Chapter - V

JUDICIAL RESPONSE TO POLICY OF RESERVATIONS
India, for centuries, has been the seat of a social system based on inequality, exploitation and injustice. The poor have not only suffered economic exploitation but have undergone and are still being subjected to social indignation of all kinds. After independence, the makers of the Constitution realised the need for social and economic justice. Nehru asserted remarked: "there is a duty cast upon us and to remember always that we are here not to function for one party or one group, but always to think of India as a whole and always to think of the welfare of the four hundred millions that comprise India". Referring to the pervasive and poignant problem of mass poverty, Nehru warned: "If we cannot solve this problem soon, all our paper Constitution will become useless and purposeless".1

The Constitution of India is a social document with most of its provisions directly or indirectly aiming at furthering the goals of social justice. The preamble, the chapters on Fundamental Rights and the Directive Principles of State Policy2 mandate the state to strengthen political, social and economic democracy. Justice, liberty, equality and fraternity are the guiding principles of the new Document. The judiciary in India, specially the higher judiciary has been assigned a vital role in upholding the federal principle, interpretation of laws made by legislatures and testing their Constitutional validity, and protecting the fundamental rights of the citizens. The Constitution of India does not recognise the doctrine of separation of powers as it exists in the United States. Apart from the powers vested in the Supreme Court by the Constitution, the Court on its own has expanded its own jurisdiction under the garb of judicial activism to meet the welfare requirements of the Constitution. The prophecy of Sir Alladi Krishnaswami Ayyar3 that "the future evolution of the Indian constitution will depend to a large extent upon the Supreme Court and the direction given to it by that Court", has come true.

An important issue that has assumed significance in recent times has been the activist role played by the judiciary especially the Supreme Court. The expression "judicial activism" has eluded a precise definition as it mean
different things to different people. Broadly speaking it implies dynamism, judicial creativity, judicial sensitivity to social and economic problems. This new role is a deviation from its traditional role of administering justice according to law. The new role visualises the urge to meet the hopes and aspirations of the teeming people. Technically, it is the Legislature and Executive that are responsible for establishing socio-economic justice when they fail or faint to do it, the judiciary cannot sit as a silent spectator. During the past four decades, the role of the apex court changed from the "interpreter of laws" to that of "maker of laws". In fact, its activist role began in the fifties when it had to pronounce on the validity of agrarian reforms introduced by the Parliament and the state legislatures. Since then there is no looking back.

The Constitution of India does not provide for judicial review in explicit terms. It is implicit in Article 13(1) and (2), 32(1) and 226. In *Kishavananda Bharti vs. State of Kerala*, Khana, J. observed: "If the provisions of a statute are found to be violative of any Article of the Constitution which is touchstone of the validity of all laws, Supreme Court and High Courts are competent to strike down the said provision".

**Scheduled Caste and Scheduled Tribes:**

The Constitution treats the scheduled castes and scheduled tribes in India with special favour and accords them with certain safeguards. The Constitution however, does not specify the tribes or the castes which are to be called as the scheduled castes or the scheduled tribes. It leaves the power to list these castes and tribes to the President. The scheduled castes, according to Article 366(24) read with Article 341, are those castes, races or tribes, or parts thereof, as the President may notify. According to Article 341(1), the President may be specify castes, races or tribes, or parts of groups within caste, races or tribes which shall be for the purpose of the Constitution be deemed to be scheduled castes in relation to that State. Thus, the classification of scheduled castes may vary with state and Union territory. As regards the states, the President issues the notification after consultation with the Governor of the
state concerned. The purpose of this provision is to avoid disputes as to whether a particular caste should be specified as a scheduled caste or not. Only those castes can be characterised as scheduled castes which are notified in the Presidential Order under Article 341. Under Article 341(2), however, Parliament may by law include or exclude from the list of Scheduled Castes occupied in a notification by the President any caste, race or tribe or part of or group within any caste, race or tribe.

The Scheduled Castes Order 1950 stipulates that "no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of scheduled castes". This means that if a member of scheduled castes converts to another religion, he would cease to be a scheduled caste. The Supreme Court in *ABSK Sangh (Rly) V. Union of India*, held that Article 341 makes it clear that a 'scheduled castes' need not be a 'caste' in the conventional sense and, therefore, may not be a caste within the meaning of Article 15(4) or 16(4). Scheduled castes become such only if the President specifies any caste, race, tribe or parts or groups within castes, race or tribes for the purpose of the Constitution. So, a group or a section of a group, which need not be a caste and may even be a hotch-potch of many castes or tribes or even races, may still be a scheduled caste under Article 341. It has been held by the Supreme Court in *Triloki Nath vs. state of Jammu & Kashmir*, that the State has, no doubt, to ascertain whether a particular class of citizens is backward or not, having regard to acceptable criteria, it is not the final word on the question. It is a justiciable issue and may be canvassed if that decision is based on the irrelevant considerations.

The Supreme Court then finally held that in reservation of appointments for backward classes, determination of backward classes, could not be on the basis of community, caste, race or religion. The Supreme Court thus held that state policy of distribution of posts community-wise was hit by Articles 16(1) and (4). For the application of clause (4), two conditions must be satisfied:
(i) a class of citizens is socially and educationally backward; and
(ii) the said class is not adequately represented in the service under the state\textsuperscript{11}.

**Backward Classes:**

Besides the scheduled castes and the scheduled tribes, the Constitution extended some protection to backward classes, as these classes have been neglected for long. Backward classes are to be found amongst all religious groups - Hindus, Muslims, Christians, etc. Under Article 15(4), the state is empowered to make special provisions for the advancement of any socially and educationally backward class besides the scheduled castes and the scheduled tribes. Under Article 16(4), there can be reservation of posts for backward classes. The backward classes have not been specified in the Constitution for, at the time of the Constitution-making, not much information was available about them. In Articles 15(4) and 340, the expression used is socially and educationally backward classes. In Article 16(4), the expression used is 'backward' and in Article 46, the term used is 'weaker sections of the people'. To facilitate the task of identifying the backward classes and laying down criteria for the purpose, Article 340(1) empowers the President to appoint a commission consisting of such person as he thinks fit to investigate the condition of socially and educationally backward classes in India and the difficulties which they face. The Commission may recommend steps for improving their condition. The commission may also make recommendation as to the grants which should be made for the purpose by the Centre or any State, and the conditions subject to which such grants should be made. The Presidential order is to define the procedure to be followed by the Commission. The Commission is to investigate the matters referred to it and present its report to the President setting out the facts as found by it and making its recommendations. The report of the Commission together with a memorandum setting out the action taken thereon by the government is to be laid before each House of Parliament. After the receipt of the Commission's report, the
President may by order specify the backward classes which shall fall within the jurisdiction of the special officer for the scheduled castes and the scheduled tribes.

The task of devising positive and workable criteria to identify backwardness on an all India basis is yet to be completed. At present, each state has its own criterion for determining backwardness and often political expediency plays a decisive role. There is, thus, no uniformity in the country in this respect. For purpose of Article 15(4) and 16(4), it is for the state concerned to list the backward classes. The Centre can also list them for purposes of admission to central educational institutions and central services and also under Article 338(3) for bringing them under the jurisdiction of the Commissioner for scheduled castes and scheduled tribes. Even in this the Centre has not been able to do much. The task is an extremely difficult one. Many communities desire to be characterised as backward because of the benefits attached to them and it is here that the entire matter gets politicised.12

The Government of India appointed the Backward Classes Commission (known as the Mandal Commission) under Article 340 on January 1, 1979. The Commission submitted its report on 31st December 1980. The Commission was inter alia "entrusted with the task of determining the criteria for defining the socially and educationally backward classes in the country". The Commission has held that (besides Scheduled castes and Scheduled Tribes who amount to 22.56% of the total population), 52% of the total Indian population can be characterised as backward and, therefore, 52% of all posts could be reserved for them. The Commission, however, refrained from making such a drastic recommendation in view of the Supreme Court's ruling that the total quantum of reservation under Article 16(4) should be below 50%.13 In view of this legal constraint, the Commission was obliged to recommend reservation of 27% only for backward classes so that the total reservation for Scheduled Castes, Scheduled Tribes and backward classes amounts to a little less than 50%. The Commission by and large identified castes with backward
classes and more or less entirely ignored the economic tests. The Commission also ignored the fact that even among the so-called higher castes, there may be a number of socially and educationally backward people deserving help. On the whole, the Commission's recommendation have proved to be very controversial.  

According to justice Subba Rao, "Casteism has been projected into every walk of life-admissions to educational institutions, appointment to Government services, contracts, licences, elections and the formation of Ministry".  

The whole controversy regarding Government reservation policy revolves around as to who should be the real beneficiaries of the policy and extent to which the reservations can be stretched. There have been several decisions of the Supreme Court since 1951, which tried to analyse the criteria to be adopted for making reservations for the backward classes. In the case of State of Madras v. Smt. Champakam Dorairajan and Another the issue was discussed in detail by the Supreme Court. The State of Madras maintains four Medical Colleges with 330 seats, out of which 17 seats are reserved for students coming from outside the state and 12 seats are reserved for discretionary allotment by the state and the remaining seats are distributed among the four districts in the State. Likewise, the state of Madras maintains four engineering college with a capacity of 395 seats. Out of which, 21 seats are reserved for students coming from outside the state, 12 seats are reserved for discretionary allotment by the state and the remaining seats are distributed among the four districts of the state.

For many years before the commencement of the Constitution, the seats in both the Medical Colleges and the Engineering Colleges so apportioned among the four distinct groups of districts used to be filled up according to certain proportions set forth in what used to be called the communal G.O. Thus, for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis:
Smt. Champakam Dorairajan prayed for the issue of a *writ of Mandamus* or other suitable prerogative writ restraining the state of Madras and all officers and subordinates thereof from enforcing, observing, maintaining or following or requiring the enforcement, observance, maintenance or following by the authorities concerned of the notification or the Order generally referred to as the Communal Government Order in which admission to the Madras Medical College, were sought or purported to be regulated in such manner as to infringe and involve the violation of her fundamental rights. From the affidavit filed in support of her petition it does not appear that the petitioner had actually applied for admission to the Medical College. She states that on inquiry she came to know that she would not be admitted to the college as she belonged to the Brahmin community. No objection, however, was taken to the maintainability of her petition on the ground of absence of any actual application for admission made by her. On the contrary, Court have been told that the state had agreed to reserve a seat for her should her application before the High Court succeed. In the peculiar circumstances, Court do not consider it necessary to pursue this matter any further.17

Sri Srinivasan who had actually applied for admission to the Government Engineering College at Guindy, filed a petition praying for a *writ of Mandamus*, or any other writ restraining the state of Madras and all officers thereof from enforcing, observing, maintaining or following the communal government order by which admission to the Engineering College was sought to be regulated in such manner as to infringe and involve the violation of the
fundamental right of the petitioner under Article 15(1) and Article 29(2) of the Constitution. In the affidavit filed in support of his petition, the petitioner has stated that he had passed the Intermediate examination held in March 1950 in Group I, passing the said examination in first class and obtaining marks set out in his affidavit. The Advocate General appearing for the State contends that the provisions of this Article have to be read along with other Articles in the Constitution. And that Article 46 charges the state with promoting with special care the educational and economic interests of the weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes, and with protecting them from social injustice and all forms of exploitation. It is pointed out that although this Article finds a place in part IV of the Constitution which lays down certain Directive Principles of State policy and though the provisions contained in that part are not enforceable by any court of law the principle therein laid down are nevertheless fundamental in the governance of the country and Article 37 makes it obligatory on the part of the state to apply those principles while making laws. The argument is that having regard to the provisions of Article 46, the State is entitled to maintain the communal government order fixing proportionate seats for different communities and if because of that order, which is thus contended to be valid in law and not in violation of the Constitution, the petitioners are unable to get admissions to the educational institutions there is no infringement of their fundamental rights. The chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III. The Directive Principles of state policy have to conform to and run as subsidiary to the chapter on Fundamental Rights.\(^{18}\)

Take the case of the petitioner Srinivasan. It is not disputed that he secured much higher marks than those of Non-Brahmin candidates and yet the Non-Brahmin candidates who secured less number of marks will be admitted into six out of every 14 seats but the petitioner Srinivasan will not be admitted to any of them. It is argued that the petitioners are not denied admission only
because they are Brahmins but for a variety of reasons, e.g. (a) they are Brahmins, (b) Brahmins have an allotments of only two seats out of 14 and (c) the two seats have already been filled up by the most meritorious Brahmin candidates. The classification in the communal government order proceeds on the basis of religion, race and caste. In the view of Judges, the classification made in the communal government order is opposed to the Constitution and constitutes a clear violation of the Fundamental Rights guaranteed to the citizen under Article 29(2). And there is no need to consider the effect of Article 14 or 15 on the specific Articles discussed above. The communal government order is therefore inconsistent with the provisions of Article 29(2) in part III of the Constitution and is void under Article 13. The appeals were dismissed with costs.  

This may be true that only two seats are reserved for Brahmins. But when we come to consider the seats reserved for the candidates of other communities, the petitioners are denied admission to any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom those reservation have been made.

It was this positive attitude, which convinced the honourable judges to observe that part III is sacrosanct and Directive Principles of State Policy must conform to and run subsidiary to fundamental rights. There is no doubt that fundamental rights as mentioned in part III of the Constitution are very important but at the same time one can not neglect the value of Directive Principles of State Policy which enshrine the aspirations of people of the country. As a result, any strict positive interpretation of fundamental rights vis-a-vis directive principles might result in the frustration of the philosophical foundations of both Part III and part IV of the Constitution. Instead if a liberal pragmatic rule of interpretation is applied to these parts that may yield fruitful results which unfortunately the honourable judges failed to adopt in this case.

Although the method of interpretation of various Constitutional provisions, in this case, is not convincing but the result of the interpretation is
quite convincing. Politicisation of reservation is a dangerous sign for a society already fragmented on various grounds. The court took into consideration not only Constitutional provisions touching upon the issue of reservation but also considered socio-economic factors involved in the case.

*M.R. Balaji and Others v. The State of Mysore and Others*  
The state appointed a Committee called the Mysore Backward Classes Committee with Dr. R. Nagen Gowda as its chairman to investigate the problem and advise the government as to the criteria which should be adopted in determining the educationally and socially backward classes, and the special provisions which should be made for their advancement. According to the order, which was passed in the light of interim report that 60% of the seats were left open for what may be conveniently described as the "merit pool" available to candidates according to their merits, 40% were reserved for the reservation pool 22% of which were reserved for the backward classes, 15% for the scheduled castes and 3% for the scheduled tribes.

The Nagan Gowda Committee submitted its report in 1961 and in the light of the said report and the recommendation made therein, the state proceeded to make an order under Article 15(4) on the 10th July 1961. This order begins with the observation that the Nagan Gowda Committee has come to the conclusion that in the present circumstances, the only practicable method of classifying the backward classes in the state is on the basis of castes and communities, and it has specified the criteria which should be adopted for determining the educational and social backwardness of the communities.

Out of the twenty-three petitioners, six had applied for admission to the pre-professional class in medicine in the Medical Colleges affiliated either to the Mysore university or to the Karnataka university and seventeen had applied for admission to the First Year of 5-year integrated course leading to the degree of B.E. of the University of Mysore. As a result of reservation made by the said order, students who have had secured less percentage of marks were admitted, but not the petitioners. The petitioner's case is that the impugned
over which has been passed under Article 15(4) is not valid because the basis adopted by the order in specifying and enumerating the socially and educationally backward classes of citizens in the State is unintelligible and irrational and the classification made on the said basis is inconsistent with and outside the provisions of Article 15(4).21

In the opinion of learned judges, when the state makes special provision for the advancement of the weaker sections of society specified in Article 15(4) it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. Therefore we are satisfied that the reservation of 68% directed by the impugned order is plainly inconsistent with Article 15(4).22

The Supreme Court laid down several important points in this judgement. It held that it was not necessary for the government to appoint a commission under Article 340 before passing an order under Article 15(4). This appointment and report of the Backward Classes Commission was only recommendatory. It was not a condition precedent for taking action under Article 15(4). It was further ruled that the executive can pass orders on reservation. It is not necessary for the legislature to make provision for reservation. The backwardness must be social and educational. Caste is one indicator, but its role cannot be exaggerated. Otherwise, it would perpetuate caste. Social backwardness is the result of poverty to a large extent. Occupations and place of habitation also determine backwardness.

Classification between backward and more backward classes made by the government was held to be unconstitutional. According to this criterion, nearly 90 percent of the state population became backward. Reservation of 68 percent was also inconsistent with Article 15(4) as it was unreasonable. The
interests of the weaker sections must be balanced with that of the society in general. It is a difficult task but in the guise of making special provision, practically all seats cannot be reserved. Reservation should be less than 50 percent. The Court concluded that the state government's order was a fraud on the Constitutional power conferred under Article 15(4). The court said that it was not its task to categorise the valid and invalid percentage. Article 15(4) gives that discretion to the state government.²³

The judgement of honourable Supreme Court through learned judges like P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das, Gupta, J.C. Shah and the then Chief justice of India B.P. Sinha, in the present case, is one of the finest judgement in relation to reservation and related issues.

The most notable observation of the Supreme Court in this case relates to its ruling that the reservation of 68% made by the impugned Mysore Government is a fraud on the Constitutional provisions relating to reservational provisions that the makers of our Constitution never intended that the special provisions ingrained in Article 15(4), 16(4) should be used in such a manner as to frustrate the most fundamental of all fundamental rights, that is, right to equality. 68% reservation is nothing but a naked misuse of special provisions to uplift the backward sections of the society. The Court further held that there can not be classification within classification so as to confuse the entire concept of backwardness. Again the backwardness as given in Article 15(4) and 16(4) does not mean either socially or educationally rather it must be both social and educational backwardness so as to claim benefits of Article 15(4). This interpretation given by the honourable Apex Court is very convincing and acts as a rider against the irrational attitude of politicians vis-à-vis reservations. Moreover, the Court's observation that caste is a relevant factor under Article 15(4) but it can't be the sole test for ascertaining whether a particular class is backward. Other factors like poverty, occupation, place of habitation are equally relevant. The Court rightly observed that Article 15(4) does not speak of "castes" but only speaks of "classes", and 'caste' and class is not
synonymous. Since the impugned government order solely relied on 'caste' without regard to other relevant factors and that is sufficient to render the order invalid. Furthermore, the observations of learned judges with regard to irrational criterion adopted by the state government which rendered about 90% of the population as backward is inconsistent with Article 15(4) is highly appreciating. The court noted that Article 15(4) only enables the state to make special and not exclusive provision for the backward classes. The court's observation that national interest would suffer if qualified and competent students were excluded from admission in institutions of higher education, is an excellent analysis of an uncontrolled and irrational reservation policy.

R. Chitralekha and another V. State of Mysore and Others\textsuperscript{24} The Government of Mysore by an Order defined backward classes and directed that 30 per cent of the seats in professional and technical colleges and institutions shall be reserved for them and 18 per cent to the scheduled caste and scheduled tribes. It was said that classification of socially and educationally backward classes should be made on the basis of economic condition and occupation. By a letter the Government informed the Director of Technical Education that it had been decided that 25% of the maximum marks for the examination in optional subject should be fixed as interview marks. The selection will be decided by a committee composed of Heads of Technical Institutions and in allotting marks for interview factors like general knowledge, personality and extra-curricular activities of the candidates should be taken into consideration. On the basis of this selections were made for admission to Engineering and Medical Colleges. Thereupon some of the candidates whose applications for admission were rejected filed writ petitions before the High Court of Mysore for quashing the orders issued by the Government and for directing that they shall be admitted to the college strictly in the order of merit. The High Court rejected the contentions raised on points of law but held that the petitioners be interviewed afresh and admissions be made in accordance with the Government Order and letter which were declared valid.
It was also contended that the Government letter was invalid in as much as it did not comply with the provision of Article 166 of the Constitution. The Government had no power to appoint a selection committee for admitting students to colleges on the basis of higher or different qualifications than those prescribed by the University. That selection by viva voce examination was illegal by reason of the fact that it enables the interviewers to act arbitrarily and therefore it contravenes Article 14 of the Constitution. Lastly it was contended that unless the observation of the High Court that the classification was not perfect since the Government has not applied the caste and economic criterion, it will mislead the Government.

The Government laid down that classification of socially and educationally backward classes should be made on the following basis: (1) economic condition, and (ii) occupation. According to that order a family whose income is Rs. 1,200 per annum or less and persons or classes following occupations of agriculture, petty business, inferior services, crafts or other occupations involving manual labour are in general, socially, economically and educationally backward. The Government lists the following occupations as contributing to social backwardness: (1) actual cultivator, (2) artisan (3) petty businessmen, (4) inferior services (i.e. class IV in government services and corresponding class or service in private employment) including casual labour, and (5) any other occupation involving manual labour. The order does not take into consideration the caste of an applicant as one of the criteria for backwardness. Learned counsel does not attack the validity of the said order.

According to Subba Rao J: We do not intend to lay down any inflexible rule for the Government to follow. The laying down of criteria for ascertainment of social and educational backwardness of a class is a complex problem depending upon many circumstances which may vary from state to state and even from place to place in a State. But what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individuals may be considered along with
other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests.25

According to Mudholkar J that it would not be in accordance either with clause (1) of the Article 15 or clause (2) of Article 29 to require the consideration of the castes of persons to be borne in mind for determining what are socially and educationally backward classes. It is true that clause (4) of Article 15 contains a non-obstinate clause with the result that power conferred by that clause can be exercised despite the provision of clause (1) of Article 15 and clause (2) of Article 29. But that does not justify the inference that castes have any relevance in determining what are socially and educationally backward communities. That the Constitution has used in clause (4) the expression "classes" and not "castes".

The Supreme Court dismissed the appeal. The judgement asserted that caste was only a relevant circumstance and it could not be a dominant test in ascertaining the backwardness of a class of citizens. Backwardness could be ascertained without reference to caste. If the government does not take caste into consideration, its order will not be bad.26

In fact, the judgement of the Honourable Supreme Court on almost all points, in this case, is quite satisfactory. The court's observation that provisions of Article 166 of the Constitution are only directory and not mandatory is very clear from the reading of the said Article. Since the government issued the impugned order to the effect mentioned there in, it does not contravene the requirements of Article 166. Secondly, the mere fact that selection by viva-voce could be abused, does not directly violate Article 14. It could be violative of that provision only when it is shown, in a particular case, that the method was actually misused by the authorities. Again the Court's observation that classification of backwardness on the basis of economic conditions and occupation is not bad and does not offend Article 15(4), is well-
founded. The caste of a group may be relevant circumstance in ascertaining
backwardness but can not be the sole criterion, is appreciable.

S. Periakaruppan V. State of Tamil Nadu. The petitioners before
court appear to have had brilliant academic career. The petitioner in petition
No. 285 of 1970 came out within first three ranks in the 10th and 11th
standards and in the final examination he secured 451 marks out of the total of
700 he stood third in his school. He has a N.C.C. cadet and passed creditably
the 'A' certificate examination. After having passed his Anglo Indian High
School examination creditably he joined Madurai College in the Pre-University
course taking Physics, Chemistry and Biology subjects. In that course he
secured first class with Grade 'D' plus in Physics and Chemistry and 'A' plus in
Biology. He stood fourth in his college. The Grade 'D' plus implies 85 to 99
percent marks and 'A' plus 65 to 75 percent marks.

The petitioners before the Court challenged the validity of the
selections made on various grounds. They contended that the unitwise selection
contravenes Articles 14 and 15 of the Constitution in as much as the same
places the applicants of some of the units in a better position than those who
applied to other units. It was alleged that the ratio between applicants and
number of seats in the Coimbatore unit was 1:13; in Tirunelveli 1:10; in
Thanjavur 1:6 and in Madurai 1:7 1/2. It was further alleged that several
applicants who secured lesser marks than the petitioners court were selected
merely because their application came to be considered in other units. It was
also alleged that this unitwise scheme were merely intended as a device to get
over the decision of this court in Rajendran's case. It was next contended on
behalf of the petitioners that the interview held was a farce. Each applicant was
interviewed hardly for three minutes. During that interview irrelevant questions
were asked. The interview marks were manipulated so as to pull up
undeserving applicants and down grade those who had scored excellent marks
in their pre-University examination. It was said that a perusal of the marks list
would show that the whole selection was a manipulation. The applicants who
had failed more than once and ultimately secured bare second class were selected while applicants who had secured first class with high marks were rejected. It was urged on their behalf that even the students who get the minimum marks could be pulled up by the selection committee by plumping 70 or more out of 75 interview marks whereas the students who have secured 170 marks the highest marks that could have been secured under the admission rules in pre-University examination could be pulled down by giving less than 10 marks out of 75. The petitioner's complaint is that after the interview the selection committee carried the marks given by them to Madras and there the Government has manipulated the marks in such a way as to select their favourites and reject such of them in whom the Government is not interested.

In Rajendran's case\textsuperscript{29} it was held that the classification of backward classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. The court further observed that there is no gainsaying the fact that there are numerous castes in this country, which are socially and educationally backward and to ignore their existence is to ignore the facts of life. Hence it is not possible to uphold the contention that the impugned reservation is not in accordance with Article 15(4). But all the same the government should not proceed as the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50% of the seats in the general pool does not show that the time has come for a \textit{de novo} comprehensive examination of the question. It must be remembered that
the Governments' decision in this regard is open to judicial review. The State of Tamil Nadu shall immediately constitute a separate expert committee consisting of eminent medical practitioners (excluding all those who were members of the previous committees) for selection to the 24 unfilled seats. The selection shall be made on statewise basis. The committee shall interview only the candidates who are shown in the waiting list, the persons who unsuccessfully moved the High Court of Madras and the two petitioners before this court. They shall allot separate marks under the five heads mentioned in the rule. The committee shall take into consideration only matters laid down in the rule, exclude from consideration all irrelevant matters and thereafter prepare a gradation list to fill up the 24 seats mentioned earlier. It is ordered accordingly. Again, in Pradeep Jain etc. vs. Union of India and Other, a group of writ petitions, the question, whether, consistently with the Constitutional values admissions to a medical college or any other institution of higher learning situated in a state can be confined to those who have domiciled within the state or who are resident within the state for a specified number of years or can any reservation in admissions be made for them so as to give them precedence over those who do not possess "domicile" or residential qualification within the State, irrespective of merit. This question has assumed considerable significance in the present day context, because we find that today the integrity of the nation is threatened by the divisive force of regionalism, linguism, communalism and regional linguistic.

In the view of court that so far as admissions to post-graduate courses, such as M.S., M.D. and the like are concerned, it would be eminently desirable not to provide for any reservation based on residence requirement within the state or on institutional preference. But having regard to broader considerations of equality of opportunity and institutional continuity in education which has its own importance and value, the Court directed that though residence requirement within the state shall not be a ground for reservation in admissions to post-graduate courses, a certain percentage of seats
may in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the post-graduate course in the same medical or university but such reservation on the basis of institutional preference should not in any event exceed 50 percent of the total number of open seats available for admission to the post-graduate course.

In R. Uma Devi v. The Principal, Kurnool Medical College, Kurnool and Others\textsuperscript{32}, where the petitioner was born in forward community was admitted to M.B.B.S. course under the open category, her marriage subsequently with a person belonging to backward community would change her social status and her admission to post-graduate class under reserved quota would not be cancelled on ground that she belonged to open category specially when there were no allegation that her marriage was a mock marriage. The petitioner though a Vysya by birth and was admitted to M.B.B.S. course under open category when she was not married, but her marriage to a person belonging to Besta (Fisermen) community which is a backward class 'A' category has sought for admission into Post-Graduate Medical course (D.G.H.) mentioning her social status as backward class 'A' category as that of her husband and the same was granted and she had also paid the necessary fee in that regard. The petitioner had secured 153 marks and was assigned 67th rank. She did not conceal facts and has stated that she is a backward class after admission by proceeding dated 1.7.92 she was issued with a notice proposing to cancel her selection on the ground that she belongs to open category on the basis of her father's caste and does not belong to backward class 'A' category, even though her husband is from backward class 'A' category. Hindu marriage is not an agreement. It is a 'Sanaskara' and is a sacrament and therefore, after marriage, the wife passes into the dominion of her husband. She goes and stays with her husband and he becomes her custodialegis. After her marriage, she no longer a member of her parents family and becomes part and parcel of her
husband's family. Husband's entitlement requiring his wife to live in his house from the moment of the marriage is well recognised under Hindu law. A wife cannot refuse this obligation. This wife, a Binnagotri at the time of marriage, enters into her husband's 'gotra' on her marriage and becomes a 'sagori' of her husband, as she is treated as part and parcel of her husband. The Supreme Court rejected the stand taken by the respondents herein and accepted the contention of the petitioner that after marriage, she comes within the fold of her husband.

**K. Duraisamy and another V. State of Tamil Nadu and Others**\(^{33}\): An appeal was filed against the decision of the Full Bench of the Madras High Court in *R. Murali v. R. Kamalakkannan*\(^{34}\) dated 1-10-1999 in writ Appeal No. 929/99. The Government of Tamil Nadu, Health and Family Welfare Department issued an order Ms No. 55 dated 9-2-1999 laying down the procedure for selection of candidates for admission to Post-graduate Diploma, Degree, Higher Specialty courses for the academic session 1999-2000. The Government Order envisaged reservation upto 50% in favour of in-service candidates on merit basis and further stipulated that 50% of the seats available in each of the specialty, shall be allotted executively to service candidates. According to the applicant that they were not selected due to a particular understanding of the orders of the government and stipulations contains in the prospectus relating to earmarking or allocation of seats for in-service candidates and non-service candidates in a manner by which the claims of in-service candidates based on merit on the basis of marks came to be ignored in respect of 50% of the seats allocated as "Open Quata" by confining them exclusively to non-service candidates and considering claims of in-service candidates like the appellants only in respect of 50% allocated to and reserved for service candidates.\(^{35}\)

As the number of candidates seeking admission to colleges far exceeds the number of seats available, the validity of orders passed by Government reserving seats for scheduled castes, scheduled tribes and
backward classes in engineering, medical and other colleges providing technical education has been considered in a number of cases after clause (4) had been inserted in Article 15. The Supreme Court considered Article 15(4) in *M.R. Balaji V. Mysore*[^36], *Heggade Janardhan Subbarye V. Mysore*[^37] and *R. Chitralekha V. Mysore*[^38], which must be read together as the second case "clarified" the first and the third "explained" a part of it. In Balaji's case the Order of the Mysore government reserving seats was the fifth Order impugned in court. The questions that were raised were of extreme importance, for it involved the interpretation of Article 15(1), Article 29(2) and Article 46. It was not however, disputed that these Articles justified a reservation of seats for the scheduled castes and scheduled tribes and for backward classes, the dispute was about the extent of such special provision, and the criterion for identifying these classes. The impugned order was based on the report of the Nagan Gowda Committee, and the judgment in Balaji's case considered that report, and other reports, dealing with backward classes and the reservation to be made for them in education institutions. However, the court first dealt with certain preliminary contentions and rejected them.[^39]

**Appointments:**

*The General Manager, Southern Railway v. Rangachari*[^40] - On a writ petition filed by the respondent K. Rangachari in the Madras High Court under Article 226 of the Constitution a *writ of mandamus* was issued restraining the appellants, the General Manager, Southern Railways, and the Personnel Officer (Reservation), Southern Railway, from giving effect to the directions of the Railway Board ordering reservation of selection posts in Class III of the railway service in favour of the members of the scheduled castes and scheduled tribes and in particular the reservation of selection posts among the Court-Inspectors in class III are of which is held by the respondent. After the writ was thus issued the appellant applied for and obtained a certificate from the said High Court under Article 132(1) of the Constitution as it involved a substantial question of law, namely, the scope of Article 16(4) of the Constitution.
The respondent was initially recruited to the grade of Rs. 200-300 and was confirmed in that grade on November 21, 1956. He was promoted to officiate in the grade of Rs. 260-350. He got a chance of another similar promotion to officiate on April 8, 1959. These promotions were purely adhoc and temporary. Later, on June 16, 1959, he was interviewed by the selection committee and his promotion to the said higher grade was regularised and an order was passed in that behalf on June 30, 1959. By this order he was allowed to continue to officiate in the said grade. Since then he has been officiating in that grade. On April 27, 1959 and on June 12, 1959, the impugned circulars were issued by the Railway Board and addressed to the General Managers. As a result of the said circulars the selection committee decided to consider the case of Hiriyanna for promotion to the grade of Rs. 260-350.

According to the respondent the two directives issued by the appellants under the two impugned circulars were ultra vires, illegal, inoperative and unconstitutional in that they were not justified by Article 16(4). He alleged that a reading of Articles 16, 335, 338 and 339 would show that the Constitution draws a clear distinction between scheduled castes or tribes on the one hand and backward classes on the other and so it was urged by him that the impugned circulars were illegal. The petitioner further urged that the safeguards provided by Article 16(4) applied only to reservation of posts at the stage of appointment and not for reservation of posts for promotion after appointment and so the circulars were outside the provisions of Article 16(4) and as such contravened Article 16(1). The petition expressed the apprehension that if the circulars are implemented the respondent would be reverted and that would cause great loss both financially and in status to him. It is on these grounds that the respondent prayed for the issue of a writ of mandamus directing the appellants to forbear from implementing the two impugned circulars.

The first question to be considered is whether Article 16(1) and (2) refer to promotion or whether they are confined to the initial appointment to any post in civil service. The appellants and the respondent both conceded that
cases of promotion fell within Articles 16(1) and (2) though they differed as to whether they were included in Article 16(4). It would be immediately noticed that the respondent's petition postulates the inclusion of promotion in Articles 16(1) and (2) for it is on that assumption that he challenges the validity of the impugned circulars.

According to Gajendragadkar J. it is true that in providing for the reservation under Article 16(4) the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any state sets about making a provision for reservation of appointment or posts. It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration; but, in the present case, as we have already seen, the challenge to the validity of the impugned circulars is based on the assumption that the said circulars are outside Article 16(4) because the posts referred so in the said Article are posts outside the cadre of services and in any case, do not include selection posts. Since, in our opinion, this assumption is not well founded we must hold that the impugned circulars are not unconstitutional. The decision of the High Court under appeal is reversed and the respondent's application for a writ is dismissed.41
The Honourable High Court of Madras rightly held that the word "backward classes" in Article 16(4) included members of scheduled castes and scheduled Tribes but the word "appointments" did not denote promotion and the word "posts" meant posts outside the civil services and thus the impugned circulars of the Railways were not covered by Article 16(4) and were ultravires. It is, indeed, important to note here that the special provisions made in matters of public employment for the "backward classes" in Article 16(4) must be interpreted in the light of Article 16(1) of the constitution. Any interpretation made in isolation could defeat the very object of this provision.

It is correct that Constitutional provisions must not be interpreted in a narrow or pedantic manner (as observed by honourable Justice Gajendragadkar in this case). Yet it is also very important that one must not forget the dangers involved in highly liberal interpretation because that can defeat the very purpose of the Constitution in relation to a specific aspect. Reservation benefits must, therefore, extend only at the initial stage (at the time of appointment) and thereafter it should be left to the merit of the persons concerned at the stages of promotions. Reservation after reservation would adversely effect the meritorious members and hence could be harmful for the nation as a whole in the long run.

On the basis of above-mentioned points, it is submitted that the observations of Mr. Justice Wanchoo and Mr. Justice Ayyangar are far more satisfactory than the other Judges involved in this case. Moreover, it is the stand of the Honourable High Court and the minority opinion in the Supreme Court which was approved by an eleven judges Bench of Supreme Court in Indira Swahany V. Union of India case around 30 years after this judgement.

Triloki Nath Tiku and another v. State of Jammu and Kashmir and Other\(^4^2\) : The injunction to the secretaries to select candidates "keeping in view the policy of adequate representation of such elements as were not adequately represented in the services", is not a provision making reservation of appointments or posts in favour of backward class. Selections made in
pursuance of such order could not be deemed to have been made on the basis of backwardness of the classes to which they belonged. The policy of the state of Jammu & Kashmir whereby 50 percent of vacancies were reserved for the Muslim of Kashmir for the entire state, 40 per cent were reserved for Jammu Hindu and 10 per cent were reserved for Kashmiri Hindus, is a policy not of reservation of some appointments or posts. It is a scheme of distribution of all the posts community-wise. Distribution of appointments, posts or promotions made in implementation of that state policy is contrary to the constitutional guarantee under Articles 16(1) and (2) and is not saved by clause (4) and the promotions granted in accordance with this policy are contrary to the provisions of Articles 16(1) and (4) of the Constitution and therefore void. This will not however prevent the state from devising a scheme, consistent with the Constitutional guarantees, for reservation of appointments, posts or promotions 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.

The petitioners claimed that they had been discriminated against in the matter of promotion to the gazetted cadre, solely on the ground of religion and place of residence. The case that junior officers were promoted to the gazetted cadre over officers senior to them on the ground solely that they belonged to the Muslim community or that they were Hindus belonging to the Jammu province of the state of Jammu and Kashmir. But the prejudicial treatment of senior officers was sought to be supported on the plea that the state had acted in consonance with the principles of clause (4) of Article 16 of the Constitution. It was the case of the state that Muslims as a community in the whole of the state of Jammu and Kashmir formed a backward class of citizens and they were not adequately represented in the services under the state: so are the Hindus from the province of Jammu and on that clause (4) of Article 16 undoubtedly empowers the state to make reservation in favour of any backward class of citizens so as to provide them adequate representation in the services under the state. The provision making such reservation need not be by a
statutory enactment: it may be made by an executive order or direction. But there is not even a formal executive order expressly dealing with reservation of posts and appointment in the Education Department. On behalf of the state, it is claimed that as a matter of state policy, in making appointments and promotions, reservations in fact have been made by the state as alleged by the petitioners with some variations as to percentage reserved for the Hindus from the province of Jammu.

But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution. The promotions granted to respondents are accordingly declared contrary to the provisions of Articles 16(1) and (4) of the Constitution and therefore void. This will not however prevent the State from devising a scheme, consistent with the constitutional guarantees, for reservation of appointments, posts or promotions 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.  

The Supreme Court rejected the argument of the government that under Article 16(4), "backward classes" are those not adequately represented in public services. If that stand was accepted however advanced a class may be educationally and socially, if it was not represented adequately in the services, it was a backward class. This theory would exclude the really backward classes from the benefit of reservation. Therefore, the court asserted two conditions for valid reservation: (i) the class of citizens must be socially and educationally backward and (2) it is not adequately represented in the services.

But some important questions left unanswered by Apex Court in this case that if a considerable section of a particular community is socially and educationally backward, would reservation for members of such a community or a part of it, not constitutionally required within the meaning of Article 16? Would a denial of reservation benefits to the members of such community on
the basis of their religion, not frustrate the purpose of Article16? include a section of Kashmiri Muslims? It seems that the court, in this case, has laid a lot of emphasis upon the 'religion' of the backward class and not their backwardness which is the main criterion for deciding whether a group of persons deserve reservation under Article16 or not? However, a noticeable point, in this case, was that there was no executive order expressly dealing with reservation of posts and appointments in the Education Department. The absence of either a statutory enactment or a formal executive order by the state is a serious omission on the part of State Government which provided sufficient space for striking down the order of State Government.

State of Kerala and another V. N.M. Thomas and Others45 The respondent alleged in the writ petition that 12 lower division clerks who were members of scheduled castes and scheduled tribes were promoted without test qualification. The further allegation is that by an order dated 15 June, 1972, 19 lower division clerks belonging to scheduled castes and tribes were promoted as upper division clerks of which 5 were unqualified scheduled caste and scheduled tribes members and 14 were qualified scheduled castes and scheduled tribes members. By order dated 19 September, 1972, another 8 promotions of members of scheduled castes and tribes were ordered of which only two were qualified and the remaining six were unqualified. By another order dater 31 October, 1972, 7 scheduled castes and scheduled tribes members were promoted without qualifying test and one was promoted with the qualifying test. The grievance of the respondent-petitioner before the High Court was that out of 51 vacancies which arose in the category of upper division clerks in the year 1972, 34 were filled up by scheduled castes member who did not possess qualifications and only 17 were given to qualified persons.

The respondent is a lower division clerk working in the registration department. For promotion to upper division clerk in that department on the basis of seniority, the lower division clerks have to pass (1) account test (lower), (2) Kerala registration test and (3) test in the manual of office
procedure. The respondent's grievance is that in view of certain concessions given to members of scheduled castes and scheduled tribes, they were able to obtain promotions earlier than the respondent, though the members of the scheduled caste and scheduled tribes who were promoted had not passed the tests. The important question before the Honourable Apex Court was whether it was permissible to give preferential treatment to scheduled castes and scheduled tribes under Clause (1) of Article 16, that is, outside the exception clause (4) of Article 16?

The judgement in the light of relevant Kerala Services Rules as well as the analysis of clause (1) and (4) of Article 16 of the Constitution seems to be extremely convincing. It rightly held that the interpretation of Constitutional provisions should not be interpreted in any narrow or pedantic manner as that would defeat the Constitutional purpose. That there can be reasonable classification of the employees in matters relating to employment or appointment under Article 16 of the Constitution. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. The court rightly observed that the purpose enshrined in Article 16(4) can't be fulfilled if it is not given effect to at the stage of promotions because denying the same would mean bringing a disadvantaged person or section only one step forward and then denial for any other step ahead frustrating the whole purpose of socio-economic upliftment. Again it stated that the classification of employees belonging to scheduled castes and scheduled tribes for allowing them an extended period of 2 years for passing the special tests for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public office. Granting temporary exemption from special tests to the personnel belonging to scheduled castes and scheduled tribes by executive does not result in any discrimination in matters of public employment. It is so because the Court held that they are only given extended period for qualifying the concerned tests for
promotion and not absolute exemption from the same. Once it does not provide an absolute exemption to members of scheduled castes and scheduled tribes it is no violation of Article 16 (1) of the Constitution rather it intends to serve the purpose of special protection accorded by Constitution to certain disadvantaged sections of our Society.

Moreover, once it is clear from the service rules under consideration that the members of scheduled caste and scheduled tribe community getting benefit of temporary extension, are bound to qualify the necessary tests otherwise they would revert to their original position (prior to promotion), it does not impair the test of efficiency as ingrained in the service rules etc. So it is differential treatment for the purpose of giving them equality consistent with efficiency.

As far the minority opinion delivered by Honourable Justice H.R. Khanna is concerned, it is no less convincing than the majority opinion discussed above. The learned judge in his minority opinion has made a critical analysis of Kerala services rules and the constitutional provisions in relation to equality and protective discrimination in favour of scheduled castes, scheduled tribes and other backward classes in the light of Article 16 as a whole. The only point which makes a bit less convincing than the majority opinion is that it is more positivistic in nature which does not completely fit into the Constitutional rules of interpretation.

This court in the State of Gujrat V. Shri Ambica Mills Ltd. Ahmedabad⁴⁶ decided that the "equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox, the court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. In this case, the respondent contended that apart from Article 16(4) members of scheduled castes and scheduled tribes were not
entitled to any favoured treatment in regard to promotion. In *T. Devadasan V. Union of India* \(^{47}\) reservation was made for backward classes. The number of reserved seats which were not filled and were carried forward to the subsequent year. On the basis of "carry forward" principle it was found that such reserved seats might destroy equality. The "carry forward" principle was not sustained in *Devadasan's case*. The same view was taken in the case of *M.R. Balaji V. State of Mysore* \(^{48}\). It was said that not more than 50 percent should be reserved for backward classes. This ensures equality. Reservation is not a constitutional compulsion but is discretionary according to the ruling of the Court in *Rajendran's case* \(^{49}\).

The Constitution makes a classification of scheduled castes and scheduled tribes in numerous provisions and gives a mandate to the state to accord special or favoured treatment to them. Article 46 mandates the state to promote with special care educational and economic interests of the scheduled caste and scheduled tribes and to protect them from any social injustice and exploitation. The Court declared that Rule 13-AA \(^{50}\) of the rules is a valid piece of statutory provision, which is fully justified under Article 16(1) of the Constitution of India and does not fall within the purview of Article 16(4). The court allowed the appeal, set aside the judgement of the Kerala High Court and directed that the *status quo ante* to be restored. \(^{51}\)

*Dr. Chakradhar Paswan V. State of Bihar and Others* \(^{52}\). This appeal by special leave against the judgement and order of the Patna High Court dated 16th May, 1980 allowing the writ petition filed by respondent Dr. Kameshwar Prasad and quashing the impugned advertisement No. 121, 1978 issued by the Bihar Public Service Commission inviting applications for the post of Deputy Director (Homeopathic) in the Directorate of Indigenous Medicines, Health Department, State of Bihar from scheduled caste candidates, and the consequent order of the State Government dated 30th May, 1979 for the appointment of the appellant Dr. Chakradhar Paswan to that post.
A few essential facts would elucidate the nature of the controversy. Prior to 1974 the Directorate of Indigenous Systems of medicines was a part of the Health Department. On 14th March, 1974 the State Government appointed Dr. Nagesh Dwivedi, Manager, State Ayurvedic and Unani Medical Pharmacy, Bihar on an adhoc basis to the post of Director (indigenous Medicines). He assumed charge on the next day and was confirmed in that post on 11th December, 1976. The State Government on 6th May 1978 directed the creation of a separate Directorate of Indigenous Medicines, the Director being from one of the systems of medicines consisting of Ayurvedic, Unani and Homeopathy. At the time of creation of the separate Directorate, the Government sanctioned the posts of Deputy Directors for the other two systems of medicine. The state Government had in the mean while on the basis of the decision of this court in \textit{M.R. Balaji V. State of Mysore} by its circular dated 8th November, 1975 prescribed a 50 point roster to implement the policy of reservation to posts and appointment for members of the backward classes under Article 16(4).

Lalit Mohan Sharma, J. speaking for a Division Bench held that (1) Reservation to the only post of Deputy Director (Homeopathic) for members belonging to the scheduled castes is tantamount to 100% reservation, (2). The two posts of Deputy Director (Homeopathic) and Deputy Director (Ayurvedic) cannot be linked together for purposes of reservation of posts. And (3) the order reserving the post of Deputy Director (Homeopathic) infringes the principles embodied in 50 point roster according to which, if in a particular cadre, a single post falls vacant, it should, in the case of first vacancy, be considered as general and on the second occasion when a single post again falls vacant, the same must be treated as reserved. The learned Judge also said that if it has been laid down that if in a particular cadre there is only one post, then in case when it is being filled up for the second time it will be considered reserved, that is, on the first occasion it must be treated as a general seat. In substance, the High Court was of the view that the posts of Director and three Deputy Directors could not be clubbed together for reservation of posts and
appointments. Now could the posts of Deputy Directors of Homeopathic, Ayurvedic and Unani, which form distinct and separate systems of medicines be grouped for purposes of reservation. And the Court upheld the judgement of the High Court quashing the impugned advertisement issued by the Bihar Public Service Commission as also the appointment of the appellant to the post of Deputy Director (Homeopathic). They directed that the Public Service Commission to take steps to re-advertise the post. However, having regard to the fact that the appellant has continued to hold that post since 30th May 1979 and confirmed against that post, the State Government was directed to adjust him in an equivalent post in the Health Department.\textsuperscript{54}

The Honourable Supreme Court consisting of Justice A.P. Sen and Justice B.C. Ray held that no reservation could be made under Article 16(4) so as to create monopoly. If that sort of policy is allowed, it would render the guarantee of equal opportunity contained in Articles 16(1) and 16(2) wholly meaningless and illusory. Therefore, the reservation of the post of Deputy Director (Homeopathic) would amount to 100\% reservation which was impermissible under Article 16(4) as otherwise it would render the guarantee under Article 16(1) wholly elusive and meaningless. If there is only one post in the Cadre, there can be no reservation under Article 16(4) of the Constitution. The whole concept of reservation for application of the 50 point roster is that there are more than one posts, and the reservation as laid down by this Court can be up to 50\% only.

\textit{Union of India and Other V. Rajiv Yadav and Others}\textsuperscript{55}. The Central Government is the authority under the Indian Administrative Service (Cadre Rules), 1954 to allocate the members of the Indian Administrative Service (IAS) directly recruited to various State cadres/Joint cadres under the said Rules. The Central Government has laid down the broad principles of allocation called "the Roster System". The said system was earlier operating from 1966 to 1977. Thereafter till 1984 the allocations were done in accordance with the procedure called, "the Limited Zonal Preferences System".
Since 1985 batch onwards the Central Government has reverted back to the "Roster System" with some modifications. Reservation to the extent of 15% and 7½% for the scheduled castes and scheduled tribes respectively has been provided in direct recruitment to the IAS. The "Roster System" provides that while allocating the scheduled castes and scheduled tribes candidates to their home state (insiders), vacancies shall be reserved for them in various cadres to the extent reservation percentage has been provided in direct recruitment to the IAS.

Rajiv Yadav appeared in the Civil Services Examination held in 1988. He belonged to the Union Territory of Delhi, and had opted for the "Union Territories" cadre. He was selected for appointment to the IAS and in order of merit he was placed at serial number 16. By order dated September 28, 1989 he was allocated to the Manipur and Tripura cadre. His representation for change of cadre from Manipur-Tripura to "Union Territories" having been rejected by the Central Government, he challenged the order allocating him the Manipur-Tripura cadre before the tribunal. The vacancies in every cadre will be earmarked for 'outsiders' and 'insiders' in the ratio of 2:1. In order to avoid problems relating to fractions and to ensure that this ratio is maintained, over a period of time, if not during every allocation, the break-up of vacancies in a cadre between 'outsiders' and 'insiders' will be calculated following the cycle of 'outsider', 'insider', 'outsider'.

In the case of candidates belonging to the reserved category, such of those candidates, whose position in the merit list is such that they could have been appointed to the service even in the absence of any reservation will be treated at par with general candidates for purposes of allotment though they will be counted against reserved vacancies. In respect of other candidates belonging to the reserved category a procedure similar to the one adopted for general candidates would be adopted. In other words, a separate chart should be prepared with similar grouping of states and similar operational details should
be followed. If there is a shortfall in general 'insiders' quota it could, however, be made up by 'insider' reserved candidates.\(^{56}\)

The judgement in this case was delivered by a three judge bench of Supreme Court consisting of Justice Kuldip Singh, M.M. Punchhi and K. Ramaswamy. It was held by the honourable court that when a person is appointed to an All India Service, having various state cadres, he has no right to claim allocation to a state of his choice or to his home state. The central government is under no legal duty to have options or even preference from the officer concerned. Rule 5 of the cadre Rules makes the central government the sole authority to allocate the members of service to various cadres. It is not obligatory for central government to frame rules and regulations or otherwise notify the principles of allocation adopted by the government as the policy.

The court further observed that a selected candidate has a right to be considered for appointment to the IAS but he has no such right to be allocated to cadre of his choice or his home state. Allotment of cadre is an incidence of service. Moreover, the Court refused to accept the contention that the principles adopted in case of allotment of cadre of government letter of 1985 should be tested upon Article 16(4) of the Constitution. It observed that since such rules don't provide reservation of appointments or posts, there is no question of testing such rules on the basis of Article 16 of the Constitution.

The judgement of Honourable Supreme Court in this case is very satisfactory because although apparently facts of the case do indicate that unnecessary advantage is given to scheduled castes and scheduled tribes candidate in allocation of cadre by the central Government. But an in-depth analysis of things in the light of "Roster System" as followed by the Government for allotting cadres to different candidates as well as the clauses of 1985 Government letter show that no discrimination results against other candidates by adopting the said criteria. In fact, the distribution of reserved vacancies in each cadre between 'outsiders', and 'insiders' was done in the ratio for 2:1. This ratio was operationalised by following a cycle 'outsider', 'insider',
'outsider' as is done in the case of general candidates. Hence the method does not result in unrequired discrimination.

*Jatinder Pal Singh and Others V. State of Punjab*\(^57\)- The appeals were filed by Gurbachan Kaur and 6 others (Head Mistresses) all belonging to the reserved category, praying for writ of certiorari to quash the promotion order dated 3.7.97 and for a mandamus seeking promotion of the said writ petitioners as principals, and Charan Singh and 9 others (Head Masters) all belonging to the reserved category for similar relief and also for promoting the writ petitioners in the place of the opposite party. The array of the parties shows that the writ petitioners (Head Masters/Head Mistresses) (reserved category) were all working as Head Masters in 1997 while the non-official respondents (general candidates) were working as Senior Lecturer/Principal or as Deputy District Education Officers.

So far as this department is concerned the relevant rules are as follows. Under Rule 10 of the Class II Rules, the posts of Principal, Deputy District Education Officers, Senior Lecturers etc. are to be filled up by promotion in respect of 75% and 25% by direct recruitment under class II Rules, 1976 sub-clause (3) of Rule 10 states that all appointments to the posts shall be made on the basis of seniority-cum-merit and no members of the service shall have any right for promotion merely on the basis of seniority.

We are acceding to this request made on behalf of the Railways as a special case but subject to a reservation - which was accepted by learned senior counsel. We agree that there is no need to revert those reserved category officers, if they were promoted even beyond 1.3.96 but before 1.4.94. But their promotions shall have to be deemed adhoc as they were otherwise irregular and further their seniority in the promoted category shall however have to be determined by following *Virpal*\(^58\) and *Ajit Singh*\(^59\) as if they were not to promoted. To give an example - in the case of roster points at two levels, i.e. from level 1 to level 2 and level 2 to level 3, if the reserved candidate was promoted before 1.4.97 to level 4, such reserved candidate need not be
reverted. If by the date of promotion of the reserved candidate from level 3 to level 4 before 1.4.97, the senior general candidate at level 2 had reached level 3, he has to be considered as senior at level 3 to the reserved candidate because the latter was still at level 3 on that date. But if such a general candidate's seniority was ignored and the reserved candidate was treated as senior at level 3 and promoted to level 4, this has to be rectified after 1.3.96 by following Virpal's, Ajit Singh's No. I as explained in Ajit Singh No. II. In other words, if a reserved candidate was promoted to level 4 before 1.4.97, without considering the case of the senior general candidate who had reached level 3 before such promotion such reserved candidate need not be reverted, but the said promotion to level 4 is to be reviewed and seniority at level 3 has to be refixed and on that basis promotion/seniority at level 4 (as and when the general candidate is promoted to level 4) is again to be refixed. The seniority of the reserved candidate at level 4 will be refixed on the basis of when his turn would have come for promotion to level 4, if the date of the senior general candidate was considered at level 3 in due time. Subject to the above are dismissed.

The Supreme Court while considering the Punjab Education Service (School and Inspection Cadre) (Class II) Rules, 1976 in general and Rule 10(3) in particular, held that appointment by seniority-cum-merit rule is interlinked with the promotional rule based on equal opportunity and can't be delinked otherwise that could result in violation of Article 16 of the Constitution. The court observed that candidates from the reserved category who got promoted to feeder post of head master on the basis of roaster points can't be promoted as Principal in place of general category candidates. This is, indeed, a timely judgement because it puts reasonable limits to undue advantage taken by candidates by reserved category at the promotional level, causing hardship to candidates belonging to general category. It is high time that the highest court of the land should place necessary limitations on the reservation issue so that its politicisation may be controlled.
P.A. Haridasan V. State of Kerala\textsuperscript{62} The economic criterion is not the guiding principle to deny a person the benefit of scheduled caste if he is actually belongs to that caste. The question of caste depends upon the caste in which the person is born. Unless there is evidence to show that a person has given up the membership of a caste and joins the other caste, he should be deemed to be in a caste in which he is born. The crucial point is to ascertain the caste at the time of birth. Thus where the case of the petitioner was held that he belongs to Thandan community i.e. a scheduled caste community in Travancore-Cochin area but evidence showed that his family was in affluent circumstance and the documents produced by petitioner adored that his ancestors were Thandans and the scrutiny committee ignored documents which proved that petitioner's ancestors and petitioner as belonging to Thandan community on irrelevant grounds and it was made on the ground that petitioner's family had social status that the entries in the documents were not taken into accounts and there was no case for the committee that these documents were not genuine, denial of benefit of caste to petitioner in service would be improper

P.A. Haridasan, is member of the Subordinate Judicial Service of the Kerala State. He entered into the judicial service as judicial magistrate of second class and now he is working as judicial first class Magistrate. The controversy in this case is regarding the caste to which the petitioner belongs. While the petitioner claims that he belongs to Thandan community, respondents 1 and 2 are taking the view that he belongs to Thiyya community. The Thandan community was declared to be a scheduled caste so far as the Travancore-Cochin area is concerned from 1950 onwards. The entire controversy arose because petitioner's caste in the High School certificate was originally described as Thiyya but after the coming into force of Act 108 of 1976, petitioner got it corrected and changed it to Thandan. It was after this petitioner applied for the post of Magistrate under the General Recruitment as well as the Special Recruitment for scheduled castes and scheduled tribes. He
was appointed in the quota reserved for scheduled castes. Even when he was selected for appointment, there was a controversy whether he belongs to scheduled caste or not. At the instance of the Public Service Commission, the government referred the matter to District Collector, Palakkad and the District Collector called for a report from the Assistant Collector regarding the caste status of the petitioner and the Assistant Collector by his report dated 8.2.1982 came to the conclusion that petitioner belonged to community Thandan other than Ezhava or Thiyya. He also relied on the fact that father and grandfather of the petitioner belonged to Thandan community and that it can be seen from the endorsement made on certain documents which came into existence even prior to the birth of the petitioner. Not satisfied with this report, another report was called for and the Assistant Collector made further enquiries and gave a report dated 6.3.1982. According to this report, the Assistant Collector was fully satisfied that P.A. Haridarsan, the petitioner herein belongs to Thandan community. The Original Petition is allowed.63

This case was heard and decided by a bench consisting of two judges - Justice A.R. Lakshmanan and S. Sankarasubban. It was held that the question of caste of a person depends upon the caste in which the person is born. Unless there is evidence to show that a person has given up the membership of a Caste and joins any other caste, he should be deemed to be in the caste, in which he is born. The crucial point is to ascertain the caste at the time of birth. Thus where the case of the petitioner was that he belongs to Thandan community i.e. a scheduled caste community in Travancore-Cochin area but evidence showed that his family was affluent and the documents produced by petitioner showed that his ancestors were Thandons and the Scrutiny Committee ignored documents which proved that petitioner's ancestors and petitioner belonging to Thandan Community on irrelevant grounds and it was solely on the ground that petitioner's family and social status that the entries in the document were not taken into account and there was no case for the committee that the documents were not genuine.
The Honourable Apex Court observed that denial of benefit of caste to the petitioner in service, on the above stated grounds, would be improper. Moreover, the economic criteria is not the guiding principle to deny a person the benefit of scheduled caste if he actually belongs to that caste. Consequently the order stating that community certificates obtained by the petitioner from Tahsildar is false and was set aside, the community certificates were restored. It was further declared that the petitioner is entitled to all the rights, benefits, exemptions or concessions admissible for scheduled castes. It is pertinent to note that the Court's observations in the light of the facts of the case are quite convincing because economic criteria is not at all taken into account when the question of reservation for scheduled castes and scheduled tribes arises. it is the caste that matters the most. The case is different in relation to other backward classes and hence the judgement in this case has rightly clarified many issues in relation to the benefits of reservation for scheduled castes and scheduled tribes.

Kuldeep Kumar Gupta and others V. Himachal Pradesh State Electricity Board and Others\textsuperscript{64} The feeder cadre of Junior Engineers, having been filled up from two recruitment sources, one by qualified diploma holders by way of direct recruitment and the other by unqualified matriculate ITI certificate holders by promotion, there can be a separate consideration for them in the matter of promotion to the post of Assistant Engineer and such separate consideration does not violate any Constitutional mandate. Once a classification is permissible notwithstanding that the feeder category is one, when the said classification is challenged as being discriminatory then unless and until sufficient materials are produced and it is established that it is unjust on the face of it by the persons assailing the classification, the court would be justified in coming to the conclusion that such plea of unlawful discrimination had no basis.

In the instant case, the Regulations from time to time on being examined, unequivocally show that right from the inception, quota has been provided for promotion in favour of the unqualified promotee Junior Engineer
though the quota has been changed from time to time and while providing such quota, the longer experience as Junior Engineer has been the basis for being eligible for promotion providing such a quota in the service history right from inception is also a germane consideration for the court, while considering the question of alleged discrimination. That apart when the feeder category itself is filled up by direct recruit diploma holders and promotee unqualified matriculates and if no quota is provided for such unqualified matriculates in the promotional cadre of Assistant Engineer then they may stagnate at that stage which will not be in the interest of administration. If the rule making authority on consideration of such stagnation, provides a quota for such unqualified promotee Junior Engineer, the same cannot be held to be violative of any constitutional mandate therefore, there can be a separate consideration for the promotee unqualified matriculate Junior Engineers in the matter of promotion to the post of Assistant Engineer and the impugned Regulation providing a quota for them cannot be held to be violative of Article 14.

Providing a quota is not new in the service jurisprudence and whenever the feeder category itself consists of different category of persons and when they are considered for any promotion the employer fixes a quota for each category so that the promotional cadre would be equi-balanced and at the same time each category of persons in feeder category would get the opportunity of being considered for promotion. This is also in a sense in the larger interest of the administration when it is the employer, who is best suited to decide the percentage of posts in the promotional cadre, which can be earmarked for different category of persons. In other words this provision actually effectuates the Constitutional mandate engrafted in Article 16(1) as it would after equality of opportunity in the matter relating to employment and it would not be monopoly of a specified category of persons in the feeder category to get promotions. Therefore there is no infraction of the constitutional provision engrafted in Article 16(4) while providing a quota in promotional cadre, as it does not tantamount to reservation.65
Indira Sawhney etc. V. Union of India. Forty-three years after the founding of the Indian Republic, the Supreme Court was asked to settle the law and reservation for backward classes. The occasion arose when the short-lived V.P. Singh government at the Centre decided to implement the Mandal commission report. It was followed by riots in most parts of northern India.

Through the Constitution guarantees equality of opportunity in matters of public employment, it also provides for reservation of posts in favour of any backward classes. A commission, called the Kaka Kalelkar Commission, was set up in 1953 to study the conditions of the socially and educationally backward classes. Its report did not find favour with the then government and it was not discussed in Parliament. The second commission called the Mandal Commission was setup in 1979. The report was submitted in 1980. However, no action was taken by the governments at the Centre till 1991 when V.P. Singh decided to implement the recommendations. It was seen as a political play to defeat his opponents in Parliament. There were howls of protests from the upper castes, and many youths in the northern cities immolated themselves against the government decision. Southern states, where the reservation was a fact of life even before the Constitution, remained comparatively claim. Ultimately the issue was taken to the Supreme Court through nearly four score petitions. They were decided by a nine-judge bench. The majority view was delivered by Justice Jeevan Riddy.

On August 13, 1990, the Government of India headed by Prime Minister Mr. V.P. Singh, basing itself on the recommendation of the Mandal Commission, issued an office memorandum purporting to extend reservation for socially and educationally backward classes in its services.

The said memorandum reserved 27 per cent of the seats for Other backward classes in addition to those already reserved for scheduled castes and scheduled tribes. Reservation was to apply to direct recruitment. Other backward classes recruited on merit in open competition were not to be counted in the 27 per cent quota. Other Backward Classes were to comprise castes and
communities common to the statewise lists in the Mandal Commission report and State Government lists. Reservation was to extend to public sector undertakings and financial institutions including public sector banks.

The issuance of this memorandum led to widespread protest, self-immolations and damage to private and public property, especially by the youth. Writ petitions were filed in the Supreme Court questioning the said memorandum. A three-judge bench of the Supreme Court comprising Chief Justice Ranganath Misra, Justice K.N. Singh and Justice M.H. Kania, reviewing its order of September 11, 1990, refused to interfere on the ground that the matter was a political one. The situation not having improved, a petition on behalf of the Supreme Court Bar Association was moved and a five judge bench of the Supreme Court stayed by its order of October 1, 1990 the operation of the memorandum of August 13, 1990 till final adjudication. The process of identification of castes for locating the other backward classes was to continue.68

The Constitutionality of this memorandum was also challenged and a nine-judge bench constituted to hear the matter arising out of the challenge to memorandum of August 13, 1990 tagged to the new writ petitions. The economic criterion having not been fixed, the bench by its order of December 12, 1991 declined to vacate the earlier stay for implementation of the memorandum. The Constitution of the special bench of nine-judges became necessary to finally settle the legal position relating to reservations in view of the several earlier judgments to the Supreme Court not having spoken in the same voice. The questions before the nine-judge bench as broadly in indicated and discussed in the leading judgement of Justice Jeevan Reddy, alongwith the miscellaneous questions discussed therein, were:

1. (a) Whether clause (4) of Article 16 is an exception to clause (1) of Article 16?

(b) Whether clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of 'backward class of citizens'? Whether it is
exhaustive of the special provisions that can be made in favour of all sections, classes or groups?

(c) Whether reservations can be made under clause (1) of Article 16 or whether it permits only extending of preferences/concessions?

2. (a) What does the expression 'backward class of citizens' in Article 16 (4) mean?

(b) Whether the backwardness in Article 16(4) should be both social and educational?

(c) Whether the 'means-test' can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?

3. Whether the backward classes can be identified only an exclusively with references to economic criterion?

4. Whether the backward classes can be further categorized into 'backward' and 'more backward' categories?

5. To what extent can the reservation be made?

(a) Whether the 50 per cent rule enunciated in Balaji case is a binding rule or only a rule of caution or rule of prudence?

(b) Whether Devadasan (1964 4 SCR 680) was correctly decided?

6. Whether Article 16 permits reservations being provided in the matter of promotions.

7. Whether reservations are anti-meritarian?

To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?

8. The concept of positive action and positive discrimination.

The learned judges summarized the answers to the various questions as follows:

1. (a) Clause (4) of Article 16 is not an exception to clause (1) It is an instance and an illustration of the classification inherent in clause (1)
(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment.

(c) Reservations can also be provided under clause (i) of Article 16. It is not confined to extending of preferences, concessions of exemptions alone. These reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' as explained in this judgment.

2. (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4).

(b) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. ?The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context.

(c) 'Creamy layer' can be, and must be, excluded.

3. A backward class of citizens cannot be identified only and exclusively with reference to economic criterion.

4. There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories.

5. (a) and (b) The reservations contemplated in clause (4) of Article 16 should not exceed 50 per cent. While 50 per cent shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national
life and in view of the conditions peculiar to end characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

(c) Devadasan was wrongly decided and is accordingly overruled to the extent it is inconsistent with this judgment.

6. Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion-be it central services or state services, or for that mater services under any corporation, authority or body falling under the definition of State in Article 12 such reservation may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or reissue the relevant rules to ensure the achievement of the objective or Article 16(4). If any authority thinks that for ensuring adequate representation of backward class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. (Justice Ahmadi expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.
7. While the rule of reservation cannot be called antimeritarian, there are certain services and posts to which it may not be advisable to apply the rule of reservation.

8. The Government of India and the State Governments have the power to create a permanent mechanism in the nature of a Commission, for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the lists of other backward classes and to advise the government, which advice shall ordinarily be binding upon the government. Where, however, the government does not accept the advice, it must record its reasons therefore.69

The following directions are given to the Government of India, the State Governments and the Union Territories:

(a) The Government of India, each of the State Governments and the Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of overinclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government.

(b) Within four months from today the Government of India shall specify the bases, applying the relevant and requisite socio-economic criterion to exclude socially advanced persons/sections (creamy layer) from Other Backward Classes. The implementation of the impugned memorandum of August 13, 1990 shall be subject to exclusion of such socially advanced persons (creamy layer).

This direction shall not however apply to states where the reservations in favour of backward classes are already in operation. They can continue to operate them. Such states shall, however, evolve the said criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated Other Backward Classes.
By this judgment, the other backward classes of India achieved their long cherished dream of reserved posts in the Central Government Services. In March 1993, R.N. Prasad committee determined the creamy layer or advanced sections of other backward classes and in September 1993 reservation of 27 percent posts in central services became operative. Now, it can be said that the judiciary not only created hurdles for their caste-based preferential treatment but also gave directions to the government for its proper implementation. Although most politicians did not accepted the judgments in its letter and spirit. It is also evident from the constitutional amendment for permitting Tamil Nadu for continuing its reservation quota of 69 per cent. Similarly, in the case of Karnataka, the President of India hurriedly gave his assent to the Karnataka Reservation Bill which reserved 73 per cent posts and seats for the different backward class groups, and its stayed by the Supreme Court as found against the Mandal case verdict. These political considerations made a mockery of the judgment of the Supreme Court that not more than 50 per cent of the available seats should be reserved. Now, the Reservation Acts of Tamil Nadu and Karnataka are under the litigation in the Supreme Court although they go blanket over of Article 31(B) and have been immunized from attack on the ground of contravention of the fundamental and other rights. The integrated and comprehensive scheme of reservation policy as evolved by the supreme court is politicised by the politicians for its political gain.

In the judgment of Indra Sawhney case, the Supreme Court rightly excluded creamy layer from the list of other backward classes. It also vehemently negated the policy of reservation regarding promotions. But it has not taken note of exclusion of advance backward castes from the beneficiaries of the policy of protective discrimination. It was pointed out in Periakarappan v. State of Tamil Nadu70 (1972) case that a case or class found to be backward should not be regarded as backward for all time. As soon as the group shows progress, for example by the way of taking good numbers of seats in the merit pool, the classification must be reviewed and the progressive groups deleted
from the backward list. Similarly, there should be a time limit for the reservation policy so that it may not tend to serve vested interests and it should be reviewed after every ten years or so, to enable the Central and State Governments to rectify any distortion arising out of it. It is said that reservation will continue till the members of the deprived classes attain a state of enlightenment and became equal partners of a new just social order in our national life. Only time will tell how long the doctrine of protective discrimination will continue in India, and what will be the results?\textsuperscript{71}

A survey of the above judicial pronouncements makes it clear that reservations should be justifiable, rational and reasonable. Thus in some special circumstances even 100 per cent reservation may be permitted if thus is no danger to the interest of the society in general. For example, in a nursery school 100 percent seats may be reserved for female teachers. Similarly, for filling the vacancies to the posts of waterman in Railway or some other department or gateman hundred percent reservations may be permissible. Even in the posts of lower office the higher percentage of reservation may be justified. Perhaps this was mind of Krishna Iyyer, J. when in \textit{State of Kerala v. N.M. Thomas}\textsuperscript{72} he said of clerks in irrigation department. "After all, he is a pen pushing clerk, not a magistrate accounts officer, forest officer, sub-registrar, space-scientist or top administrator or one on whose initiative the wheels of a department speed up or slow down".\textsuperscript{73}

On the other hand, there may be some services or educational institutions where some restraint is necessary in reservations. And it may be possible under the scheme of the Constitution and proper appreciation of the value-preference enshrined in Articles 15(4) and 16(4) and indicated in \textit{Balaji-Devadasan} approach. This spirit of accommodation and value preference is clear from the judgment of A.P. Sen, J. in \textit{K.C. Vasanth Kumar v. State of Karnataka}\textsuperscript{74}. The learned Judge said:

"The doctrine of protective discrimination embodied in Articles 15(4) and 16(4) and the mandate of Article 29(2) cannot be stretched beyond
particular limit. This state exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the state serves the ailing members of the public who need medical aid, medical services directly affect and deal with the health and life of the populace. Professional expertise, born of knowledge and experience, of high degree of technical knowledge and operational skills is required of pilots and aviation engineers. The lives of citizens depends on such persons. There are other similar fields of governmental activity where professional, technological, scientific or the special skill is called for."

The learned Judge wished: "In such services or posts under the Union or states, there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments".

The study has shown the Government's attempts to identify the backward classes with no fruitful result of dilution the caste consciousness. It has accentuated caste consciousness and pressure politics for reservational benefits. The courts cannot be proper substitute of Legislative-Executive combinations which are the formulators of protective discrimination policy. Judicial remedies are sought in cases of abuse of protective discrimination policy. Since rights involved in protective discrimination are only permissive rights and not substantive right, therefore, generally the beneficiary of such arrangements do not go to the courts. The persons whose rights are adversely affected by reverse discrimination, go to the courts against the governmental action. And disputes arise between the sponsored of protective discrimination and the victims of reverse discrimination. Any way the courts have to perform their onerous Constitutional duty to allow or disallow the preferential treatment in accordance with the Constitutional norms. Both as to the issue of the identification of the recipients of protective discrimination and as to the issue the extent of protective discrimination the court has to intervene only if the Government or Legislature has failed to discharge its primary obligation properly. In doing so, the judiciary has honoured the Constitutional mandate of
classless or casteless society. The court is expected to act more effectively than the political wings of the Government which are vulnerable to political pressures. And, this vulnerability has been responsible for policies in derogation from the framers' commitment to establish a society free from discrimination on the grounds of religion, race, caste, sex or place of birth. The judiciary has to take care of this commitment and to evolve rational, scientific and secular criterion to identify the backward classes a label that every community wishes to bear on one pretext or the other.77
References


6. Article 13 which appears in part III of the constitution, dealing with the fundamental right provides in clauses (1) and (2) as follows -

   (1) All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provision of this part, shall, to the extent of such inconsistency, be void.

   (2) The state shall not make law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause, to the extent of the contravention, be void.

   Article 32 clause (1) provides
   The right to move the Supreme Court by appropriate proceeding for the enforcement of the rights conferred by this part is guaranteed.

   Article 226 clause (1) confers on the different High Courts the power to enforce any of the rights conferred by part III and for any other purpose.


17. *Ibid*.
18. *Ibid*.
22. *Ibid*.
24. 1964 (6) SCR 368.
29. *Ibid*.
38. 1964 6 SCR 368.
40. 2 SCR 586 (1962).
41. *Ibid*.
42. *AIR* 1967 SC 1283.
47. *AIR* 1964 SC 179.
50. (a) The President, Kerala *Harijan Samsarika Kshema Samithy*, Trivandrum has brought to the notice of Government that a large number of Harijan employees are facing immediate reservation from their posts for want of test qualifications and has therefore requested that all Scheduled caste and Scheduled Tribes, employees may be granted temporary exemption from passing the obligatory departmental tests for a period of two years with immediate effect.

(b) Government have examined the matter in consultation with the Kerala Public Service Commission and are pleased to grant temporary exemption to members already in service belonging to any of the Scheduled Castes and Scheduled Tribes from passing all tests (unified and special or departmental tests) for a period of two years.

(c) The benefit of the above exemption will be available to those employees belonging to Scheduled Castes and Scheduled Tribes who are already enjoying the benefits of temporary exemption from passing newly prescribed tests under General Rule 13-A. In their case, the temporary exemption will expire only on the date of expiry of the temporary exemption mentioned in para (2) above or on the date of expiry of the existing temporary exemption, whichever is later.

(d) This order will take effect from the date of the order.
56. *Ibid*.
60. *AIR* 1999 SC 3471.
63. *Ibid*.
64. *AIR* 2001 SC 308.
65. *Ibid*.
69. *AIR* 2001 SC 308.
70. *AIR* 1971 SC 2303.
75. *Ibid*.