CHAPTER III

THE CONCEPT OF EQUALITY

In order to have proper understanding of the concept of equality, it would be reasonable to examine the meaning of equality.

"While inequality is easy since it demands no more than to float with the current, equality is difficult for it involves swimming against it".\(^1\) The term equality is undefinable since it can only be realised and understood in contradistinction with inequality. The Webster's third New International Dictionary\(^2\) defines equality as "the quality or state of being equal, as a sameness of equivalence in number, quantity or measure, likeness or sameness in quality, power, status and degree".

According to Oxford English Dictionary, the word equality means:

1) The condition of having equal dignity, rank or privileges with others;
2) The condition of being in power, ability, achievement or excellence;
3) Fairness, impartiality, equity, due proportion, proportionateness.

Irwin Kristol\(^3\), has criticised the meaning of equality.

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1. R.H. Tawney, *Equality* 47 (1952)
According to him, if, for example, men are unequal in power, ability, achievement or excellence then an adherence to meaning at no. 3 will lead to violation of the definition.

It would be correct and reasonable to say that men ought to be treated unequally, because they are of unequal rank, circumstances, ability or race. As a matter of fact, realisation of complete equality in any societal arrangement seems utopian. But the thought that inequality is a necessary condition of all our social organisations is repugnant to the modern sensibilities. Equality can only be achieved when we have a social order which is based on the identity of interests, roles, power and authority in different sectors of human life. (4) According to Friedmann:

"It is clear however, that the principle of absolute equality between individuals of all classes and races cannot be understood in a rigid sense... it means the abolition not of natural differences, which it is not within man's power to abolish, but of man-made differences inherent in the organisation of the society... It is these which it is the task of law, in democratic societies, to remove."

The word 'Equality' is incapable of single definition as it is a notion of many shades and connotations. The disagreement among the philosophers, political theorists over the years of what just equality as a political notion indicates the want of consensus on the meaning of the term. The word equality is ambiguous precisely because no ready indication is forthcoming.

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5. W.Friedmann, 'Legal Theory' 387 (1960)
as to the common attribute with respect to which men are asserted to be equal.\(^6\)

The doctrine of equality is the foundation of social justice. It refuses to accept a state in which some men are more equal than others. It recognises equality between men in society.\(^7\) Equality means in one sense that adequate opportunities are laid open to all. By adequate opportunities we cannot imply equal opportunities in a sense that implies identity of original chance.\(^8\) The principle of equality is not a description of fact about men's physical or intellectual natures but rather it is a prescription or policy of treating men.\(^9\)

Laski has said that, "equality therefore involves up to the margin of sufficiency identity of response to primary needs. And that is what is meant by justice. We are rendering to each man his own by giving him what enables him to be a man. We are, of course, there in protecting the weak and limiting the power of strong. We so act because the common welfare includes the welfare of the weak as well as the strong. Grant as we may well grant, that this involves a payment by society

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to men and women who limp after its vanguard, the equality of state depends on it regarding their lives as worth preserving. To act otherwise is to regard them not as persons but as instruments. (10)

According to radical equilitarian theory, equality can be summed up as follows:

1) All social inequalities are unnecessary and unjustifiable and ought to be eliminated. By social inequality is meant not only caste class or other status differences but also any political, legal and economic differences among persons irrespective of whether inequality results from one's own choice or efforts or that of another.

2) Justice involves equality.

3) All men are equal, now and for ever, in intrinsic value inherent worth, essential nature,

4) Social equalities need no special justification, whereas social inequalities always do.

5) All persons are to be treated alike, except where circumstances require different treatment. what these circumstances are is a matter which depends upon social conditions and no universal rule can be laid down. The notion of justice alone can supply the yardstick.

6) Some social inequalities are necessary which means, that it is not only impossible to eliminate all inequalities

but also it is necessary that there would be certain social inequalities. As Hume long ago remarked, "Render possessions ever so equal men's different degrees of art, care and industry will immediately break that equality".

7) Some social inequalities are justiciable. (11)

Justice Mathew rightly crystallised the nature and scope of equality as follows:

Equality is not an imperative to treat in identical ways men who are unequal in their physical or intellectual attainments. It is a policy of equality of concern or consideration for men whose different needs may require different treatment. It is not a mechanical policy of equal opportunity for every one at any time and in all respects. It is equality of opportunity for all individuals to develop whatever personal and socially desirable talents they possess and to make whatever unique contributions their capacities permit. It is not a demand for absolute uniformity of living conditions or even for arithmetically equal compensation for socially useful work. It demands that, when the productive forces of a society make possible the gratification of basic human needs (which are, of course, historical variables) no one should be deprived of necessities in order to provide other with luxuries. It is not a policy of restricting the freedom of being different or becoming different. It is a policy of encouraging the freedom to be

11. Supra note 8 at 405-6
different or becoming different. It is a policy of encouraging the freedom to be different, restricting only that exercise of freedom which converts talents or possession into a monopoly that frustrates the emergence of other free personalities.

It is not a demand that all people be leaders or that none should be. It does not demand that the career of leaderships like all other careers be open to all whose natural or acquired talents qualify them; that everyone has a say in the process of selecting leaders; that the initiative of leaders operates within a framework of basic laws and that these laws in turn ultimately, rest upon the feeling given consent of the person who constitute the community. It does not make the assumption of sentimental humanitarianism that all men are naturally good. It does assume that men, treated as equals in a community of persons, may become better. The emphasis upon respect of the personality of all individuals, the attitude which treats the personality not as something fixed but as a growing developing pattern is unique to the philosophy of democracy.\(^{(12)}\)

Equality in the dynamic sense means reduction of the harshest forms of inequality. The wide gulf between the rich and the poor must be bridged not by getting the rich plundered by the proletariat but by elevating the poor. Society can no doubt put some limits on the capacity of the rich to exploit the asses, but if the poor remains lazy, the rich would, inspite of the limits and laws, continue to be masters.\(^{(13)}\)

\(^{12}\) Mathew, K.K. *Supra* note 9, p.10.

\(^{13}\) Advani, B.T. *Influence of Socialism on policies and administration in India since Independence* (1947-62)
In the Constituent Assembly, provisions pertaining to the right of equality were discussed in great detail. The advisory committee on Fundamental rights provided only for the 'equal treatment of the laws' and combined it with the 'due process' clause regarding the right to life and liberty.\(^{(14)}\) The Drafting Committee replaced the words 'the equality before the law' and added a new clause namely 'equal protection of the laws'. But even in the Draft Constitution, the right to equality before the law and the right to personal liberty were combined in one article. However, after the second reading stage, it was decided to incorporate the right to equality before law in a separate article. The members unanimously approved this provision which has been incorporated in article 14.

Article 14 embodies the principle rule of equality which prohibits the state from denying to all persons, whether citizens or foreigners, equality before the law or the equal protection of the laws. 'Equality before the law' is an expression of English Common Law and according to Dicey, it may be defined "as the equal subjection of all persons to the ordinary law of the land administered by the ordinary law courts.\(^{(15)}\) Equality before the law does not mean absolute equality but it postulates that there shall not be any special privilege by reason of birth, religion, race or the like in favour of an

\(^{(14)}\) Advisory Committee, Fundamental Rights : Interim Report Cl.21 Delhi, 1948.

individual. It means further, that among equals the law shall be equal and shall be equally administered. Absolute equality among human beings is an impossibility.\(^{(16)}\) It can only mean that among equals the law should be equal and equally administered and that the like should be treated alike.\(^{(17)}\)

The phrase 'equal protection of the laws' occurs in section I of the Fourteenth Amendment to the U.S. Constitution. It reads: No State shall deny to any person within its jurisdiction the equal protection of the laws.\(^{(18)}\) It means that there shall not be arbitrary discrimination made by the laws themselves in their administration.

In essence both terms mean 'equal justice'\(^{(19)}\) everybody from the President downwards to the poorest citizen or person in India, is subject to the Rule of Law which is enshrined in our Constitution. The right to equality is conferred on every person and not merely on citizens. The courts have held that 'law' in article 14 is not confined to the law enacted by legislature but includes any order or notification.\(^{(20)}\) Such an interpretation makes the protection provided in article 14 complete.

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17. Satish Chandra V Union of India AIR 1953 SC 250.
Article 14 does not mean that all laws must be uniform and must universally be applicable. It only prohibits improper and invidious distinctions created by conferring rights or privileges upon a particular group to the exclusion of other group without any valid reason. Thus under this article, there cannot be unfair discrimination between one group of citizens and another in relation to the same matter or between citizens and foreigners.

Since all persons are not by nature, attainment or circumstances equal and the varying needs of different classes of persons often require separate treatment and therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the state the power to classify persons for the purpose of legislation. \(^{(21)}\)

The position explained above provides a fair exposure to the meaning of the right to equality. Justice Krishna Iyer always showed his deep concern for equal treatment. To him equality before law implies equality of power and equal effectiveness of that power. Be you ever so high the law will watch you, catch you, convict you if guilty, and that, swiftly but fairly. The crucial test is 'all power is a trust', its holders are accountable for its exercise for "from the people, and for the people all springs, and all must exist". \(^{(22)}\) He observed in

\(^{(21)}\) I[bi]
\(^{(22)}\) I[n Re: Special Courts Bill 1978 aIR 1979 SC 478.
Ganga Sugars' case that the plea that infants and adults, weaklings and strongmen, paupers and princes should be put on a par lest legislative validity be imperilled, has an elitist merit but sounds like an 'argumentum et absurdum' in the context of social justice. Unequals cannot be treated equally since mechanical uniformity may become unmitigated injustice.

Justice lyers' concept of equality lies at the core of democracy. He says, where glaring disparities between large groups mar the stark social geography, affirmative state action by way of equalisation becomes obligatory to reach actual equality. The enrichment of the equal protection clause (art.14) by the promotional programme mandated by art.46 makes neotic sense. Art.46 states that, the State shall promote with special care the educational and economic interests of the weaker section of the people, and, in particular, of the scheduled castes and scheduled tribes, and shall protect them from social injustice and all forms of exploitation."

Seervai says if all men were created equal and remained throughout their lives, then the same laws would apply to all men. But we know that men are unequal; consequently a right conferred on persons that they should not be denied the equal protection of the laws cannot mean the protection of the same laws for all. It is here that the doctrine of classification steps in, and gives content and significance to the guarantee of the equal protection of laws. Equal protection of the laws must mean the protection of equal laws for all persons similarly
situating from those who are not, we must discriminate, i.e. act on the basis of a difference between persons, or observe distinctions carefully between persons who are, and persons who are not similarly situated. (24)

REASONABLE CLASSIFICATION

Though article 14 of the Indian Constitution and Fourteenth Amendment of the American Constitution forbid class legislation, they do not forbid reasonable classification for the purpose of legislation. In order to pass the test of permissible classification, two conditions must be fulfilled, namely:

1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group.

2) that differentia must have a rational relation to the object sought to be achieved by the statute in question. (25)

The classification may be founded on different bases, namely geographical, or according to objects or occupations or the like. What is necessary is that there must be nexus between the basis of classification and the object intended to be achieved by the statute. (26)

In U.A, the Supreme Court has laid down that the clause

the equal protection of the laws' does not preclude classification of citizens into groups for the purpose of taxation or other similar purposes. Thus, in *Missouri v. Lewis*, the Supreme Court observed:

"The important principle... that the equal protection clause of the 14th Amendment does not prevent the application by a state of different laws and different systems of judicature to its various local sub-divisions. There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. (27)

The courts in India have also upheld the view that article 14 does not forbid reasonable classification and that the legislature has power to classify persons into different groups for purposes of legislation. Judicial interpretation of article 14 is mainly centered around the question of reasonableness on the basis of classification permissible under the article.

We may now examine a few important judicial decisions which have upheld the rule of differentiation implicit in rule of equality. The rule of differentiation was for the first time adopted by the Supreme Court in *Chiranjeet Lal Choudhari v. The Union of India and others*. (28) In this case, the management and direction of the Sholapur Spinning and Weaving Mills Ltd., was taken over by the Government of India under an Ordinance. The preamble to the Ordinance referred to the mismanagement and neglect which had prejudicially affected the production by the mill of an essential commodity and stated that it had caused serious unemployment. The Ordinance was replaced by an Act. A shareholder

27. (1879) 101 US 22.
28. AIR 1951 SC 41.
of the Company filed a suit against the government of India on the
ground that the Act violated the equality clause and was therefore
void. The Supreme Court adopted the rule of classification and
upheld the validity of the Act. The court observed that the
principle of equality did not mean that identically the same
rules of law should be made applicable to all persons in spite
of difference of circumstances and conditions, it meant only that
there should be no discrimination between one person and another,
if, as regards the subject-matter of legislation their position
was the same. It was further held that the rule of equality
did not take away from the state the power of classifying
persons for legitimate purposes, however, such classification
could not be made arbitrary and without any substantial basis.

Similarly, in *Ram Krishna Dalmia and Others v. Justice S.K. Tendolkar and Others* (29) the rule of classification was
further elaborated. The facts of this case were: the commission
of Enquiry Act, 1954 empowered the Government to appoint a
Commission to inquire into any definite matter of public
importance. Under this act, a Commission was appointed to inquire
into one of the Dalmia concerns affair on the ground of mismanage-
ment. The appellants contended that the Act and the appointment
of the Commission infringed the equality clause. It was also
alleged that notification appointing the Commission was
discriminatory.

The Supreme Court rejected both the contentions. It held
that the discretion conferred by the Act was not unguided because

29. AIR 1958 SC 538.
the act clearly laid down the policy of enquiring into matters of public importance. It also held that the fact that the Act could be used against a particular individual or concern did not, by itself, make it discriminatory.

In *D.S. Reddy v. Chancellor, Osmania University*,(30) the Vice-Chancellor D.S. Reddy challenged the validity of S. 13A of the Osmania University (second Amendment) Act 1966,(31) on the ground that it curtailed his tenure of office. The Supreme Court rightly held that S. 13A of the Act was violative of article 14 on the ground that the creation of two classes of Vice-Chancellors, namely, of Vice-Chancellors appointed under the amending Act and Vice-Chancellor who was in the office at the commencement of the Second Amendment Act, was not on any rational basis. The court further observed that persons appointed as Vice-Chancellors, constitute a group and should, therefore, be considered as persons similarly situated and entitled to equal treatment.

In *State of Kerala v. Haji K. Kutty Naha & Others*,(32) the Supreme Court observed that the Kerala Building Tax Act, 1961, was violative of article 14 for, under the Act the floor area of the building was taken as the basis of tax irrespective of all other considerations. The Supreme Court held the act invalid on the ground that it did not take into account factors like the class to which the building belonged, the nature of construction, the purpose to which it was used, its situation, and other

31. Section 13A of the Act provided that the person holding the office of the VC, immediately before the commencement of the amending Act of 1966, was to hold office only until a new VC was appointed and it also provided that such appointment will be made within 90 days after such commencement.
relevant circumstances which have a bearing on matters of taxation. The court observed that where objects, persons, or transactions essentially dissimilar are treated by imposition of a uniform tax, discrimination may result, for refusal to make a rational classification may itself in some cases operate as denial of equality. Thus in certain conditions and circumstances, rational classification is necessary to ensure equality.

However in *Kustom Cavasjee V. Union of India* 33) the majority judgement did not express an opinion on the question whether the nationalisation of the fourteen named banks, as provided in the banking companies (Acquisition and Transfer of Undertakings) Act, 1960, was based on rational classification. The minority judgement upheld the nationalisation of the fourteen named banks on the ground that it was based on rational classification.

The majority judgement held that prohibiting the 14 named banks from carrying on banking business while permitting other banks to carry on banking business was based on a flagrantly hostile discrimination. It held:

"The fourteen named banks are prohibited from carrying on banking business—disability for which there is no rational explanation. Banks other than the named banks may carry on banking business in India and abroad; new banks may be floated for carrying on banking business. s. 15(2) of the Act which by the clearest implication prohibits the named banks from carrying on banking business is, therefore, liable to be struck down." 34

33. AIR 1970 SC 564.
34. Ibid.
However, A.N. Ray, J. (as he then was), in his dissenting judgement held as follows:

These fourteen banks are not in the same class as other scheduled banks. The classification is on the basis of the 14 banks having deposit of ₹ 50 crores and over. The object of the Act is to control the deposit resources for developing national economy and as such the selection of 14 banks having regard to their larger resources, their greater coverage, their managerial and personnel resources and the administrative and organisational factors involved in expansion is both intelligible and related to the object of the Act. (35)

Hence, the learned Justice held that the acquisition of the 14 banking undertakings did not offend Article 14 because of intelligible differentia and their rational relation to the object to be achieved by the Act of 1969. It is submitted that Justice A.N. Ray has rightly upheld the reasons for the classification of the named 14 banks. The object of the Banking Companies Act, 1969, was to have a wider distribution of economic resources among the weaker sections of the economy, namely agriculture, small scale industry and retail trade. To achieve this objective, the 14 named banks with the deposits of not less than ₹ 50 crores were selected for nationalisation. The plea that nationalisation should comprehend all the banks is not feasible for the government would be faced with the stupendous problem of providing compensation.

35. Ibid.
Hence, only a few banks could be nationalised and thus the selection of the 14 named banks was based on reasonable classification. Consequently, those banks could not be permitted to carry on banking business. Hence it is submitted that the guarantee of equality is not impaired.

Another important case on the issue is that of *P. Rajendran v. State of Madras*[^36], in which a rule made by the State of Madras allocating seats in medical colleges on district-wise basis was challenged. The Supreme Court observed that it violates Article 14. Wanchoo, CJ speaking on behalf of the Court observed that the question whether district-wise allocation is violative of Article 14 will depend on what is the object to be achieved in the matter of admission to medical colleges. The object of selection can only be to secure the best possible material for admission to colleges subject to the provision for socially and educationally backward classes. Further, whether selection is from the socially and educationally backward classes or the general pool, the object of selection must be to secure the best possible talent from the two sources and the object would be defeated if seats are allocated district-wise, as better qualified candidates from other districts may be admitted from either of the two sources. Since the district-wise classification does not serve the object to be achieved (i.e. the selection of the best talent), so it was incoherent with Article 14.[^37]

[^36]: AIR 1968 SC 1012.

[^37]: Id at 1016.
Then again in *Perlakarrupan V. State of Tamil Nadu* (38) the same consideration prevailed with the Court in striking down the scheme of selection of candidates for admission to medical colleges in the State of Tamil Nadu. It was a unit-wise scheme under which the medical colleges in the city of Madras were constituted as one unit and each of the other medical colleges in the Mofussil was constituted as a unit and separate selection committee was set up for each of these units. The intending applicants were asked to apply to the Committee nearest to their place of residence. This unit-wise classification was challenged as violating Article 14. This challenge was upheld by the Supreme Court which observed that it is admitted that the minimum marks required for being selected in some unit is less than in the other units. Hence, prima facie the scheme in question results in discrimination against some of the applicants. Before a classification can be justified it must be based on an objective criteria and further it must have reasonable nexus with the object intended to be achieved. The object to be achieved in the present case is to select the best candidates for being admitted to medical colleges. That object cannot be satisfactorily achieved by the method adopted. Thus it violates Article 14. (39)

But in *D.N.Chanchala V. State of Mysore* (40) the object was

38. AIR 1971 SC 2303
39. Id at 2306
changed. In short, the facts of the case were that the State had divided seats for its medical colleges into 3 categories, one of which was 'university-wise' in which 20% seats were reserved for the rest of India. The Supreme Court approved this type of university wise reservation by observing that since universities and medical colleges are set up for satisfying the educational needs of different areas where they are set up, such reservations are not undesirable, because such basis does not have the disadvantage of district-wise or unit-wise selection as any student from any part of the state can pass the qualifying examination in any of the three universities irrespective of the place of his birth or residence. Each university student body forms a class by itself distinct from other two universities in the State. Such classification has a reasonable nexus with the object of the rules, namely, to cater to the needs of the candidates who would naturally look to their own university to advance their training in technical studies, such as medical studies.\(^1\)

In State of Jammu & Kashmir v. T.N. Khosa, Justice Iyer has said that in this unequal world the proposition that all men are equal has wording limitations, since absolute equality leads to procrustean cruelty or sanctions, indolent inefficiency. Necessarily, therefore, an imaginative and constructive modus vivendi between commoners and excellence must be forged to make the equality clause viable. This pragmatism has produced the

\(^1\) Ig at 302.

\(^2\) AIR 1974 SC 1.
judicial gloss of 'classification' and 'differentia' with the by-products of equality among equals and dissimilar things having to be treated differently. He further observed that mini-classifications based on microdistinctions are false to our egalitarian faith, and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity.

Projecting the same theme, Justice Iyer on another occasion and in another situation observed that differences and disparities exist among men and things, and they cannot be treated alike by the application of the same laws; but the laws has to come to terms with life and must be able to recognize the genuine difference and disparities that exist in human nature. The Legislature has also to enact legislation to meet specific ends by making a reasonable or rational classification. Judges may differ in constitutional construction, but without peril of distorting the substance, cannot discard the activism of the equal justice concept in the setting of deep concern for weaker sections of the community.

Justice Iyer points out that the genesis of Article 14 and 16 consists not in literal equality but in progressive elimination of pronounced inequality. At the same time, he cautions that to treat sharply dissimilar persons equally is

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43. Ibid.
44. Ibid. at 4.
subtle injustice.\footnote{40}

Justice Iyer observed that the basic purpose of Article 14 is to give protection to the underprivileged and any law made to give them a legal lift should be permissible. They form a legislative class. He observed in \textit{Shambhu Nath V. Calcutta Municipality} \footnote{47} that basti-horrid hovels, which blot the human scone of India stand as a separate category although as an ugly but inescapable social reality. So far as Article 14 is concerned the bastis and dwellers of bastis stand in a tearfully separate class and special provisions dealing with owners of bastis cannot be challenged as discriminatory.

In the case of \textit{Jagdish Saran v. Union of India} \footnote{48}, the 48\% reservation quota for Delhi graduates for admission to post-graduate medical courses was raised to 70\% with entry point also left open to them from the rest of the 30\% open seats also. The Supreme Court justified it on the grounds that the Delhi students were from families drawn from all over India, that the practice of reservation by all other universities prejudiced Delhi students' chances - this indirect, real yet heavy handicap created discrimination and cannot be wished away and needs to be antidoted by some percentage of reservation of legitimate device, and that the Delhi students could not be made martyrs of the Constitution.\footnote{49}

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\begin{itemize}
  \item \textit{Id} at 537
  \item \textit{aIn} 1978 SC 768.
  \item (1980) 2 SCC 768.
  \item \textit{Id} at 770.
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The case really starts on the trodden assumption that institutional reservation is not violative of article 14. But it has a silver lining; articulation were given to the hitherto neglected values when Justice Krishna Iyer wondered at the trend of Indians from other Indian universities being treated as aliens.  

Justice Iyer rightly observes that 70% is far too excessive and therefore, contradicts articles 14 and 15. According to him, in advanced medical courses merit should be given preference, and 70% was too high at the post-graduate level.

Justice Iyer further observed that institutional reservation is an exclusionary or segregative device, de facto monopoly of seats, xenophobic trend; Indians from other Indian Universities being treated as aliens; any one who lives inside India can never be considered an outsider in Delhi.

He further observed that state must weave these special facilities into the web of equality which, in an equitable setting provide for the weak and promote their levelling up so that, in the long run, the community at large may enjoy a general measure of real equal opportunity. Equality is not negated or neglected where special provisions are geared to the large goal of the disabled getting over their disablement consistently with the general good and individual merit. He said that we have no doubt that where the human region from which the

50. *Id* at 787.
51. *Id* at 789
52. *Id* at 774.
alumni of an institution are largely drawn is backward, either from the angle of opportunities for technical education or availability of medical services for the people, the provision of a high ratio of reservation hardly militates against the equality mandate viewed in the perspective of social justice.\textsuperscript{53}

Regarding the question of extent of reservation based on residence requirement and institutional preference. Justice Iyer held that reservation must be kept in check by the demands of competence. You cannot extend the shelter of reservation where minimum qualifications are absent. Similarly all the best talent cannot be completely excluded by wholesale reservation. So, a certain percentage which may be available, must be kept open for meritorious performance regardless of university, state and the like. Complete exclusion of the rest of the country for the sake of a province, wholesale banishment of proven ability to open up, hopefully, some dalit talent, total sacrifice of excellence at the altar of equalisation - when the Constitution mandates for every one equality before and equal protection of the law - may be fatal folly, self-defeating educational technology and anti-national if made a routine rule of State-policy. A fair preference, a reasonable reservation, a just adjustment of the prior needs and real potential of the weak with the partial recognition of the presence of competitive merit - such is the dynamics of social justice which animates the three egalitarian articles of the Constitution.\textsuperscript{54}

\textsuperscript{53} Id at 786.

\textsuperscript{54} Id at 778.
Then comes the case of Pradeep Jain V. Union of India, which picks up the thread from where it was left by Jagdish Saran. This case fits in very well within the ambit of Justice Krishna Iyer’s conception of equality. The Supreme Court in this case has tried to project the entire country as one and not a mere amalgam of number of states. The courts have dispelled the very idea of being a domicile of a particular state. One is domicile of India and not of Panjab or Haryana or Rajasthan. Therefore, for purposes of admission in medical and technical institutions there should not be demarcation on the basis of domicile. Justice Iyer would very much wish and want that the most meritorious be admitted irrespective of the fact that they belong to this or that State. The Supreme Court has tried to achieve this through its judgements in this case. In this case, the majority judgement was delivered by Justice Bhagwati (as he then was). He has quoted Justice Iyer with approval at number of places in this Judgement. It would not be wrong to say Justice Iyer and Bhagwati have jointly as also individually advanced and advocated the cause of equality keeping in view the peculiar needs of our country. Infact, this approach is very essential. The concept of equality cannot be blindly made operative. In order to make it functional, the factual aspects cannot be ignored.

56. Id at page 1429, para 10
PROTECTIVE DISCRIMINATION:

In the United States, the Provision of the 14th Amendment guaranteeing equal protection of the laws was not found sufficient, at least for a long time, to prevent racial discrimination in various segments of the American social and political life. The framers of the Constitution of India had reason to fear, therefore, that in spite of the prohibition in article 14, discrimination on the basis of religion, race, caste, sex or place of birth might be legitimised by the courts on the basis of reasonable classification. It was with a view to forestalling such an eventuality that the Constitution in clause (1) of Article 15 expressly provided that "the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

Litigation under article 15 soon revealed that all the theoretical and conceptual obstructions that were raised in the United States to block equal protection to the weaker sections of society could be raised, and judicially countenanced in India also. Thus the constitution of India provided special protection to women and children, and socially and educationally backward classes under arts. 15(3), (4) and 16(4).

Justice Iyer, protection discrimination as a realistic necessity to attain preliminary equality, is a sine qua non for the play of equal protection, given a vast heterogeneous nation characterised by profound inequalities of caste and class. The Constitution is caste-blind, the goal being a caste less society. But benign discrimination is a requirement
of the larger conceptual Siamese twins of equalisation and equality.\(^{(57)}\)

An issue had arisen in America where concessions for coloured have been castigated as 'reverse-discrimination.' De-Funis presented this constitutional question: whether race can be a constitutionally valid criterion for admission to a state law school if the law school's purpose and the effect of its policy is not to stigmatize or segregate but partially to rectify and ameliorate the consequences of racial segregation by effectively affording equal educational opportunity to certain minority group members where previously it did not exist, notwithstanding the admitted detriment imposed on certain displaced non-minority group applicants.\(^{(58)}\) Although, the U.S. Supreme Court declined to decide this case, but the briefs submitted do unfold the meaning given by Justice Iyer:

"Equal protection is the constitutional mandate, and this may indeed require, as the courts have decreed, the recognition and use of racial classifications. On the same ground, the brief submitted by the American Bar Association concluded that 'preferential programs enhancing access to the mainstream of American society are not 'invidious' discrimination since the goals of compensatory programme is not the separation of races but equalisation of two cultures within one society. In short, racial classifications are constitutionally permissible when utilized to eradicate the vestigiate of a dual society.\(^{(59)}\)


\(^{59}\) Supra note 57 at p. 52.
Later the U.S. Supreme Court dealt with another case of reverse discrimination i.e. Bakke's Case\(^{60}\) in 1978. By a 5-4 vote, the court ruled that state universities may not set aside a fixed quota of seats in each class for minority group members, denying white applicants the opportunity to compete for those places. At the same time, a different five-justice majority held that it is constitutionally permissible for admission officers to consider race as one of the complex of factors that determine which applicant is accepted and which rejected.

The dilemma of protective discrimination whether in India or the United States - is not by the very use of racial and caste criteria. These distinctions are perpetuated and endowed with a vested interest in their own survival.

The Constitution of India has shown protective discrimination in favour of women and children and socially and educationally backward classes which we shall now deal separately.

**PROTECTIVE DISCRIMINATION IN FAVOUR OF WOMEN:**

Article 15 (3) enables the State to make provisions for women. This obviously intends to meet their special needs on account of their peculiar characteristics as women, such as the need for maternity leave before or after child birth etc. This raised an important issue that whether the words

\(^{60}\) University of California Regents \textit{v.} Bakke,\textit{438 US 265} at 412 418 (1978).
special provisions for women and children as used in article 15(3) are confined to conceiving or other biological peculiarities of women or these words are to be taken as equivalent to special provisions for the advancement of the interest of women as used in article 15(4).\(^{61}\) It is submitted that women under article 15(3) also should be treated as a socially and educationally backward class as contemplated in article 15(4).\(^{62}\) In the words of V.S. Deshpande J.

"Women satisfy the educational, social and economic criteria of backwardness as compared to men. This fact is clouded and has not been brought to the forefront because the search for the criteria of backwardness has been restricted to comparisons being made, between different castes, communities or social classes, each of them including men as well as women. But when the condition of women is to be considered, one can approach by treating women as a class and compare the condition of women as against the condition of men."\(^{63}\)

The court while interpreting any law should keep in mind that the women constitute a weaker section of the society and this applies to almost every society. This classification cuts across social, economic and regional distinctions. However, the judicial predicament towards women has been quite wavering and this can be seen from some of the decided cases.

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61. Art. 15 (4): Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

62. The first Backward classes Commission in its report recommended that all women in India should be treated as Backward Class. While recommending concessions in education, the commission did not mention government services sec. 1 B.C., 31-32.

63. Charan Singh v. Union of India (1979) S.L.J. 26 at 32.
In Anjali Roy V. State of W.B., \( (64) \) where a girl student was refused admission in the college solely on the ground of sex in contravention of article 15(1) of the Constitution. It was held that article 15(1) was of wider application than article 29(2) and, therefore the former should be construed 'as controlling' the latter. Bose J. did not consider the provision in article 15(1) of any help in upholding the rights of the Indian Women to equal facilities of college education. The learned Judge pointed out:

"Article 15(3) of the Indian Constitution, however provides for only special provision being made for the benefit of women and does not require that absolutely identical facilities as those enjoyed by males in similar matters must be afforded to women also. \( (65) \)"

This view seems to be wrong, because if article 15(3) enables the state to make special provision favouring women, then how can the state take away the rights guaranteed to them under article 15(1)? It is submitted that guarantee under article 14 can be made available to women and nothing in article 15(1) or in article 29(2) should be understood to qualify the provisions of Article 14. Article 15, 16 and 17 and 29 should be understood to supplement and add to the equality clause of article 14 and not to detract from that guarantee.

In University of Madras V. Shantha Bai, \( (65) \) a women applicant was refused admission to the college on the ground

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64. AIR 1952 Cal.822.
65. Id. at 825.
66. AIR 1954 Mad. 67.
of sex only. Rajamannal Chief Justice held that Madras University was not maintained by the State, but was only aided by the state of Madras, thus it was not included in the definition of state, and therefore the petitioner could not complain of discrimination under article 15(1). The learned judge justified the denial of admission on the ground that in the college open to men only, there were no facilities for women like a separate common room etc. In this context, the court compared the situation to that where a college is not permitted to admit students to the science classes without adequate laboratories. The court ignored the fundamental right of the women. It is submitted that if women have a right to be admitted, there is a corresponding duty on the state to provide necessary facilities for admission. The state thus discriminates against women precisely by creating facilities for women students and in failing to create equal facilities for women. (67) The court also relied on article 29(2) which has omitted 'sex' as prohibitory ground for discrimination. It is submitted that articles 15(1) and 29(2) should be interpreted harmoniously. In the words of Professor Tripathi:

"(T)he omission of 'sex from the test of article 29(2) absolves the state from the duty of admitting a woman applicant in a particular college, but it does not absolve the state from the duty, imposed by article 15(1), of making available to the same student another and equally good college where she could be admitted. Article 29(2), which is a guarantee

against segregation cannot take away or destroy article 15(1) which is a guarantee against discrimination or unequal treatment. It may be true that segregation on the basis of 'sex' does not offend article 29(2), but the fact remains that if such segregation also has the additional effect of discriminating it must be struck down under article 15(1).\(^{68}\)

In *Yusuf Abdul Aziz V. The State of Bombay*,\(^{69}\) the validity of section 497 of the Indian Penal Code was challenged. This section makes an abettor of adultery punishable, but provides that, "in such case the wife shall not be punishable as an abettor." It was argued that clause (3) of article 15 should be confined to provisions which are beneficial to women and could not be used to give them a licence to commit and abet crimes. The court found no such restriction under clause (3) nor agreed that provisions which prohibit punishments is tantamount to a licence to commit offence of which punishment has been prohibited.

Bose, J. speaking for the unanimous court observed:

"Sex is a sound classification and although there can be no discrimination in general on that ground the constitution itself provides for special provisions in the case of women and children.\(^{70}\)

To differentiate between men and women on this account smacks of an archaic concept which is certainly not consonant with

\(^{68}\) Id at 195.

\(^{69}\) AIR 1954 SC 321.

\(^{70}\) Id at 322.
dignity of the woman. A small step has been taken by the Law Commission in recommending the removal of this difference between men and women in the offence of adultery.

Section 437 of the Code of Criminal Procedure enables women and children to be released on bail for non-bailable offences in the circumstances under which a male cannot be released on bail has been held to be consistent with article 15(3).\(^{(71)}\) This provision takes care of women's physical condition and saves her from falling into awkward and hazardous situation which could have put her into inconvenience. But the contention that one of the litigants is a woman and merely on the ground of differentiation of sex, she should be exempted from paying the costs of suit is liable to be rejected.\(^{(72)}\) The reasons for the rejection may be that bearing of costs depends upon the financial condition of a person and poor financial condition is not a universal feature of all Indian women. In another case,\(^{(73)}\) the Allahabad High Court disallowed the decision of excise authorities taken at the time of disposal of the application for the licence for opening liquor shops to prefer women applicant to men applicants. The grant of the licence to the applicant only on the ground that she was a woman said the court was not

\(^{(71)}\) Mst. Choki V. State AIR 1957 Raj.10.
\(^{(72)}\) Srinivasan V. Padmasini AIR 1957 Mad. 622.
only made on irrelevant ground, but was also discriminative
and violative of article 15(1).

The provision under order 5 rule 15 of Civil
Procedure Code for making service of summons on any male
member of the family, if the defendant could not be found
was held not discriminatory of article 15(3) which covers
any provision either for betterment or for some other
purpose specially made for women. It was held that there
was no discrimination between a woman and man simply on the
ground of his or her sex in receiving a notice on behalf of
some other member of the family. It is submitted that such
a provision cannot be sustained in modern times as it
discriminates against women. Indeed, it is heartening to
note that keeping pace with the growing literacy, awareness
and the change in the role of female, discriminatory provision
was amended to provide that the service of summons can be
affected on adult females also.

The article making
equal opportunity for woman in employment obligatory has
however not always been interpreted in favour of women.
This is because the court in addition to the constitutional
mandates has also taken into consideration the peculiar
circumstances of each case involving the name of the job
in which the employment of the woman was in question.

In Raghubans Saudagor Singh, an order of the Governor of Punjab rendered women ineligible to posts in men's jails other than those of clerks and matrons. The order was assailed as violative of article 16(2). The court turned down this plea and held that what is forbidden under the Constitution is discrimination on the ground of sex alone, but when the peculiarities of sex added to a variety of other factors and consideration form a reasonable nexus with the object of classification than the constitutional bar under article 15 and 16(2) cannot be attracted.

Explaining the difficulties of a female officer in men's jail the court observed:

"Necessarily the inmates of these jails have a large majority of hardened and ribald criminals guilty of heinous crimes of violence and sex. The difficulties which even male wardens and other jail officials experience in handling this motley and even dangerous assemblage are too clear to need elaboration. A woman performing these duties in a men's jail would be even in a more hazardous predicament."

Thus the bar which was not solely based on the ground of sex was held constitutionally valid.

However, in W.A. Raid V. Union of India, a contrary view was expressed by a single bench of the Delhi

75. AIR 1972 P & H 117 (Per Grover J, as he then was)
76. Id at 121
77. Ibid.
78. AIR 1976 Delhi 302.
High Court. In this case, the post of a Senior nursing tutor in the school of Nursing was reserved only for females in view of the requirements of the job. This was declared to be violative of article 16. Justice H.L. Anand refused to accept the proposition that all men or all women could be unfit for a particular job. The learned judge observed:

"It is too late, therefore for anyone to suggest that there is any area of human activity for which women as a class are ineligible for any work for which all women are unfit. An aggressive protagonist of woman's liberation may perhaps describe such findings by a court as a virtual judicial slander. (79)

Accordingly, it was construed that clause (3) of article 15 should not be permitted to control the fundamental right contained in clause 2 of article 16 so as to virtually add a fourth exception to the three already contained in article 16.

Professor Balram Gupta does not agree with the observations of Justice H.L. Anand. He says that this approach of the judge is beset with problems. His (Justice Anand's) endeavours cannot make man and woman equally suitable for all jobs. He further says that Justice Anand refused to take stock of the doings of God for it is he who has made them different. (80) However, Professor Gupta agrees with

79. Id at 306

Dr. Mohd. Ghouse when he asks: if the learned judges' (Justice H.L. Anand) construction is right, how can the Government ensure appointment of lady doctors in maternity hospitals and lady teachers in girls schools and colleges when the need for such appointment is self-evident? Dr. Gupta further said that the judge has failed to recognise that the role of the judiciary lies in filling the 'silences of the Constitution'. By adopting the 'stand-still' approach, the judiciary fails to contribute to the growth of Constitutional jurisprudence.

The other view taken is that protective discrimination in favour of women in matters of employment is permissible within the constitutional scheme. The Supreme Court has interpreted in Thomas case that articles 14, 15 and 16 have to be read together to form the 'totality of provisions dealing with equality. It was argued that the reason for enacting articles 15(3) and 16(4) was that the right to equality declared in article 15(1), 16(1) and 16(2) had to be balanced by benign or reverse discrimination made in favour of the disadvantaged classes.

81. Quoted in Ibid.
82. Ibid.
85. Supra note 83 at 31-32.
In Dr. D.B. Sen, p.B. Mukherjee, J., pointed out that what is prohibited by article 15(1) as also by article 16(2) was adverse discrimination. What is allowed by article 15(3) as also by article 16(4), benign or protective discrimination by which women and backward classes are helped towards equality. Remedial and welfare provisions such as article 15(3) have to be widely construed.

Justice R.S. Sarkaria (as he then was) while speaking for the court in Shamsher Singh said that article 15 overlaps and supplements Article 16. The learned judge noted:

"It follows as a necessary corollary there from that the scope and the content of the exception in cl.3 will extend to the entire field of state discrimination including that of public employment. Thus construed cl.3 of Article 15 is to be deemed as a special provision in the nature of a proviso qualifying the general guarantees contained in Article 14, 15(1), 15(2), 16(1) and 16(2). (88)

In this case, the validity of a special allowance for woman in a wing of the educational service was challenged on the ground that their male counterparts were not given the benefit although both performed identical duties, and were part of the same service. The discrimination was justified on the ground that, even though, it was grounded on sex alone, it was saved by clause (3) of Article 15.

86. AIR 1951 Cal.563.
87. Supra note 83.
88. Id. at 375.
It is submitted that if article 16 is interpreted narrowly and in isolation of other provisions of the constitution, it would mean that what the framers gave by way of Article 15(3), took away by Article 16. The fact, that the women have remained 'backward' when they are compared with men needs no evidence. The report of the committee on the status of women in India amply supports this. (89)

It is precisely this fact which prompted the framers to constitutionally carve out a special provision in favour of women. It is surprising that the sex prejudice against the Indian womanhood pervades in the service rules even in the last quarter of this century. In C.B. Muthamma V. Union of India (90) the rules requiring female employees to get permission before marriage and denial of right to employment

89. The committee on the Status of Women has pointed out that though the women do not constitute a minority they have started acquiring the recognised dimensions of a minority. These are: (1) inequality of class (ii) inequality of status and (iii) inequality of political power. The Committee emphasised that the continued backwardness of women is basically due to a deeply ingrained notion that a woman's role in life does not call for much formal education. Indicating that this notion is reaffirmed by an occupational structure that makes it difficult for women to be productively employed after completion of their education. The report strongly recommended: (1) the development of suitable employment opportunities for women, (2) the development of information and guidance service to ensure that the women avail of the new employment opportunities and (3) the launching of a systematic campaign to alter both societal notions as well as women's self-concepts regarding their roles in life. In fact the committee recommended the launching of a massive campaign to promote acceptance of equality of sexes.


90. AIR 1979 SC 1868.
to married women were held discriminatory and violative of article 16. It is submitted that if the family and domestic commitments of a woman member of service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male. In this context, it would be worthwhile to quote what Justice V.R. Krishna Iyer said in this case. His Lordship observed:

"Discrimination against women in traumatic transparency is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families intercontinental marriage and unconventional behaviour, one fails to understand the naked bias against the gentler of the species! (91)

Justice Iyer further said that this rule is in defiance of article 15. If a married man has a right, a married woman other thing being equal, stands on no worse footing. This misogynous posture is a hangover by the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is justice. That our founding faith enshrined in articles 14 and 15 should have been tragically ignored vis-a-vis half of India's humanity, viz. our woman is a sad reflection on the distance between constitution in the book and Law in action. If the Executive as a surrogate of

91. Id at 1869-70.
Parliament, makes rules in the teeth of part III, especially when high political office, even diplomatic assignments has been been filled by women, the inference of die-hard allergy to gender parity is inevitable. Making it more clear he said that we do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity.

But save where the differentiation is demonstrable, the rule of equity must govern.

In Air India V. Nargesh Mirza the validity of the Indian Airline's and Air India's service rules providing, that an Air Hostess had to retire from service at the age of 35 or on marriage - whichever was earlier, or, if she got married within four years of confirmation or on first pregnancy was in question. The rules also empowered the Managing Director to retain in service an unmarried Air Hostess upto the age of 45 years on her being found medically fit.

The forced retirement at the age of 35 deprived the Air Hostess of 8 years service, entailing loss of salary, larger amount of gratuity, provident fund and dearness allowance. The short tenure of service also prevented them

92. Id at 1870
93. AIR 1981 SC 1829.
from availing other benefits such as vehicle allowance and house building loans as the pay back period was shorter necessitating few and heavy instalments.

The rule (13) of the Indian Airlines Employees Service Rules and Establishment Orders was challenged as discriminatory and violative of articles 14, 15 and 16 of the Constitution.

The Supreme Court upheld the Air Hostesses contention in part and struck down as unconstitutional corporation regulation on retirement age and pregnancy bar on the service of Air Hostesses. The judges held that an Air Hostess can work upto the age of 45 years and that her services could be terminated on third pregnancy provided her two children were alive. The judgement attempted to recognise that their right to service benefits is equal to their male counterparts, and came down heavily upon the Corporation management for its chauvinistic attitude of looking upon the hostesses as sex symbols employed for 'business consideration'. The court observed:-

"Having taken the Air Hostess in service and after having utilised her services for 4 years to terminate her services by the management if she becomes pregnant amounts to compelling the poor Air Hostess not to have any children and thus interfere with and divert the ordinary course of human nature. It seems to us that the termination of the services of an Air Hostess under such circumstances is not only callous and cruel act but an o-ren insult to Indian womanhood... the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of..."
utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution.\(^{94}\)

The three judges bench held that the power conferred on the Managing Director was unguided, uncontrolled and arbitrary and struck it down. As the provision stood, the extension of the retirement age of the Air Hostess was entirely at the discretion of the Managing Director. This suffered from excessive delegation of powers the court held.

But regarding the question of marriage of an Air Hostell within four years, it was held that the provision did not suffer from any constitutional infirmity. It is submitted that why should such a bar exists only against the women employees? Why not in respect of all the employees - male or female? The judgement needs reviewing because it is based on the surmise that women are not fit for services after a particular age and stage. Women are as much human beings as men and are entitled to equal rights. If they work on equal terms with men then why should they be denied the same benefits, why cannot they marry, have children and lead a normal happy and settled life. Corporation has no right to curb the natural course of human nature by compelling an Air Hoste to marry late and remain childless.

\(^{94}\) Id at 1850
Justice Krishna Iyer who always stands by the masses, the down-trodden and the weaker sex says in his book recently published that strategies for deliverance for the weaker gender have to be evolved. New perceptions and conceptions geared to the goal of woman's weal is our task. Goals have to be defined.\(^{(95)}\) A raging campaign must blow across the nation. It must begin with the demand for women as a backward class followed by reservation, economic and political. The women must take a pledge that they will vote only for a party which sets up the largest number of credible women candidates which spells out time bound, action oriented programmes of economic and political liberation.\(^{(96)}\) He further says that the various indicia and concerns that have been catalogued definitely point to women as a backward class under Article 15(4). The Supreme Court has rightly held that class may not be equated with caste or class is same as religious denomination. This will enable the government to reserve posts in the government service. The same may be extended to private sector also through legislation.

Realising the fact that the number of the women employees is less in different sections as compared to men, Justice Iyer suggests that women should be trained up in working class jobs in the whole range of occupations, not only in 'Soft' and 'Pretty' places or menial jobs. He

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96. Id. at 75.
believes that women can work as hard as men and as intelli-
gently, imaginatively and tactfully. It is blasphemy to
brand women as nitwits, incompetents and not tough enough for
hard and heavy tasks. They can win laurels in any sector.\(^{96a}\)

Justice Iyer locates one more snag. He observes that
courts have held that since fundamental rights are binding
only on the state, private entities and enterprises may
lawfully discriminate against women and deny to them their
just claims to offices, employment and other assistance.
Justice Iyer has suggested a solution for this problem also.
He states that the spirit and thrust of the preamble is
assurance of ample equality of status and opportunity, not
confined to the State sector. This is a key to the unlocking
of the semantic sweep of Articles 14 to 16. Moreover, even
if the addressee is the state, it behoves the state to
enforce equality in all ways its writ can run. So much so,
if a private enterprise needs state aid, state sanction,
state loan, licence or other participation, it must feel
bound by the equality mandate and should reduce assistance,
license or co-operation unless the private or joint undertaKing
abides by Article 14 to 16.\(^{97}\)

He further suggests an appointment of Ombudsman or
Presidents' Commission to invigilate, monitor, audit and
report on the disabilities, bottlenecks and obstructive
tactics whereby womanhood is denied social justice, and the

\(^{96a}\) Justice V.R. Krishna Iyer, Human Rights & The Law,

\(^{97}\) Id at 45.
legislatures must discuss such reports and direct follow-up action.\(^8\)

According to him, a women cell in the Law Commission must be set up consisting of women legal activities with sensitive mental antennae who should take prompt steps to enact or amend laws, rules and orders with a view to actualise woman's deliverance.\(^9\)

Justice Iyer also stresses on the formation of a Special cell at several levels to mark out legislative, administrative and other measures to actualize our objectives. Likewise, processing and monitoring cells to check up progress in implementation of laws to promote women's interests are also needed.\(^10\)

It is submitted that Justice Krishna Iyer has established that how equality clause can widen the scope of fundamental rights for women.

The fight for justice to women cannot be explained in a better way than in the words of Justice V.R. Krishna Iyer, who brings out illuminatingly the importance of women in the life of men and the society and strongly urges for universal justice to the entire womanhood as it brings cosmic harmony and restores peace. In his apt words:

"The fight is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony which never comes till woman comes. The soul of man is woman and when she goes there is not goodness of strength left."\(^11\)

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98. Id at 46-47.
99. Ibid.
100. Id at 42.
PROTECTIVE DISCRIMINATION IN FAVOUR OF SOCIALLY AND EDUCATIONALLY BACKWARD CLASS OF CITIZENS AND SCHEDULED CASTE & SCHEDULED TRIBES

The founding fathers of the Constitution have left the definition of 'Other backward classes' an open question. Even the Constitution of India has not defined the term backward classes clearly. So the question arises what is a backward class? "A backward class is a class/community which is backward in the opinion of the Government."102 Pandit Jawaharlal Nehru disliked the term "Backward Classes" and stated that "it was basically wrong to label any section of the people as backward even if they were so, particularly when 90 per cent of the people in the country were poor and backward."103

The Commission for Scheduled Castes and Scheduled Tribes, 1956-57 also expressed similar view:

1) Our aim is to have classless and casteless society and we cannot continue for ever classifying people according to caste and classes appellation.

2) Backwardness has a tendency to perpetuate itself and those who are listed as backwards try to remain as such due to various concessions and benefit they receive and thus backwardness itself becomes a vested interests.104


Winston Churchill described it as a mystery wrapped in an enigma.

The subject is puzzling even under the Indian Constitution. Ever since the Constitution came into force, the states have been making special provisions to facilitate the requirements of socially and educationally backward classes. Though the term backward class has nowhere been defined in the Constitution, but the term Scheduled Castes was defined by the Britishers for the first time in the Government of India Act, 1935 as follows:

"The Scheduled Castes means such castes, races and tribes corresponding to the classes of persons formerly known as the depressed classes as His Majesty specify". This definition is not satisfactory for the whole of the population of India, even the Brahmin himself is in a depressed condition. Under the Constitution of India, the term 'Scheduled Castes' have nowhere been defined specifically. However, Article 366 (24) of the Constitution defines the term "Scheduled Castes" as such castes, race or tribes or parts of or groups within such castes, races, or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution.

Under Article 341, the President may specify the castes, races or tribes... which shall for the purposes of this Constitution be deemed to be 'Scheduled Castes' and Parliament by law include in or exclude from the list of Scheduled Castes specified in a notification... any caste, race or tribe.

105. 27 JIL I (1935 at 319.)
Article 15 (4) says, "nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the Scheduled Castes and Scheduled Tribes."

Since these efforts impinge upon equality, the scope for challenge is obvious. The first case on this was State of Madras v. Smt. Champakam Dorairajan\(^{106}\), in which the Supreme Court held that the reservation of seats in the Medical and Engineering Colleges for Brahmins, Non-Brahmin Hindus, backward Hindus, Muslims and Christians, offended article 29(2) and 15(1) of the Constitution.

Immediately after this Supreme Court decision, the First Amendment of the Constitution was made which inserted article 15(4) to avoid this anomalous position. This is a saving clause, empowering the state to make special provisions for the advancement of any socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes. Such a provision could override the principle of equality. The protective discrimination recognised by the provisions of the Constitution, referred to above, is largely concerned with certain classes of citizens of India, who were regarded as suffering or having suffered in the past, from social and economic disabilities, such classes.

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106. AIR 1951 SC 226. In this case, the State of Madras had reserved seats in Medical and Engineering institutions in favour of candidates coming from backward classes, in pursuance of article 46 of the Constitution. It was contended on behalf of the affected students that article 46 is a directive principle and directive principles cannot override the fundamental rights and thus demanded that communal government order be declared invalid.
of citizens are scheduled castes, scheduled tribes and backward classes.

The significance of the article 15(4) has been examined by the courts in several cases. In *Puppala Sadarsan vs. State of A.P.* 107, the High Court of Andhra Pradesh held that the fundamental rights of a citizen whether he belonged to a backward community or not, was to secure admission to any educational institution maintained by the State without his being discriminated on grounds only of religion, race, caste or any of them. In exercise of the powers under Article 15(4), the State may direct that certain percentage of seats in each faculty of educational institutions should be reserved for candidates from backward classes. The rule should be so worked out as to protect the interest of the students of the backward classes without at the same time causing prejudice to students of other communities. So we see in this case, it was established that any scheme of preference must be administered so as to operate in favour of the backward class.

The extent of preference permitted was among the most pressing issues at that time. The Constitution is explicit in regard to the protection of the Scheduled Castes and Tribes, and the Scheduled Castes, as such, were understood to be those suffering the disabilities of untouchable status. But who were the 'Backward Classes' and what criteria might be used in designating these for preferential treatment? 108 The Constitution

107. AIR 1958 A.P. 569.
is vague in this respect. Questions regarding the determination of backwardness had been raised in Doria Ann. Using caste or religion criteria for classification would inevitably involve gross judgements about the level of particular group's advancement, but even within the more backward communities, certain elements or individuals might be highly advanced. Were they to receive the benefit of advancement? Similarly among the higher castes, even the Brahmins could be found who could be regarded as socially and educationally backward. Were they simply because of their caste, to be denied benefit?

Whatever criteria might be applied for determining backwardness, fundamental problems always remained. Galantar States, Backwardness is not a single trait, it exists in kinds and degrees. By whatever standards employed, some are more backward than other. Without special protection for the most backward, competition could, in effect, "give the least benefit to those with greatest need."109

Then the question came up that to what extent preference might be given. Would reservation be limited so as to correspond roughly with the percentage of the group in the overall population?

Mysore government was confronted with series of cases regarding the problem of determining 'backwardness' and the limits on the percentage of the populations designated for preferential treatment under article 15(4).

In Kamkrishna Singh vs. State of Mysore, the notification of the government of Mysore which provided for reservation of certain percentage of seats in Medical Colleges to certain classes on the ground of socially and educationally backwardness was challenged as contravening Art. 15(4). The determination of the backward classes was made in 1959 on the basis of census report of 1941. Under the notification, the list of backward classes included 95 per cent of the population of the State and excluded only a few of the communities, namely, Brahmins, Kayasthas, Banias, Anglo-Indians and Parsees from getting the benefit of the seats reserved for all other communities of the State.

The Mysore High Court held that the determination of backward classes made in 1959 on the basis of the census report of 1941 was not based on any intelligible principle. The Court further observed that since the notification excluded only few of the communities from getting the benefit of the seats reserved for all other communities of the State, it was more a discrimination against these communities than a provision for the backward classes. It was also held that it was a provision not for socially and educationally backward classes, but for the classes who were comparatively backward to the most forward classes. Hence the Court declared that the notification could not be justified under Article 15(4).

In Balaji vs. State of Mysore, under the Order of the

111. AIR 1960 Mysore 338.
112. AIR 1963 SC. 649.
Mysore Government, 68 per cent of the seats available for admission to the Engineering and Medical Colleges and other Technical Institutions specified therein were reserved on the following basis: Backward Classes - 28 per cent; more backward classes - 22 per cent; Scheduled Castes - 17 per cent; and Scheduled Tribes - 3 per cent.

The petitioners challenged the validity of the Order on the ground that the classification of backward and more backward classes was made almost solely on the basis of caste and in such a manner as to exclude, principally, Brahmins.

In its judgement in Bajaj, the Supreme Court, stated that article 15(4) refers to "classes of citizens", not to castes and while "the caste or a group of citizens may be relevant its importance should not be exaggerated. Caste cannot be the sole or dominant test. Backwardness must be both social and educational, and while its sources are complex, it is ultimately the result of poverty. The court also held that the classification of "backward" and "more backward" is neither justified nor warranted by article 15(4) and that, generally speaking, special provisions should be less than 50 per cent. Decline in quality, the court contended, is the "inevitable consequence of reservation", and the interests of the nation would be seriously jeopardised if special provision for the backward were not held within "reasonable limits".

The adjustment of competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a state reserves practically all the seats available in all the colleges, that clearly would be subverting the object
of article 15(4). The Court cautioned that in looking after the advancement of the backward classes, the State would not be justified in ignoring altogether the advancement of the rest of society. The interests of the weaker sections of society have to be adjusted with the interests of the community as a whole.

The Supreme Court once again confronted the issue in a challenge to the reservation of seats for backward classes in Madras Medical College in the case of *Najenderan vs. State of Madras* (113). The rules issued by the Madras which were challenged were as follows: Rule 5 provides for reservation for socially and educationally backward classes. Rule 3 provides that the seats reserved in the general pool and the seats reserved for socially and educationally backward classes will be allocated among the various districts on the basis of the ratio of the population of each district to the total population of the State. The district-wise allocation will not apply to seats reserved for scheduled tribes and scheduled castes provided under rule 5. Rule 5 was challenged on the ground that it contravened article 15(1) and further that the list of socially and educationally backward classes for whom reservation was made under rule 5 was nothing but a certain list of castes. The Supreme Court rightly held a class was also a class of citizens and if the caste as a whole was socially and educationally backward, reservation could be made in favour of such a caste on the ground that it was a socially and educationally backward class of citizens within the meaning of article 15(4). Hence the Supreme Court

113. AIR 1968 SC 1012.
held that the list of candidates for admission to the Medical College prepared caste-wise, was not violative of article 15(1) for the candidates belonged to the castes which were as a whole socially and educationally backward. Rule 5 was therefore upheld. Rule 8 was challenged on the ground that it contravened article 14 and 15(1). The Supreme Court held that district-wise allocation infringed article 14; for allocation of seats district wise was considered to destroy the object of securing the best possible talent, whether selection was from the socially and educationally backward classes or from the general poor. Hence Rule 3 was declared void as violative of article 14.

The problem in Balaji decision was that while the court conceded that caste might be taken as a factor in determining backwardness, it could not be taken as the 'basis' for such determination. In this and subsequent case i.e. State of Andhra Pradesh Vs. Sagar(114) the Supreme Court held that Caste cannot be the sole criterion for the determination of backward classes. The court held that since clause (4) of article 15 was by way of exception to the fundamental right in clause (1), once it was shown that, prima facie, a classification infringed the right in clause (1), the burden was on the government to show that it was protected by the exception in clause (4). Further, the court held, that a classification based on caste, as the one involved in the case in hand, did, prima-facie violate the right in clause(1).

114. AIR 1968 SC 1379.
The Government's case was that its expert officials, and a sub-committee of the Cabinet had satisfied themselves that the classification was based on proper criteria and not solely on caste, and, that the court should accept their findings. Speaking through justice Shah (as he then was), the Court rejected this contention, and held that the issue was justiciable, and, that the High Court below was right in insisting that the materials on the basis of which the officials and the cabinet sub-committee had determined the backwardness and prepared the lists must be placed before the Court for it to decide whether the Constitutional requirement had been satisfied. And, since this had not been done it was held that the classification made by the government on the basis of castes was invalidated by the High Court.

It is clear that courts will not uphold any list of backward classes in terms of castes unless it was well established on the basis of evidence and argument before the Court that the castes really represented groups of socially and educationally backward people.

P.K. Tripathi submitted that Courts should go a step further and hold that caste, and also, for that matter, race or religion, cannot at all be made the basis of classification for the purposes of determining backwardness as contemplated in clause (4) of article 15. Because, as long as caste remains even one of the several criteria on the basis of which backwardness is to be determined, it will be found, that in the ultimate
analysis, it will emerge as the sole basis of differentiation and will therefore, make the classification invalid. (115)

However, we see in two cases i.e. State of Andhra Pradesh V. U.S.V. Balaram (116) and A. Chettiar Pariskarunnum V. State of Tamil Nadu (117) that caste was made the essential and inseparable ingredient of the concept of backwardness for the purposes of art. 15(4) and 16(4). In the former case, it was held that if an entire caste is as a fact found to be socially and educationally backward, their inclusion in the list of backward classes by their caste name is not violative of art. 15(4). A caste is also a class of citizens and a caste as such may be socially and educationally backward. If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average.

It is submitted that the benefit of reservation should not be given to those few who are socially and educationally above the general average, so that this benefit may be availed by those candidates who really deserve it.

115. P.A.Trinathi, Some Insights Into Fundamental Rights. 263(1972)
Balaram was perhaps the first case where doubts were expressed over some of the doctrines developed in Balaji. (118) As against the Balaji's insistence on the well below the State average test of educational backwardness, the court in Balaram upheld the inclusion of several communities in the list whose educational attainment was slightly higher than the state average. Then, the Balaji's requirement of comparability of Other Backwards Classes to the Scheduled Castes and Scheduled Tribes was relaxed by saying that Other Backward Classes need not exactly be similar to Scheduled Castes and Scheduled Tribes in all respects.

In Periakaruppam's case (119) also, the Court clarified that there were numerous castes in this country which were socially and educationally backward and to ignore their existence would be to ignore the facts of life.

Justice Krishna Iyer in State of Kerala V. N.M. Thomas (120) says that equal opportunity for members of a hierarchial society makes sense only if a strategy exists by which the unprivileged have environmental facilities for developing their full human potential." (121) He further said,

118. Supra note 112.
119. Supra note 117.
120. AIR 1976 SC 490.
121. Id at 536.
"If a court is convinced that the purpose of a measure using a suspect classification is truly benign, that is, that the measure represents an effort to use the classification as part of a programme designed to achieve an equal position in society for all tribes and groups and communities, then it may be justified in permitting the State to choose the means for doing so, so long as the means chosen are reasonably related to achieving that end." (122)

But in affirming the impugned preference for Scheduled Castes and Tribes, Krishna Iyer offered a three-fold note of caution on the danger of reservation. First, he contended that the benefits bestowed by "protective discrimination" by and large, are snatched away by the too creamy layer of the backward caste or class, thus keeping the weakest among the weak always weak." This is true not only within the backward classes category but among the Scheduled castes as well.

Secondly, the claim of backwardness is overplayed extravagantly in democracy by large and vocal groups. The higher backward classes have acquired a "vested interest in the plums of backwardism." With privilege and preference, they compete unfairly with their near-equals in the unprotected category above them, but they deny to the truly disadvantaged the benefits which the Constitution seeks to bestow. For purposes of protective discrimination, backwardness cannot be treated without internal distinctions. The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. Third, Krishna Iyer was convinced that a "lasting solution" to the problem of

122. Id at 538.
backwardness in India will come only from fundamental improvements in the social environment and ultimately in the breakdown of caste barriers through inter-marriage.\(^{(123)}\)

Justice Iyer believes that poverty plays a great role in the social and educational backwardness of a class of people. He further says traditional occupations, village life and like circumstances also have a bearing on the issue. It is the time that an objective appraisal of backwardness be made. The less vociferous but really backward artisan classes of the village are smothered because of the really advanced and more influential pseudo backward castes.\(^{(124)}\) Justice Iyer though believes that real backward classes should be helped under art. 15(4) so that they come forward but at the same time says that we should not allow to continue this caste-system. This disease must be cured, for which he suggests that they may be given scholarships, special tuition, intensive training and hostel life in urban surroundings, more colleges to accommodate every backward aspirant may also be started. Another method he suggests is to lower the standards for admission to institutions for backward classes of people.\(^{(125)}\) He seems to be aware of the products of such institution when he says that this method is an anti-merit method whose long term effect upon national efficiency is obvious. It is submitted that it is only the latter process that has come

\(^{(123)}\) Id at 531.


\(^{(125)}\) Id at 157.
to stay in this country, and the outcome would be the same as has been made clear by Justice Iyer in his observations.\(^{(126)}\)

In this case, the Supreme Court by a majority of 4 to 3 held that the equalitarian guarantee of the Constitution (Art. 14-16) can be so interpreted as mandating affirmative action on the guide lines supplied by non-enforceable directive principles.

Justice Iyer in *Jagdish Saran Vs. Union of India*\(^{(127)}\) has justified preferential admission in medical colleges to ensure better supply of medical services to the neglected regions of the country. Regional preferences are now seen as reasonable to correct imbalance or handicaps from which the students from backward regions are suffering. But at the same time he cautioned that we cannot extend the shelter of reservation where even minimum qualifications are absent. He further said that the basic medical needs of a region of the preferential push which are justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality, where the best talent or skill must be handpicked.\(^{(128)}\) He is of the view that preference may be given if the students are willing to go back to their own provinces and serve there, so that it can be brought to the level of other advanced provinces.

Another case came before Supreme Court regarding determination of backwardness in which the Court observed that poverty alone cannot be the basis of classification to support reservation in

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126. Id at 153.
128. Id at 778-779.
rural areas. In the case of Miss Arti Saoru Vs. State of Jammu and Kashmir and Others, applications were invited for admission to Medical College. The manner and procedure governing the eligibility for admission had been set forth in a Government Order of 3rd April, 1973, which laid down that a Selection Committee constituted by Government would determine the inter se merit of eligible candidate on the basis of an interview for judging their (a) physical fitness, (b) personality, (c) aptitude, (d) general knowledge and (e) general intelligence. Later, this Government Order was modified by a subsequent order, and in the result, eligible candidates were now required to appear not only in the viva voce examination but also in the objective test. Besides examination base, the selection was also determined by a distribution of the seats into three distinct divisions. Of the total number of seats 50% were earmarked for being filled on the basis of an open merit, 25% were reserved for candidates belonging to scheduled castes and other reserved categories one of which was broadly described as specially an educationally backward classed and included candidates from (a) areas adjoining actual line of control and (b) areas known as bad pockets including Ladakh. After selection had been made as above the remaining 25% of the seats were to be filled on the basis of inter se merit to ensure rectification of imbalance in the admission for various parts of the State, if any, so as to give equitable and uniform treatment to those parts. It was also recited that if there was no 'visible imbalance', the seats earmarked under that

129. AIR 1931 SC 1009.
head were to be distributed among further open merit candidates. On 27th May, 1974, the percentage of seats reserved for the different categories was refixed, so that 60% of the seats were now earmarked for admission on the basis of open-merit, 20% for distribution among candidates from the scheduled castes and other reserved categories including socially and educationally backward classes and the remaining 20% of the seats were earmarked for ensuring rectification of imbalances. Still another order dated 21st April 1976 reduced the reservation for removing regional imbalances from 20% to 18%. The State Government published a Notification on 24th September, 1980, purporting to identify certain villages as socially and educationally backward for applying the principle of 'rectification of imbalance' in different parts of the State. A long schedule was annexed and listed some hundreds of villages.

Court held, that the classification attempted by the State Government by its order dated 24th September, 1980 suffers from the vice of arbitrariness and must be declared invalid. There is no intelligible data before us for sustaining the classification. The fact by itself that some hundreds of villages have been brought within the classification is of no assistance whatever. Hay, C.J., speaking for the court said, "The reservation for rural areas cannot be sustained on the ground that the rural area represent socially and educationally backward classes of citizen. This reservation appears to be

130. Id at 1011
made for the majority population of the state. 80% of the population of a state cannot be a homogenous class. Poverty in the rural areas cannot be the basis of classification to support reservation for rural areas.\(^{(131)}\) In this case, we have seen that Ray CJ disagrees with Justice Iyer when he says that poverty cannot be the basis of classification to support reservation.

It is submitted that the most important controversy on the subject relates to the criteria for determining backwardness. It would appear that in the thinking of the Supreme Court as it has shared itself from time to time, several streams of thoughts come to the mind:

(i) According to the first stream, caste is not very important consideration in determining social and educational backwardness for the purpose of art. 15(4) of the Constitution.

(ii) According to the second, caste is a very important consideration for the above purpose and in any case, is an inseparable and essential ingredient of the concept of backwardness for the purpose of art. 15(4), the backward classes should be comparable to the scheduled castes and scheduled tribes and this comparability is an essential component of social and educational backwardness.

(iii) The third stream is in a sense, a variation of the first and may not give necessarily a substantial different result from the second.

\(^{(131)}\) Ibid.
First view is based on the judgement of Justice Gajendragadkar in Balaji. According to him, the special provisions under article 15(4) and 16(4) are contemplated for the classes of citizens who are socially and educationally backward. Though the caste may be relevant, its importance should not be exaggerated.

The second view is based on the decision of Justice Hegde in Kelaram and Periakurren. According to them: "A caste has always been recognised as a class."

Third view comes to mind after reading the judgement of Justice Shah in Sagar. In this case reservation of seats has been done solely on the basis of caste or community, without taking into account whether the members were, in fact, socially and educationally backward. The reservation was struck down as being outside the scope and ambit of article 15(4), being an exception to the principle of equality in article 15(1), cannot be extended to so far as, in effect, to destroy the guarantee of the latter. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth, and the backwardness, being social and educational, must be similar to the backwardness from which the scheduled castes and scheduled tribes suffer.

132. Supra note 112.
133. Supra note 116.
134. Supra note 117.
135. Supra note 114.
The Supreme Court was once again confronted with the problem of deciding socially and educationally backward classes in Suneel Jatley's Case. The Court held reservations for students coming from rural schools for the M.B.B.S. course in Maharishi Dayanand University as unconstitutional and void. In this case out of total of 148 seats available for admission, 30 seats were to be filled according to the merit list drawn up on the basis of the performance in the entrance examination and the test were reserved for scheduled castes and scheduled tribes and 25 seats were reserved for candidates coming from the rural areas. In order to qualify such reservation, the candidate must have received education from class I to class VIII and passed the VIII class examination from a common rural school situated in any village not having any municipality or notified area or town area committee.

Desai J. observed that the selection of specialised subjects had to be made in classes XI and XII and in respect of education in classes IX to XII, all students being educated in all schools are similarly situated, similarly circumstanced and similarly placed with no differentiation. The earlier handicap of education in classes 1 to 8, if there be any, becomes wholly irrelevant and of no consequence and therefore, cannot provide an intelligible differentia which distinguishes persons say students seeking admission being grouped together as having been educated in common rural schools from those left out namely

It is submitted that Supreme Court has rightly decided this case because in order to take advantage of the reservation, students from nearby urban areas can join common rural schools on the periphery of urban agglomeration. And all rural schools without an exception cannot be condemned as ill housed, ill staffed and ill-equipped.

However, in a recent case, the Supreme Court tries to deal with this problem which does not seem to dispose of the problem in a conclusive manner. In this case, the Court formulated certain guidelines on the specific request for the State Government of Karnataka, which had sought guidance for the purpose of the commission which the State Government wished to appoint for going into the question of backward classes. The request was made by the government at the end of the hearing of writ petitions challenging its order of February 1977 (as modified by orders of May and June 1979 providing for reservation for the purposes of article 15(4) at 63 per cent. Thus, only 32 per cent seats in professional and technical colleges were left to be filled on merit. These orders were the result of the report of the Backward Classes Commission under the Chairmanship of L.G. Havnamur. The main question that the Supreme Court had to deal with was as to the test to be adopted for determining backwardness. It may be mentioned that the writ petitions had challenged reservations for backward classes made by the State of Karnataka in professional and technical colleges. Chief Justice Chandrachud and Justice Desai, Reddy, Sen, Venkataraman

137. Id at 1-39.
have given different views on this issue. According to Chandrachud CJ. (as he then was), the test of economic backwardness ought to be made applicable even in the scheduled castes and scheduled tribes. The privileged section of the underprivileged society should not be permitted to monopolise preferential benefits. As regards the other backward classes, the classes should be comparable to the scheduled castes and scheduled tribes in the matter of their backwardness, and secondly they also should satisfy the 'mean test' i.e. test of economic backwardness.\(^1\) By going through this, it seems that chief justice also wants to convey the same what Justice Iyer observed in *Thomas Case*\(^2\) that the reservation should be made in such a manner so that the benefit goes to the under-privileged and not that the top creamy layers take away the benefit leaving the under-privileged in the same condition.

Justice D.A. Desai and Justice Sen also observed the same what was emphasised by Justice Iyer long back that poverty should be the main test in determining backwardness. According to Justice Chinappa Reddy, class poverty not individual poverty should be the primary test.\(^3\) Justice Sen's view was the same as that of

\(^1\) Ibid.
\(^2\) Supra note 120
\(^3\) Supra note 138 at 1529.
Justice Desai. Justice Venkataramiah agreed with Chandrachud CJ. in that the backward classes should be comparable to the scheduled castes and scheduled tribes. He observed that if advanced castes, groups or communities are classified as backward together with really backward castes, groups and communities, the benefit of reservation would invariably be eaten up by the more advanced sections with the result that really deserving sections would get no benefit at all.

Justice Venkataramiah made almost the same suggestions as was made by Justice Iyer in 1976 in Thomas Case i.e. the Government should provide scholarships, free studentship, free boarding and lodging facilities, extra tutorial facilities, stationery and books free of cost and library facilities.

Vasantha too has passed up the chance to clarify many confusions surrounding the meaning of Other Backward Classes. The anxiety expressed by Marc Galantar ever since 1968 over the judicial failure to clarify the distinctions between caste as unit of classification and caste as a measuring rod of backwardness remains

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142. Id at 1530.
143. Sunra note 124 at 157.
144. Sunra note 138 at 1558.
145. Sunra note 139.
unresolved. It is not quite clear in which sense caste has been used by the Justices either for defending caste or opposing it. It can perhaps be inferred from the opinions of Justice Ready, Venkataramiah and Sen that "classes" under article 15(4) and 16(4) would be historic communities. But it is far from clear as to how should the social and educational backwardness of these 'classes' be measured.

Reservations involve social costs and impinge heavily on the careers of merited applicants, provoking resistance and resentment of various kinds. Much of the resistance and resentment can perhaps, be minimised by either diluting widely spreading the social costs by measures aiming at the enhancement of the overall competitiveness of the beneficiary classes (e.g. by added educational opportunities, coaching, training, provision for favourable home environment) (147). Symbolic enhancement of quota or expansion of beneficiary groups has proved to be more politically gainful devices to beguile the wider public that too much is being done for the disadvantaged groups. (148)

If all such facilities are provided right from school days, it would help in levelling-up the backward people. They would be provided equal opportunities to grow in even environment. If this becomes a reality, it would mitigate the need to provide for any kind of reservation. Infact, reservations are not a healthy polity. It needs full review. Hein should be provided from the beginning. This would speed up the process of equality.

147. V.R.Krishna Iyer, Supra note 125.
148. Ibid.
EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT

The Constitution of India in its article 16 provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State but at the same time keeping in view the condition of the backward classes, it provided in clause (4) that nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State. (149)

In the United States not only was there non equality of opportunity in matters relating to public employment but its opposite, the 'Spoils System', prevailed. As Professor Finer puts it: "But the spoils system on a really grand scale, began when Andrew Jackson became President in 1828". (150) The theory that to the victor belongs the spoils of victory-meaning the distribution of public offices - was enunciated by William L. Mency, a United States Senator. (151) The Federal Government has very largely freed itself of the stain of this system by successive laws which enlarged the jurisdiction of the Civil Services Commission to hold open competitive examinations.

151. Ibid.
Consequently, on June 30, 1947, employees numbering 1,698,908 out of 1,849,731 employees in the Civilian Branch of the Executive were subject to the competitive requirements of the Civil Service. However, "the largest amount of 'spoils' are in the State and the municipal services: The Federal Government has cleaned itself."(152)

Servaei says,

"Far from Public employment being considered as a matter of right, the spoils system was based on the theory that no one had the right to public employment. This was because Article II, Sec.2(2) of the U.S. Constitution provides that, "He (President) shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur, and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consol judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which he established by law, by the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the heads of departments". (153)

Servaei further says that the existence of the spoils system in the United States is relevant, because it was well known to the framers of our Constitution, and they knew that in the United States, the doctrine of equality did not carry with it, as a necessary corollary, the doctrine of equality of opportunity in matters of public employment which was governed by the law of master and servant. Consequently, the right was expressly conferred by Article 16, since we have not adopted the spoils system.(154)

152. Id p. 329.
153. Supra note 150.
154. Ibid.
It may be noted that Article 16(1) does not confer a right to obtain public employment but only a right to equality of opportunity for being considered for such employment. Since the equality of opportunity is in respect of any employment, Article 16 is not confined to the initial matters prior to the act of employment, but includes other matters relating to employment such as provision about the salary and periodical increments therein, terms as to leave, gratuity and pension and as to the age of superannuation. It also includes promotion to selection posts.

In *Sadanand V. State of Kerala* (155) the High Court of Kerala held that equality of opportunity in matters of employment means, equality between equals, i.e. equality as between persons who are either seeking the same employment or have obtained it. Thus in *All India Station Masters' and Assistant Station Masters' Association V. General Manager, Central Railways*, the Supreme Court held that assuming that the determination of matters of promotion were matters relating to employment within Article 16(1), such equality of opportunity in matters of promotion must mean equality as between members of the same class of employees and not equality between members of separate independent classes. (156) It was held that roadside Station Masters and Guards belonged to two different and distinct groups between whom there was no scope for

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155. AIR 1963 Ker. 591.
156. AIR 1966 SC 394. This case was followed in *Yojana Laturiya V. Ch. Controller of Imports & Exports* (1969), 2 SCR 27; *M. Menon V. Rajasthan* (1967) 3 SCR 430; *Sham Sunder V. Union* (1969) 1 SCR 312; *S. M. Pandit V. Gujarat* AIR 1972 SC 252;
predicting equality or inequality of opportunity in matters of promotion.

The Courts have secured equality of opportunity in public employment in all cases of discrimination. Thus in *Gazula Vasratha Rama Rao v. State of Andhra Pradesh* (157), the Supreme Court held that as 'descent' was a forbidden ground of classification, S. 6(1) of the Madras Hereditary village Officers Act, 1895, was void as it discriminated on the ground of descent only. In this case, Supreme Court held that the office of a village munsiff under the aforesaid Act was an 'office under the State' within cl. (1) and (2) of Article 16. It was also held that as S.6(1) of the Act provided that in choosing persons to fill new offices, the collector should select the persons whom he considered the best qualified from among the last holders of the offices which had been abolished, it discriminated on the ground of descent only and contravened Article 16 (2).

Similarly in *Balkrishna Hegde v. Shankara Hegde*, (158) the Mysore High Court held that the offices held by village officers were comprehended within the meaning of "office under the state" in clause (1) and (2) of Article 16, hence the application of principle of hereditary succession contravened Cl. (1) (2) of Article 16. The court held that the

158. AIR 1962 Mys. 233.
appointing authority must consider the claims of the candidates disregarding principles of hereditary succession, and as the impugned orders had applied principles of hereditary succession they were ultravires.

In Krishna Chand Nayar v. Chairman, Central Tractor Organisation the services of the petitioner were terminated under the Civil Service Regulations by reason of his antecedents and a ban was imposed against him by the Government in the matter of his employment under the government. The Supreme Court rightly held that the fundamental right guaranteed by the Constitution was not only to make an application for a post under the Government but the further right to be considered on merit for the post for which an application had been made. It was further held that the imposition of a ban amounted to denial of the right of equal opportunity of employment, guaranteed under cl. (1) of Article 16.

In Mervyn Continho and Others v. Collector of Customs, the Supreme Court held that when recruitment was from two sources, there was no violation of the principles of equality of opportunity in following the rotational system in fixing seniority. In this case, the Court held that vacancies in Customs Department could be filled by the Government of India either by direct recruits or by promotees according to the quota fixed. Seniority between direct recruits and promotees

159. 54 1962 SC 602.
160. 41 In 1967 SC 69.
was to be determined in accordance with the rotational system, i.e., one promotee followed by one direct recruit in accordance with the roster. Thus there was no violation of the principle of equality of opportunity in following the rotational system in fixing seniority. But it must be noted that rotational system could not apply when there was only one source of recruitment, and fixation of seniority by rotation in such a case violated article 16(1).

In G.A. Rajendran V. Union (162), the Supreme Court observed that it was well established that there could be a reasonable classification of employment for the purpose of appointment by promotion and that a classification as between direct recruits and promotees was reasonable.

The question of equality of opportunity for promotion was considered in Rajan V. Dy. I.G. of Police, Aimer, (163) where the Supreme Court upheld that 'three-tier' system evolved for the Police force in the State of Rajasthan on the ground of efficiency of the force, even though as a result of that system employee A in one range who may be junior to employee B in another range, may get a promotion and B may not. The Court held that knowledge of local conditions was necessary for the efficient working of the first and second tiers and it was only in the third tier that it was not insisted upon. Balancing

161. AIR 1963 SC 346.

162. (1963) 3 SCR at p.606. This decision was followed in Homen Lal V. Union of India (1968) 1 SCR 185; Satya Kumar V. State (71) AAP 320, 327-30; General Manager, S.C.H.V. V. A.V.H., Siddhanti (72) A.A.P. 252.

163. (1963) 1 SCR 721.
the claims of equality of opportunity in public employment against the necessity of an efficient police force, the three-tier system did not violate Article 16(1).

However, in *Manendra Prasad v. Ranchi Municipal Board* *(164)*, the petitioner was promoted as accountant on condition that if he did not pass the Local Body Accounts Examination, he would be reverted. As he did not pass the examination, he was reverted, whereas applicant No. 3 was also appointed as accountant but the same condition was not imposed on him, on the ground that he was a member of the Schedule Tribe. The court held that in the absence of reservation of posts for members of scheduled-tribes, this was a discrimination between equals and violated Article 16.

The question of equality of opportunity in matters of public employment was again considered in *C.C. Paumanabhan v. Director of Public Instruction* *(165)* on the following facts. Each appellant was an Assistant Educational Officer for more than 6 years continuously, when in implementation of instructions issued by the government that every A.E.O. after 6 years of service should be transferred back as High School Assistant, the appellants were reverted as H.S.A. The Supreme Court held that the post of A.E.O. was a promotion post vis-a-vis the post of H.S.A. and consequently the two posts could not be treated as interchangeable. The reversion of the appellants, therefore violated Article 16. In any event, even if the post of an A.E.O.

164. A.I. 1951 A.P. 208.
165. A.I. 1961 SC 64.
was not higher than that of an H.&.A., the direction that AEOs after 6 years of service should be transferred back as H.&.As, was not based on any principle and was wholly arbitrary and therefore, violated art. 14. The order of reversion was set aside.

Another important case on this issue is that of N.M. Thomas V. State of Kerala. The facts of the case were briefly as follows. The petitioner was a lower division clerk in the Registration Department. For promotion to the upper division on the basis of seniority, lower division clerks had to pass a test in three prescribed subjects. The petitioner complained that although he had passed all the tests by Nov. 2, 1971, he had not been promoted to the upper division, because of the concession given to lower division clerks who were members of the scheduled castes and scheduled tribes and who were promoted even though they had not passed the tests. This concession was given to them under the rule 13AA promulgated by Government in 1972. One of the important questions that was decided by the majority judges namely Ray Cj. (as he then was), Mathew, Nisanna Iyer and Fazl Ali JJ. was, whether Rule 13AA was supported by a valid classification under Article 14(1)?

with reference to the above question, the majority of the judges

166. AIR 1970 SC. 490.
167. Rule 13AA states that notwithstanding anything contained in these rules, the Govt. may, by order, exempt for a specific period any member or members, belonging to Sch.Castes and Sch. Tribes, and already in service, from passing the tests.
with the help of decided cases\(^1\) which showed that the doctrine of classification applied to Article 16(1) and that doctrine required that the equality of opportunity under Article 16(1) was equality between equals. The majority held that providing equal opportunity in government employment is a legitimate objective; Article 46 directs the State to promote the economic interests of scheduled castes and scheduled tribes with special care; article 33\(^1\) directs the State to take into their consideration their claims regarding service under the State. Thus the classification of employees belonging to these groups to afford to them an extended period to pass tests for promotion is a just and reasonable classification having rational nexus to the object of promoting equal opportunity relating to public employment.\(^{169}\)

H.M. Seervai\(^{170}\) criticises it by saying that this exercise undertaken by the four majority judges was unnecessary and the doctrine of equality between equals was misapplied because the four judges asked the wrong question and, not surprisingly, gave the wrong answers. Seervai further says that the right question to ask was not "can Rule 13\(^{A}\) be defended as a valid classification under Article 16(1)" but "can any classification be made under Article 16(1) on grounds prohibited by Article 16(2)?" He says that it is elementary and obvious that no classification based on grounds which the

\(^{168}\) Sunra note 154.

\(^{169}\) Sunra note 166 at 500.

Constitution prohibits, as Article 16(2) does, can be made under Article 16(1), although Article 16(1) clearly permits classification. This is because the fundamental right to equality of opportunity in matters of public employment conferred in positive terms is effectively enforced by Article 16(2), which in a negative form prohibits discrimination in matters of public employment on the "grounds only of religion, race, caste, sex, descent, place of birth and residence or any of them. For, if discrimination on the prohibited grounds was not forbidden, the equality of opportunity in matters of public employment guaranteed by Article 16(1) would be illusory. Therefore, the equality of opportunity guaranteed by Article 16 is to be found in Article 16(1) and (2) read together. The same was decided in Rangachari's Case(171) as far back as in 1961, in which Justice Gajendragadkar observed:

"Article 16(2) emphatically brings out in a negative form what is guaranteed affirmatively by Art. 16(1). Discrimination is a double edged weapon, it would operate in favour of some persons and not against others; and Article 16(2) prohibits discrimination and thus assures the effective enforcement of the fundamental right to equality of opportunity guaranteed by Article 16(1)."

Seervai further says since no classification can be made which is forbidden by Article 16(2), the only other question which survived was: Since Rule 13AA makes a discrimination in favour of scheduled castes and scheduled tribes, is the discrimination based on religion and or caste and/or race and/or descent prohibited by Article 16(2)? If yes, is Rule 13AA protected by any other clause of Article 16?

171. AIR 1962 SC 36, 42. Quoted in Ibid.
The extent of doctrinal innovations here can be appreciated by considering the opinion of Justice Beg, the only member of the majority who does not participate in the reconceptualization of Article 16. According to him, the guarantee contained in Article 16(1) is not by itself aimed at removal of social backwardness due to socio-economic and educational disparities produced by past history of social oppression, exploitation or degradation of a class of persons. Instead, it was in fact intended to protect the claims of merit and efficiency against incursions of extraneous considerations. And efficiency tests, in turn bring out and measure existing inequalities in competency and capacity or potentialities so as to provide a fair and rational basis for justifiable discrimination between candidates. Thus provisions for equality of opportunity are meant to ensure 'fair competition' in securing government jobs; they are not directed to removal of causes for unequal performances. But such provisions do not stand alone, they are juxtaposed with articles 46 and 335 which imply preferential treatment for the backward classes to mitigate the rigour of equality in the sense of strict application of uniform tests of competence. (172)

Justice Mathew articulates the view of equality that implies the doctrinal shift. The equality of opportunity guaranteed by the Constitution is not only formal equality with fair competition but 'equality of result'. In order to assure the disadvantaged their due share of representation in public services, the Constitutional equality of opportunity was fashioned 'wise enough to include

172. Baner note 16 at 522
compensatory measures. Thus, the guarantee of equality implies differential treatment of persons who are unequal. Article 16(1) is only a part of a comprehensive scheme to ensure equality in all spheres. It implies 'affirmative action' by government to achieve equality - that is compensatory state action to make people who are really unequal in their wealth, education or social environment equal.

Justice Krishna Iyer propounds a complex vision of the constitutional commitment to equality interpreting the constitution by a spacious, social science approach, not by pedantic, traditional legalism, he proposes to erect a 'general doctrine of backward classification, to pursue real, not formal equality. According to the doctrine of backward classification, the state may, for purposes of securing genuine equality of opportunity, treat unequals equally.

He further says 'not all caste backwardness is recognised' as a basis for differential treatment under article 16(1). The differentia... is the dismal social milieu of harijans.... The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search, we cannot find any large segment other than the scheduled castes and tribes... no class other than harijans can jump the gauntlet of equal opportunity guarantee. Their only hope is an Article 16(4).

There is a clear difference on this point between the judgments of Justice Mathew and Justice Krishna Iyer. According to the former, the operation of the compensatory discrimination concept in

173. Ibid.
174. Id. at 519
175. Id. at 516.
176. Id. at 525.
177. Id. at 529
178. Id. at 537.
179. Ibid.
Art. 16(1) will cover all the weaker sections. But according to Justice Iyer "no class other than harijans can jump the gauntlet of 'equal opportunity' guarantee.

May be the learned judge draws this conclusion on the basis of article 33 whose beneficiaries are only harijans. But to limit the scheme of special concessions to harijans only, is to be (with due respect) unjust to the constitutional creed of equality and social justice embodied in article 46 and accommodated in article 16(1). If article 46 means social justice to all the weaker sections it cannot be a reality to harijans but a 'teasing illusion' - a promise of unreality to other socially, economically and educationally depressed citizens who may be grossly unrepresented in the public services. If article 16(4) is the only one mode of reconciling the claims of the backward people and the opportunity for free competition, the advanced members of the society are entitled to, other modes covered by the dynamic concept of equality should be available to all backward citizens (who are in real terms backward) whether harijans or non harijans. Justice Krishna Iyer himself cites with approval the observation of Marshall, CJ in McCulloch V. Maryland: (180)

Let the end be legitimate, let it be within the score of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consists with the letter and spirit of the Constitution, are constitutional. (181)

180. (1816-19) 17 US 316.
181. Id at 421.
Article 16(4) is in the nature of an exception to article 16(1) of the Constitution. This clause empowers the State to reserve in the services under it, appointments or posts in favour of backward class of citizens. Article 335 provides that the claims of members of scheduled castes and tribes shall be taken into consideration with the maintenance of efficiency of administration in the making of appointments. Dr. Ambedkar explained that the expression backward class referred to the Scheduled Castes and Scheduled Tribes and not any other minority community.

In order to improve the intake of Scheduled Caste and Scheduled tribe officers in the State services many steps have been taken by different State Governments from time to time, which include nomination of scheduled castes and tribes members on the Public Service Commission, selection boards or committees, creation of special cells in the State Secretariat, Pre-examination Training Centres, coaching-cum-guidance centres, separate interviews for avoiding comparison of standards, relaxation of maximum age limit and grant of concessions in competitive examination fees. Schemes relating to carrying forward of reserved vacancies for three years have also been introduced. (182)

The advancement of the socially and educationally backward classes required not only that they should have adequate

representation in the lowest wing of services but that they should aspire to secure adequate representation in selection posts in the services as well.\(^{183}\)

The question of the nature and the extent of the reservation which can be made in public employment has been considered by the Supreme Court in several cases. The first important case being, the General Manager, Southern Railway V. Rangachari.\(^{184}\) In this case, the scope of cl. (4) of Article 16 was considered first by the Madras High Court and then by the Supreme Court. The Railway Board ordered reservation of selection posts in Class III of the Railway services in favour of members of the Scheduled Castes and the Scheduled tribes and issued a number of circulars prescribing a quota of reservation for selection posts and to give retrospective effect to the reservation. The respondent who was affected by the circulars, filed a writ petition in the Madras High Court. The High Court held that the circulars infringed cl. (4) of Art. 16.

The General Manager, Southern Railway, preferred an appeal to the Supreme Court. The majority held that the power of reservation which was conferred on the State under cl. 4 of Article 16 could be exercised by the State not only by providing for reservation of appointments but also by providing for reservation of selection posts. It was also held that reserved


\(^{184}\) AIR 1962 SC 36.
posts could be filled either prospectively or retrospectively. Thus the decision of the Madras High Court was reversed.

It is submitted that this judgement of the Supreme Court is a realistic interpretation of Cl. (4) of Art. 16 and ensures adequate representation to the Backward classes in the services.

However, since Rangachari's case dealt with promotion in selection post, it was argued that reservation could not be made in posts filled in by promotion on the basis of seniority-cum-fitness where there is no element of selection. Such a controversy has been set at rest in November, 1980, by the Supreme Court. It is common knowledge that despite the reservation quota for scheduled castes and scheduled tribes, the required numbers of posts are not filled in either because of the non-availability of the qualified candidates from these classes or because of the indifference and apathy of the concerned departments and recruiting agencies which are normally dominated by classes hostile to Scheduled Castes and Scheduled Tribes. It is legitimate that the posts reserved for backward classes but not filled in, in a particular year should be carried forward, created heart burnings amongst the general classes.

The question of nature and extent of reservation once again came up for consideration in M.R Balaji V. State of Mysore\(^\text{(185)}\). Speaking for the Court, Gajendragadkar, J. observed

\(^{185}\). AIR 1963 S.C. 649. In this case the total reservation was 687 and 327, seats were available for open merit.
"A special provision contemplated by Art. 15(4) like reservation of posts and appointments contemplated by Art. 16(4) must be within reasonable limits. The interest of weaker sections of society which are a first charge on the states and the centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a state reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4)". (186)

The learned judge further remarked:

"Speaking generally and in a broad way a special provision should be less than 50 per cent, how much less than 50% would depend upon the relevant prevailing circumstances in each case."(187)

Thus the Court struck down the reservation of 68% as constitutionally invalid. The question left open was whether 50% was the maximum limit of reservation. This question came for consideration in T.Devadasan V. Union of India. (188) In this case, the government had reserved a little over 64% of vacancies for Scheduled Castes and Scheduled tribes by adopting the principle of carry-forward in the second and third year. By a majority of four to one, the Supreme Court held that article 16 conferred a right on each individual citizen seeking employment or appointment to an office under the State, and that "in order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly

186. Id at 663.
187. Ibid.
188. AIR 1964 SC 179.
The Supreme Court also expressed the opinion that article 16(4) was in the nature of a proviso to article 16(1), and the opening words of Article 16(4) that "nothing in this article shall prevent etc...." could not be so construed as to nullify the express guarantee contained in article 16(1) and (2).

Amplifying it further, the Court remarked:

"A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under Cl.(4) would in effect efface the guarantee contained in Cl.(1) or at best make it illusory.' (191)

After citing the observations made in Bhajji (192) on article 16(4), the court said that what was laid down about reservations of seats in educational institutions applied equally to reservation of posts under article 16(4), namely that generally speaking, the reservation ought to be less than 50%. Thus according to the court, the overriding effect of clause (4) of article 16 on clause (1) and (2) could only extend to the making reservation for a reasonable number of appointments and posts for certain communities.

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189. Id at 187.
190. See also. Abdul Latiff V. State of Bihar, AIR 1964 Pat.393, Puppala Sudarson V. State of Andhra Pradesh, AIR 1958 A.P.569. These decisions support the interpretation that it is not permissible to interpret article 15(4) in such a way as to destroy or nullify the guarantee of equality given under art.15(1).
191. Supra note 188 at 187.
192. Supra note 185.
classes. It is submitted that the court did not strike down the carry-forward rule on the ground that it was bound to lead to lead to vicious results in the future if permitted to operate without inhibitions. But the reservation was held invalid as in the year in question its working was found vicious. The learned judge indicated that the repercussions of such a rule have to be watched from year to year.\(^{(193)}\)

On the other hand, Subba Rao, J. (as he then was) in his dissenting judgement was of the view that the 'reasonable number' of reservations should be measured by its relation to the total cadre of strength and not on the basis of seats reserved on one particular occasion. He expressed the view that the government was free to use any method of reservation including the reservations of one hundred per cent of posts until the prescribed level was reached.\(^{(194)}\)

Another important case on Cl. (4) of art. 16 is C.A. Rajendran V. Union of India and others\(^{(195)}\), the petitioner alleged that under the impugned office memorandum, provision was made for reservations in certain types of class III and class IV services only, and not in class I and class II services for government servants belonging to the scheduled castes and scheduled tribes, and the classification was discriminatory. It was contended that the impugned office memorandum contravened Cl. (4) of art. 16 of the Constitution. The Supreme Court held

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193. Supra note 188.
194. Infra note 209.
that art. 16 (4) did not confer any right on the petitioner and there was no constitutional duty imposed on the government to make reservation for the Scheduled Castes and Scheduled Tribe, either at the initial stage of recruitment or at the stage of promotion. It was also held that the claims of the members of the Scheduled Castes and Scheduled Tribes should be taken into consideration, consistently with the maintenance of efficiency of administration, in making appointments to services and posts in connection with the affairs of the Union or of a State.

In *Trilok Nath and another V. State of Jammu and Kashmir* (196) the appellant challenged the State distribution of posts to Muslims, Jammu Hindus and Kashmiri Hindus in the ratio of 50:40:10 as violative of Cl. (4) of art. 16. The Supreme Court held that though the State was empowered to make provision for reservation of appointments in favour of backward classes, the distribution of total numbers of posts or appointments on the basis of community or place of residence was contrary to the constitutional guarantee under clis. (2) and (4) of Article 16 and was not saved by cl. (4) of Article 16.

It is submitted that in these cases we have examined manifest that the courts have provided ample protection to the rights of the backward classes in matters of services under

the state, without at the same time jeopardising the rights of the other classes in this regard.

The validity of the scheme showing favour to the scheduled caste and tribes employees by exempting them from the necessity of passing the departmental test of promotion in services was once again challenged in the case of N.M.Thomas v. State of Kerala.\(^{(197)}\) The circumstances leading to the scheme were as follows. It was brought to the notice of Kerala Government that a large number of government servants belonging to the scheduled castes and tribes were unable to get their promotion because of want of test qualifications for promotion from lower division clerks to upper division clerks in the registration department. In order to give relief to the backward class of citizens, the government incorporated rule 13AA under the Kerala State and Subordinate Services Rules, 1958, enabling the government to grant exemption to these employees for a specific period. Consequently, an order was made under the rule giving to these backward class employees an exemption for a period of two years from passing the necessary test. As a result, 34 out of 51 posts were filled up by the members of the scheduled castes and tribes without passing the test. N.M.Thomas, a lower division clerk, was not promoted as an upper division clerk despite his passing his test. He filed a petition for a declaration that rule 13AA was violative of article 16 of the Constitution.

\(^{197}\) AIR 1976 S.C. 490.
The Kerala High Court declared the impugned rule invalid on the ground that it was beyond the permissible limits of article 16(1). It held that by virtue of carry-forward rule, the government had promoted sixty-two percent of the clerks belonging to the backward groups and had made an uncalled for discrimination between the members of the same service. Moreover, the promotion of 34 out of 51 posts was not conducive to the efficiency of the administration as envisaged under article 335.

The Supreme Court by a majority of five out of seven upheld the impugned rule as a valid protective discrimination. Ray, C.J. and Mathew, Krishna Iyer and Martaza Fazal Ali, JJ, approved the classification made by the rule as permissible under article 16(1) but Beg, J., justified the rule under article 16(4) as constituting a 'conditional' or partial reservation, in favour of the backward classes. (198).

The majority in this case authorised the state to adopt any methodology of protective discrimination by making proper classification, this it is submitted is clearly in conflict with the earlier ruling (199) of the Supreme Court according to which preference can be given to the backward classes only by method of 'reservation' under article 16(4) which is an exception to article 16(1). The majority rejects the well-settled theory of the exceptional nature of article 16(4) and in doing so it impliedly overrules the Devadasan, Rangachari and Balaji's cases.

198. Ibid.

These cases tell us that the claims of backward classes could be projected only through the exceptional clauses in articles 15 and 16 and not outside them.

Regarding carry-forward rule, until Thomas case, the usual practice was that in a particular year, recruitment of backward classes should not exceed 50 per cent of the total number of posts filled in that year. But in this case, it was held by the Supreme Court that this ratio was not sacrosanct and may exceed in a given case. Ray CJ. felt that the question of the extent of preference should be considered in the context of total position of the promotions in service. (200)

The opinions of Krishan Iyer and Fazl Ali JJ. (201) clearly point out the unsoundness of the Devadasan approach on the legitimacy of the carry-forward rule. Justice Krishna Iyer, observed:

"The arithmetical limit of 50 per cent in any one year set by some early rulings cannot perhaps be pressed too far. Overall representation in department does not depend on the recruitment in a particular year but the total strength of a cadre. (202)

Upholding the carry-forward rule, Fazl Ali J. observed:

"What difference does it make if instead of keeping reserved vacancies vacant from year to year as a result of which the work of the Government 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." (203)

200. Supra note 197 at 501.
201. Id at 537
202. Ibid.
203. Id at 555.
It is submitted that there should be no objection to the adoption of the carry-forward rule as a means of preference. This method is justified because in view of their social and educational backwardness, the members of the backward classes are not able to avail their full quota and thus remain inadequately represented in the service. If the real object is to provide adequate opportunities in services, there should be no objection if the posts which are not able to be fulfilled by them are carried over to the next year.

Marc Galantar says that the carry-forward rule is "self-liquidating" and "non-recurring" to the extent that higher the reservation is effective, reservation returns to its original lower level. (204)

Even Devadason (205) also did not object to the adoption of the carry-forward rule as such. It objected only to the rule involved there, the effect of which was to exceed the limit of fifty per cent. The insistence of art. 335 on the efficiency of administration would also not be undermined by the 'carry-forward rule' as the efficiency is likely to be affected only by an excessive representation in total and not by any number recruited or promoted in a particular year. (206)


205. Supra note 188.

Justice Krishna Iyer in his judgement in *Thomas* case has voiced concern for harijans and girijans. He says that it is statistically proved social reality in India that the depressed employment position of Harijans is the master problem in the battle against generation of retardation, and "reservation" and other solutions have made no significant impact on their employment in public services. In such an unjust situation, to maintain mechanical equality is to perpetuate actual inequality. A battery of several programmes to fight this fell backwardness must be tried out by the state. Relaxation of "tests" qualification at the floor of clerical posts (lower or upper division) is a part of this multiform strategy to establish broader though seemingly differential equality. However, he sees three-fold danger in making reservation which we have already discussed in detail.\(^{(207)}\) He further suggests that social science research, not judicial impressionism, will alone tell the whole truth, and a constant process of objective re-evaluation of progress registered by the 'underdog' categories is essential lest a once deserving 'reservation' should be degraded into 'reverse discrimination'. Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made.\(^{(208)}\)

It seems that the majority in the *Thomas* case adopts the line of judicial restraint like the one by

207. *Supra* note 121.

208. *Supra* note 197 at 531.
Subharao, J. in his dissenting opinions in the Devadason case on the question of the extent of preference. It follows from the holding in the Thomas case that the members of the backward group can be allowed 'reservation' or other preferences in services commensurate with their ratio in the population of the State. But assuming, that in a state the backward classes of citizens constitute eighty per cent of its population, will it be permissible to reserve eighty per cent of the jobs for them. This, it is submitted, would not be fair.

In the Constituent Assembly, B.R. Ambedkar, while defending article 16(4) also indicated that the reservation of the posts under this provision 'should be confined to minority of posts' and gave an example of reservation of seventy per cent as falling outside its scope. Apparently, this view was expressed by the draftsman treating article 16(4) as a proviso to article 16(1). But the Thomas case rejects the theory of the exceptional nature of art. 16(4) and permits preference even under art. 16(1).

The question of quantum should depend upon the facts and circumstances of each case and in the absence of any reliable

209. Subba Rao J. (as he then was) in his dissenting opinion in Devadason said that "the expression nothing in this article is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provisions but falls outside it. It has not really carved out an exception but has preserved a power untrammelled by the other provisions of the article."

social logical data, it would be unrealistic to adhere to any strict numerical standard.

Marc Galantar says that "the question of the quantum of preference is itself no indication of its legitimate constitutional use." One can visualise 'reasonable' reservations involving more than 50 per cent and abuses involving less.\(^{(211)}\)

In the case of \textit{Jagdish Saran V. Union of India}, Justice Iyer says, "the constitutionality of institutional reservation must be founded on facts of educational life and the social dynamics of equal opportunity. Political panic does not \textit{ipso facto} make constitutional logic. He rightly sounds a caveat or two even in this approach lest exception should consume the rule. The first caution is that reservation must be kept in check by the demands of competence. He says, you cannot extend the shelter of reservation where minimum qualifications are absent. Similarly, all the best talent cannot be completely excluded by wholesale reservation. So, a certain percentage, which may be available, must be kept open for meritorious performance regardless of university, State and the like.\(^{(212)}\)

\(^{(211)}\text{Supra note 204 at 47.}\)
\(^{(212)}\text{(1980) 2 SCC 768 at 778.}\)
and equal protection of law—may be fatal folly, self-defeating educational technology and antinational if made a routine rule of state policy. He suggests that a fair preference, a reasonable reservation, a just adjustment of the prior needs and real potential of the weak with the partial recognition of the presence of competitive merit—such are the dynamics of social justice which animate the three egalitarian articles of the Constitution.\(^{(213)}\)

Secondly, he says that the basic medical needs of a region of the preferential push which are justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality, where the best skill or talent must be hand-picked by selecting according to capability.\(^{(214)}\) He further says, there is a good reason for reservation in many cases but the promiscuous application of an exception as a rule of educational life by forwarding cities and universities will boomerang on the nation in the long run. The Union of India has special responsibility to ensure that in higher education, provincialism does not erode the integrity of India.\(^{(215)}\)

In A.B.S.K. Sangh V. Union\(^{(216)}\), Justice Iyer was once

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\(^{213}\) Ibid.

\(^{214}\) Id at 778-779.

\(^{215}\) Id at 779.

\(^{216}\) (1981) 1 SCC 246.
again confronted with the carry-forward rule. Justice Iyer, upheld the validity of carry-forward rule and observed that carry-forward rule shall not result, in any given year, in the selection or appointments of Scheduled Caste and Scheduled Tribe candidates considerably in excess of 50%. His lordship rejected the criteria of efficiency and said: The preponderant minority coming from the unreserved communities are presumably efficient and the dilution of efficiency caused by the minimal induction of a small percentage of reserved candidates cannot affect the overall administrative efficiency significantly. He further observed, it would be gross exaggeration to visualise a collapse of the administration because 5 to 10 per cent of the total number of officials in various classes happened to be sub-standard. Moreover, care has been taken in service to give training and coaching to correct the deficiency.

In this case, two out of three justices endorse a higher percentage of reservation for Scheduled Castes and Scheduled Tribes in view of the yawning gap between the legitimate expectations of these people and their utter under representation in services except in such menial jobs as of scavengers and sweepers for which no one else is forthcoming. (217)

Justice Krishna Iyer stated that in view of microscopic representation of Scheduled Castes and Scheduled Tribes at all levels of services, it will only be a statistical jugglery

217. Id at 283-84.
to say that the carry forward rule would create a monopoly of Harijans/girijans in service. (218) See table below: (219)

Representation of SCs and STs in Central Services
(Selected years 1970–79)

<table>
<thead>
<tr>
<th>As on</th>
<th>Class I</th>
<th></th>
<th>Class II</th>
<th></th>
<th>Class III</th>
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<th>Class IV</th>
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<tr>
<td></td>
<td>SC</td>
<td>ST</td>
<td></td>
<td></td>
<td>SC</td>
<td>ST</td>
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</tr>
<tr>
<td>1.1.1970</td>
<td>2.36</td>
<td>0.40</td>
<td>3.84</td>
<td>0.37</td>
<td>9.27</td>
<td>1.47</td>
<td>18.09</td>
</tr>
<tr>
<td>1.1.1972</td>
<td>2.99</td>
<td>0.50</td>
<td>4.13</td>
<td>0.44</td>
<td>9.77</td>
<td>1.72</td>
<td>18.61</td>
</tr>
<tr>
<td>1.1.1974</td>
<td>3.25</td>
<td>0.57</td>
<td>4.59</td>
<td>0.49</td>
<td>10.33</td>
<td>2.13</td>
<td>18.53</td>
</tr>
<tr>
<td>1.1.1976</td>
<td>3.46</td>
<td>0.68</td>
<td>5.41</td>
<td>0.74</td>
<td>11.31</td>
<td>2.51</td>
<td>18.75</td>
</tr>
<tr>
<td>1.1.1978</td>
<td>4.50</td>
<td>0.85</td>
<td>6.44</td>
<td>0.88</td>
<td>12.22</td>
<td>2.86</td>
<td>19.13</td>
</tr>
<tr>
<td>1.1.1979</td>
<td>4.75</td>
<td>0.94</td>
<td>7.37</td>
<td>1.03</td>
<td>12.55</td>
<td>3.11</td>
<td>19.32</td>
</tr>
</tbody>
</table>

On the basis of these figures the Court rightly concluded that the grievance that junior Harijans steal a march over other senior members was only exceptional rather than general, and even if one carried forward vacancies for any number of years there was no prospect, within the reasonable future of sufficient number of SC/ST candidates turning up to fill them. (220)

Apparently, the Court in this case adopts a line of judicial restraint like the one adopted by Justice Subba Rao in Devadasan and is not willing to oversee the balance struck by the Government when it applies the carry forward rule to

218. Id at 294.
219. Id at 294.
220. Id at 294.
221. Id at 294.
remedy the paucity of Scheduled Castes and Scheduled tribes to fill the reserved quota. But Justice Krishna Iyer tries to align his holding with *Balaji* and *Devadasan* without making any mention of his own opinion in *Thomas* on the validity of the carry-forward rule or the result reached in *Thomas* in upholding a preference to the extent of 62 per cent.

It is interesting to ponder how Justice Krishna Iyer (with whom Justice Channappa Reddy concurs) decides that "in no year shall SC/ST candidates be actually appointed to substantially more than 50 per cent of the promotional posts." He approves the carry forward rule subject to the rider that this method shall not result in any given year, in the selection or appointment of SC and ST candidates considerably in excess of 50%. By limiting the physical operation in any particular year, he ensures a real opportunity for the exercise of the right under Art. 16(1) for every candidate of the unreserved community. Since he upholds the Annexure permitting reservation to the extent of $6\frac{2}{3}$ per cent, it is clear that reservation up to the extent of 67% would be reasonable, compatible with administrative efficiency and consistent with the value of equal reward for equal competence.

Let us now see how this conclusion is consistent with *Balaji* and *Devadasan*. Explaining the import of these two

222. *Id* at 296.
223. *Ibid*.
224. *Id* at 298.
225. *Id* at
cases, Justice Iyer, tries to distinguish Soshit Sangh case by saying that: "It is true that in Balaji and Devadasan..."
the carry forward rule for the backward classes far exceeded 50% and was struck down. We must remember that the percentage of reservation for backward classes including SC and ST was rather too high in both the cases. In Devadasan case, the Court went into actual not into hypotheticals. He said that in Devadasan, the carry-forward rule had actually resulted in reservation to the extent of 64.4 per cent. On that footing, in the instant case, the petitioners have not demonstrated that in any particular year virtually and in actual terms of promotion there has been a substantial excess over 50% in favour of SC and ST promotees.

The import of Balaji and Devadasan as explained by Justice Iyer invites comment. First Balaji involved a State arrangement under Article 15(4) for the categories of SC and ST and other backward classes and the Court there struck down only that part of the Scheme which related to the other backward classes. The reservation for SC and ST remained unaffected by Balaji. All that the Court said, there was that an aggregate reservation should be below 50%. Balaji did not involve the carry-forward rule as stated by Justice Iyer. Devadasan on the other hand

226. Id at 295.
227. Id at 296.
228. H. Janardan Subbarev V. State of Mysore. AIR 1963 SC 701 held that the decision in Balaji had not affected the reservation for SC and ST in the impugned order. 
involved a Central Scheme of reservation for SC and ST only under which carry-forward project was applied within the permitted limit of 17½ per cent for these groups (12% for SC and 5½% for ST). Devadasan was perhaps the first and the last case where a court has struck down a beneficial scheme favouring SC and ST. The State Power of reservation, on the other hand, have been subjected to vigorous judicial intervention presumably to prevent the abuse of this power by politicians. This contrasts with the continued judicial reluctance in overseeing the presidential designation of the SC and STs and the judicial assumption of their social and educational backwardness.

Second, had the Supreme Court in Devadasan handled the question of 'actual results' in the manner in which Justices Iyer and Patnai do in Soshit Sangh’s Case, it would have upheld the reservation upto the extent of 55% resulting from the operation of the carryforward rule. At the time of Devadasan too, the percentage of SCs and STs in various grades and services was much lower than the prescribed percentage.

Finally, it is true that in Devadasan, the operation of the carry-forward rule had actually resulted in about 65% of reservation in a particular year but what about Thomas? In Thomas also, the court went into actuals and found as a matter of fact that the operation of the test exemption rule had actually resulted in 62 per cent preference in favour of SCs and STs. But

229. Supra note 197.
the two Justices in Soshit Sangh(230) did not refer to Thomas holding on this point and only unsuccessfully tried to align their holding with Devadasan.(231)

The greatest contribution of Soshit Sangh's case lies in its focus on statistical impact of reservations on SC's and ST's. But on the question of quantum of reservations, Soshit Sangh raises problems in terms of Stare decisis. On this particular aspect, the decision contains inner inconsistencies requiring subsequent interpretative effort by a large bench of the Supreme Court. Policy and goal-oriented opinion writing in the characteristic style of Justice Iyers' "intuitive hunch" to achieve a desired result might be welcome as a matter of judicial state craft but the interest of definiteness and stability requires a clear cut and neat decision in troubled areas like the one involved in this case. When Judges make law or expound what they consider to be the basic philosophy of the Constitution, they are declaring 'the law of the land' not only for the actual and affecting litigants but the larger constituency of the people of India.(232) Justice Iyer remarks

230. Supra note 216.
231. Supra note 188.
232. See U. Baxis' Introduction to K.A. Mathew: Democracy, Equality and Freedom at XIII (1978) Prof. Baxi says Judgements of opinions as law making exercises do not obviously exclusively address themselves to the instant litigant parties. An appellate judicial decision may be an attempt at authoritative communication with many groups, besides the instant parties. See the Times of India, April 29, 1981, p.1.
that Constitutional propositions on which the whole nation directs it destiny are not like Olympic records to be periodically challenged and broken by fresh exercises in excellence and that "to play crossword puzzle with constitutional construction is to profane it" are indeed valuable but his neat side stepping of the ratio in Devadasan and his inadvertance to the ratio in Thomas on the question of quantum of preference will only create a cross word puzzle for the policy planners and future potential litigants in this troubled area.

Recently, in K.C. Vasantha V. State of Karnataka the Karnataka Government reserved 66 per cent seats under art.

16(4) thus leaving only 34 per cent posts in government services to be filled on merit. This extent of reservation in government services was challenged. However, different views were given by different judges. Chief Justice Chandrachud enunciated the following proposition. The reservation in favour of Sch.Castes and Sch.Tribes must continue as at present without the application of a "means" test, for a further period not exceeding 15 years. This would take it to a total period of 50 years after the commencement of Constitution. This would be a period reasonably long for the upper crust of the oppressed classes to overcome the beneficial effects of social oppression isolation and humiliation. He further said, as regards the backward classes;

233. Supra note 216 at 276.
234. Parmanana Singh, "Perspectives on Soshit Sangh"(1982) 1 SCC 43.
235. AIR 1935 SC 1495.
236. 'Means test' means the test of economic backwardness.
a) They should be comparable to Scheduled Castes and Scheduled Tribes and
b) They should satisfy the means test as the State Government may lay down in the context of prevailing economic condition. (237)

Justice Desai repeatedly pointed out that reservations benefitted only the top creamy layer of the class (thus agreeing with Justice Iyer, (239) and this must be avoided at any cost. He further observed that reservations must have a time span otherwise concessions tend to become vested interests. (239)

Justice Sen cautions that expertise and skill are the essence, in some services, such as medical services, and services of pilots and aviation engineers. The lives of citizens depends on such persons. There can be no room for reservation in such services, merit alone must be the sole decisive criterion for appointment to such services. (240) Justice Sen also seems to agree with Justice Iyer who also cautioned that while making selection for services, which need talent and skill should be made according to capability. (241)

Reservation in services and posts in connection with the affairs of the Union or of the states or statutory Corporations, local authorities and public undertakings, though provided for under art. 16(4) and 335 of the Constitution, the

237. Id at 1499.
238. Supra note 123.
239. Supra note 239 at 1506.
240. Id at 1531.
241. Supra note 214.
30 years of experience of the operation of these provisions reveal that the position even today is most unsatisfactory and discouraging. Out of the total population of 54.81 crores in 1971, population of Scheduled Castes and Scheduled Tribes were 8.05 crores and 3.80 crores respectively, and therefore, they are entitled to recruitment to the extent of 15 per cent and 7.5 per cent respectively. 

In 1960 - about a quarter million members of Scheduled castes were drawn into government posts rising to about a half a million in 1980; the corresponding figures for Scheduled tribes are about 35,000 and over a hundred thousand.

The anti-reservation movements launched in Gujarat, Bihar, U.P. and other parts of the country, are indicators of imminent danger for solidarity and integrity of the nation. The reservation of jobs as it stands today leads to an illegitimate gain for only a section of such classes i.e. those who are already holding high offices and consequently whose children can no longer said to be facing any disqualification in the society. The benefit of reservation is enjoyed by the already well off and advanced people among those classes the needy being deprived of its fruits. The framers of the

242. KK Singhvi, Scheduled Castes and Scheduled Tribes; the Bulwork of Economic and Social Revolution, in Dewan & Virendra Kumar's Directive Principles Jurisprudence at 318 (1982).

The anti-reservation movements launched in Gujarat, Bihar, U.P. and other parts of the country, are an indicator of imminent danger for solidarity and integrity of the nation. The reservation of jobs as it stands today leads to an illegitimate gain for only a section of such classes i.e. those who are already holding high offices and consequently whose children can no longer be said to be facing any disqualification in the society. The benefit of reservation is enjoyed by the already well off and advanced people among those classes the needy being deprived of its fruits. The framers of the Constitution definitely did not aim to formulate privileges for such a privileged class of backward castes. It was cautioned by Shri Jagjivan Ram, a veteran leader of the country who advised the so-called untouchables to stand on their own legs because these facilities and concessions are not life long which would have to be given up at any time.

Dr. Gopal Singh, the Chairman of the high power panel for minorities suggested that 'instead of reservation of posts which would undermine merit, bright boys from the weaker sections should be picked up for scholarship and pecuniary benefits to their families so that they could pursue their studies without any financial constraints and compete effectively with boys of communities.'

245. Quoted in Bharuwaj, Problems of Scheduled Castes and Scheduled Tribes in India 85-86 (1979).
It is submitted that the reservation policy which was intended only for a transitory period seems to have become the permanent feature. The reasons are casteism and communalism, two major evils, the Indian Society is infected with.

It is submitted that our founding fathers who provided for reservations for favoured communities never visualised that the given safeguards shall be the permanent features of the Constitution. Two main reasons behind this are (i) casteism and communalism with which the Indian society is infected. Those who assert the point that by providing reservation to the favoured communities the efficiency in administration is not affected then the question arises why such reservations are not provided in defence services and while selecting a pilot. Justice Krishna Iyer has very aptly remarked when he pointed out that while making selection for services which needs talent and skill, must be made according to the merit and capability. (247)

It is further submitted that where a seat in some medical college or engineering colleges is given to a reserved category student who has scored 40% marks and refused to a student of general category is on the face of it denial of social justice and equality. If we really want to help these favoured communities, for which Constitution has made special provisions, then the State and Central Government following Justice Iyer's suggestions should open special institutions for backward communities and should take such measure so that best education may be provided to these students

247. Supra note 214.
and this will certainly help in bringing them to the level of other meritorious students. The government must keep check over all these institutions to make sure that the benefit is reaching the real deserving students.

It is submitted that practice of carrying forward has created stern resentment amongst the members of the other castes. The Supreme Court in *Devadasan* (248) laid down that vacancies can be carried forward, but ordinarily in order to avoid monopoly being created, in a particular year recruitment of backward classes should not exceed 50 per cent of the total number of posts filled in that year. This rule of convenience was given statutory status until the Supreme Court in *Thomas* (248) ruled that 50% ratio was not sacrosanct and may exceed in a given case. This has been followed and upheld in *A.B.S.K.Sangh* (Per Justice Iyer). Recently in *Vasanthas case* (249), the same ruling was followed. In this case, 66 per cent seats were reserved under article 1(4). It is further submitted that the moral claims of the members of Scheduled Castes, Scheduled tribes and other backward classes should be justified as reasonable restrictions under article 14 upon the rights of the members of advanced sections of the society. The Supreme Court has held that a reasonable restriction may even amount to total prohibition. (250). Thus, the 50% limit stands liquidated,

248. Supra note 188.
249. Supra note 197.
250. Supra note 235.
reservations exceeding this limit are constitutionally permissible and can be justified under the need-based principle of distributive justice.

Justice Iyer says that an amendment of Articles 14 to 16 to clarify some moot points in favour of the backward classes so as to avoid litigative and speculative adventures and agitations is necessary. Otherwise, as things now stand, every time a fictitious percentage of reservation is fixed, the court paralyses the processes since challenges are made quickly and decisions are delayed till the purpose is defeated. (251) He suggested that fool-proof provisions must be made so that the Scheduled Castes and the Scheduled tribes and the really backward classes received not merely reservation for jobs and college admissions, but other facilities to upgrade their socio-economic status in life. If only the economic status of these communities living in rural squalour can be upgraded through positive policies of the State, including its financial institutions, all that hue and cry about reserved jobs could have been avoided. Therefore, new constitutional formula imaginatively conceived and intelligently executed, are essential. This surely means several amendments. (252)

251 Ibid.