CHAPTER - 5

LIMITS OF RESERVATION

5.1. EXTENT OF RESERVATION

The minority needs protection but up to what extent? There is no indication in the Constitution that the state need reserve any minimum number of post in government service or seats in educational institutions; or divert any minimum part of its resources to benefit. Preferences are not mandatory but only permitted. In absence of any specific limits on the extent of reservation under the Constitution, various Governments have been resorting to implement reservation in educational institutions and governmental jobs to the maximum possible extents.

The claimants of reservation under the Constitution the three categories, the Scheduled caste, the Scheduled Tribes and the Backward Classes, constitute 74.5% of the total population of India; their percentage being 15%, 7.5% and 52% respectively. At present the Scheduled Castes are given 15 percent seats in the total number of vacancies on account of their 15 percent population. The Scheduled Tribes are given 7.5% seat and the backward classes’ (OBC) are given 27% reservation.

588 Marc Galanter “Protective Discrimination for Backward Classes in India, J I L I 1961 p.44.


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Apart from this, the central Government has made a reservation of seats to the tune of 27% for Socially and Educationally Backward Classes in Central Educational Institutions. The seats secured on merit by any number of persons belonging to the protected groups are not calculated with reserved seats, rather excluded and counted with general seats. Less than 50 percent of reservation of seats in services and educational institutions has been permitted by the decision of the Supreme Court. It should not exceed that limit and how far less that would depend upon the relevant prevailing circumstance in each case. The same had been the reason for striking down “carry forward” rule so as to consider each year of recruitment as a distinct unit for applying the below 50% rule. However, the decision on the part of some states to accelerate the ratio or percentage of reservation for backward classes in service under the state and educational institutions in contradiction to the limitation of below 50 percent has led to anti-reservation agitations. For example the government of Karnataka since 1977 has increased the quota from 32 percent to 40 % in addition to 18% already reserved for the SCs and STs. A new reservation policy reserving 68% of government jobs and seats in educational institutions was announced in October 1986 thus covering a population of 89% for purpose of reservation in educational institutions and 92% so far as job reservation is concerned. The governments of Bihar’s policy of 1978 reserving 26% of jobs for backward classes cover 47% of the total population of the state, apart from 24 % reserved for SCs and STs. Similarly the

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591 Central Government has passed the Central Educational Institutions (Reservation in Admission) Act, 2006. The 93rd Constitution Amendment introduced a new clause (5) in Article 15, which provides: “nothing in this Article or in sub clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision, by law for the advancement of any socially and educational backward classes of citizens or for the SC, or the ST in so far as such special provision relate to their admission to the educational institutes including private educational institutions whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of Article 30.

593 Ibid.
594 Ibid.
state of Tamil Nadu in February 1980 has raised the quota to 50% as against 31% besides 18% already reserved for the SCs and STs. In the end of 1983 in Gujarat 10% of reservation for backward classes was pushed up to 28% in addition to those reserved for other two categories. Apart from 14% for SCs and 6% for STs the Andhra Pradesh government’s decision in July 1986 has raised the reservation from 25% to 44% for backward classes.\footnote{Ibid.}

The limit of reservation policy is determined by, what is termed as, “the boundaries of the width of the power”. The width of the power envisages limitation in the form of ‘numerical benchmark’, that is, the ceiling – limit of below 50%, and the limitations that are somewhat abstract and conceptual in nature, and yet identifiable and measurable through “quantifiable data”. The latter limitations, called the “controlling factors”, include the compelling reason of social and educational backwardness’, exclusion of creamy layer’, inadequacy of representation’, and desirability of open competition and the overall administrative efficiency.\footnote{Virendra Kumar, \textit{Dynamics of Reservation Policy: Towards A More Inclusive Social Order}, 50 JLI (2008) p. 511.}

In \textit{M. R Balaji v. State of Mysore},\footnote{\textit{A I R} 1963 \textit{S C} 649.} the Supreme Court, by majority, held that speaking generally and in board sense’ a special provision of reservation should be less than 50%. How much less than 50% would, however, depend upon the relevant factors and prevailing circumstances in each case. The issue of laying down the outer limit arose in the context of the peculiar circumstance. In this case the state of Mysore issued an order that all communities except those of Brahmins would fall within the definition of \textit{Socially and Educationally Backward Classes} of citizens, Scheduled Castes and Scheduled Tribes, and that 75% of the seats in educational institutions were to be reserved for them. Holding that determining who are socially backward is undoubtedly very complex, as it involves the plethora of sociological, social and economic considerations, nevertheless reservation being a special measure,
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could exceed in no case beyond the outer limit of less that 50% of the total.\(^{598}\) While laying down this maximum extent, the court observed “a special provision contemplated by Article 15(4)…..must be within reasonable limit. The interests of weaker section of society which are first charge on the states and the centers have to be adjusted with the interests of the community a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, state reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad sense, a special provision should be less than 50\%.\(^{599}\)

In *T. Devadasan v. Union of India*,\(^{600}\) the Supreme Court read the *Balaji* below 50% rules as rigid one and applicable equally to reservation under Article 16(4). *Devadasan* involved a central scheme reserving post in favor of the scheduled caste and Scheduled Tribes for promotion from grade IV to grade III post in the central secretariat service. The government had applied the carry forward rule. Under which the unfilled reserved post were carried over to the three succeeding years. The result was that for the year in question 64.4 percent of the available vacancies were reserved in favor of the favoured groups. Proceeding from the notion that Article 15(4) and 16(4) are exception to the equality clauses the court struck down the carry forward rule as unconstitutional. The court held that reservation could not be used to destroy or nullify the ideal of equality of opportunity enshrined in Article 16(1). The overriding effect of causes (4) on clause (1) and (2) could only extend to the making of reasonable number of reservation of appointments and posts in certain circumstances, and the reasonable number is that which strike a reasonable balance between the claims of the backward classes and the claims of other employees as pointed out in *Balaji* case. The purpose of Article 16(4) was described by the court as

\(^{598}\) Ibid.


\(^{600}\) *A I R 1964 S C 179*.
ensuing equal opportunity for all citizens relating to employment and appointments to any official under the state. Article 16(1) was thus viewed by the court as ensuing uniform standards and protecting the claims of meritocracy and thus on every occasion for recruitment the state should see that all citizens are treated equally. The guarantee is to each individual citizens and therefore, every citizen who is seeking employment or appointment ----is entitled to be afforded an opportunity for seeking such employment or appointment.\(^{601}\) The court suggested the following formula for striking a balance between the competing claims.\(^{602}\) Where the objects of a rule is to make reasonable allowance for the backwardness of the member of class by reserving certain proportion of appointments for them what the state would in fact be doing would be to providing the members of the backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments. Reservation are confined to certain proportion of appointments, leaving a substantial number of post open for merit competition, then the requirement of equality will be met. A reservation of more than 50 percent would destroy equality. In the State of Kerala v. N. M Thomas,\(^{603}\) the Supreme Court made a remarkable shift from earlier precedents and declared that Article 16(4) is not an exception but is an elaboration of the equality principle contained in Article 16; and thus in appropriate cases the extent of reservation may be as high as eighty percent. This description heralded a new era in the field of reservation as it legitimized transcending the rule of 50% laid down in Balaji\(^{604}\) which it trivialized as mere rule of caution.

The consideration of administrative efficiency has been emphasized again by the Supreme Court in different cases. The court stated that reservation cannot be stretched beyond a particular limit,’ and in certain cases where expertise and skills are

\(^{601}\) T. Devadasan v. Union India, A I R 1964 S C 179

\(^{602}\) Ibid.

\(^{603}\) A I R 1976 S C 490

\(^{604}\) M. R Balaji v. State of Mysore, A I R 1963 S C 649
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of essence,’ merit alone must be the sole and decisive consideration and there would be no reservation in those cases.605

In A. B. S. K Sangh (Rly) v. Union of India,606 Chinnappa Reddy, J., expressed his view on the ceiling of reservation as follows: “there is no fixed ceiling to reservation or preferential treatment in favor of scheduled caste and Scheduled Tribes though generally reservation may not be far in excess of fifty percent. There is no rigidity about the fifty percent rule which is only a convenient guidance laid down by judges. Every case must be decided with reference to the present practical result yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future”.607 In R. K Sabarwal v. State of Punjab,608 the Supreme Court held that when percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the post shown at the reserve points are to be filled from amongst the member of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve categories candidates can compete for the non-reserve post their number cannot be added and taken into consideration for working out of percentage of reservation.609

For determining as to what extent reservation would be reasonable we must take into account two factors:- one its effect on the fundamental rights of the candidates of the general category under Article 15(1) and 16(1) and 16(2) of the Constitution and the other about its effect on merit and efficiency in administration. There can be no doubt that reservation adversely affect both and has to be tolerated to a reasonable extent as something necessary to compensate for injustice perpetrated by

606 A I R 1982 S C 298
607 Chinnappa Reddy, J., holds the majority opinion in this case.
608 A I R 1985 S C 1371
609 Ibid.
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society on the Scheduled Tribes as well as other backward classes in the past. In Janaki Prasad’s case, Supreme Court held that the protection given by special reservation must be balanced against the Constitutional rights of every citizen to demand equal opportunity. Moreover, where appointment or promotions to responsible public offices are made, greater circumspection would be required in making reservation for the benefit of any backward class because efficiency in public interest must always remain paramount.

Since every reservation under Article 16(4) claims a victim from the general category the power conferred by the said Article should be exercised sparingly with great care and caution only where others means of promoting the interest of certain weaker section of the society under Article 15(4) and Article 46 are not found sufficient. It is for this reason that Article 16(4) must be very strictly construed.

So far as reservation of seats in educational institutions is concerned, it seems it was not contemplated in the draft Constitution because clause (4) of Article 15 was not there in Article 9 of the draft Constitution which corresponds to Article 15. Moreover, clause (2) of Article 29 expressly lays down that no citizens shall be denied admission into any educational institutions maintained by the state or receiving aid out of the state funds on grounds only of religion, race, cast, language or any of them. Clause (4) of Article was introduced in the Constitution later by the First Constitution Amendment so that reservation of seats in educational institutions for socially and educationally backward classes as well as for the SCs / STs may be made.

611  A I R 1989  S C  48
613 Ibid note 638 at  13
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The second backward Classes Commission popularly known as Mandal Commission recommended and said that the Scheduled Castes and Scheduled Tribes constitute 22.5% of the country’s population. Accordingly a pro-rata reservation of 22.5% has been made for them in all service and public sector undertaking under the central government. In the state also, reservation for SCs and STs is directly proportional to their population in each state.  

The population of OBCs both Hindu and Non-Hindu is around 52% of the total population of India. Accordingly 52% of all posts under the central government should be reserved but this provision may go against the law laid down is a number of supreme court judgment wherein it has been held that the total quantum of reservation under Article 15(4) and 16(4) of the Constitution should be below 50%. In view of this the proposed reservation for OBCs would have to be pegged at a figure which when added to 22.5% for SCs and STs remain below 50%. In view of this legal constraint, the Commission is obliged to recommend a reservation of 27% only, even though their population is almost twice this figure.

In *Indra Sawhney v. Union of India*, the Supreme Court observed that clause (4) of Article 16 speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportional representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. It is therefore, not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant.

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615 Ibid.
616 *A I R 1993 SC 477.*
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Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits and what is more reasonable that to say that reservation under clause (4) not exceeds 50% of the appointments or posts, barring certain extra ordinary situations as explained here in after. From this point of view, the 27% reservation provided by the government in favor of backward classes is well within the reasonable limits. Together with reservation in favor of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. It need no emphasis to say that the principal aim of Article 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objectives. Clause (4) is a special provision- though not an exception to clauses (1). Both the provisions have to be harmonized keeping in mind the fact that both are but the treatment of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain section of society – should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out of every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being confined to a minority of seats.617

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extra ordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of condition peculiar to and characteristically to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In this connection it is well to remember that the reservation under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition field on the basis of their own

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617Referred in Indra Sawhney v. Union of India, A I R 1993 S C 477
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merit; they will not be counted against to quota reserved for Scheduled Castes’ they will be treated as open competition candidates.618

Though the draftsman of the Constitution visualized judicial review of the extent of reservation, the text of Article 16(4) itself supplies no opponent warrant for it, unless the word ‘reservation’ is construed to necessary imply a minority (less fifty percent) of posts – not merely a minority for any single backward group but for the aggregate of all backward groups. Some judicial control over the extent of reservations may be necessary to preserve their character as an exception and prevent government from creating it into a general principle of operation, but while a strict “percentage” limitation has the obvious advantage of definiteness, it is complicated but its connection with the question of whom the state may designate as backward. If the backward groups may be allowed reservations commensurate with their ratio in the population, would a similar limitation be placed on the total number who may be designated as backward? or if as has sometimes been the case some 90% of the population was designated as backward, may not the state commensurate number of posts.619

The extent of both reservations and benefits might be reviewed on the different ground – their conformity with the “equal protection” clauses of Article 14. This would amount to a rule of” reasonableness” which would free the courts from the arbitrariness of the “percentage” test. One can visualize “reasonable” reservations in evolving more than fifty percentages and abused involving less. Judicial control of the percentage of reservation cannot be separated from the review of standards for designated the backward. The quantum of preference is itself no indication of its legitimate constitutional use.620

618 Ibid.
620Ibid.
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In *Union of India v. Virpal Singh Chauhan*, the court held that the percentage of reservation has to be worked out in relation to the number of posts which from the cadre-strength and that the concept of vacancy has no relevance in operating the percentage of reservation. Honorable Dr. B.R Ambedkar said in the Constitute Assembly “of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many members of this house that every individuals who is qualified for a particular post should be free to apply for that, to sits for examination and to have his qualification tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly shared by a section of this house is that, if this principle is o be operative and it ought to be operative in their judgment to its fullest extent there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public service are concerned that is the second point of view we have. Then we have quite massive opinions which insist that although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said drafting Committee had to produce a formula which would reconcile their three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservation in favor of certain communities which have not so far had a proper look in so to say into the administration. If honorable members will bear these facts in mind the three principles, we had to reconcile they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of Article 10 of the Constitution.; they will find that the view of those who believe and hold that there shall be equality of opportunity, has seen embroiled in sub-clause (1) of Article 10. It is a generic principle at the same time as it said we had to reconcile this formula with the demand made by certain community that the administration which has now for historical reason been

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621 A I R 1996 S C 448

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controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public service. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity.622 Let me give an illustration supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 percent of the total posts under the state and only 30 percent are retained as the unreserved. Could anybody say that the reservation of 30 percent as open to general competition would be satisfactory from the point of view of giving effect to the first principle namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.623

5. II. RESERVATION POLICY AND EXCUSION OF CREAMY LAYER

The aim of civilized society should be to secure dignity to every individual. There can be no dignity without equality of status and opportunity. The democratic foundation is missing when equal opportunity to grow and give one's best to the society is denied to a sizable section of society. The goal enumerated in the preamble of the Constitution remains unattainable so long as the equality of opportunity is not ensured to all. The commitment of the founding fathers was to uplift our backward class brethren by giving them protective discrimination and ensuring their social

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justice. For this reservation has been given by the Central as well as state government to backward classes in public employment as well as in educational institutions. Founding fathers wanted to minimize inequalities in status and to provide facilities and opportunities not only among individuals but also among groups of people so that they may secure adequate means of livelihood and their education and economic interests are protected.

Some members of the designated backward classes are highly advanced socially as well as economically and educationally and they constitutes the forward section of that particular backward classes – as forward as any other forward class member – and that they are lapping up all the benefit of reservation meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. The Mandal Commission has pointed out 3743 castes as backward which are considered as other backward classes for giving the benefit of reservation. But the real agony is whether all the 3743 backward castes fulfill all the conditions of a backward class? Justice Kuldip Singh in his minority opinion has said Mandal has not done any survey to find out whether 3743 castes which according to him are backward classes under Article 16(4). He further said that hardly any investigation was done by the Mandal Commission to find out the backward classes for the purpose of Article 16(4). A collection of so called backward castes by a clerical act based on drawing room investigation cannot be backward class under Article 16(4).

In K. C Vasant Kumar v. State of Karnataka, Chinnappa, J., observed “one must, however, enter a caveat to the criticism that the benefits of reservations are often snatched away by the top creamy layer of backward class or caste. That a few of

625 Indra Sawhney v. Union of India, A I R 1993 S C 477 at 558
626 A I R 1985 S C 1495.
the seats and post reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and post snatched away, in the same way, by the top creamy amongst them as the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be had if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved post by the top creamy layer of society itself is not bad?”

In *Indra Sawhney v. Union of India*, it was held that it is not the question of permissibility or desirability of means test but one of proper and more appropriate identification of a class -a backward class. The very concept of class denotes a number of persons having certain common traits which distinguishes them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially which in the context, necessarily means economically and may also mean educationally, the connecting thread between them and the remaining class snaps? They would be misfit in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, nearly lies in drawing the line – how and where to draw the line? For, while drawing the line it should be ensured that it does not result in taking away with one hand what is given by the others. The basic of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement.

The court further observed that the industrialization and the urbanization which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social

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627 *A I R 1993 S C 477.*
reform movement of the last several decades, the spread of education and the advantages of special provisions including reservation secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birth mark. It can further hardly be argued that once backward class, always a backward class. That would defeat the very purpose of the special provision made in the Constitution for the advancement of the backward classes and for enabling them to come to the level of and to compete with the forward classes, as equal citizens. On the other hand, to continue to confer upon such advanced section from the backward classes the special benefits, would amount to treating equals – unequally violating the equality provision of the Constitution. The object of special Constitutional provision is not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Hence taking out the forward from among the backward classes is not only permissible but obligatory under the Constitution. However, it is necessary to add that just as the backwardness of backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forward among the backward classes cannot be measured in terms of the backwardness of the backward section of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes. So long as the individuals belonging to the backward classes do not develop sufficient capacities of their own to compete with others, they can hardly be classified as forward. The moment, they develop the requisite capacities; they would cease to be backward. It will be a contradictory term to call them backward and others more or more backwards. There will always be degree of backwardness as there will always be degree of forwardness, whatever the structure of society. It is not degree of backwardness or forwardness which justifies classification of the society into forward and backward classes. It is the capacity or the lack of it to compete with others on equal terms which merits such classification. The remedy therefore, does


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not lie in classifying each backward class internally into backward and more backward, but in taking the forward from out of the backward classes’ altogether.\textsuperscript{628}

The court further held that while the income of person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of designated backward classes becomes a member of I.A.S or I.P.S or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children get full opportunity to realize their potential. They are in no way handicapped in the race of life. By giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.\textsuperscript{629}

 Keeping in mind all these considerations, the court directed the government of India to specify the basis of exclusion - whether on the basis of income, extent of holding or otherwise of ‘creamy layer’. One such specification person falling within the net of exclusionary rule shall cease to be the members of the other backward classes for the purpose of Article 16(4).\textsuperscript{630}

The creamy layer concept was introduced in Indra Sawhney case.\textsuperscript{631} The court observed that the protective discrimination in the shape of job reservations has to be programmed in such a manner that the most deserving section of the backward class is benefited. Means test ensures such a result. The process of identifying backward class cannot be perfected to the extent that every member of the said class is equally backward. There are bound to be disparities in the class itself. Some of the members of the class may have individually crossed the barriers of backwardness but while

\textsuperscript{628} Indra Sawhney v. Union of India, A I R 1993 S C 477

\textsuperscript{629} Ibid.

\textsuperscript{630} Indra Sawhney v. Union of India, A I R 1993 S C 477 at 486.

\textsuperscript{631} Ibid.
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identifying the class they may have come within the collectivity, it is often seen that comparatively rich person in the backward class though they may not have acquired any higher level of education are able to move in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practiced on them by the superior class is in turn practiced by the affluent members of the backward class on the poorer members of the said class. The benefits of special privileges like job reservation are mostly chewed up by the richer or more affluent section of the backward class and the poorer and the really backward section among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniformed. The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the state – services. It is therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservation is necessary to benefit the needy section of the class. In Janaki Prasad Parimoo v. State of Jammu and Kashmir⁶³², it was held that in identifying backward classes therefore, one has to guard oneself against including there in section which is socially and educationally advanced because the whole object of reservation would otherwise be frustrated. In this connection it must also be remembered that state resource are not unlimited and further the protection given by special reservation must be balanced against the Constitutional right of every citizen to demand equal opportunity.

5. III. DETERMINATION OF CREAMY LAYER CLASS

⁶³² AIR 1973 S C 930
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In pursuance of the Mandal case, the Union of India in 1993 issued an Office Memorandum which stated that children of officers belonging to I A S, I F S, I P S and All India First Class Service and are those whose annual income exceeded Rs. 1 lakh per annum among the OBCs – be identified as falling under “creamy layer” for being excluded from the benefit of reservation meant for OBCs. State of Kerela could not evolve a suitable mechanism for identifying creamy layer. It was seeking extension of time periodically. Then the Apex Court issued suo motu contempt notice to the state and its chief secretary. During the pendency of the contempt proceedings, a state legislature committee went into issue of creamy layer. It reported that the some OBCs were not adequately represented in the service of the state. Later the state enacted the impugned 1995 Act declaring that there was no socially advanced person among the OBCs in the state. Apex court directed the construction of K. J Joseph Committee to identify the creamy layer among the OBCs. The Committee identified the creamy layer and frame some guidelines to exclude them. The annual income of a person belonging to OBC was raised to Rs. 1.5 lakh for this purpose. The Bench said that till the state appointed a commission to identify the “creamy layer” all the appointment in the service of the state government including the PSUs and cooperatives would be on the basis of guidelines of the Joseph Committee Report. Justice Jagannadharao said “whether creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely that will be a breach not only of Article 14 but of the basic structure of the constitutions”.

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


634 Ibid at 144.
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creamy layer among the SEBC for excluding it from the list of Mandal Beneficiaries. The Committee report states that only when the creamy layer is substantially and stably formed after crossing the limits of social backwardness, then and then alone can its be made the basis for disentitlement. Those are as follows.

1. Certain Constitutional posts qualify for the rule of exclusion e.g., posts of President, Vice-President, Judges of the Supreme Court and High Court, Chairman and Members of UPSC and State PSC, Chief Election Commissions, Controller and Auditor General of India, Governors, Ministers and Members of Legislatures.

2. The rule of exclusion covers Class I Officers of Central and State Service (direct recruitments) Public Forces, Professional Class including trades, business and industry and property owners.

3. It excludes those having gross annual income of Rupees One lakh and above.

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

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

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


636 Ibid.
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Group – B class II (direct recruitment)

The report says –

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

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

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

4. The above service categories criteria also applies to officer holding equivalent or comparable post in public sector undertaking, banks, insurance organization, universities and also equivalent or comparable posts and position under private investment.

5. As regards armed forces including Para Military Forces (not person holding civil post) the exclusion rule would apply at the level of Colonel and above in the army and to equivalent post in the Navy and Air Force and Para Military forces.

If the wife of an armed forces officer is herself in the armed force the Rule of exclusion would apply, only when she herself has reached the rank of colonel, the service ranks below colonel of husband and wife shall not be clubbed together. Even
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if the wife of an officer in the armed forces is in civil employment this will not be a ground for applying the rule of exclusion unless she falls in the service category.

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

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

   In the case of member of a family owning both irrigated and un irrigated lands, the exclusion rule would apply where the precondition exist that the irrigated area is 40% or more of statutory ceiling limit for irrigated land.

   However, the exclusion rule on the basis of land holding will not apply to the states of Nagaland, Mizoram, Meghalaya, Arunachal Pradesh and Goa and in the Union Territory of Andman and Nicobar Island, Lakshdweep, Daman and Diw where there is no ceiling law.

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

   In Ashok Kumar Thakur v. State of Bihar, the Supreme Court upholding the decision in Indra Sawhney case where the court held that a person belonging to a

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637 AIR 1996 SC 75
638 AIR 1993 SC 477
backward class, who becomes member of IAS, IPS or any other All India Service, his children cannot avail the benefit of reservation. The states of Bihar and Uttar Pradesh have added further condition such as salary or rupees ten thousand or more per men sum, the wife or husband to be graduate and one of them owning a house in a urban area. So far as the professional are concerned, an income of Rs. 10 lakhs per annum has been fixed as the criteria. It is further provided that the wife or husband is at least graduate and the family owns immovable property of the value of at least rupees twenty lakhs. Similarly, the criteria regarding trades, industrialist, agriculturist and other is wholly arbitrary apart from being contrary to the guidelines laid down by Supreme Court in *Mandal case*. The court further held that the protective discrimination in the shape of job reservations under Article 16(4) has to be programmed in such a manner that the most deserving section of the backward class in benefited means test by which “creamy layer” is excluded ensure such result. The process of identifying backward class cannot be perfected to the extent that every member is bound to be disparities in the class itself.

Some of the members of the class may have individually crossed the barriers of backwardness but while identifying the class they may have come within the collectivity. It is often seen that comparatively rich person in the backward class are able to more in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practiced on them by higher class is in turn practiced by the affluent members of the backward class on the poorer member of the same class. The benefits of social privileges like job reservation are mostly chewed by the either or more affluent section of the backward class and the poorer and the really backward section among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniform. The job are so very few in comparison to the population of the backward classes that it is difficult to give them adequate reservation in the state service it is therefore necessary that the benefit of reservation must reach the poorer and the weaker section of the backward class. Economic ceiling to cut off the
backward class for the purpose of job reservation is necessary to benefit the needy section of the class. The means test is, therefore imperative to skim off the affluent section of the backward class.

Justice P. B. Sawant in *Indra Sawhney v Union of India*\(^{639}\) said ‘the correct criterion for judging the forwardness of the forward among the backward classes is to measure their capacity not in terms of the capacity of other in their class, but in term of the capacity of the members of the forward classes as stated earlier. If they should be taken out from backward classes and should be made disentitled to the provision meant for the said classes. It is necessary to highlight another allied aspect of the issue, in this connection who do we mean by sufficient capacity to complete with others: is it the capacity to compete class IV or class III or higher class posts. Class IV employees children may develop capacity to complete for class III posts and in that sense, he and his children may be not secured even to those in his class who have not secured even class IV posts it cannot, however, be argued that on that account he has reached the creamy level. If the adequacy of reservation in the services is to be evaluated in terms of qualification and not mere quantitative representation, which means representation in the higher rung of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward section reaches that level or at least near that level’\(^{640}\)

R. M Sahai, J.,\(^{641}\) held that the exclusion of creamy layer is a social purpose. Any legislation or exclusive action to remove such person individually or collectively cannot be constitutionally invalid. The learned judge elaborated his conclusion as under “More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problems. The collectivity or the group may be backward class but the individuals from the class may have

\(^{639}\) A I R 1993 S C 477.

\(^{640}\) Ibid.

\(^{641}\) Ibid.
achieved the social status or economic affluence disentitle them from claiming reservation, therefore while reservation for backward classes, the department should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limits can be determined by the appropriate state. Income apart, provision should be made that wards of those backward classes of person who have achieved a particular status in society either political or social or economic or if their parents are in higher service then such individuals should be precluded to avoid monopolization of the service reserved for backward classes by a few. Creamy layer, thus shall stand eliminated”

In *Ashok Kumar Thakur v State of Bihar*, the Supreme Court, finally after examining the criteria for identifying the creamy layer as laid down in Mandal case, came to the conclusion. and approved the rule of exclusion framed by the government of India.

In *Ashok Kumar Thakur v. Union of India*, the Court held that when socially and educationally backward classes are determined by giving importance to caste, it shall not be forgotten that a segment of that caste is economically advanced and they do not require the protection of reservation. Determination of backward class cannot be exclusively based on caste. Poverty, social backwardness, economic backwardness, all are criteria for determine action of backwardness. It has been noticed in Indra Sawhney case that among the backward class, a section of the backward class is a member of the affluent section of society. They do not deserve any sort of reservation for further progress in life. They are socially and educationally advanced enough to compete for the general seats along with other candidates.

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642 A I R 1996 S C 74

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The Court further held that it ought to be understood that creamy layer principle is introduced merely to exclude a section of particular caste on the ground that they are economically advanced or educationally forward. They are excluded because unless this segment of caste is excluded for that caste group, there cannot be proper identification of the backward class. If the creamy layer principle is not applied it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC for the purpose of either Articles 15 (4), 15 (5), or 16 (4) solely on the basis of caste is expressly prohibited by various decision of this court and it is also against Article 15 (1) and Article 16 (1) of the Constitution to fulfill the condition and to find out truly what is socially and educationally backward class, the exclusion of creamy layer is essential. It may be noted that the creamy layer principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining SEBC is poverty. If that be so, the principle of exclusion of creamy layer is necessary.

The court further held that same principle of determining the creamy layer for providing 27% reservation for backward classes for appointment need not be strictly followed in case of reservation envisaged under Article 15(5) of the constitution. The government can make a relaxation to some extent so that sufficient number of candidate may be available for the purpose of filling up the 27% reservation. It is for the union government to issue appropriate guidelines to identify the creamy layer, so that SEBC are properly determined in endurance with the guidelines given by this court. In this case it was categorically held that the creamy layer principle cannot be applied to STs and SCs as SCs and STs are separate classes by themselves. Ray,

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644 Ibid.
645 Ibid.
646 Ashok Kumar Thakur v. Union of India. (2008) 6 SCC 1 at 512.
**Limits of Reservation**

C. J., stated that scheduled caste and Scheduled Tribes are not a caste within the ordinary meaning of caste.\(^{647}\)

The process of chronic development and the spread of education have resulted in narrowing the gap between the classes considerably. As larger percentages of backward class member attain acceptable standards of education and employment, they should be narrowed from the backward classification, so that attention is given to those classes that genuinely need help. It would be a useful exercise to review the classification of backward classes once again and also check whether the criteria used for classification of backwardness is relevant for today’s conditions. If this is not done, it will provide the backward classes incentive to remain backward, because in the knowledge that, with relatively little effort and qualification the government still guarantee them adequate educational and employment opportunities. A periodical re-examination of the classification of backwardness and a progressive reduction of reservation percentage, couple with expansion of educational facilities is the policy that will suit the country best in the long term. Governments may be reluctant to reduce reservation or attempt a reclassification because of their tremendous political implications, but it would be consistent with the principle behind helping the genuinely needy only. Therefore, the creamy layer should be excluded not only among the other backward classes but also from the scheduled caste and Scheduled Tribes.

5. IV. **DURATION OF RESERVATION**

The ultimate objects of the Constitution makers was to establish a casteless society by gradually eliminating caste hierarchy, caste distinction and caste stigma and thus to ensure the dignity of the individual and equality of status among all the citizens on India. Special provision for Scheduled Castes and Scheduled Tribes as

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\(^{647}\) Ibid.
Limits of Reservation

well as backward classes were introduced as a temporary measure to raise them to the status of an average enlightened citizen of India whose dignity and status depend on being an Indian and not on his belonging to this caste or that or any other subdivision of society of this nature. Once all distinction or high and low depending on race, caste or religion etc., disappear the special provision for reservation etc. would no longer be necessary. The state is specifically directed to make special provision by law for the advancement of any socially and educationally backward classes of citizens or for the scheduled caste or the Scheduled Tribes. This is the common command under clauses (4) and the newly inserted clause (5) of Article 15. The meaning if this mandate for making ‘special provision’ is clear and specific: it is for the advancement of those who have been identified as backward for fructifying this objective, it is incumbent upon the state to go on reviewing periodically whether or not the special provision of reservation in yielding the desired result such as periodic review would provide as opportunity to the state are to rectify distortions arising out particular facts of the reservation policy, two, to exclude the beneficiaries of reservation who have ceased to be backward and instead of them (on their exclusion) pass on the benefits of reservation to the next incumbents from the backward class. There is yet a third related benefit of the periodical review it would afford an opportunity “to the people both backward and non-backward, to ventilated their views in a public debate on the practical impact of the policy of reservation”

Regarding the period of operation of the Commission’s recommendations, the entire scheme should be reviewed after twenty years. We have advisedly suggested this span of one generation as the raising of social consciousness is a generational progress. Any review at shorter interval would be rather arbitration and will not give fair indication of the impact of our recommendations on the prevailed status and lifestyles of OBCS.

648 S. M. N Raina. Reservation with Justice, III, 1990 C I L Q , p. 10
650 Mandal Commission Repart, Chapter XIII para 13.40
The reservation of seats for SC and ST in the House of the People and Legislative Assemblies of the states; was to continue only for 10 years from the commencement of the Constitution under Article 334. This means the Constitution makers expected that with the aid of the provision made for the benefit of backward class in consonance with the demands of social justice, a casteless society would be established within a period of 10 years and therefore, there would be no need for reservation at all. It is true that for the reservation under clause (4) of art. 16 no time limit was prescribed but it is obvious that once the stage is reached when the reservation of the seats in lok sabha and the legislative assemblies of the state become unnecessary there could be no need for reservation under clauses (4) of Article 16. The aforesaid time has been extended from time to time by constitutional amendment in almost a routine manner and now it extends to 50 years. As pointed out above reservation under clause (4) of art. 16 is the only provision in the Constitution which while prompting the interest of the community causes grave hurt to another community and therefore, this power must now be excised very sparingly by the government of the nation.

Article 16(4) of the Constitution is not intended to perpetuate reservations for all times to come and it is not to be interpreted in such a way as to negate the essential sense of the principal clause 16(1). Chapter IV – A on Fundamental Duties speaks of a fundamental duties to cherish and follow the noble ideas which inspired national unity, and struggle for freedom to uphold and protect the sovereignty and integrity of India, to promote harmony and spirit of common brotherhood amongst all people of India, irrespective of religion and to strive towards excellence in all spheres of individuals and collectivities so that nation rise to higher standard and achievement. Dr. Ambedkar was not in favor of reservation in perpetuity and he was in favour of it only for a limited period of ten years or so. His speech in the Constitution Assemble is worth quoting. He said supposing we were to concede in full the demand of these communities, who have not so far been employed in the public services to the fullest

651 S. M. N Raina. *Radical Approach to the Questian of Reservation*; (III) 1990 C I L Q p. 418
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extent, what would really happen is that we shall be completely destroying the first proposition upon which we are all agreed namely that there shall be equality of opportunity. Let me give an illustration, supposing reservations were made for community or collection of a community to total of which comes something like 70% of the total post under the state and only 30% are retained as un-reserved, could anybody say that reservation of 30% as open to general competition would be satisfactory from the point of view of giving effect to the first principle namely that there shall be equality of opportunity.652

Nobody would oppose giving of benefits to the deprived and the poor but as soon as they are brought to the level of standard where a take off stage is essential and only competition will help in that take off stage and bringing them into the mainstream of national life, the remedy is not extreme reservation but reasonable moderate benefits on the rational economic criteria.653 In Jagdish Negi v State of U. P.654 the Supreme Court held that the statutory scheme of reservation of 27% for socially and educationally backward classes of citizens may continue indefinitely till the reservation Act continues to operate. Still a given category of citizens which may form a part and parcel of that class of citizen, namely socially and educationally backward classes of citizens as on date may in future case to belong to that class. Consequently the question whether a given category of citizen at a given point of time or not has to be left to the state concerned for its objectives decision from time to time. The state cannot be bound in perpetuity to treat such classes of citizens for all times as socially and educationally backward classes of citizens. The principles on once a mortgage always mortgage’ cannot be pressed in service for submitting that once a backward class of citizens, always such a backward class. In other words it is open to the state to review the situation from time to time and to decide whether a


653 Ibid.

654 A I R 1997 S C 3505
**Limits of Reservation**

given class of citizens that has earned the benefits of 27% reservation as socially and educationally backward class of citizen has continued to form a part of that category or has ceased to fall in that category.

In *Indra Sawhney v. Union of India*, the court held that no period for reservation has been provided but every state must keep an evaluating periodically if it was necessary to continue reservation, and for whom.

### 5. V. RESERVATION IN CASE OF SINGLE POST

Reservation of the post in a single – post cadre amounts to 100% reservation in the cadre, while keeping it beyond the realm of reservation might render it almost inaccessible to reserved category of candidates. This dilemma of “to reserve or not to reserve” haunts the court as is evident from a conspectus of case law on this point. In *Arati Ray Cahudhary v. Union of India*, the Supreme Court has clearly held that the reservation for backward community should not be so excessive as to create a monopoly or to disturb unduly the legitimate claim of other communities. It has been specially indicated in the said decision that if there are two vacancies to be filled up in a particular year, not more than one vacancy can be treated as reserved. In this case the learned judges followed the earlier decision in *M.R Balaji case* that in no case reservation of seats beyond 50% could be made. In *Dr. Chakradhar Paswan v. State of Bihar*, Supreme Court pointed out that whenever there is one post in a cadre, there can be no reservation with reference to that post either for recruitment at initial stage or for felling up future vacancy in respect of that post. The court observed that no reservation could be made under Article 16(4) so as create a monopoly otherwise, it would render the guarantee of equal opportunity, it would render the guarantee of

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655 A I R 1993 S C 477 at 731
657 A I R 1974 S C 532
658 A I R 1988 S C 959

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equal opportunity contained in Article 16(1) and 16(2) wholly meaningless and illusory. A reservation, which would come under Article 16(4), presupposes the arability of at least more than one post in that cadre.

In *Indra Sawhney v. Union of India*,659 it has not been held that there can be reservation in a single cadre post. There is no dispute that a carry forward scheme, provided, it does not result in reservation beyond 50% is constitutionally valid but that does not mean that by the device of carry forward scheme, 100% reservation on some occasion can be made even when the post is only a single cadre post. In *Chetana Dilip Motghare v. Bhide Girls Education Society, Nagpur*,660 where the Supreme Court upheld its earlier decision taken in the case of *Chakradhar Paswan*, where it was held that single isolated post cannot be reserved. In the present case Supreme Court held that the principle of reservation would not apply in the case of an isolated post and the decision of *Chakradhar Paswan* holds the fields.

In *Union of India v. Madhav*,661 a 3-judges bench of the Supreme Court held that reservation in a single post neither violates Article 16 nor contravenes the mandatory 50% rule if the rule of rotation and roster is applied strictly to such post. Extension of reservation in such case, the court pointed out, is not unconstitutional. The court here overruled its earlier decision in *Chetra Dilip Motghare* wherein such reservation had been held as unconstitutional, however it prefer to follow its earlier decision in *A. R Chaudhary*,662 *Merry C S Rao v. Dean, Seth G. S Medical College*,663 7, and *State of Bihar v. Bageshwari Prasad*. The Madhava judgement was followed in numerous cases involving the impugned reservation in initial appointments or even in promotion. In *Dina Nath Shukla case*,664 the court held that single post of professor / reader / lecturer in various faculties / departments / speciality, which cannot be reserved due to the bar of 50% should be clubbed together and roster should be applied thereto subject to the rule of rotation. This ruling was followed in *P G I of

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659 A I R 1993 S C 477  
660 A I R 1994 S C 1917  
661 A I R 1997 S C 3074  
662 A I R 1974 S C 532  
663 (1990) 3 S C C 130  
664 A I R 1997 S C 1095
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*Medical Education & Research v. K. L Narasimhan*, where it was reiterated that single – cadre post carrying same scale of pay or grade can be clubbed together for applying roster thereon. On promotion the Supreme Court in *Suresh Chandra v J. B Agarwal*, held that in case of solitary isolated post on the basis of the rule of rotation, the benefits and facilities should be extended to the reserved candidates. Namely, Scheduled Castes and Scheduled Tribes for appointment by promotion to the single post and, therefore application of the rule of reservation is not unconstitutional.

In *Union of India v. Brij lal Thakur*, it was held that even though there is a single post, if the government have applied the rule of rotation and roster point to the vacancies that had arisen in the single point post and where sought to be filled up by the candidate belonging to the reserved categories at the point on which they were eligible to be considered, such a rule is not violative of Article 14 and 16(1) of the Constitution. In *State of Punjab v. G.S Gill*, it was held that it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and constitutional.

In *Ashok Kumar Gupta v. State of U.P*, the Supreme Court followed *Madhav’s* case and held that reservation provided to single post on the basis of rule of rotation is not unconstitutional. It is clearly, therefore an error to hold that reservation in promotion to a single post and application of carry forward rule and of roster is unconstitutional.

The ongoing controversy was finally abated by the court’s 5 judges Constitutions Bench in *Post Graduate Institutes of Medical Education and Research, Chandigarh v. Faculty Association*, the decision of *Madhav’s* case was withdrawn by the same court. The court observed that, where there is a single post cadre, the same can not be reserved neither directly nor by device of Rotation of roster points.

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665 A I R 1997 S C 2487  
666 A I R 1997 S C 2101  
667 A I R 1997 S C 2324  
668 (1997) 5 S C C 201  
669 A I R 1998 S C 1767
Limits of Reservation

The reason given by the court that, if reservation is made to a single cadre through a device of rotation of roster points to the exclusion of the general members of the public, it would amount to 100% reservation which is not permissible within the constitutional framework. Besides, it also held that till there is plurality of posts in a cadre, the question of reservation will not arise. This decision cannot be fully appreciated as it excludes the members of Scheduled Castes and Scheduled Tribes from claiming reservation where there is a single post in a cadre.

5. VI. RESERVATION IN PROMOTION

It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stages of promotion, it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion the member of a reserved category is enabled to frog leap over his compatriots, which is bound to generate acute heart burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance the members of reserved categories would steal a march over them, irrespective of their performance and competence. Example are given how two person (A) & (B) are belonging to O.C category and other belonging to reserve category have been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over, the members of the O. C category already there and gains further promotion and so on. This would generate, it is submitted a feeling of heartening which kill the sprit of competition and develops a sense of disinterestedness among the members of O.C category. It is pointed out that once person coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotion and that no distinction is permissible on the basis of their “birth mark”. It is also pointed out that even the
constituent assembly debates an draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well.\textsuperscript{670}

It is further submitted that if Article 16(4) is construed as warranting reservation even in the matters of promotion it would be contrary to the Mandate of Article 335 viz. maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon in-efficiency. The members of the reserved category would not work hard since they do not have to complete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (J) of Article 51A.\textsuperscript{671}

The qualitative benefit along with the quantitative has been judicially well accepted now with emphasis on the constitutional requirement of due regard to efficiency. Promotion to higher posts contributes to elevating the image of the socially low rated class, serving as a modern catalyst to sanskritization. Reservation for promotions has a rough side also. These not only sub ordinate the element of efficiency to instant advantage, they also adversely affect the legally vested promotional opportunities of those in the line. While the legal validity of reservation for promotion is no more an issue, suggest a more rational policy should eschew over enthusiasm and lay greater stress on efficiency.\textsuperscript{672}

In \textit{General Manager, Southern Railway v. Rangachari},\textsuperscript{673} the validity of the circular issued by the Railway administration providing for reservation in favor of scheduled caste / schedule tribes in promotion was questioned. The contention was that Article 16(4) does not take in or comprehend reservation in the matter of

\textsuperscript{670} Indra Sawhney v. Union of India, A I R 1993 S C 477 at 569-570
\textsuperscript{671} Ibid at 570
\textsuperscript{672} V. P Bharatiya. \textit{Egalitarian Differentiation for Job Reservation}, 33 J I L I (1991)
\textsuperscript{673} A I R 1962 S C 36
Limits of Reservation

promotion as well and that it is confined to direct recruitment only. The majority view expressed by Gajendragadkar, J., as follows:

A. Matter relating to employment (in clause (i)) must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and condition of such employment.

B. In regard to employment, like other term and condition associate with an incident to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantee is equality of opportunity to all citizens who enter service”.

C. The condition precedent for the exercise of the power conferred by art. 16(4) are that the state ought to be satisfied that any backward class of citizen is not adequately represented in its service. This condition precedent may refer either to the numerical inadequacy of representation in the service or even to the quantitative inadequacy of representation. The advancement of socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of service but that they should aspire to secure adequate representation in selection posts in the service as well in the context the expression ‘adequate represented’ imports consideration of “size” as well as “value”, number as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one”.

In *State of Punjab v. Hiralal*,674 validity of an order made by the government of Punjab providing for reservation in promotion, in addition to initial recruitment was questioned. The Supreme Court upheld the validity of the government order

674 A I R 1971 S C 1777
Limits of Reservation

following the Rangachari\textsuperscript{675} decision. In Ahkil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India,\textsuperscript{676} the validity of a number of circular issued by the Railway Administration was questioned. The experience gained over the year disclosed that reservation of appointments / posts in favor of SCs / STs, though made both at the stage of initial recruitment and promotion was not achieving the intended result in as much as several posts meant for them remained unfilled by them accordingly, the administration issued several circular from time to time extending further concession and other measures to ensure that members of these categories avail of the posts reserved for them fully. The circular contemplated (1) giving one grade higher to SC / St candidates than in assignable to an employee; (II) carrying forward vacancies for a period of three years; and (III) provision for in – service training and coaching to raise the level of efficiency of SC / ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petition was that these circular, being incises term with the mandate of Article 335 are bad. Rangachari was sought to be re-opened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The division bench (Krishna Iyer, Pathak and Chinnappa reddy, JJ. not only refused to re – open Rangachari but also repelled the attach upon the circulars. It was held that no dilution of efficiency in administration resulted from the implementation of the circular in as much as they preserved the criteria of eligibility and minimum efficiency required and also provided for in- service training and coaching to correct the deficiency if any.

In Comptroller and Auditor General v. K. S. Jagannathan,\textsuperscript{677} it was held that the reservation in favor of backward classes of citizen including the members of Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotion are to be made.

\textsuperscript{675} Ibid
\textsuperscript{676} A I R 1981 S C 2981
\textsuperscript{677} A I R 1987 S C 537.
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In *Indra Sawhney v. Union of India*, the nine judges bench did not agree with the decision of the Rangachari case, that Article 16(4) contemplates or permits reservation in promotion as well. The court held that it is true that the expression “appointment” takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizen. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwire and impermissible to make any reservation at the cost of efficiency of administration that undoubtedly is the effect of Article 335. Reservation of appointments or post may theoretically and conceivably means “some impairment for efficiency” but then its explain it away by saying but the risk involved in sacrificing efficiency of administration must always be borne in mind when any states sets about making a provision for reservation of appointments or post. The court further held that “we see no justification to multiply the risk which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizen at the stage of initial appointment, it would be serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of permanent separate category apart from the mainstream – a vertical division of the administrative apparatus. The member of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and heart burning among open competition members. All this is bound to affect the efficiency or administration putting the members of backward classes as a fast track would necessarily result in leapfrogging and the deleterious effect of leap-fogging need no illustration at our hands. At the initial stage of recruitment of

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678 *A I R 1993 S C 477* at 572
reservation can be made in favor of backward class of citizen but once they enter the
service, efficiency of administration demands that those members too compete with
others and earn promotion like all others; no further distraction can be made thereafter
with reference to their birth mark. They are expected to operate an equal footing with
others. Clutches cannot be provided throughout one’s carrier. That would not be in the
interest of efficiency of administration nor in the larger interest of the nation. It is
wrong to think that by holding so, we are confining the backward class of citizens to
the lowest cadres. It is well known fact that direct recruitment takes place at several
higher levels of class – IV and class – III. Direct recruitment is provided even at the
level of all India services

In Mohan Kumar Singhania v. Union of India, the court has taken a view
that once candidates even from reserved communities are allocated and appointment
to a service based on their ranks and performance and brought under the one and same
stream of category, then they too have to be treated at par with all other selected
candidates and there cannot be any question of preferential treatment at that stage on
the ground that they belong to reserved community though they may be entitled for all
other statutory benefits such as the relaxation of age, the reservation etc. reservation
referred to in that context is preferable to the reservation at the initial stage or the
entry point as could be gathered from the judgment.

Clause (4-A) of Article 16 was inserted by the Constitution (Seventy- Seventh
Amendment) Act, 1995 to overcome the decision in Mandal case that no reservation
in promotions could be made under clause (4). This clause does not affect that
decision as regards other backward classes but makes it inapplicable as regards the

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679 Indra Sawhney v Union of India, A I R 1993 S C 477 at 573


681 Ibid.
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Scheduled Castes and the Scheduled Tribes. Justifying promotion to the Scheduled Castes and scheduled tribe candidates in promotion, the court had at one point held that even their seniority acquired by promotion over the general class candidates shall not be affected by subsequent promotion of the general class candidates.

The said insertion of clause (4-A) to Article 16 was challenged in Ashok Kumar Gupta v State of U.P. as being unconstitutional. It has been held in that case that this policy of reservation is part of socio-economic justice contained in the preamble of the Constitution and the fundamental rights under Article, 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), 46 and 335 and other related Article to give effect to the above constitutional objective. Thus the contention made in that case were rejected.

In Union of India v. Virpal Singh Chauhan, it was held that if a scheduled caste / scheduled tribe candidate is promoted earlier by virtue of rule of reservation / roster than his senior general candidate and the regains his seniority over such earlier promoted scheduled caste / Scheduled Tribes candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category. In Ajit Singh Jamuja v. State of Punjab, it was held that the members of the scheduled caste or backward class who have been appointment / promoted on basis of the policy of reservation and system of roster cannot claim promotion against general category posts in the higher grade, on basis of their seniority in the lower grade having been achieved because of the accelerated promotion or appointment by applying the roster. The equality principle requires

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684 (1997) 5 S C C 201
686 (1995) 6 S C C 684
687 A I R 1996 S C 1189.
Limits of Reservation

exclusion of the factor of extra weightage of earlier promotion to a reserved category candidate because of reservation alone when he compete for further promotion to a general category candidate senior to their in the panel.

The Apex Court held that employment includes promotion. It also stated that Article 16(1) provides to every employees otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be considered for promotion. Equal opportunity means the right to be considered for promotion, if a person satisfies the eligibility and zone criteria but is not considered for promotion, and then there will be clear infraction of this fundamental right. The court also held that Article 16(4) and 16(4-A) do not confer any fundamental right and they were enabling provision only. Article 16(4), 16(4-A) confer a discretion but do not create any duty or obligation which could be enforced by issuing a writ of mandamus to provide reservation a relaxation under Article 32 and 226.688

In *Union of India v. Brij lal Thakur*,689 the court held that appointment by promotion to the single post applying 40 percent and rule of rotation is not violative of Article 14 and 16(1) of the Constitution. In *Superintending Engineer, Public Health U T Chandigarh v. Kuldeep Singh*,690 the Government of India, Ministry of Home Affairs admittedly, by letter dates June 12,1986 had given direction that since in the Union Territory of Chandigarh, the population of Scheduled Tribes is not available, the principle of alternative exchange to the scheduled caste should be adopted. Consequently, when vacancy no. 1 in the roster is available to the Scheduled Tribes, it requires to be filled by considering caste. It is therefore, clear that though scheduled tribe candidate was not available to fill up the vacancy at no. 1 in the roster, the candidate belonging to the Scheduled Castes is required to be considered

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689 A I R 1997 S C 2101
690 A I R 1997 S C 2133
Limits of Reservation

according to the rules and given promotion on seniority cum fitness basis which is the rule under which the candidates are required to be considered. When eligible scheduled caste candidate was available for promotion he could not be denied the same on the specious ground that as per the carry forward rule the period of three years had expired. Thus promotion could not be given to a candidate from general category in preference to the eligible scheduled caste candidate. In *Suresh Chandra v J. B. Agarwal*,691 it was held that even though there is single post, if the government have applied the rule of rotation and the roster point to the vacancies that have arisen in the single point post and work sought to be filled up by the candidates belonging to the reserve categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the constitution692

In *Jagdish lal v State of Haryana*,693 it was held by the Supreme Court that equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities and opportunities for excellence in each cadre /grade. Where therefore, that is inequality, in fact, legal equality always tends to accentuate inequality. It is therefore necessary to take into account de facto inequalities which exist in the society and in order to bring about real equality, affirmative action fills the bill and allows to give preference to the socially and economically disadvantages person by inflicting handicaps as those more advantageously placed. Such affirmative action though apparently discriminatory, is calculated to produce equality in result on a broader basis by eliminating defects in equalities and placing the weaker section of the community on a footing of equality with the stronger and more powerful and disadvantages section so that each member of the community, whatever is by his birth, occupation or social position, may enjoy equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence. Protective discrimination envisaged in Article 16(4) and 16(4-A) is the armour to establish the said equilibrium between

691 *A I R 1997 S C  2487*

692 In *Suresh Chandra v J. B. Agarwal*, *A I R 1997 S C  2487*.  
693 *A I R 1997 S C 2366*
equality in law and equality in result as a fact to the disadvantages. The principle of reservation in promotion provides equality in result. Facilities and opportunities should therefore be given to the dalits and tribes for promotion to higher cadre or grade, gain accelerated seniority of the erstwhile general candidates in the lower cadre or grade in accordance with the roster point. Thereby, the dalits and tribes are getting an accelerate placement in the higher echelons of cadre or grade. It is constitutionally a permissible classification bearing reasonable nexus to the object of equality in result as component of economic and social empowerment. It is just a reasonable procedure prescribed to achieve the constitutional objectives of equality in result, of status and opportunity and dignity of person to integrate them in the mainstream of the national life.

In *State of Punjab v. G. S. Gill*, the Supreme Court while considering the question whether reservation in promotion to a single post is unconstitutional being violative of Article 16(1) and 14 of the constitution. After examining the fact and decision of the two cases namely, *Arati Ray, Chaudhary* and *Union of India v. Madhav* held that it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and constitutional. With a view to give adequate representation in public service to reserved category candidates, the opportunity given to them is not violative of Article 14 and 16(1) of the constitution. In case of *Post Graduate Institution of Medical Education and Research, Chandigarh v. Faculty Association*, it was held that there is no difficulty in appreciating that there is need for reservation for the members of the scheduled caste and Scheduled Tribes and other backwards classes and such reservation is not confined to the initial appointment in cadre but also to the appointment in promotional post. It cannot, however, be lost light of that in the anxiety for such reservation be brought by which the chance of appointment is completely taken away so far as the

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694 AIR 1997 S C 2324  
695 AIR 1974 S C 532  
696 (1997) 2 S C C 332  
697 AIR 1998 S C 1767.
**Limits of Reservation**

members of other segment of the society are concerned by making such single post cent percent reserved for the reserved categories to the exclusion of other members of the community even when such members is senior in service and is otherwise more meritorious.\(^{698}\) It was as further held that Article 14,15 and 16 including Article 16(4) and 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointment by creating reasonable opportunities for the reserved classes and also for the other members of community who do not belong to reserved classes\(^{699}\)

As regard promotion, it is absolutely necessary that it should be objective with due regard to merit and seniority. Merit thrives on recognition and fades out if ignored. If a civil servant is superseded by a junior officer ignoring merit and seniority he is bound to lose heart in his job due to frustration and will not have the incentive to put in his best if on the basis of reservation which is found necessary for compelling reason a promotion of a junior officer is made ignoring the merit and seniority of the officer senior to him its adverse effect on efficiency should be minimized by giving the officer superseded the same scale as that of the post to which the junior is promoted from the date of promotion. Further care must be taken to post the promoted officer in some other section or place so that the senior officers who are superseded should not be required to work under his junior\(^{700}\).

**5. VII. EMERGENCE OF RIGHT TO RESERVATION**

Reservation under Article 15 (4) and 16 (4) no doubt fall within part- III of the constitution comprising the fundamental rights. Every provision of part- III however does not confer a fundamental right. Some of the provisions of part III are just definitional: others are on the effect of the fundamental right on the existing and

\(^{698}\) Ibid.
\(^{699}\) Ibid.
**Limits of Reservation**

future laws. Still other provides for the enforcement and implementation of the fundamental rights while some others provides exceptions to the fundamental rights. Because of this variety of provisions, doubt persists whether Article 15(4) and 16(4) confer fundamental rights\textsuperscript{701}.

These is so much of suffering, discrimination and systematic exclusion of member of disadvantaged groups from valued reserves, opportunities and careers, that a theory of right may help them to fight existing in equalities. Despite its usefulness this theory seems illogical, unsound as well as unbalanced some may even consider it undesirable. With too much of participation of the reservation issue and political abuse of this device one has to move with great circumspection in acknowledging a right to reservation. One cannot overlook that Articles 15(4) and 16(4) have been placed under several limitations especially in respect of a firm evidence of clear and legitimate identification of the backward groups\textsuperscript{702}.

In *M.R. Balaji v State of Mysore*\textsuperscript{703}, the Court held that Article 15(4) authorises special provision to be made but if a provision which is in the nature of an exception completely excludes the rest of the society that clearly is outside to scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the constitution intended to provide that where the advancement of the backward classes or the Scheduled Castes and Scheduled Tribes was concerned the fundamental right of the citizens constituting the rest of the society were to be completely and absolutely ignored considerations of national interest and the interests of the community or society as a whole cannot be ignored is determining the question as to whether the special provisions contemplated by Article 15 (4) can be special provision which excludes the rest of the society altogether. Further the court held that like the special provision improperly made under Article 15(4), reservation made

\textsuperscript{701} Mahendra Pratap Singh, “Are Articles 15(4) and 16(4) Fundamental Rights?” (1994) 3 S C C (J) p. 33.

\textsuperscript{702} Ibid

\textsuperscript{703} A I R 1963 S C 649 at 31.
Limits of Reservation

under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the constitution. In this connection it is necessary to emphasis that Article 15(4) like Article 16(4) is an enabling provision: it does not impose or obligation but merely leaves it to the discretion of the appropriate Government to take suitable action if necessary.\textsuperscript{704}

In \textit{C.A. Rajendran v. Union of India}\textsuperscript{705}, the petitioner based his agreement on the minority opinion of Subba Rao J, in \textit{T. Devasasan v. Union of India}\textsuperscript{706} and cantoned that the provision contained in Article 16 (4) of the constitution was in itself a fundamental right of Scheduled Castes and Scheduled Tribes and it was not open to the Government to with draw the benefit conferred on s/c s/t by the Govt. orders. Rejecting this candidate the count held that the only matter which classes (4) of Article 16 covers is a provision for the reservation of appointing in favour of a backward class of citizens. It is well stilled that clause (4) of Article 16 is an exception classes and is not an independent provision and it has to be strictly construed it is also apparent that the language of Article 16(4) has to be interpreted in the context and background of Article 335 of the Constitution in other words, in making a provision for resumption of appointment or posts the Government has to take into consideration take into backward classes but also the maintenance of efficiency of administrator which is a matter of permanent importance. The court sited the majority opinion of Gajendra Gadvar. J., in general manager, southern railway v. Rangrchari\textsuperscript{707}, where he said “it is true that is providing for the reservation of appointments or pasts under Article 16 (4) the state has to tale into considerate the claims of the member of the backward classes consistently with the member of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that its efficiency of administration is of paramount importance that it would be uncase and impermissible to make bay reservation at the cost of efficiency of and ministration. It is also true that the

\begin{footnotesize}
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\item \textsuperscript{704} \textit{A I R 1963} S C 469.
\item \textsuperscript{705} \textit{A I R 1968} S C 507.
\item \textsuperscript{706} \textit{A I R 1964} S C 179.
\item \textsuperscript{707} \textit{A I R 1962} S C 36.
\end{itemize}
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reservation which can be made under clause 16(4) is interceded merely to give adequate representation to backward communities. It cannot be used to or eating monopolies or for unduly or illegitimately disturbing the legitimate interest of other employees. 708

The court ultimately held that Article 16(4) does not confer any right on the petition and there is no constitutional duty imposed on the Government to make reservation for Scheduled Castes and Scheduled Tribes either at the initial stage of recruitment or at the stage of promotion. In other word Article16(4) is an enabling provision and confers a discretions power on the state to make a reservation or appointments in favor a backward class of citizens where in its opinion is not adequately represented in the services of the state 709.

In P to T Scheduled Castes / tribes employees welfare association v. Union of India 710, the court refused to issue a writ against Government for providing reservation in posts or appointment in P and T. department. Here the petitioner prayed that a director should be issued to the government to issue specific orders conferring on thin such an extra advantage. The court held that the claim made in the petitioner is true but it may be true that no writ can be issued ordinarily compelling the Government to make reservation under Article 16 (4) which is only an enabling clause. Therefore the court used a direction to the Government of India to issue order on the behalf.

In State of Kerala v. N.M. Thomas 711, the court held that the power to make reservation, which is conferred and the state under Article 16 (4) can be exercised by the state in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of

708 Ibid
709 C.A. Rajendra case
710 (1998) 4 S C C 147
**Limits of Reservation**

appointment or posts under Article 16(4) the state has to take into consideration the claims of the backward classes consistently with the maintenance of the efficiency of administration. It must the not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make reservation at the cost of efficiency of administration.

The consequences of recognizing reservation as a fundamental right are also relevant. Once something which has so far been recognized as a matter of policy is acknowledged as a guaranteed fundamental right, each individual claim to secure the enforcement of such right will be subject only to judicial determination.

The right to affirmative action will thus open a flood gate for indeterminate uncertain and vacuous claims. It seems even the courts and not lively to responsive to such claims as a matter of enforceable right. It may be mentioned here that beginning from Balaji\(^{712}\) until the nine judge bench decision of the supreme court in Mandal\(^{713}\) Article 16(4) and 15(4) have been treated as enabling provisions.

In *Mohan Kumar Singania v. Union of India*\(^{714}\), the court held that the constitution, no doubt, has laid a special responsibility an the government to protect the claims of sc/st in the matter of public appointments under various constitutional provisions is an enabling provision conferring a discretionary power on the state for making any provision or reservation of appointments of posts in favor of any backward class of citizens, which in the opinion of the state is not adequately represented in the service under the state. Clause (4) of Article 16 has to be interpreted in the background of Article 335. Article 335 conjoins that the claim of the members of the maintenance of efficiency of administration in the making of appointments to services or posts in connections with the affairs of the union or of a


\(^{713}\) Indra Sawhney v Union of India, A I R 1993 S C 477.

\(^{714}\) AIR 1992 S C 1.
state the count for the held that reservation is not a constitutional compulsion but it is discretionary one. In *Mandal case*\(^{715}\), the court has cleanly ruled that reservations in promotions are constitutionally impermissible. The court has also advised the government not to make any reservation in higher position and in specialized areas. For instance, no reservation should be provided in technical posts in research and development institutions, in specialties and super specialties in medicine engineering and other such areas. Similarly university professorship and higher echelon positions in defense-space, science and nuclear research have to go by merit alone reservations in these kinds of jobs are seen as inconsistent with the values of efficiency that are needed in such professions and services\(^{716}\). None of these judges even indirectly indicates that those clauses can themselves be construed as aspects or the fundamental rights to equality and thus be enforceable in a court of law.

The word “nothing in this Article shall prevent the state from making any provision” in Article 16 (4) and nothing in Article 15 or Article 29 (2) shall prevent the state from making any special provision, in Article 15 (4) clearly establishes that those clauses constitute authorizing provisions for implementing the directives contained in Article 46\(^{717}\). It is true that in *Thomas* case the Supreme Court ruled that Article 16 (4) was not an exception to Article 16 (1) but an emphatic statement that equality of opportunity could be carried to the extent of making reservation but Thomas nowhere acknowledged a fundamental right to affirmative action\(^{718}\).

In *Union of India v Madhav*\(^{719}\) a three judge bench held that “Government evolved reservation in post or office under the state as one of the modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an office or post in

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\(^{715}\) Indra Sawhney v. Union of India, A I R 1993 S C 477.

\(^{716}\) Ibid


\(^{718}\) Ibid.

\(^{719}\) (1997) 2 S C C 332.
Limits of Reservation

a service under the state is some of the means to render socio-economic justice\textsuperscript{720}. The same consideration was held in \textit{Ashok Kumar Gupta v State of Uttar Pradesh}\textsuperscript{721}, where it was observed that the policy of reservation is part of socio-economic justice enshrined in the preamble of the constitution, the fundamental right under Article 14, 15(4), 16(1), 16(4), 16(4A) 46 and 335 and other related Articles to give effects to the above constitutional objectives. It was also held in this case that right to proportion is a statutory right. It is not fundamental right. The policy of reservation creates an obligation an the state to treat every one with equal respect and cancan and in this sense this policy serves the principle of equal treatment but this policy dose not create any corresponded individual right in favour of the members of the beneficiary groups\textsuperscript{722}.

There is no indication in the constitution that the state need reserve any minimum number of posts in government service or seats in educational institutions; nor divert any minimum part of its resources to benefits. Preferences are not mandatory but only permitted\textsuperscript{723}. Article 15(4) and 16(4) do not confer on backward groups any fundamental rights to such arrangements. But rather are an exception to the rights that other would otherwise enjoy complaining of such arrangements as violation of the fundamental rights granted in Article 15, 16 and 29. It is clear that Government any constitutionally omit to make any such preferences\textsuperscript{724}.

It is submitted that the notion of equality as a matter of policy has to be kept distinct from the notion of equality as a matter of right. In the constitution the protective clauses are juxtaposed with the main clauses garneting nondiscrimination and equality of opportunity. The constitution scams to view it as a matter of policy. A

\textsuperscript{720} Ibid
\textsuperscript{721} (1997) 7 S C C  201.
\textsuperscript{722} (1997) 7 S C C  201.
\textsuperscript{723} Marc Galanter, “Protective Discrimination” for Backward Classes in India, Law and Society in India, Oxford University Press, Delhi, 1994 p. 44.
\textsuperscript{724} Ibid
Limits of Reservation

policy stipulated a collective goal which a community seeks to pursue. A right is an individual claim which seeks to protect an individual’s interest. Rights are primarily protesting. They guarantee citizen certain basic freedom and protect them against infusion, discrimination and arbitrary action by the state. The duties correlative with these personal rights and largely prohibitions on the Constitutional rights, here in citizens generally and no one is excluded from the benefits they confer. Indeed these constitutional rights can justly be suppressed for achieving carting socials or collective goals. In a sense, Article 16 (4) and 15 (4) could be treated as authorizing norms in kelserian sense justifying encroachment of the individual’s right to the disadvantaged groups. Professor Dworkin holds that rights are individual claims which operate as trumps over collective goals. If a right is truly a right, it must have some weight to trump policy considerations but compensatory discriminator is thought of as serving a policy of increasing caste-has many by eliminating visible and institutionalized prejudices and increasing economic equality by removing some of the obstacles that keep the member of backward classes in an economically and socially disadvantaged position. Dworkin argues that a right is a matter of principle and there every citizen has a right not to be discriminated against on reseal ground a right to be treated with equal concern and respect it is submitted that the underlying argument in Dworkin’s theory had adequately been embodied in the non discrimination clause of Article 15 and 16.

The policy of reservation creates an obligation on the state to treat everyone with equal respect and cancer and in this sense this policy serves the principles of equal treatment. The policy of reservation does not create any corresponding individual right in favor of the members of the beneficiary group.

726 Ibid.
727 C. E. S. C. Ltd v Subhash Chandra Bose, A I R 1992 S C 573
728 Air India Statutory Corporation v. United Lab Union, A I R 1997 S C 645 (Justice K Ramaswamy)