Social justice is the signature tune of the Indian Constitution. This founding faith has paramount position in our society because the struggle for freedom has not only been political but also economic and social. Pointing to the importance of social justice, Dr. B.R. Ambedkar said: “How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.”

That is why, running right through the warp and woof of the country's Fundamental Law, there is a great concern for the weaker sections of the society. The constitution requires all to have equal opportunity including socially, educationally and economically backward classes. Dr. B.R. Ambedkar as a great architect of the Indian Constitution dismissed caste inequality as man-made rather than ordained by God. He said: “If I fail to do away with abominable thraldom and human injustice under which the class to which I belong has been groaning, I will put an end to my life with a bullet.”

It was largely because of leaders ardent support for the cause of depressed classes that the framers of the Indian Constitution provided special safeguards in favour of Scheduled Castes, Scheduled Tribes and Backward

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1 The Constituent Assembly Debates, Volume XI, p. 979.
2 Keer, Dhanajay, Dr. Ambedkar: Life and Mission (Bombay: Popular Prakashan), 1954, p. 446.
Classes. Protective discrimination is aimed at balancing the benefits of a social welfare state between the haves and the have-nots. It is primarily designed to uplift the backward sections of the society without harming the interests of the advanced sections of the society. What does the word "backward" signify? It is obvious that the founding fathers of the Constitution identified scheduled castes and scheduled tribes as backward classes and further authorised the state to identify other backward classes for the purpose of protective discrimination. The Governments in the States have from time to time made attempts to identify backward classes in each State. Many of such attempts made by the State have been found unconstitutional by the judiciary. The Central Government appointed two Commissions for the purpose and the reports submitted by these Commissions to the Government have generated beat and controversy.

There has been no uniformity in standards determining backwardness of communities. It has to be admitted that it miserably failed in evolving objective, fair and dependable criteria to identify other backward classes. The main reason is that more than 70% of population in India suffer from acute social and economic handicap. The Governments have generally been led by political considerations, rather than merits in their search for identification of other backward classes. In some states attempts have been made to include

4 For example, Kerela Government appointed Backward Classes Reservation Commission under the Chairmanship of P. D. Netter which submitted its report in 1970. Similarly, J & K Government appointed Backward Classes Committee under the chairmanship of Justice J. N. Wazir which submitted its report in 1969 and this report later challenged before the Supreme Court in Janaki Prasad’s Case.
among the backward classes people on the basis of caste or community without reference to their social and economic backwardness. The results have been disastrous.

The Government move seem to go in directions other than intended by the framers or indicated in judicial pronouncements. This has caused protective discrimination policy of the Governments to become a bone of contention between so-called forward and backward communities and have given birth to great social tensions and disturbing forces.

The word “backwardness” has not been defined by the Indian Constitution. Article 16(4) uses the term ‘backward classes’ as compared with words “socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes” used in Art. 15(4). This difference in terminology raises two questions: Firstly, whether Art. 16(4) covers Scheduled Castes and Scheduled Tribes or not. Secondly, whether the term “Backward Classes” is to be understood in the same sense as in Art. 15 (4), i.e., socially and educationally Backward Classes. It has been held in several cases that the term backward classes under Art. 16 (4) covers Scheduled Castes and Scheduled Tribes, and also the term is identical with “any socially and educationally backward classes” i.e., there is no difference between Art. 15 (4) and 16 (4) as far as the definition of backward classes goes.

Two other factors which have to be borne in mind in making reservations for the backward classes are that reservations can be made for backward classes which in the opinion of the State are not adequately

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6 In Mysore, from 1921 till 1960s, the backward classes included everyone excepting Brahmins and those whose mother-tongue was English and this rule was challenged in Balaji’s case.
represented in the services under the State,\textsuperscript{10} and that any reservation made in their favour does not materially affect administrative efficiency.\textsuperscript{11}

In this way the Judiciary has over the years made numerous attempts to evolve a secular, scientific and rational formula for adjudging backwardness, yet the judicial attempts in this direction have not resulted in concretising any well-defined principle that could find application in every case.

Marc Galanter has mentioned ten denotations of the term 'backward classes' which was used in the pre-independence period often as a generic term. After 1936, when the Scheduled Castes and the Scheduled Tribes were recognised separately, the scope of the term Backward Classes was gradually narrowed and the term came to signify all those communities which occupied a middle position between the Advanced Communities and the Scheduled Castes and Scheduled Tribes. While moving the Objectives Resolution in the Constituent Assembly in December 1946, Jawaharlal Nehru stressed the need to provide adequate safeguards for "minorities, backward and tribal areas and depressed and Other Backward Classes".\textsuperscript{12} Clause (3) of Article 10 in the Draft Constitution (corresponding to clause (4) of Article 16 in the Constitution) enabled the State to reserve appointments or posts in favour of any class of citizens who, in the opinion of the State, are not adequately represented in the services under the State. It was the committee to scrutinise the draft of the Constitution under the Chairmanship of Dr. Ambedkar that inserted the word 'backward' in between the words "in favour of any" and "class of citizens".

On November 30, 1948, Damodar Swarup Seth and Loknath Mishra moved amendments seeking deletion of the clause (3) of Article 10. R. M. Nalavade, a representative of the SC from Bombay, warned that the words

\textsuperscript{10} The Rangachari case, supra; The Triloki case, ibid.
\textsuperscript{11} The Rangachari case, Ibid; T. Devadasan vs Union of India AIR, 1964, SC, p. 179.
"Backward Classes" are so vague that they could be interpreted in such a way as to include so many classes which are even educationally advanced. Almost every member who participated in the debate on this issue admitted that the words backward class or classes were delightfully vague and that they were not clearly defined anywhere in the Draft Constitution. Some members such as A. B. Gurung from West Bengal and Chandrika Ram from Bihar argued that the term "Backward Classes" includes SC, ST and a section which occupies a middle position between the caste-Hindus and the Scheduled Castes. T. Channiah from Mysore drew attention of the members from Northern India to the fact that in South India, the term 'Backward Classes' meant either socially backward or educationally backward classes and the economically forward groups are excluded from this category. K. M. Munshi, a member of the Committee to scrutinise the draft of the Constitution, pointed out that in the province of Bombay the term backward classes included not only SC and ST but also Other Backward Classes who are economically, educationally and socially backward. T. T. Krishnamachari predicted correctly that since the word 'backward' is liable to different interpretations, ultimately the Supreme Court would have to determine the precise meaning of the term 'backward class'. Reminding the other members that the clause did not use the term 'caste', T. T. Krishnamachari asked, "Is it a class which is based on grounds of economic status or on grounds of literacy or on grounds of birth? What is it?"\(^{13}\) Replying to the debate, Dr. Ambedkar stated, "Somebody asked me, What is a backward community? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government."

The framers of Indian Constitution made other special provisions regarding SCs and STs. Under Article 339, the President of India was authorised to appoint after 10 years the Scheduled Areas and Scheduled Tribes

\(^{13}\) Ibid., p. 386.
Commission to report on the administration of the Scheduled Areas and welfare of the Scheduled Tribes. Such a commission appointed in April 1960 with U. N. Dhebar as its Chairman found the basic framework of the Constitution adequate. Under Articles 341 and 342, the President of India specifies the SCs and STs after consultation with the Governor of a State. Under Article 244, the provisions of the Fifth Schedule\textsuperscript{14} apply to the administration and control of the Scheduled Areas and Tribes in any State other than the States of Assam, Meghalaya and Tripura. The provisions of the Sixth Schedule\textsuperscript{15} apply to the administration of the Tribal areas in the States of Assam, Meghalaya and Tripura and the Union Territory of Mizoram.

Part III of the Indian Constitution dealing with Fundamental Rights includes Article 17 which proclaimed the abolition of "Untouchability".\textsuperscript{16} Though the practice of untouchability is forbidden and the enforcement of any disability arising out of untouchability was declared to be an offence punishable in accordance with law, the term "Untouchability" is not defined in the Constitution. Parliament enacted the Untouchability (Offences) Act, 1955, which was later amended and renamed in 1976 as the Protection of Civil Rights Act, 1955. In 1976 not only the coverage of the Act was enlarged but more stringent punishments were also provided. On 11th September, 1989 the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was passed. It made a provision for setting up of Special Courts for the trial of those who were accused of committing atrocities against the members of the SC and ST. An attempt was also made to provide relief and ensure rehabilitation of the victims of such offences.

\textsuperscript{14} Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes.
\textsuperscript{15} Provisions as to the Administration of Tribal Areas in the State of Assam, Meghalaya and Mizoram.
\textsuperscript{16} "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.
Kalelkar Commission

Under Article 340, the President of India could appoint a Commission to investigate the conditions of socially and educationally backward classes. The First Backward Classes Commission with Kakasaheb Kalelkar as its Chairman was appointed on January 29, 1953 and it submitted its report on March 30, 1955. The Commission issued a Questionnaire comprising 182 questions for eliciting the views of the State Governments and the general public on various aspects of its inquiry. It also undertook extensive touring of the country to collect on the spot evidence. After sifting and sorting the facts collected as above the Commission formulated the following criteria for identifying socially and economically backward classes:

(i) Lack of social position in the traditional hierarchy of Hindu society;
(ii) Lack of general educational advancement among major sections of a caste or community;
(iii) Inadequate or no representation in Government services;
(iv) Inadequate representation in the field of trade, commerce and industry.\(^{17}\)

This commission prepared a list of 2399 backward castes and communities in India and 837 of these were classified as 'most backward'.

The recommendations of the Commissions for the upliftment of the backward classes are extremely wide-ranging and comprehensive. They cover such diverse fields as Extensive Land Reforms, Reorganisation of Village Economy, Bhoomil Movement, Development of Livestock, Dairy farming, Cattle Insurance, Bee-keeping, Piggery, Fisheries, Development of Rural and Cottage Industries, Rural Housing, Public Health and Rural Water Supply, Adult Literacy, University Education, Representation of Backward Classes in Government service etc. etc. Some of the most noteworthy recommendations of the Commissions were:

(i) Undertaking caste-wise enumeration of population in the Census of 1961.

(ii) Relating social backwardness of a class to its low position in the traditional caste hierarchy of Hindu society;

(iii) Treating all women as a class as “backward”;  
(iv) Reservation of 70 per cent seats in a technical and professional institutions for qualified students of backward classes; 
(v) Minimum reservation of vacancies in a Government services and local bodies for other Backward Classes on the following scale:

<table>
<thead>
<tr>
<th>Class</th>
<th>Reservation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class I</td>
<td>25%</td>
</tr>
<tr>
<td>Class II</td>
<td>33-1/3%</td>
</tr>
<tr>
<td>Class III &amp; IV</td>
<td>40%</td>
</tr>
</tbody>
</table>

Regarding the recognition of a large number of castes and communities as backward, it was pointed out, “if the entire community, baring a few exception has thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive any special attention or adequate assistance, nor would such dispensation fulfill the conditions laid down in Article 340 of the Constitution.”18

The report of the commission was, however, not unanimous and five of its members recorded minutes of dissent. The whole exercise proved to be futile as the Chairman in his forwarding letter to the President opposed the acceptance of 'caste' as the basis for backwardness. He did not agree with the majority over other important recommendations made by the commission.

In view of the above, the Government considered it necessary that “some positive and workable criteria should be devised for the specification of the socially and educationally backward classes.” And to undertake further

18 Ibid., p. 7.
investigations “so that deficiencies that have been noticed in the findings of the Commission are made good…..” It was also pointed out in Memorandum that the Planning Commission had already formulated the development programmes for the removal of backwardness and “the main point to be stressed was whether the special needs of the backward classes could be intensively and effectively served by appropriate shifts of emphasis or by rearrangement of priorities within the framework of the existing programmes or whether additional programmes needed to be drawn up.”

The Kalelkar Commission's report was not discussed in Parliament. Nor was it accepted by the Government of India. The Government felt that the Commission had classified a very large section of the population as backward and if special assistance had to be extended to all these people, “the really needy will be swamped by the multitude.” The Government was also opposed to the adoption of caste as one of the criterion for backwardness and preferred the application of economic tests.

The Commission made two interesting suggestions. One was that all women should be treated as backward and other was that all landless labourers or persons having uneconomic holdings, should be treated as backward. The Union Government decided that no all India list of backward classes should be compiled and no reservation was to be made in the Central services for any group of backward classes other than the SC and ST. In a letter dated August 14, 1961, the State Governments were informed that they could have the discretion to choose their own criteria for defining backwardness though the Government of India would prefer to apply economic, tests than go by caste.

Consequently a number of State Governments set up their own Commissions or Committees for defining criteria for backwardness and

19 Ibid.
recommending measures for its removal. So far ten State Governments have set up fifteen Commissions and Committees in this behalf. These states are: Andhra Pradesh, Bihar, Gujarat, Jammu and Kashmir, Karnataka, Kerala, Maharashtra, Punjab, Uttar Pradesh and Tamil Nadu. Further 8 States and Union Territories have notified lists of Other Backward Classes for the grant of various educational, employment and other benefits. These are: Assam, Delhi, Harayana, Himachal Pradesh, Meghalaya, Orissa, Pondicherry and Rajasthan. These State Governments and Union Territories mostly relied on the lists of OBCs maintained by them for the grant of post-matric scholarships, etc. under the Education Ministry’s scheme formulated in 1944, and another list prepared by the Commissioner for Scheduled Castes and Scheduled Tribes at the time of drafting the First Five Year Plan.

In their examination of Kaka Kalelkar Commission Report, the Government of India had specifically noticed the absence of any objective tests for identifying socially and educationally backward classes. Several Supreme Court judgments have also emphasized the need for evolving such criteria on the basis of field investigations and other independent evidence. To begin with, a Research Planning Team of Sociologists met in Delhi from 12th June to 14th, 1979 to draw up a plan of studies and researches which should be undertaken by Backward Classes Commission for determining, in a scientific and objective manner, the criteria for defining socially and educationally backward classes. Subsequently, a Panel of Experts led by Professor M. N. Srinivas, met in Delhi from July 16th to 20th, 1979 and after detailed deliberations, prepared a complete design of the survey along with a set of schedules, dummy tables, instructions etc. Experts’ Panel agreed with the observation of Research Planning Team that the task before the Commission was “to lay down the criteria for identifying recognizable and persistent collectiveness and not individuals.” It also observed, “in the Indian context such collectivities can be castes or other hereditary groups traditionally associated with specific occupations which are considered to be low and
impure and with which educational backwardness and low income are found to be associated.” The experts’ Panel had prepared the following four schedules for canvassing during the field survey:

1. Household schedule (rural)
2. Household schedule (urban)
3. Village schedule
4. Town schedule.

These schedules were pre-tested in a number of villages in West Bengal, U.P., Maharashtra and Haryana and validation checks carried out by the Research & Survey Wing of the Commission. The results were discussed by Technical Advisory Committee and after detailed examination, it was decided that rural and urban house-hold schedules may be combined in one composite schedule with two independent, mutually exclusive sections for rural and urban areas. It was also decided to drop the town schedule. The combined rural and urban household schedule was fully pre-coded so as to meet the requirements of electronic processing of data.\(^\text{21}\)

House hold schedule was divided in to five parts, that is, house hold particulars, particulars of individual members, particulars of non-students between five to fifteen years, description of assets and indebtedness. Questions under each part were so framed as to get information on such social, educational and economic particular of a house hold as characterized the syndrome of social and educational backwardness in the Indian conditions.

In the Indian situation where vast majority of the people are illiterate, poor or backward, one has to be careful in certain deviations from the norms as in our conditions, norms themselves are very low. For example, Per Capita Consumer Expenditure for 1977-78 at current prices was Rs. 991 per annum. For the same period, the poverty line for urban area was at Rs. 900 per annum and for rural areas at Rs. 780. It will be seen that this poverty line is quite close to the Per Capita Expenditure of an average Indian. Now the following

the dictum of Balaji case, if 50% deviation from this average Per Capita Consumer Expenditure was to be accepted to identify ‘economically backward’ classes, their income level will have to be 50% below the Per Capita Consumer Expenditure i.e. less than Rs. 495.5 per year. This figure is so much below the poverty line both in urban and rural areas that most of the people may die of starvation before they qualify for such a distinction.22

In the view of the above, the ‘Indicators for backwardness’ were tested against various cut-off points. For doing so, about a dozen castes well-known for their social and educational backwardness were selected from amongst the castes covered by our survey in a particular state. These were treated as 'control' and validation checks were carried out by testing them against ‘Indicators’ at various cut-off points. For instance one of the ‘Indicators’ for social backwardness is the rate of student drop-outs in the age group 5-15 years as compared to the state average. As a result of the tests, it was seen that in educationally backward class this rate is at least 25% above the state average. Further, it was also noticed that this deviation of 25% from the state average in the case of most of the ‘Indicators’ gave satisfactory results. In view of this, where ever an ‘Indicator’ was based on deviation from the state average, it was fixed at 25%, because a deviation of 50% was seen to give wholly unsatisfactory results and, at times, to create anomalous situations.

Second Backward Classes Commission (Mandal Commission)

The Second Backward Classes Commission with Bindeshwari Prasad Mandal as its Chairman was appointed on 20th December 1978 and it submitted its report on December 31, 1980 has evolved eleven indicators or criteria for determining social and educational backwardness. They are:

22 Ibid., p. 57.
A. Social
(i) Castes/Classes considered as socially backward by others.
(ii) Castes/Classes which mainly depend on manual labour for their livelihood.
(iii) Castes/Classes where at least 45 per cent females and 10 per cent males above the State average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas.
(iv) Castes/Classes where participation of females in work is at least 25 per cent above the State average.

B. Education
(i) Castes/Classes where the number of children in the age group of 5-15 years who never attend school is at least 25 per cent above the State average.
(ii) Castes/Classes where the rate of student dropout in the age group of 5-15 years is at least 25 per cent above the State average.
(iii) Castes/Classes amongst whom the proportion of matriculates is at least 25 per cent below the State average.

C. Economical
(i) Castes/Classes where the average value of family assets is at least 25 per cent below the State average.
(ii) Castes/Classes where the number of families living in kutcha houses is at the State average.
(iii) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50 per cent of the households.
(iv) Castes/Classes where the number of households having taken consumption loan is at least 25 per cent above the State average.

Separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 point each. Educational 'Indicators' a weightage of 2 points each and Economic "Indicators' a weightage of one each point. Economic, in addition to social and educational indicators, were considered important as they directly flowed from social and educational backwardness this also help to highlight the fact that socially and educationally backward classes are economically backward also.23 It will be seen that from the values given to each indicator, the total score adds up to 22. All these 11 indicators were applied to all the castes covered by survey for a particular state as a result of this application, all castes which had a score of (i.e. 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (it is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further in case the number of house-hold covered by survey any particular caste were below 20, it was left out of consideration as the sample was too small for any dependable inference.

The above system of listing castes as socially and educational backward on the basis of their score may appear somewhat arbitrary. On the face of it, this is tenable viewpoint. On the other hand, the points scored by a particular caste under the above system actually reflects the number of indicators of backwardness which it satisfies. Secondly, this method has the great merit of objectivity, as point system allows no subjective assessment. Thirdly, this method was found to be highly dependable in practice. For instance, as a result of its application, most of the well-known socially and educationally backward castes were identified as backward.

23 Ibid., p. 58.
A large number of castes were identified as backward in each state as a result of socio-educational survey. The two supplementary approaches were adopted to prepare complete lists of OBCs for each state. First, state-wise list of the 11 groups of primitive tribes, exterior castes, criminal tribes, etc. contained in the Registrar General of India’s compilation of 1961 were culled and included in the Commission’s list of OBCs. This was done as the social and educational status of these castes and communities was more or less akin to Scheduled Castes and Scheduled Tribes. Secondly, based on the public evidence and personal knowledge of the Members of the Commission, State wise list of those OBCs were drawn up which could not be covered by the socio-educational survey. It was result of this three pronged approach that State lists of OBCs were prepared. From the results of the field survey it was seen that some of the well-known OBCs which were also included in the lists of backward classes notified by various State Governments were not ranked as ‘backward’. The set of eleven Indicators (criteria), being caste-based, could not be applied to non-Hindu communities. In view of this, a separate set of 3 criteria was evolved for the identification of non-Hindu backward communities.

Reservation for SCs and STs is in proportion to their population, i.e., 22.5%. But as there is a legal obligation to keep reservations, under Articles 15(4) and 16(4) of the Constitution below 50%, the Commission recommends a reservation of 27% for OBCs. This reservation should apply to all Government services as well as technical and professional institutions, both in the Centre and the States.

Special educational facilities designed at upgrading cultural environment of the students should be created in a phased manner in selected areas containing high concentration of OBCs. Special emphasis be placed on vocational training. Separate coaching facilities should be provided in...
technical and professional institutions to OBC students to enable them to catch up with students from open quota.

Special programmes for upgrading the skills of village artisans should be prepared and subsidised loans from financial institutions granted to them for setting up small scale industries. To promote the participation of OBCs in the industrial and business life of the country, a separate network of financial and technical institutions should be created by all State Governments.

Under the existing scheme of production-relations, Backward Classes comprising mainly small land holders, tenants, agricultural labour, village artisans, etc., are heavily dependent on the rich peasantry for their sustenance. In view of this, OBCs continue to remain in mental and material bondage of the dominant castes and classes. Unless these production-relations are radically altered through structural changes and progressive land reforms implemented rigorously all over the country, OBCs will never become truly independent. In view of this, highest priority should be given to radical land reforms by all the States.

At present no Central assistance is available to any State for implementing any welfare measures for Other Backward Classes. Several State Governments expressed their helplessness in undertaking more purposeful development programmes for backward classes in view of lack of resources. It is, therefore, recommended that welfare programmes specially designed for OBC should be financed by the Central Government in the same manner and to the same extent as done in the case of SCs and STs.

The report of the Mandal Commission has been criticised on several grounds, namely,

The Commission seems to have been carried away by its enthusiasm in inviting castes to come forward with such a claim. Otherwise, how is it that between the Kalelkar Commission and 1978 over 1000 castes have gone "backward", increasing the number from 2700 to over 3700? The Mandal Commission violates the constitutional provision prohibiting any
discrimination based on caste or religion in recruitment to services and goes against the special provisions for SCs and STs.

The Mandal Commission, by recommending 27% representation for BCs has exceeded the 50 percent limit laid down by Supreme Court, including representation for SCs and STs. And what a farce of special representation if 70% of the population is clubbed as "backward" and keeping floodgates open for more and more castes competing for "backwardness". Why not defined the "forward" classes, which would be easier, provide special representation to them and leave the rest to backward classes?

The Mandal Commission recommendations opened the floodgates of special representation to Muslims, Jains, Buddhists, Christians and so on, leading to disintegration rather than harmony in the society.

The Commission has disregarded the observations of the Supreme Court that social backwardness is a result of poverty to a large extent. Caste and poverty both are relevant to backwardness but neither caste nor poverty alone could be a determining factor. To illustrate, how cold a barber by caste sets up a modern haircutting saloon or a tailor with cutting edge technology or a dhobi starting a modern laundry be considered "backward"?

In fact, changes have taken place by abolition of Zamindar, Jagardari and other land reforms as well as liberal loans for self-employed resulting in upper mobility so as to remove all vestiges of "backwardness". Even though this process is not yet complete, we shall allow this to take a quick forward direction rather than reverse the order by creating vested interest in backwardness, just to obtain a few thousand government jobs.

A pernicious result of the Mandal Commission recommendations is to create multiple leaderships in 4,000 castes to serve the political ends of the parties serving as vote gatherers and agents - backward class elite appropriating all concessions to them and in the process exploiting their own community.
The Commission has laid considerable emphasis on 'castes' for determining backwardness. A criterion based on 'caste test' cannot be easily applied to Muslims, Christians and other non Hindu communities which do not recognise caste system in the conventional sense of term.25

The Commission has not explained why it chose to assign differential weightage to social, educational and economic backwardness and particularly why it devalued economical backwardness while determining the classes who are socially and educationally backward.26

There are five major methodology drawbacks of the Mandal Commission report - the use of 1891, 1931 and 1961 Census data for linking caste with traditional occupations and for making population projections on the basis of an assumed constant rate of population growth, the bungling of facts and figures related to the identification of the other backward classes, the unobjective sampling procedure and lacunae in the date assembled, the terminological discrepancies specifically with reference to use of terms like 'caste' and 'class' and finally the criteria used for defining the other backward classes (OBCS).27

The Commission constituted a panel of experts headed by Professor M.N. Srinivas which recommended that 1.00 per cent villages at the district level should be sampled to identify the majority of backward classes. This expert opinion was ignored by the Commission. Therefore, the criteria adopted by the Commission cannot be accepted as scientific.28

It seems that no single test can be sufficient for delineating backwardness. Caste cannot be made the sole basis of classification for the

reason that many sections of the Indian society do not recognise castes in the conventional sense known to Hindu society. Article 340 makes it clear that commissions can be appointed for investigating who are backward classes, and it would be contrary to the letter and spirit of the Constitution if such commission's made caste or religion the criterion for backwardness. Similarly, the test of occupation for determining "backwardness" presents many difficulties. The Hindu Varna System was originally based upon occupation that each Varna pursued. The choice of occupation was thus limited by accident of birth. Therefore, if occupation was adopted as the test for determining backwardness, it would ultimately degenerate into a 'caste' test for backwardness - an anomaly which must be avoided. Again, in the modern welfare state the concept of traditional occupation has become obsolete and redundant. It is no doubt that income test can certainly prove very useful in determining backwardness, but it is equally true that more than 70% of population in India live below the line of poverty and there is considerable difficulty in the application of poverty test. It is, therefore, suggested that poverty, education, caste, occupation, geographical placements and other factors must all be considered together to evolve a coherent and rational basis for backwardness.

Further no caste should be allowed to have vested interest in being called as backward. There is an urgent need to identify the receivers of protective discrimination; otherwise the great edifice of our democracy might suffer a jolt and crumble to pieces under the sheer weight of its own contradictions. The benefits of this policy cannot be given to the undeserving people. Even if a class or a section of people is found to be backward today, the courts or the legislatures should not act on the presumption that class would continue to be backward for all times to come. Social scientists and the lawyers would have to conduct empirical studies periodically to assess the attainments of the members of that class in different walks of life. If such studies reveal that backwardness of a class has ceased to exist, then that class
should be removed from the orbit of backwardness. It must be remembered that a stage must reach when even without claiming protection of backwardness, an individual may be able to get non-discriminatory treatment and equality of justice.

The Mandal Commission Report was challenged in the Supreme Court of India on the following grounds. The Caste data used by the Mandal Commission are based on the census report of 1931. Since then, nothing short of a qualitative change has occurred in the Indian scenarios but Mandal takes no account of it. The Commission has erroneously thought that it was its duty under Article 340 of the Constitution to recommend job reservation for the backward classes. The Mandal Commission virtually rewrites the Constitution by providing preference to the 3,743 backward castes by reducing the status of forward castes as of second class citizens. Casteism which the Constitution emphatically intended to end was revived by the report and ideals were buried by it. The Commission has ignored certain principles laid down by the apex court that efficiency of administration should be borne in mind when reservations were made and unreasonable, excessive or extravagant reservation was a fraud on the Constitution. There had never been more flagrant disregard of these principles.

From time to time the problem of caste based reservation was challenged in the Court of Law. Some of the prominent judgments of various High Courts and Supreme Court of India dealing with this matter are given below:

Clause (4) in Article 15 was added in 1951 by the Constitution (First) Amendment Act, 1951. Its purpose was to bring Articles 15 and 29 (2) in line with Articles 16(4), 46 and 340. The objective of this amendment was to enable the State to make any special provision for the advancement of any socially and educationally backward classes of citizens (SEBC) or for the SCS and the STs. The words 'socially and educationally backward classes' were borrowed from clause (1) of Article 340 under which the President of India
could appoint a Commission to investigate their condition. Clause (4) of Article 15 was inserted by Parliament as a result of the judgments given by the Supreme Court in 1951 when two petitioners Champakam Dorairajan and Venkataramana challenged the Communal Government Order issued by the Government of Madras prior to coming into force of the Indian Constitution. Shrimati Champakam complained that the Communal Government Order reserving certain number of seats in the Medical and Engineering colleges on the basis of the caste and religion of the applicants violated the fundamental right guaranteed to her by Articles 15 (1) and 29 (2) of the Indian Constitution. Rejecting the argument of the State of Madras that Article 46 in the Directive Principles of State Policy expected the State to promote with special care the educational and economic interests of the weaker sections of the people and in particular of the SCs and the STs, the Supreme Court pointed out that while in the case of employment under the State clause (4) of Article 16 provides for reservation in favour of backward classes no such provision was made in Article 15. The verdict in the Venkataramana case was given with reference to Article 16 (4). Declaring that the reservation of posts in favour of any backward class of citizens cannot be regarded as unconstitutional, S. R. Das J., speaking for the Special Bench of 7 judges, proceeded to hold the Communal Government Order as repugnant to the provisions of Article 16 and was as such void and illegal.

After the enactment of the First Amendment which added Clause (4) to Article 15, the Supreme Court delivered a very important judgment in 1963 in the case of M. R. Balaji vs. The State of Mysore. The petitioner challenged the validity of the Mysore Government Order issued in 1962 on the basis of the recommendations made by the Nagangowda Committee. The State of

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29 Madras vs. Smt. Champakam, AIR, 1951, SC, p. 226
Mysore reserved 68% seats in the engineering, medical and other technical colleges. Of these, 50% was the quota fixed for OBCs, 15% for SCs and 3% for STs. Other Backward Classes were further sub-divided into 'Backward Classes' and 'More Backward Classes', the former was guaranteed the quota of 28% while the latter category could get 22% of the reserved seats. Four vital issues were raised in this case (i) What are the criteria for identifying the social and educational backwardness? (ii) What is the role of 'caste' in determining social backwardness? (iii) Is the sub-classification of backward classes into categories valid? (iv) Is the quantum of reservation excessive? While striking down the Mysore Government vs. Order, the Supreme Court enunciated certain principles, namely, (i) Clause (4) of Article 15 is a proviso or an exception to clause (1) of Article 15 and to clause (2) of Article 29. (ii) For the purpose of Article 15, backwardness must be both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of a class of citizens, it cannot be made the sole and dominant test. As Christians, Jains and Muslims do not believe in caste system, the test of caste cannot be applied to them. Apart from caste, poverty, occupations, place of habitat were in the opinion of the Supreme Court some relevant factors for determining social backwardness. (iii) Further, classification of backward classes into 'backward' and 'more backward' is not warranted by Article 15(4). (iv) The total reservation of 68% for SCs, STs and OBCs was held to be excessive since the Supreme Court held that reservation exceeding 50% would violate the principle of equality. The unanimously speaking through Gajendragadkar, J., in though caste in relation to Hindus may be a relevant in determining the social backwardness of groups or a however, it cannot be sole or dominant test. Gajendragadkar, said: “Social backwardness is in the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor
automatically become socially backward - the occupations of citizens may also contribute to make classes of citizens socially backward.\textsuperscript{32}

Thus the Supreme Court while emphasising that caste could be a relevant factor for determining backwardness also pointed out that poverty, occupation and place of habitation could also contribute to backwardness and such factor could not be ignored.

Further in R. Chitralekha vs. State of Mysore\textsuperscript{33}, the question regarding backwardness was: Whether an order specifying tests other than caste tests was a valid order? In the instant case, the Government of Mysore by an order defined backward classes and directed that 30 per cent of the seats in professional and technical colleges and institutions shall be reserved for them and 18 per cent shall be reserved for Scheduled Castes and Scheduled Tribes. Relying on Balaji's case, the court pointed out that if in a given selection, caste is excluded in ascertaining a class within the meaning of Article 15(4), it does not vitiate the classification if it satisfied other tests. The court, therefore, tried to base the determination of backwardness solely on secular, scientific and rational criterion ignoring the rational factors. The basis of ignoring caste altogether in determination of backwardness was found by Justice Subba Rao in Article 15 which used expression "Classes" and not "Castes". Both are not synonymous.\textsuperscript{34}

The first Supreme Court case under which the question arose is Triloki Nath vs. State of Jammu & Kashmir. This case arose after the Supreme Court judgments in Balaji vs. State of Mysore and Chiterlekha vs. State of Mysore under Art. 15 (4). The facts in 1\textsuperscript{st} Triloki Nath were that the Government had adopted the following policy of reservations in the matter of promotion of certain posts, without any formal rule or announcement: (1) 50 per cent of Muslims; (2) 60 per cent of the remaining 50 per cent for Jamvi Hindus; and

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\textsuperscript{32} AIR ,1963, SC, p. 659.
\textsuperscript{33} R. Chitralekha vs. State of Mysore, AIR, 1964, SC, p. 1823.
\textsuperscript{34} Ibid., 1824.
(3) Remaining 40 per cent of the 50 per cent for Kashmiri Pandits, and sometimes one or two posts for Sikhs out of turn.

The court held that the sole test of backwardness is not that certain classes are inadequately represented in the services of the state as was claimed by the state, for such an argument “would exclude the really backward classes from the benefit of the provision [16(4)] and confer the benefit only on the class of citizens who, though rich and cultured have taken to other avocations of life.” The court stated that a class to be backward has to be socially and educationally backward in the sense explained in the Balaji’s case, and that further such a class is not adequately represented in the services of the state. Following Balaji and Chiterlekha, the court stated that classification of backward classes should be made on the following two conditions: (1) economic conditions, and (ii) occupations. Though caste could be a factor, yet it should not be sole or dominant test. In its view social and educational backwardness was the result largely of poverty. Further, while the State had necessarily to ascertain whether a particular class of citizens is backward, yet it is a justiciable issue and the court can examine whether the power has been abused by the State or not. In this case the Court struck down the policy of the State as the State did not place sufficient material before the court to justify the conclusion that the categories adopted by the State were backward. It called for a report to be supplied by the High Court containing such material as total population of the entire State, breakup figures of the two provinces, the extent of social and economic backwardness of the different communities.

In Triloki Nath vs. State of J & K35, the Supreme Court again considered the question of backwardness. The Court held that community-wise allocation of seats between Hindus and Muslims was not a valid criterion for the determination of backwardness. The expression “backward class” is not used as synonymous with 'backward caste' or 'backward community'. The members of an entire caste or community may, in the social, economic and

educational scale of values at a given time, be backward and may on that account be treated as backward class, but this is not because they are members of a caste or community, but because they form a class. Chief Justice Subba Rao stated that the economic criterion of poverty is more important than any other and a class cannot be accepted as backward merely because it is not adequately represented in the services under the States.\(^{36}\) The learned judge rejected the test of caste or community for determination of backwardness. Thus the caste as the basis for backwardness received a rude jolt.

Subsequent to the second Triloki Nath case occurred Makhan Lal vs. State of Jammu and Kashmir.\(^ {37}\) The case occurred on the facts of Triloki Nath. Makhan Lal is hardly of any significance for the constitutional interpretation. In Triloki Nath, though the court had stated that the State should prepare a scheme of reservation consistent with Art. 16, no such scheme had been devised. However, the State adopted an ingenious device by which the State gave ostensible effect to the Court’s decision in Triloki Nath, but really to continue the respondent-teachers, whose promotions had become illegal in view of the decisions in Triloki Nath, in the same higher position. As this was violative of section 16, the court again struck down these promotions.

However, in P. Rajendran vs. State of Madras,\(^ {38}\) the Supreme Court upheld a classification arranged solely in terms of caste. The Court did not depart from Balaji: “If the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(l). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is socially and educationally class of citizens within the meaning of Article 15(4). It is true that in the present case the list of

\(^{36}\) Ibid., p. 4.


socially and educationally backward classes has been specified by caste. But that does not necessarily mean that the caste was the sole consideration and that persons belonging to these castes are not also a class of socially and educationally backward citizens."

Criticising the decision in the Rajendran case, P.K. Tripathi said, "Although the judgment in Rajendran case paid lip service to the rule in Balaji that caste should not be sole criterion of classification in effect, it marked a set back to the new trend towards retrieving the fundamental right in Article 15(1)." Commenting on Rajendran case, Ghouse said: "Rajendran case revived the controversy which Balaji and Chitralekha had laid to test....In the light of these clear pronouncements was it open to the Rajendran Court to hold without overruling that a caste is also a class of citizen? Does Article 15 seek to eradicate casteism in clause (1) and preserve it in clause (4)."

In State of Andhra Pradesh vs. P. Sagar, the judicial trend in Rajendran case was sufficiently modified. Justice Shah in this case interpreted non-abstante clause and clarified: "The criterion for determining the backward must not solely be on religion, race, caste, sex or place of birth and the backwardness being social and educational must be similar to the backwardness from which the scheduled castes and scheduled tribes suffer."

The Rajendran formula which had suffered a set back in P. Sagar's case was again reviewed by the Supreme Court in State of A.P. vs. Balram. In this case the Andhra Pradesh Backward Classes Commission in 1970 had drawn up a list of 92 communities. The list which was based on 'castes' and 'communities' was upheld by the Supreme Court. The Court held that in

39 Ibid., 1014
40 Tripathi, P. K., Some Insights into Fundamental Rights (Bombay: Tripathi), 1972, p. 203.
43 Ibid., 1383.
determining backwardness the Government could take into account the percentage of educated boys in a caste or community and after assessing their poverty and social status if it was found that a caste was educationally and socially backward, its inclusion in the list of backward classes would not be bad.

The judicial consciousness to evolve secular formula, however, again was realised in Janaki Prasad vs. State of J & K. In this case validity of J & K Scheduled Castes and Backward Classes Reservation Rules, 1970 was challenged insofar as it provided that persons belonging to the specified 63 traditional occupations and 23 social castes, small cultivators, low paid pensioners, residents of areas designated as 'bad pockets' were backward. The Court found that all the listed occupations were not traditional. Under the list, the traditional occupation included the occupation of the grandfather of a person even if his father had abandoned it. The Supreme Court held that this rule of treating an occupation as tradition was bad and must be suitably revised. Again, the caste criteria was not based on intelligible basis and therefore, it refused to accept four of the enumerated castes as backward.

The rules had notified 23 castes as backward. However, the Backward Class Committee had identified only 19 such castes. For want of material, the court was not prepared to hold that the other four remaining castes were also backward.

The rules had identified cultivators of land with a small holding as “backward classes”. The limits of the holding were to differ according to the land cultivated and the region in which it was situated. The reasons for this categorization were economic. The court discounted this approach as in its view a class must be a homogenous social section of the people with common traits, and identifiable by some common attribute. In the classification in question the relevance of social and educational backwardness took a subordinate place. Taking an example, the court said that a person holding 10

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Kanals of land or less is regarded as backward, i.e., socially or educationally backward, but not the brother of such a person if he owned half a Kanal more. The court found a similar defect in the classification which had regarded the dependents of a pensioner, if the maximum of the scale of pay to the post to which he belonged did not exceed Rs. 100, as backward.

Finally, the court examined the rules which had identified residents of certain villages within five miles of cease-fire line and a few other areas which were regarded as “bad pockets”. The court was satisfied on material before it that these villages and areas could be regarded as socially and educationally backward. However, the rules had provided that a person wanting the advantage of reservation could be regarded as belonging to the area if his father was or had been a resident of the area for a period of not less than 10 years in a period of 20 years preceding the year in which the certificate of backwardness was obtained. The defect of the rule was that the father the rules or the son need not be a resident of the area, when the advantage was claimed, and further the rules did not require that the son should have his earlier education in these areas to ensure that he and his father were permanent residents of that area. Under the rules the benefit could not only be claimed by the genuine residents but also by others who might go to these areas for purposes of business or government service etc. Thus outsiders could also claim the benefit. Thus loophole must be plunged.

In an early Mysore High Court decision46, the Government had specified all communities other than Brahmin Community as backward. The classification was upheld by the High Court. The government had done it on the recommendation of a Committee known as the Millers Committee. The decision of the Court is of doubtful validity. No material was placed before the court as to on what basis the blanket classification was made that all communities other than Brahmins were backward. The court here had

46 Kesava vs. State of Mysore, AIR, 1956, Mys., p. 20
proceeded on the basis that the courts had hardly any power of judicial review over the matter.

In other Mysore case\(^\text{47}\), the criteria of backwardness adopted by the State were the income limit and the nature of occupation. A person was regarded as backward if the income of the parent and guardian was below Rs. 1,200 per annum and he was engaged in any of the following occupations: (a) actual cultivator; (b) artisan; (c) petty business man; (d) certain inferior services including casual labour; and (e) any other occupation involving manual labour. The High Court upheld the order of classification of backward classes of the government. This ruling is not in accord with the Supreme Court judgment in Janki Pd., discusses earlier, where the court stated that the income criterion would lead to marginal difficulties. However, in another Supreme Court cases occurring under Art. 15 (4). Subsequent to Janki Pd. the court upheld the caste criterion subject to the income limit.

In K. S. Jai Shree vs. State of Kerala,\(^\text{48}\) the Supreme Court of India unanimously upheld the denial of protective discrimination in admission to medical colleges to the families among the backward classes whose income exceed Rs. 10,000 per annum. It observed that caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining factor.\(^\text{49}\) It emphasised the need for adopting means-cum-caste/community test in classifying backward classes. He said that the rich people among the backward castes/communities ceased to be socially and educationally backward classes even though they had not required any high level of education. With the economic advancement the social disabilities of the members of the backward castes and communities to a large extent were dispelled.

\(^{49}\) Ibid., p. 2386.
The Supreme Court also made very important observation in State of U.P. vs. Pradip Tandon.\(^5\) In this case the U.P. Government made reservation of seats in the state's medical colleges in favour of candidates from the rural, hill and Uttrakhand area. The Supreme Court upheld reservation in favour of hill and Uttrakhand areas as it was satisfied that people therein were socially and educationally backward, but reservation in favour of rural people was held unconstitutional. The rural population being 80 per cent of the entire state population, the Court found it incomprehensible as to how such a large population could be regarded as backward. The Court refused to accept the economic basis for classification. Ray, C.S. observed: “If poverty is the exclusive test, a large population in our country would be socially and educationally backward class of citizen. Poverty is evident everywhere and perhaps more so in educationally advanced and socially affluent classes.”\(^5\)

In State of Kerala vs. N.M. Thomas,\(^5\) Justice Krishna Iyer, after stating that equality of opportunity and anti-discrimination clause will prevent politically powerful castes from taking advantage of backwardness, opined: “Not all caste backwardness is recognised in this formula (reasonable basis test). To do so subversive of both Articles 16(1) and 16(2). The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination . . . If the real basis of classification is caste marked as backward class, the court must strike at such communal manipulation.”\(^5\)

Carrying the same theme in A.S.S.K. Sangh (Rly.) vs. Union of India,\(^5\) Justice Krishna Iyer observed:

Art. 16(4) speaks of class not caste and two are different, however, political convenient the confusion may be.

\(^5\) Ibid., p. 567.
\(^5\) Ibid., p. 552.
If the goal be a casteless society delineation on the basis of castes as such is bound to prove counter productive. The Supreme Court unanimously commended the application of community-cum-means test in defining the other backward classes.\textsuperscript{55} Justice Chandrachud observed: "Two posts should be conjunctively applied for identifying them for the purpose of reservation in employment and education. One, that they should be comparable to Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means of test such as State Government may lay down in the context of prevailing economic conditions."\textsuperscript{56}

Following the Supreme Court in Rajesh Arunjibhai Patel vs. State of Maharashtra,\textsuperscript{57} the Bombay High Court laid down that migration of Scheduled Tribe candidate from one state to another state does not affect the benefits to the candidate.\textsuperscript{58}

An important decision regarding reservation was made by Delhi High Court in A. P. State S. C. W. Assocn. vs. Director of Engg., I.A.H., New Delhi.\textsuperscript{59} The High Court laid down that if Scheduled Caste/ Scheduled Tribe or other backward class person does not possess required level, he cannot make his claim for reservation. Similarly in Asheesh Sharma vs. H.P. University, Shimla,\textsuperscript{60} the Himachal Pradesh High Court held that reservation founded upon backwardness of an area is permissible under the Constitution.

\textsuperscript{55} AIR, 1985, SC, p. 1495.
\textsuperscript{56} Ibid. p. 1499.
\textsuperscript{58} Ibid., p. 115.
\textsuperscript{60} Asheesh Sharma vs. H.P. University, Shimla, AIR, 1991, H. P., p. 39.
The Constitution nowhere prescribes any maximum or minimum limit of reservation. However, B. R. Ambedkar while defending Article 16(4) in the Constituent Assembly expressed the view that the reservations authorised was of "a minority of seats" and gave the example of an aggregate reservation of seventy per cent posts as falling outside the purview of this clause. Thus in the absence of a constitutional prescription the task fell on the courts to determine the limits of reservation.

The nature and extent of reservation of seats in educational institutions was first considered by the Supreme Court in M.R. Balaji's case. The Court striking down the reservation of 68% held that Article 15(4), being in the nature of an exception to the main rule embodied in Article 15(1), cannot be allowed to eat away the main rule and that, therefore, reservation in favour of socially and educationally class of citizens must be less than 50% of the total available seats, and how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.

The question again came up for consideration in T. Devadasan vs. Union of India. The Supreme Court followed Balaji's case and said that what was laid down about reservation of seats in educational institutions applied equally to reservation of posts under Article 16(4). Thus, according to the Court, the overriding effect of clause (4) of Article 16 on clauses (1) and (2), could only extend to the making of reservation for a reasonable number of appointments and posts for certain classes and cannot provide for excessive reservation as excessive or extravagant reservation would, by eliminating general competition in large field and by creating wide-spread dissatisfaction among the employees, materially affect administrative efficiency. The court agreed with Balaji that reservation of more than 50% of the vacancies would be violative of Art. 15 (1). In this case, the reservation of 12½% of vacancies

for Scheduled Castes and 5% for Scheduled Tribes was made. This by itself was reasonable. However, the Court did not strike down the carry-forward rule on the ground that it was inherently vicious or on the hypothetical consideration that it was bound to lead vicious results in the future if permitted to operate without inhibition. Justice Fazl Ali commented: “What difference does it make if instead of keeping reserved vacancies vacant from year to year as the result of which the work of department would suffer, they are allowed to be filled up by other candidates and the number of vacancies so filled are kept reserved for the next year to accommodate candidates of the backward classes.”

Thus, though the percentage of reservation by itself may not be excessive, yet if certain method followed in applying these percentages results in excessive reservation in a particular year, it will be bad. This is further illustrated by the following cases. In one High Court case the facts were that there were two cadres of railway inspectors known as Inspectors of RMS and inspectors of Post Offices and these cadres were distinct ones. In a particular year, there were three vacancies in the former and 29 vacancies in the latter, thus total of 32 vacancies were reserved for Scheduled Castes by treating the two cadres as one unit. This resulted in going one post of RMS Inspector to the first candidate (general category) from the RMS section and two posts going to Scheduled Castes candidates. The petitioner, who stood second from the general seat, was thus excluded from the post of RMS Inspector. It was held by the High Court that since two out of three seats as a result of clubbing the two distinct cadres resulted in 66% of posts for Scheduled Castes, it was an excessive reservation. The two branches were distinct ones and should not have been clubbed for purposes of reservation.

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64 Ibid., p. 555.
In Rajaiah vs State of Andhra Pradesh\(^66\) the petitioners six in number, were temporary Class IV employees of the Government and did not belong to Scheduled Castes and Scheduled Tribes. The Government sought to retrench these employees under a policy that whenever retrenchment was to be affected, senior temporary employees, probationer and even approved probationers who did not belong to Scheduled Castes and Scheduled Tribes, must face retrenchment before the junior-most employees belonging to the Scheduled Castes and Scheduled Tribes were retrenched, if the total representation of these two categories fell below a certain percentage. The first question before the Court was whether retrenchment from employment came within the Art. 16(4) as it was contended that since different ages of superannuation cannot be fixed for persons belonging to backward classes and persons not belonging to backward classes, even for the purposes of maintaining the percentages of employees belonging to backward classes, different considerations should not apply in the case of retrenchment. This question was left open by the Court and it proceeded on the basis that Art. 16 (4) covered even retrenchment. The court quashed the retrenchment of the petitioner by the Government as in a particular year the scheme of retrenchment followed by the Government resulted in “excessive reservation” for the backward classes.

The question of extent of reservation again came in for consideration before the Supreme Court in Thomas case\(^67\). The Supreme Court by 5:2 held that the rule did not in any way violate Art. 16(1) because the implementation of Article 46 required the State to promote with special care the educational and economic interests of the weaker sections of the people and in particular the Scheduled Castes and Scheduled Tribes.\(^68\) Justice Ray observed that the


\(^{67}\) AIR, 1976, SC, p. 490.

\(^{68}\) Thomas case impliedly overrules the Balaji and Devadasan cases. For detail comments on Thomas case Sharma, S. K., Distributive Justice under Indian Constitution, 1989, pp. 114-115.
extent of reservation should be considered in the context of total position of promotions in services.\textsuperscript{69} Justice Krishna Iyer pointing out the unsoundness of the Devadasan approach on the legitimacy of carry forward observed: “The arithmetical limit of 50 per cent in any year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in departments does not depend on the recruitment in a particular year but the total strength of a cadre.”\textsuperscript{70}

The matter of quantum of reservations was again reviewed by the Supreme Court in A.B.S.K. Sangh’s case.\textsuperscript{71} The Supreme Court, following Thomas case, upheld the validity of the Railway Board circular under which reservations were made in selection for the Scheduled Castes and Scheduled Tribes candidates. The court also upheld the ‘carry forward rule’ under which 17\% posts were reserved for those categories. This carry forward rule was extended from 2 to 3 years. As a result of this rule the reservation quota come to about 64.4\% but the Court held that this was not excessive.\textsuperscript{72}

Justice Krishna Iyer concluded\textsuperscript{73}: In no year Scheduled Castes and Scheduled Tribes candidates be actually appointed to substantially more than 50 per cent of the promotional posts. Some excess will not affect as mathematical precision is difficult in human affairs, but substantial excess will void the selection.

Justice Chinnappa Reddy had gone to the extent of ruling that the rule of 50\% laid down in earlier case was only for the guidance of judges and they were not bound by it.\textsuperscript{74} Justice Pathak, however, dissented from the majority and said that the rule of 50\% as laid down in earlier cases was fair and reasonable, but he was not very emphatic in his dissent and said that in view of

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\item \textsuperscript{69} Ibid., Thomas, p. 501.
\item \textsuperscript{70} Ibid., p. 537.
\item \textsuperscript{71} AIR,1981, SC, p. 298.
\item \textsuperscript{72} A. B. S. K. (Sangh) followed Thomas case and again impliedly overruled Balaji and Devadasan cases.
\item \textsuperscript{73} AIR, 1981, SC, p. 326.
\item \textsuperscript{74} Ibid., pp. 339-40.
\end{itemize}
\end{footnotesize}
majority decision in Thomas case he was bound to hold the impugned rule as valid.\textsuperscript{75}

Next in K. C. Vasant Kumar's case\textsuperscript{76} judges appear to understand the Thomas decision rather differently. Justice Venkatarmiah, expressed: "(A)fter carefully going through all the opinions in the above case (Thomas case) it is difficult to hold that the settled view of this court that the reservation under Article 15(4) or Art. 16(4) could not be more than 50 per cent has been unsettled by a majority on the Bench which decided this case...."\textsuperscript{77} He further observed:

Four out of seven judges, Ray, C.J., Beg, Krishna Iyer and Fazl Ali, JJ. were also of the clear view that the so-called 50 per cent rule would apply to the total number of posts in the service and not to the number of posts filled up at different times on different occasions. The reservation in appointment may be made on any single occasion. The reservations in appointments made on any single occasion might well exceed 50 per cent.\textsuperscript{78}

In V. Narayanan Rao vs. State of A.P.\textsuperscript{79}, the A.P. High Court struck down the reservation of 69 per cent of seats in favour of backward classes on the ground that it was violative of Article 16(1). On the same theme in Deepak Sibal vs. Punjab University\textsuperscript{80}, the Supreme Court following Balaji case laid down that Art. 15(4) does not contemplate to reserve all the seats in an educational institution at the cost of rest of the society. The same principle should also apply with equal force in the case of cent per cent reservation of

\begin{itemize}
\item \textsuperscript{75} Ibid., pp. 332-33.
\item \textsuperscript{77} Ibid.
\item \textsuperscript{78} Ibid., p. 1526.
\item \textsuperscript{79} V. Narayanan Rao vs. State of A.P., AIR, 1987, A. P., p. 53.
\end{itemize}
seats in educational institution for a certain class of persons to the exclusion of meritorious candidates.

The Punjab and Haryana High Court followed the Supreme Court in Jaswant Singh vs. State of Haryana, the High Court held that additional preference of marks was discriminatory and unconstitutional. Allocation of 10 marks for the domicile of Mewat area while selecting candidates against 50% of the seats meant for general category has virtually resulted in 100% reservation of the seats which is unconstitutional.

The question of extent of reservation was also considered by Karnataka High Court in Raj Kumar vs. Gulbarga University, wherein the High Court made it clear that reservation quota should not exceed 50% at any cost. Similar in All Kerala Poor Aid Level Assocn., Trivandrum vs. Chief Justice of India, the High Court held that the office of a High Court Judge is neither a post, nor an appointment under the services of the State. Thus Article 16 does not control Article 217 and omits the office of High Court Judge from pale of reservation.

Broadening the horizons of reservation in Sida Nitin Kumar vs. Gujarat University, the Gujarat High Court made it clear that candidates of reserved category can also occupy unreserved seats/posts and not only reserved seats/posts.

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82 The decision of High Court was based upon A. Periakaruppan vs. State of Tamil Nadu, AIR, 1971, SC, p. 2303 and State of Maharashtra vs. Raj Kumar, AIR, 1982, SC, p. 1301.
83 Raj Kumar vs. Gulbarga University, AIR, 1990, Kant., p. 321, also Shivaji vs. Chairman, Maharashtra Public Service Commission, AIR, 1984, Bombay, p. 434. The Court held that 50 per cent limit must not be crossed.
84 All Kerala Poor Aid Level Assocn., Trivandrum vs. Chief Justice of India, AIR, 1990, Kerela, p. 241.
85 Sida Nitin Kumar vs. Gujarat University, AIR, 1991, Gujarat, p. 43.
Regarding the extent of reservation the A.P. High Court in Dileep Damodaran vs. Secretary to Govt., Education Department, Hyderabad. The High Court held that so far as the general policy of reservation is concerned be it in favour of schedule caste, schedule tribe, backward classes or any other categories like N.C.C. or the defence personnel, it is necessary to have some form of uniformity with regard to the percentage prescribed by the authorities.

A very important aspect which needs consideration is the identification of the 'most backwards' amongst the backwards. Does our Constitution permit such a classification or division of the backward? It seems that there is nothing in the Constitution which prohibits a classification between backward and more backward groups, so long as its purpose is to promote the educational, economic and other social interests of these groups of people. However, there is no method for determining 'the really backward classes' expect by applying the relative test.

In Balaji's case, Backward classes were divided into two categories - backward and more backward and out of 50 per cent reservation meant for other backward classes, 28 per cent and 22 per cent of seats respectively were reserved for them. The Supreme Court held that such a sub-classification is not permissible under Article 15(4). However, in Thomas case, Krishna Iyer gave warning: Its benefits by and large, are snatched by the top creamy layer of the 'backward' caste or class, thus, keeping the weakest among the weak always seek and leaving the fortunate layers to consume the whole case. Secondly, this claim is overplayed extravagantly in democracy by large and local groups whose burden of backwardness has been substantially lightened by march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' level as a means to score over their near equals formally categorised as upper brackets - a tiny elite.

86 Dileep Damodaran vs. Secretary to Govt., Education Department, Hyderabad, AIR, 1991, A. P., p. 195.
gobbling up, the benefits and the darker layers sleeping distanced away from special concession.89

In Anupam Gupta vs. Secretary, Medical Health, Lucknow90, some concession was given to Scheduled Caste and Scheduled Tribe candidates in respect of marks to be obtained at entrance test for admission to post-graduate course in medicine.

Since the decision in Balaji, it was assumed for nearly three decades that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, SCs and STs mentioned in Article 15(4).

In the Indra Sawhney case91, the scope and extent of Art. 16 (4) has been examined thoroughly by the Supreme Court in this historic case popularly known as the Mandal case.

The facts of the case were as follows. On January 1, 1979, the Government headed by the Prime Minister Sri Morarji Desai appointed the Second Backward Classes Commission under Art 340 of the Constitution under the Chairmanship of Sri B.R Mandal (MP) to investigate the socially and educationally backward classes within the territory of India and recommend steps to be taken for their advancement including desirability for making provisions for reservation of seats for them in government jobs. The Commission submitted its report in December, 1980. It had identified as many as 3743 castes as socially and educationally Backward classes and recommended for reservation of 27 percent Government's jobs for them. In the meantime the Janta Government collapsed due to internal desensions and the Congress Party headed by the Prime Minister Indira Gandhi came to power at the Centre. The Congress Government did not implement the Mandal

89 Ibid., pp. 531-32.
90 Anupam Gupta vs. Secretary, Medical Health, Lucknow, AIR, 1992, Allahabad, p. 3.
Commission report till 1989. In 1989 the Congress Party was defeated in the Parliamentary elections and the Janta Dal again came to power and decided to implement the Commission's report as it had promised to the electorate. Accordingly, the Government of India, headed by Prime Minister V.P. Singh issued the office Memoranda (called O. M.) on August, 13, 1990 reserving 27 percent seat for backward classes in government Services on the basis of the recommendations of the Mandal Commission. The acceptance of the report of the Mandal Commission threw the Nation into turmoil and a violent anti-reservation movement rocked the nation for nearly three months resulting in huge loss of persons and property. A writ petition on behalf of the Supreme Court Bar Association was filed challenging the validity of the OM and for staying its operation. The Five Judge Bench of the court stayed the operation of the OM till the final disposal of the case on Oct. 1, 1990. Unfortunately the Janata government again collapsed due to defections and in 1991 Parliamentary elections the Congress party again came to power at the Centre.

The Congress party Government headed by P. V. Narsimha Rao issued another Office Memoranda on September 25, 1991 but made two changes in the OM of Janata Dal Government issued on August 13, 1990: by introducing the economic criterion in granting reservation by giving preference to the poorer sections of SEBCs in the 27% quota and 60 reserved another 10% of vacancies for other socially and educationally Backward classes (SEBCs) economically backward sections of higher castes. The economic criterion was to be specified separately. The five judges Bench referred the matter to a special Constitution Bench of 9 Judges in view of the importance of the matter to finally settle the legal position relating to reservations as in several earlier judgments the Supreme Court have not spoken in the same voice on this issue. Despite several adjournments the Union Government failed to submit the economic criteria as mentioned in Official Memoranda of Sep. 25, 1993.

The 9 Judge Constitution bench of the Supreme Court by 6-3 majority (Justice BP Jeevan Reddy, CJ. M.H. Kania, M. N. Ventatachalah, A.M. 230
Ahmadi with S.R. Pandian and S.B. Sawant concurring by separate Judgments held that the decision of the Union Government to reserve 27% Government jobs for backward classes provided socially advanced persons - Creamy layer among - them are eliminated, it is only confined to initial appointments and not promotions and the total reservation shall not exceed 50 percent. The court accordingly partially held the two impugned notifications (OM) dated August 13, 1990 and September 25, 1991 as valid and enforceable but subject to the conditions indicated in the decision that socially advanced persons - creamy layer - among BC's are excluded. However, the Court struck down the Congress Governments OM reserving 10% Government jobs for economically backward classes among higher classes. The majority also held that the reservation should not exceed 50 percent. While 50 percent shall be the rule but it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and people.

In such situation, some relaxation of this rule may be necessary.

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

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

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

The majority held that neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. The court said that it must be left to the authority appointed to identify. It can adopt such method as it thinks convenient and so long as it covers the entire population no objection can be taken to it. Identification of Backward classes can certainly be done with reference to castes among, and along with other occupation groups, classes and sections of people. One can start the process either with the occupation of groups or with castes or with some other groups. Caste will have to be considered among and along with other criteria as the test of backwardness. Caste alone can not be taken into consideration for purposes of identification of backward classes. A similar process can be adopted for occupational groups, communities and classes.

2. Art. 16 (4) is not an exception to Art. 16 (1). It is an instance of classification. Reservation can be made under Art. 16 (1). The majority held that Art. 16 (4) is not an exception to Art. 16 (1) but an independent clause. Reservation can be made under clause (1) of Art. 16 on the basis of reasonable classification. The Court accordingly overruled its decision in Balaji vs. State of Mysore\(^\text{92}\) in which it was held that Art. 16 (4) is an exception to Art 16 (1). The Court approved the decision in State of Kerala vs. N.M. Thomas\(^\text{93}\) where it was held that Art. 16 (4) is not an exception of Art. 16 (1), but a facet of the doctrine of equality enshrined in Art. 14 and permits reasonable classification just as Art 14 does.

\(^{93}\) Kerala vs. N.M. Thomas, AIR, 1976, SC, p. 490.
3. Backward classes in Art. 16(4) are not similar to as socially and educationally backward in Art. 15(4). The majority held that the backward class of citizens contemplated in Art. 16(4) is not the same as socially and educationally backward classes referred to in Art. 15(4). It is much wider. Clause (4) does not contain the qualifying words "socially and educationally" as does clause (4) of Art 15. The "backward class of citizens" in Art. 16(4) takes in SC's and ST's and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes may not qualify for Art. 15(4) but they may qualify for Art. 16(4). Accordingly, the court overruled the Balaji case on this point in which it was held that the backward class of citizens in Art. 16(4) is the same as the socially and educationally Backward Classes, Scheduled castes and Scheduled Tribes mentioned in Art. 15(4).

The court held that it is not necessary for a class to be designated as a backward that it is situated similarly to the SCs. and STs.

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

5. Art. 16 (4) permits classification or Backward classes into backward and more backward classes. On this point the court overruled the Balaji Case in which it was held that the sub-classification between Backward classes and more backward classes was unconstitutional. In the Mandal Case the court held the classification is necessary to help the more Backward Classes, otherwise the advanced sections of Backward Classes might take all the benefits of reservations.

6. A backward class of citizens can not be identified only and exclusively with reference to economic criteria. It was held that it would defeat the very object of Art. 16 (4) to give adequate representation to backward classes in the services. Art. 16 (4) is not aimed at economic upliftment or alleviation of poverty. It is specifically designed to give a due share in the state power to those who have remained out of it mainly on account of their social and therefore, educational and economic backwardness.
7. Reservation shall not exceed 50 percent. The majority held that the maximum limit of reservation can not exceed 50 percent. However in extraordinary situations it may be relaxed in favour of people living in forlorn and remote areas of country who because of their peculiar conditions, and characteristics need a different treatment. But in doing so the court said extreme caution is to be exercised and a special case made out on this point the majority affirmed the Balaji and Devadasan Cases in which the 50% rule was laid down and overruled the State of Kerala vs. N.M. Thomas and K.C. Vasanth Kumar vs. State of Karanataka cases. The court relied on the speech of Dr. Ambedkar in the Constituent Assembly where he said that "reservation must be confined to a minority of seats". Art. 16 (4) speaks of adequate representation and not proportionate representation. If a member of SCs/STs is selected in the open competition on the basis of merit they will not be counted against the reserved quota. However the rule of 50% shall be applicable only to reservations proper, they shall not be applicable to exemptions, concessions or relaxations if any provided to Backward classes of citizens under Art. 16 (4).

The court also overruled the decision in Devadasan vs. Union of India94 and held that the 'carry forward rule' is valid provided it should not result in breach of 50% rule.

8. Reservation can be made by 'Executive order'. The majority held that a 'provision' under Art. 16 (4) can be made by an executive order. It need be made by Parliament or Legislature.

9. No reservation in promotions. The majority held that the reservation under Art. 16 (4) can not be made in promotions. The reservations is confined to initial appointments. However, it shall not effect promotions already made. Such reservations may continue for a period of five years; within this period, the authorities will revise modify or re-issue the rules relating to reservation. On this point the court has "thus" overruled the following cases: General

94 Devadasan vs. Union of India, AIR,1964, SC, p. 179.
Manager S. Rly. vs. Rangachari; State of Punjab vs. Hira Lal; Akhil Bharatiya Shoshit Karamchari Sang vs. Union of India and Comptroller and Auditor General of India; Gian Prakash vs. K.S. Jagannathan. This is consistent with the object inshrined in Art 335. At the initial stage reservation can be made for them but once they enter the service, efficiency demands, that these members too compete with others and earn promotions like all others the Court said.

10. Permanent Statutory body to examine Complaints of over-inclusion under inclusion. This Court directed the Union Government, State Governments and Union Territories to appoint a permanent statutory body to examine complaints of 'wrong inclusion or non-inclusion of groups, classes and sections' in the list of Other Backward Classes. Its advice should ordinarily be binding upon the Government. It can also be consulted in the matter of periodic revision of lists of OBCs as suggested by the court in Vasant Kumar Case, “Within four months the Government of India shall specify the bases applying the relevant and requisite socio economic criteria to exclude socially advanced persons/sections/creamy layer from other Backward Classes.”

This direction shall however not apply to States where reservation in favour of backward classes are already in operation. They can continue to operate them. Such state shall however evolve the said criteria within six months and apply the same to exclude the socially advanced persons/sections from the other Backward Classes.

11. Mandal Commission Report. No opinion Expressed - The majority held that in view of the guidelines laid down in its decision there is no need to express any opinion on the correctness or adequacy of the exercise done by the

95 General Manager S. Rly. vs. Rangachari, AIR, 1962, SC, p. 36.
Mandal Commission. Pandian J. held that the report is valid and can be implemented. The minority held that the report is invalid and recommended for appointment of a fresh commission for identifying to Backward Classes.

12. Disputes regarding new criteria can be raised only in the Supreme Court. The majority made it clear and directed that all objections to the criteria evolved by the Central and State Government to exclude socially advanced persons, creamy layer, from other backward classes shall be preferred only before the Supreme Court and not before any High Court or Tribunal. Similarly, any petition challenging the validity, operation or implementation of the two OM’s shall be filed only before the Supreme Court and not before any Court.

In this case the Supreme Court reiterated the general rule that the reservations should not normally exceed 50% except in certain extraordinary situations when with extreme caution a special case can be made in order to relax somewhat the strict application of this rule. The Supreme Court, however, did not regard clause (4) of Article 16 as an exception to clause (1) of Article 16. It also conceded that a caste can be and quite often is a social class in India. Along with socially backward castes among the Hindus, several occupational groups, sects and denominations among non-Hindus, are socially backward and, according to the Supreme Court, can benefit under Article 16(4).

While delivering the majority judgment in the Indra Sawhney case99 in November 1992, B. P. Jeevan Reddy, Justice of the Supreme Court, held that this assumption had no basis. The socially and educationally backward classes referred to in Article 340 is only one of the categories for whom Article 16 (4) was enacted. Article 16 (4) applies to a much larger class than one contemplated by Article 340.

The makers of the Indian Constitution have provided reservation and special political representation to SCs and STs and the Anglo-Indians. Under Articles 330, 332 and 334, seats are reserved for them in the Lok Sabha and State Legislative Assemblies in proportion to their population. There is no reservation for seats in Rajya Sabha and the State Legislative Councils. In the beginning the makers of India's Constitution provided for such reservation in Legislatures for a period of ten years from the commencement of the Constitution.

Under Article 338, the Constitution had provided for the post of a Special Officer to investigate all matters relating to the safeguards guaranteed to the SCs and STs and report to the President about their working. On 18th November, 1950 such a Special Officer designated as Commissioner for Scheduled Castes and Scheduled Tribes was appointed for the first time. Between November 1981 and February 1986, the post, however, remained vacant. In 1978, during the Janata Party's rule, a five-member Commission was set up by an executive order in addition to the Constitutional Office of the Commissioner for Scheduled Castes and Scheduled Tribes. After an unsuccessful attempt to amend Article 338 through the 46th Amendment Bill, 1978, the Commissioner was replaced by the National Commission for Scheduled Castes and Scheduled Tribes. This was done through the Constitution (Sixty-Fifth) Amendment Act, 1990. On 12th March, 1992, the Commission has been set up. Its functions include the duties earlier discharged by the Commissioner for Scheduled Castes and Scheduled Tribes as well as new duties such as participating in the advising on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and evaluate the progress of their development under the Union and any State.100

100 Article 338 (C).