasan vs Union of India A.I.R.1964 S.C.179 at 190. The opinion of Subba Rao J. was cited with approval by Krishna Iyer J.Supra note 4 at 536 and by Fazal Ali J.at P.554.
standards which give each individual the same opportunity to use his talents and by giving unequal benefits to the backward groups according to the social needs. State classification to favour meritocracy and to distribute governmental benefits according to need, both are consistent with constitutional equality. The state can experiment all possible ways to raise the social standing of the backward groups who because of their lack of resources, attainments and background cannot successfully compete with more advanced sections of the society.

The approach of the minority Justices in Thomas is to view Article 16(1) as only protecting the claims of merit and efficiency and not permitting compensatory discriminating for removing socio-economic inequalities. These Justices believe that Arts.16(1) and 16(4) indicated that but for these provisions no preference could be given to the backward classes. Adhering to the precedents they hold that in no case had the Supreme Court accepted or upheld preferential treatment in favour of backward groups under Art.16(1). Art.16(1) applied to all individuals the least deserving as well as most deserving. Preference to some individuals in matter of employment would be antithesis of equality, privileges, advantages, favours, concessions for certain groups ran counter to the concept of equality and resulted in discrimination in reverse against those excluded. The liberal approach in upholding classifications under Art.14 would be in appropriate in the area of compensatory discrimination. And if Articles 14, 15(1) and 16(1) were sufficient to provide compensatory discrimination there was then no need of having Articles 16(4) or 15(4). To
read broader notions of social justice into Article 16(1) otiose. It was dangerous to authorize the state to give preferences outside the protective clauses. The minority argues that if in roads were allowed into the equality notion beyond those permissible under Art.16(4) the ideals of supremacy of merit, the efficiency of service-and the absence of discrimination in the sphere of public employment would be the obvious casualties. \(^1\)

It is submitted that the minority justices’ reasoning is based upon the supposed dichotomy between formal equality in fact. These justices think that Articles 15(1) and 16(1) deal with legal equality requiring uniform standards for distribution of governmental benefits whereas equality in fact or substantive equally is enshrined in Articles 15(4) and 16(4). They fail to appreciate that the comprehensive notion of equality embraces within its fold all legitimate measures of compensatory discrimination to uplift, the weaker sections of the society. The majority rightly thinks that Article 16(1) is an instance of the application of the larger notion of equality embodied in Article 14. Moreover, the accent on the positive aspect in the expression ‘there shall be equality of opportunity…..’. In Article 16(1) is wide enough to include all legitimate

\(^1\) Supra Note 4 Khanna J. at 510-511 Gupta J.543,Beg J.521,522,523
constitutional measures providing a real equality of opportunity to the backward classes. It is true that the accent in Art.14 is on the negative aspect i.e., a ban on the State to create inequalities but according to the new concept of equality article 14 is also a command to the State to resort to the standard of proportional equality in making its laws for mitigating the inequalities among men. The whole drive of the directive principles is towards the constitutional goal of achieving actual equality.

It is thus clear that the Thomas case has discarded the old way of thinking that Articles 15(4) and 16(4) are the exceptions to the equality guarantee and declare that these articles are themselves aimed at achieving the very equality broadly proclaimed and guaranteed by Arts.14, 15(1) and 16(1).

The urge of this decision is that the government should adopt new strategy to repair the depressed lot of the backward classes in order to level them upto the rest of the society. This advise of the Supreme Court is in due recognition of the ineffectiveness of the method of ‘reservation’, the benefits of which are snatched away by the creamy elites among the backward classes leaving the weakest and the most needy in the original condition of utter deprivation and backwardness. The immediate thrust of this decision is to enlarge the states authority to confer preferential treatment and to provide all possible opportunities and incentives to the backward classes enabling them to take initiative and improve their own capacity to cope, the ‘reservation being at the most a temporary palliative’. 
K.C. Vsanth Kumar Vs State of Karnataka \(^1\) the Supreme Court has provided the guidelines of the issue of reservation only with a purpose to serve as a guideline to the commission which the Government of Karnataka proposed to appoint, for analysing the better deal in the form of educational and employment opportunities to S.Cs and S.Ts and other backward classes.

This decision has been discussed earlier with reference to Art.15(4). Here an attempt is made to further evaluate it from the perspective of Art.16(4). The Supreme Court has taken into consideration all the possible earlier cases on Articles 16(4) and 15(4) providing the best guidelines. The guidelines which are thus provided are not final or conclusive but are amenable for acceptance or rejection. The acceptance or rejection of the guidelines depends on the viability of the guidelines in the course of time and circumstances.

The entire approach of the court and even of the Judges independently is based on rectification of social actions and inactions on reservations. What promise the court has chosen to provide these guidelines? The court has chosen the earlier decided cases on reservation as the major premise along with the existing realities of the backwards in the country. This

\(^1\) A.I.R.1985, S.C. P.1495
premise, can be affirmed from the independent judgments of all five judges.¹ All the earlier decided cases have missed the mark in following reaspects the clarity as to the definition of backwardness and backward class and over all unification of the scheme of the reservation. Justice Chandrachud has provided the propositions in the form of opinion. These propositions are not elaborated. The propositions are precise and concise without reasonings. In the words of Justice Chandrachud

1) ‘The reservation in favour of S.Cs and S.Ts must continue as at present, there is, without application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make fifty years after the advent of the constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the benful effects of social oppression, isolation and humiliation.

2) The means test, that is to say, the test of economic backwardness ought to be made applicable even to S.Cs and S.Ts after the period mentioned in (1) above. It is essential that the privileged section of the under privileged society should not be permitted to monopolies preferential benefits for an indefinite period of time.

3) In so far as the other backward classes are concerned two tests should be conjunctively applied for identifying them for the purpose of reservation in employment and education, one, that they should be comparable to the S.Cs and S.Ts in the matter of their backwardness, and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

4) The policy of reservation in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (1) to the State to rectify distortions arising out of particular facets of the reservation policy and (II) to the people both backward and non-backward to ventilate their view in a public debate on the practical impact of the policy of reservation".\(^1\)

These propositions in the form of guidelines are not new proposition except the limitation of the time proposed in it. The interesting part of these propositions in this that they are to be effective from 2000 A.D. onwards. According to the researcher the guidelines laid down by Chandrachud J. are mere theoretical. The do not have the pragmatic assertion.

\(^1\) Supra Note 66 at P.1499.
Desai J. has proposed the guidelines in the form of rectifications to the existing set up of the reservations. He has attacked the caste system with a view that the caste should not be regarded as a criterion for determining the backwardness. He observed:

“The question we pose and answer is whether caste should be the basis for determining social and educational backwardness. In other words, by what yardstick, groups which are to be treated as socially and educationally backward are to be identified? To simplify the question: should membership of caste signify a class of citizens as being socially and educationally backward? If ‘caste’ is adopted as a criterion for determining social and educational backwardness does it provide a valid test? Or it would violate Article 15(1) which prohibits discrimination against any citizen on the ground of religion, race, caste, sex, place of birth or any of them”. ¹

The answer to this question is also given by Desai J. when he observed:

“Time has come to review the criterion for identifying socially and educationally backward classes ignoring the caste level. The only criterion which can be realistically devised in the one of economic backwardness. To this

¹. Ibid., at P.1503.
may be added some relevant criterion such as the secular character of the group, its opportunity for earning livelihood etc. but by and large economic backwardness must be the load star.\(^1\) He said that the reservation benefits, by and large, are snatched away by the top creamy layer of the ‘backward’ caste or class, thus keeping the weakest amongst the weak always weak and leaving the fortunate layers to consume the whole cake.\(^2\) He has provided the guidelines by considering the above aspects in the following manner.

Let me conclude. If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness and simultaneously take a vital step in the direction of destruction of caste structure which in turn would aware the secular character of the nation. Justice Desai’s solution of economic criteria appears to be sound but he has failed to describe it appropriately. For want of description of this principle how to utilize it is a problem. Justice Chinnappa Reddy has provided the following guidelines: “Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc., Despite individual exceptions it may be possible and easy to identify social backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature.

\(\text{\footnotesize 1. Ibid., at P.1506.}\)
\(\text{\footnotesize 2. Ibid., at P.1507.}\)
Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they must be recognized for what they are along with other less primary sources. There is and there can be nothing wrong in recognizing poverty wherever it is reflected as an identifiable group phenomenon whether you see it as caste group, as sub-regional group, an occupational group or some other class. Once the relevant factors are taken into consideration, how and where to draw the line is a question for each state to consider since the economic and social conditions differ from area to area. Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined it will not be for the court to interfere in the matter but, lest there be any misunderstanding, Judicial Review will not stand excluded. The guidelines proposed by Justice Chinnappa Reddy reflect the general outlook of the backwardness. In fact the general requirement is, to provide the specific guidelines for the specific concept of backwardness. But that has not been achieved by his proposed guidelines. For determining the social and economic backwardness he has given the priority to the class poverty. If we consider the class poverty as the principle consideration for determining the social and economic backwardness, it would be no wonder to declare the majority of the population as the social and economic backward classes.

1. Ibid., at P.1530.
Justice Sen has proposed the guidelines with note that the reasons for this decision will follow. The main question which he pointed out pertains to the identification of the socially and educationally backward classes of citizens for whose advancement the State may make special provisions under Article 15(4) like those for the S.Cs and S.Ts about the reservation he has observed:

“....... But unfortunately the policy of reservation hither-to formulated by the Government for the upliftment of such socially and educationally backward classes is caste oriented while the policy should be on economic criteria. Then alone the element of caste in making such special provisions under Articles 15(4) and 16(4) can be removed. At present only the privileged groups within the backward classes i.e. the forwards among the backward classes reap all the benefits of such reservation with the result that the lowest of the low who are stricken with poverty and therefore socially and economically provisions under Article 15(4) and 16(4) are meant for their advancement”.\(^1\)

Sen J. has expressed that the caste should not be criterion for determining backwardness. In place of caste, economic criterion would be a better alternative.

Venkataramaiah J. expressed his opinion independently but on the similar theme of his brother Judges. He observed:

\(^{1}\text{Ibid., at P.1530.}\)
‘India’s vast and unparalleled experiment with ‘protective’ or ‘compensatory’ discrimination in favour of backward sections of her populations be taken as generosity and farsightedness that are rare among nations…… the court must guard against abuses of the preferential principle while at the same time insuring that the Government has sufficient to devise effective use of the broad powers which the constitution places at its disposal’.

Mare Galanter has brought into focus the constitutional submit of reservation and the check on it through the court.

Venkataramaiah J. has proposed the following guidelines while concluding his verdict. In his words:

“............ At this stage it should be made clear that if on a fresh determination some castes or communities have to go out of the list of backward classes prepared for Articles 15(4) and 16(4), the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive principles contained in Article 46 of the constitution”. Venkataramaiah J. has proposed the occupation-cum-income formula to determine the backwardness. It means all the five judges in this case have accepted economic criterion as the principle criterion for the purpose of determining the backwardness. The guidelines which are proposed by the court have no binding force because it is not a decision given in the disputed issues.

1. Ibid., at P.1530
Analysis of Vasanthakumar:

For convenience, one can make an analysis of the dominant approach in each Judgment as under:-

1. Chandrachud C.J.
   1) Comparability to scheduled castes an scheduled tribes.
   2) Satisfying the ‘means’ test

2. Desai J..... Poverty, the exclusive test.

3. Chinnappa Reddy Poverty of group, the main test. It can be a caste also.

4. Sen J..... Poverty, the predominant test.

5. Venkataramaiah J “Caste-cum-means‘ test.1

Thus, Justices Desai and Sen given almost exclusive importance to economic criteria, while the remaining there judges favour a combination of social and economic criteria. Even in the Judgements of the remaining there Judges, one can discern an anxiety to emphasis the importance of economic aspect in some form or at some stage.

The Chief Justice recognizes the relevance of social satisfaction as also of economic conditions. Justice Sen emphasizes predominance of poverty.

From his view which in a sense, takes a mid-way position, one can proceed to the views of justices Desai and Chinnappa Reddy who seem to a still stronger emphasis on the economic criterion.¹

In V. Narayana Rao Vs State of Andhra Pradesh ² the High Court has highlighted the significant aspects of reservation. In this case the High Court has considered the guidelines laid down by Supreme Court in K.C.Vasanthakumar case.³ The High Court has not agreed with all the propositions laid down by the Supreme Court as the guidelines. In this case the G.O.Ms.No.166, 167 and 168 were challenged. Theses G.O.Ms.Nos. 166, 167 dealt with the acceptance of the report and recommendations of ‘Sri Muralidhara Rao Commission’ with some modification and changes. The commission has recommended the addition of nine communities among the backward classes. It has enhanced the quota of reservation in educational institutions and services from 25% to 44%. It has provided the duration of 25 years and proposed the review thereafter. The Andhra Pradesh High Court has unanimously declared to enhance quota of reservation as bad. The following are the observation of the High Court: ⁴

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1. Ibid., P.333.
2. A.I.R. 1987,A.P.P.53 (F.B.)
“The Muralidhara Rao Commission did exceed its scope of enquiry in so far as it recommended the raising of the extent of reservation in favour of backward classes and in recommending the inclusion of nine more communities. The determination of the population of the backward classes vis-à-vis the total population of the State at 52% by the Muralidhara Rao Commission is arbitrary and is vitiated by several errors pointed out herein before. The said clauses in so far as they raise the extent of reservation in favour of backward classes from 25% to 44% are arbitrary and unreasonable and total number of percentage for Scheduled Caste, Scheduled Tribes and Backward Classes is 15+6+44=(65) respectively, and must be held to be violate of Articles 15 and 16 of the constitution. It is open to the Government to undertake the determination of population of backward classes and fix the extent of reservation in their favour, bearing in mind the population figures.

Poverty alone cannot be made the basis though poverty and social and educational backwardness are interlinked, and are mutually contributory. The ultimate objective of designating certain groups of backward classes is to give effect to the principle of equality of opportunity and status enshrined in the preamble to an in Art. 14 to 16 of the constitution.

6.10. Compensatory Justice Some Recent Trends:

As State instrumentalities specially meant for academic advancement, Universities have a big role under Art.15(4) for designing special programmes for scheduled castes and scheduled tribes. This is another matter on which a special discussion would be necessary in future. As regards
reservation of posts and services, universities either may have their own statutory provisions or may follow the Central or State Government order. Such an order is binding on the universities because universities are State instrumentalities. Art.16(4) constitutionally enables such reservation in ‘appointments or posts’. As such constitutional mandate is to authorize the State to discriminate, inter alia, in matters of employment.

So when under Sec.57(4) (a) of the Nagpur University Act it was stipulated that employment notice should indicate the number of posts to be reserved, it was a legal right with constitutional permissiveness. In other words, State has to make provisions to entertain claims of the Scheduled Castes and Scheduled Tribe candidates regard being had to the maintenance of efficiency in the services. It means, other things being equal, S.C./S.T. candidates are to be preferred. In view of the enabling provision of the Constitution as well as State policy of social justice many of the University Acts and Statutes provide specific provision for reservation of posts for Scheduled Castes and Scheduled Tribes and educationally and economically backward sections of the community. Such a provision in the University Acts and Statutes has been subjected to a wide variety of interpretations.

2. Ibid.,
Hence it is worthwhile to look to the decision of the Supreme Court in Dr.Suresh Chandra Verma and Others \(^1\) case. In this case facts were; that under Sec.57 (4) (a) of the University Act, employment notice would indicate the number of reserved posts. The University issued the employment notice in question inviting applications for a total of 77 posts which included 13 posts of Professors, 29 posts of Readers and 35 posts of Lecturers in various subjects, mentioning in the notice that out of the 13 Professor’s posts 3 were reserved for S.C. 2 for S.T. and 1 for VJ/NT; out of 29 posts for Readers 6 were reserved for S.C. 4 for S.T and 2 for VJ/NT; and out of 35 posts of Lecturers, 7 were reserved for S.C. 5 for S.T. and 4 for VJ/NT. But there was no subject-wise specification for reservation. A number of applications were received both from reserved non-reserved categories. Different Selection Committees numbering 53 were constituted and they recommended 47 candidates for 53 posts. These committees gave weightage to the candidates belonging to the reserved categories. Thereafter the Executive council constituted a sub-committee to decide which posts should be reserved for the reserved categories. On the recommendation of the Sub-Committee and taking into consideration of the backlog of reservation, the Executive Council decided to keep apart 17 posts, on March 30, 1085. 17 posts were kept as reserved categories and temporary appointments were given in these posts. All these posts reserved for S.C./S.T were created in the Sixth Plan Period.

\(^1\) Suresh Chandra Verma Dr., and others vs Chancellor, Nagpur University & Others, 1 L.L.J.(1991),P.574.
Some social workers and organizations made representations to the Chancellor making a grievance against the employment notice and the procedure followed in the selection and appointment. On this the Chancellor appointed a one-man Committee to inquire into the matter. The Committee submitted it report on September 24th, 1985 which was accepted by the Chancellor.

Meanwhile a bunch of writ-petitions were submitted in the High Court challenging the employment notice on the ground that the non-obtaining of the recommendation from the Board of University Teaching & Research (BUTR) before issuing the employment notice was bad in law in view of Section 32(2) (iii) of the Act. On these writ petitions the High Court directed the University to be restrained in giving appointments ignoring the recommendations from the BUTR.

Taking into consideration the High Court’s orders and the report of the one-man committee, the Chancellor directed the University to terminate the services of all the appointees. The termination notice was served on four grounds, namely,

a) Reservation policy not consistent with law;

b) Allocation by Executive Council of all reserved post in VI plan period was arbitrary;

c) Mandatory recommendations of BUTR not taken; and

d) Employment notice not according to law.
The Vice-Chancellor, of course, reappointed all of them by exercise of his emergency power under sec.11 (4) for temporary period subject to final selection. The matter went to the Supreme Court through the Division Bench and Full Bench decision of the High Court.

Issues raised:

Some fundamental issues that were raised in Dr.S.C.Verma’s case are:

a) Should reservation be made post-wise and subject-wise or can it be done only on the cadre basis?
b) Should the reserved post be notified in the employment notice itself?
c) Should the appointment be terminated if employment notice is invalid?
d) Should individuals be heard before serving the termination notice on the ground that the employment notice was itself unlawful?
e) Should recommendation of BUTR be mandatory?

Should Reservation be Post wise/Subje ct-wise?

On the issue of whether reservation be post & Subject-wise or cadre-wise, general in nature, there were conflicting stands. In Bhakare’s case the Division Bench of the Bombay High Court ‘post and subject-wise’ reservation was not necessary. Another Division Bench came to the opposite view on which the matter was referred to a Full bench in Dr.S.C.Vermas’s case. The Full Bench, of course, decided that category-wise general reservation was not valid, against which appeal was preferred to the Supreme Court. It may be noted that teaching posts in the universities are created differently and are

1. Supra Note.2.
treated differently. Unless this is known, a proper assessment of reservation policy cannot be made. But before doing that let us see the policy framework of reservation for S.C./S.T can be made ‘in the making of appointments to services and posts’: 

(a) In ‘the affairs of the union or of a state’;
(b) Consistently with maintenance of efficient administration.

Universities either follow the ‘Government Order’ on the matter or have clear provision of their own Acts and Statutes. In the Verma case \(^1\) of course, the Act of the University provides for reservation in teaching posts.

Now, university posts are created in a span of 15 years on the assessment of the university Department of Studies by a team of experts. In most of the cases, one/two posts are created in any cadre looking into the existing and expanding needs of the department. Naturally, in the higher posts less vacancies are created in comparison with the lower posts. Unlike any other services, all vacancies in the universities are ‘open’ vacancies to be filled up by open advertisement and there is no provision for promotion

\(^1\) 1985 Lab. I.C.148 (Bom).

\(^2\) Supra Note.2.
to higher posts. So a few special features of University teaching assignments are:

i) Posts are seldom created in a shorter period than 5 years. Thus a clear policy decision is required to be taken as regards the period for which a post in the reserved category is to be kept vacant in case of the non-availability of a suitable reserved category candidates.

ii) In few subjects, very few posts are created. It becomes difficult to apply the quote of reserved posts to such posts. As for example, in a few departments of Studies there are in total 3 or 4 posts. In that case reservation becomes difficult at the rate of 12.5 or 7.5% as the case may be.

iii) In case there is a single post created in a subject, it becomes impossible to reserve the post.¹

In order to obviates these difficulties, in some States the government order specifies a ‘roster’ system in which posts of a Department are numbered and reservation category is fixed. As for example,

¹.Supra Note.2.
Post 1 of a Department is Unreserved
Post 2 of a Department is for S.C.
Post 3 of a Department is Unreserved
Post 4 of a Department is Unreserved
So on and so forth.

In a ‘roster’ system at a given time the rate of reservation may work out to be very high or very low. Another difficulty is due to non-availability of reserved category candidates in some areas or subjects. ¹ This has become more difficult because of the absence of a backup long term policy under Art.15(4).² In view of these arguments of (1) a few posts; (2) allocation of post can hardly be proportionalised on subject basis as per the rate of reservation; and (3) in some subjects reserved category applicants are very few in number etc., some Universities, like in the verms’s case, the Nagpur university provided reservation on the category-wise posts. The reservation of a post for a subject was, therefore, made dependent on the availability of applicants for that category of post in a subject. Advantages of such cadre-wise reservation are:

1. Chakradhar Paswan Dr. V.State of Bihar & others (1988) 2 S.C.C.214
2. As for example, see G.O.No.DPAR 29 SBC 77, dated April 27 1978 of Karnataka
1. Required percentage of reservation is possible;
2. Universities can allocate posts on the basis of availability of competent reserved category applicants in any subject;
3. At a given time out of the total cadre in the University teaching assignments adequate representation of S.C./S.T. is possible;
4. In subjects where there are more competent hands available from S.C./S.T. candidates more of them can be taken;
5. It is in conformity with the spirit of Art.335 where reservation is provided on the total services taken into consideration. Even Art. 16(4) also talks about representation in the services as a whole and not on the microlevel components in posts of individual Departments.

There are of course disadvantages too as pointed out by the Supreme Court, which are as follows:

1. “Neither the University nor the candidates know at the time as to for which of the subjects and in what number the said posts were reserved”.

2. “Candidated belonging to the reserved category in particular who wanted to apply for the reserved posts did not know for which of the posts they could apply and whether they could apply at all for the posts in the subjects in which they were qualified...”
3. “The Selection Committee which were appointed to interview the candidates for respective posts did not also know whether they were interviewing the candidates for reserved posts or not, and to assess merits of the candidates for the reserved category as such candidates”¹

The counter-arguments of the above were also visualized by the Supreme Court as follows:

1. “… all those belonging to the reserved category who wanted to apply for all the said posts had done so even without knowing that the concerned posts were reserved.
2. “It also presumes that all eligible candidate from unreserved category had applied for the posts without knowing whether the posts were reserved or not”.

After assessing both the sides, the Supreme Court in the Verma case decided that the reservation has to be post-wise i.e., subject-wise when reservation is needed to be made “in posts”.

The Supreme Court has given the rationale suggesting that the cadre-wise reservation will have the following defects:

¹ Ibid.,
a) The possibility that many eligible candidates belonging to both categories might not have taken the risk of uncertainty in the absence of clear provisions;
b) Uniform weightage marks to the candidates or reserved category is unsuitable because the suitability for a reserved category has to be adjudged by taking various factors into consideration.
c) This method provides a scope to eliminate unwanted selected candidates at the final stage.

All said and done, what is wrong if cadre-based reservation is made asking all qualified candidates to apply for all posts with a provision to give special weightage to S.C./S.T. candidates where available. In the above case Supreme Court presumes that there are good number of qualified candidates in each category of applicants so that unless post-wise and subject-wise reservation is made there is likely to be an injustice. In fact, the reserved posts was not objectionable in this case. Generally the Universities suffer from the difficulty of identifying a post as reserved and then are unable to get applications from sufficiently qualified candidates from the reserved category. That compels the University to keep posts vacant indefinitely at the cost of studies. This difficulty can be mitigated if there is cadre-wise reservation with a provision of weightage for the S.C./S.T. applicants. Supreme Court’s decision could create further difficulties for the Universities because of lack of qualified and competent applicants in the reserved categories in certain subjects specially in the higher cadres.
Of course, in Vermas’s case there was nothing on record to show as to show weightage was given for S.C./S.T. candidates. There was no reply to the question as to why all posts created in 6th plan were only reserved for S.C./S.T. candidates and what was the criteria on which a reservation was made on the posts and subjects late after the selection. There were obviously procedural lapses.

Was the employment notice invalid?

The Supreme Court in this case decided that if post-wise and subject-wise reservation was not made at the time of employment notice, the notice became vague and the purpose of the notice was defeated. Hence the notice was ‘bad in law’. In Raj Kumar v Gulbarga university¹ the Full Bench of the Karnataka High Court decided that reservation must be indicated post and subject-wise at the time of notice. But in case of Professor’s cadre, the Court held a cadre-wise reservation would be justified. In view of the fact that subject-wise posts of Professor’s cadre are very few in number reservation scheme can hardly be implemented. In one post of a Professor there cannot be any reservation². So cadre-based reservation in the posts of Professors is a kind of attempted reconciliation with the ground problem and legal problem. But the Supreme Court in varma’s case has not considered by ground problem at all.
Natural Justice to Newly Appointed Teachers when Employment Notice is valid in Law?

The Court in Verma’s case decided that when the notice is valid in law there would be no requirement for natural justice principle in terminating the services of the wrongly recruited teachers. The earlier decision in this regard was that, in Baakare’s case which held the cadre-wise reservation to be valid and justified. Now that the present law under Verma’s case decided in the Supreme Court was that reservation should be post and subject-wise to be notified in the employment notice itself, what shall happen to the appointments made till this decision was reported but which was in conformity with the earlier interpretation? The Supreme Court held that:

“When the court decides that the interpretation of a particular provision as given earlier was not legal, it in effect declares that the laws as it stood from the beginning was as per decision, and that it was never the law otherwise”

This seems to be creating administrative problems to the extent of paralyzing the teaching process in the University if the teachers appointed in between these two case decision have to lose their job on the ground of appointments becoming ‘void ab initio’ because the employment notice has been found to be void in law. The court held the decision of terminating the services of teachers to be justified.

Employment contract is based on the letter of appointment which happens to be the offer, and acceptance is made by the person who gets the offer letter. A question may, therefore, be raised as to whether an information void in law in the employment notice can challenge the whole contract of service. If, of course, offer is itself unlawful or void in law, the service agreement becomes void ab initio. University authorities may be in a dilemma. If they make reservation against specific post in a subject they are likely to get no response at least in some subjects if not in most areas. If reservation is made on the basis of cadre, the notification itself becomes bad in law. In both the cases, students are the sufferers. Hence, there is sufficient scope for rethinking about the whole affair and making a practical adjustment so that reserved categories may be benefited as well as students do not suffer on account of delay in appointment of teachers.¹

**Summary:**

Under Article 15 (4) reservations are provided in Educational institutions for Scheduled Castes, Scheduled Tribes and Backward Classes. The decision of the Supreme Court in Champakam led to the first amendment of the constitution in 1951. The first amendment incorporated clause (4) to Article 15 empowering the State to make special provisions for socially and educationally backward classes of the citizens. In this first part, the role of the Judiciary is analysed and visualised with the help of decided cases of the High Courts and the Supreme Court. The role of the court in deciding the

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The constitutional validity of affirmative action is important for the reason that the reservation for Scheduled Castes and Scheduled Tribes and Backward Classes has been shaped by the court in the various aspects of affirmative action for weaker sections. The constitutional validity of the affirmative action was analysed under different headings while discussing the cases. Mainly the components backward classes criteria to decide the backwardness, duration of reservation, also quantum of reservation and finally the Supreme Court's guidelines to determine the socially and educationally backward classes of people have been elaborately discussed. Some of the leading decisions of the Supreme Court and High Courts are discussed. For example, a few landmark decisions like Balaji, Chitralekha, Rajendran, Sagar Periakaruppan, Balaraman, Trilokinath Tikku, K.S. Jayasree, K.C. Vasanthakumar and Narayana Rao, and Mohini Jain have been discussed on various aspects of reservation policies to determine the criteria for reservations in favour of Scheduled Castes, Scheduled Tribes and Backward Classes.¹

Under Article 16(4) reservations are provided in employment for scheduled castes, scheduled tribes and backward classes. In this chapter the role of the court in deciding the constitutional validity of reservation policy is very important for the reason that the reservation for scheduled castes, scheduled tribes and backward classes has been shaped by the Judiciary in the

¹ Indian Express, October 22, 1992, P.9,
various aspects of policy of reservations for scheduled castes, scheduled tribes and backward classes

The constitutional validity of the reservation policy has been discussed under various sub-headings while discussing the cases. Mainly, the components of the backward classes criteria to decide the backwardness whether social backwardness is criteria or educational backwardness or both or economic backwardness, also duration for reservations and percentage of reservations, finally the highest court’s guidelines to determine the backwardness have been discussed elaborately.

The landmark Judgments of Balaji Devadasan, Rangachari, Trilokinath, Rajendran, Thomas, Vasanthakumar and finally Narayana Rao have been elaborately discussed on various aspects of protective discrimination. The difference between the protective discrimination and compensatory discrimination has been mainly focused in Thomas case and it has been elaborately discussed. Finally in Vasantha Kumar the Supreme Court of India has laid down the guidelines to determine the social and educational backwardness of backward classes. This guidelines had been followed by Narayana Rao in 1987. Finally Chakradhar Paswan has been Briefly discussed and sureshchandra vema has been discussed elaborately.