CONSTITUENT ASSEMBLY DEBATES

Analysis of the Constituent Assembly Debates leading to the inclusion of article 16(4), 46 *and* 340.

(1) *Article* 16(4)

Article 16(4), incorporated in the Constitution, corresponds to draft article 10(3). This reads :

> "Nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, who, in the opinion of the State, are not adequatey represented in the services under the State"

This, in fact, provides an exception to the principle of equality of opportunity in public employment, guaranteed under this article of the Constitution.

Draft article 10 submitted in similar terms by K. M. Munshi and Ambedkar came up for consideration before the Assembly on 30th November 1948, and various amendments were moved.

Lokanath Mishra (Orissa : General) proposed deletion of clause 3 altogether. In his opinion it was unnecessary as it put "a premium on backwardness and inefficiency.[1] Further no citizen had the fundamental right to claim state employment on any other consideration apart from merit A similar plea for deletion of clause[1a] was made by Damodar Swarup Seth (United Provinces : General) on the ground that "though the clause on the face of it appears to be just and reasonable it is wrong in principle".[2] He pointed out that the term "backward" was not easy to define nor was it easy to "find a suitable criterion for testing the backwardness of a community or class".[2a] He argued that if accepted, it would give rise to casteism and favouritism, which should not find a place in a secular state. While necessary concessions could be given to backward classes for improving educational qualifications and raising the general level of their uplift, appointments to posts should only be on merit and qualifications, concessions not being allowed to any class on the ground of backwardness.[3]

Further amendments suggested retention of clause 3 though in a modified form.

Thus, Hirday Nath Kunzru suggested the amendment that in clauses 3 the words "shall prevent the State from making any provision for the reservation" be substituted by the words "shall during a period of ten years after the commencemnt of this Constitution, prevent the State from making any reservation".[4] Castes and the Scheduled Tribes. . . . in the making of appointments to services and posts. Article 338[5] makes provisions for a "Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President". His duty would include "Investigation of all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes" and submit a report thereon to the President.

Thus, it seems obvious that these articles do not refer to "backward classes" as does draft article 10(3) corresponding to article 16(4) of the Constitution. To that extent, the articles are opposed, though it can be argued that it is more a case of overlapping in as much as reservation for " 'backward classes' in article 16(4) very obviously includes reservation for members of the Scheduled Castes and Tribes".

When clause 3 came up for general discussion the use of the word "backward" led to controversy as the scope of the term had not been adequately defined. Thus, Ari Bahadur Gurung (West Bengal : General) raised the question as to whether the term "backward classes" includes three categories of people, namely Scheduled Castes, and Tribes and one particular class which is not included so far, under the term "backward" although it is :—

The amendment would then read as follows :

> "Nothing in this article shall, during a period of ten years after the commencement of this Constitution, prevent the State from making any reservation of appointments of posts in favour of any backward class of citizens who. . . . etc."[6]

In his view it was not desirable that any special provisions granting protection to communities should operate indefinitely. Further the term "backward" had not been defined anywhere in the Constitution. It was left to the law courts to decide as to whether a class was backward or not. He felt that the term "backward" should be defined by the House, so that there could be no dispute as regards its meaning in the future.

Aziz Ahmad Khan (United Provinces : Muslim) suggested the amendment that the word "backward" in clause 3 should be omitted. He submitted that when the Minority Report was placed before the House, the word "backward" was not present and it had been "finally decided"[7] that it was unnecessary to include it. Further, if this amendment was not accepted articles 296 and 299 of the Draft Constitution would become opposed to article 10.[8] Draft article 296 and 299 correspond to articles 335 and 338 of the Constitution. Article 335 safeguards the claims of the members of the Scheduled educationally and economically backward".[9] In the category of one particular class, he pleaded that the Gurkhas "who are domiciled in India should have the same privilege as other backward communities in India"[10]

Members, who belong to the backward classes, and were given an opportunity to express their views, generally favoured the provision in clause 3. Majority of these, expressed their apprehension with regard to the scope of the word "backward". They pleaded for a classification to the effect that the word may have application only to them. In fact, R. M. Nalavade (Bombay : General) suggested that the term "backward classes" be substituted by the words "Scheduled Castes". He argued that the words "backward classes" are so vague that they could be interpreted in such a way as to include so many classes which are even educationally advanced.[1] D uram Prakash (United Provinces : General), submitted that "the words backward classes" should be substituted by 'depressed class' or 'scheduled class' because the latter have a definite meaning.[2] He pointed out that "backward" class had yet to be defined and there was "no possibility of its being defined in the near future".[3] He, therefore, supported the amendment that the words "backward class" be substituted by 'scheduled caste'. Chandrika Ram (Bihar : General) was in favour of adding the words "Scheduled Castes" after he words "Backward Classes" : He pleaded that since Harijans enjoyed provisions for reservation in services, there should be similar provision for backward classes also. Expressing disapproval of the amendment suggested by Seth Damodar Swarup and Lokanath Misra seeking to delete the words "backward class" be observed that those who were of the opinion that no backward class existed in the country were "blind to the facts of the history of our country, to the progressive society of today and to the conditions obtaining at present".[4]

P. Kakkan (Madras : General) also supported the article. He urged that the Government "take special steps for the reservation of appointments for the Harijans for some years".[5] While supporting the clause, V. I. Muniswamy Pillay (Madras : General) pointed that the word "backward" had not been defined properly. He was apprehensive as to whether communities earlier left out in the administration—specially the scheduled castes—had been provided for. He pleaded that a clear indication be given by the House that their interests would be protected. The argument advanced by some members of the House that reservation was not necessary he thought to be "unwholesome thinking".[6] This was so, because so long as the communal canker remained, reservation for communities would be necessary. However, he was pleading the case of the Scheduled Castes for different reasons *i.e.* "because they have been left in the lurch and due to their lack of social economic and educational advancement for years".[7]

T. Channiah (Mysore) also favoured retention of the word "backward". He pointed out that notwithstanding that the word "backward" had not been defined in the Draft Constitution, it was known in North India that among Hindus, the classes of people engaged in agriculture and artisan works belonged to the backward class. In South India the scope of the "backward classes" was very distinct. They were either socially or educationally backward but not those who were ecoonomically forward. In Mysore for class B vacancies, only backward classes were considered, while class A was meant for both Brahmins and non-Brahmins. He agreed with Ambedkar that the word "backward" should be retained on the ground that clauses (1) and (2) of this article "would be null and void if this word 'backward' is not retained in clause (3) of article 10".[8] He further urged that the reservation for 10 years suggested by Kunzru be extended to 150 years to equalise the period they had been deprived of opportunities.

Santanu Kumar Dass (Orissa : General) also supported retention of the article. He voiced his opinion that due to "evil effects of foreign rule" it was not possible to immediately delete provisions as regards reservation from the Constitution. As long as these conditions prevailed, there would be demands for such reservation for the Harijans and Scheduled castes, who were included in the term "backward class"

H. J. Khandakar (C.P.&A. Berar General) favoured the word 'backward' in clause 3. He argued that in its absence, "the purpose of the scheduled castes would not have been served as it should".[9] He stressed their condition as being "deplorable" since although such candidates apply for some Government posts, they are not selected, because the selectors belong to other communities or sections. He pointed out that the term 'backward' was vague and had not been defined anywhere. He disagreed with Chandrika Ram that such a definition was given in the Census Report. What had been defined there was 'scheduled caste'. He, therefore, supported the amendment proposed by Muniswamy Pillay that the words 'scheduled caste' be added after "backward class".

On the other hand, some members supported omission of the word "backward" as they were of the view that its scope was likely to be misconstrued by the State which might adversely affect claims of minority groups seeking adequate representation in the services.

Thus, Mohamed Ismail Sahib (Madras : Muslim) pointed out that though the word "backward" had not been defined in the Constitution, in Madras it had "a definite and technical meaning".[10] The Government had enumerated more than 150 of these classes—all belonging to the majority community of Hindus—and if the Scheduled Castes were included it would constitute "the majority of the whole population of that province".[11] If this was its meaning, then he was apprehensive that the backward classes in minority communities *e.g.* Muslims and Christians, would be "excluded from the purview of this clause".[12]

K. M. Munshi now replied to the criticism levelled against the draft article. As regards the fears voiced by members, who belonged to the Scheduled Castes, he observed :

> I cannot imagine for the life of me how, after an experience of a year and a half of the Constituent Assembly any honourable Member of the Scheduled Castes should have a feeling that they will not be included in

> the backward classes so long as they are backward ... Look at what has been going on in this House for the last year and a half. Take article 11 ..... There has not been a single member of the non-Scheduled Caste who has ever raised any objection to it. On the contrary, we members who do not belong to the Scheduled Castes, have, in order to wipe out this blot on our society, been in the forefront in this matter .... What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the state ..... At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward classes, who are really backward should be given scope in the State services ; ..... the word "backward" signifies that class of people—does not matter whether you call them untouchables or touchables belonging to this community or that—a class of people who are so backward that special protection is required (for them) in the services ...

T. T. Krishnamachari, who spoke after K. M. Munshi referred to article 10 as a piece of "loose drafting",[a] which should not, in his opinion find any place in the chapter on fundamental rights. Referring to clauses 3 in particular he inquired "who are the backward class of citizens ? It does not apply to a backward caste. It does not apply to a Scheduled Caste or to any particular community".[a] Futher, what would be the criteria for determining who was "backward". He suggested the basis of literacy and raised the question that "If the basis of division is literacy, 80 per cent of our people fall into the backward class citizens, who is going to give the ultimate award ? Perhaps the Supreme Court".[b] It would have to find out the intention of the Constitution—makers as to who constitute the backward class. Was it a class based on grounds of economic status or on grounds of literacy or on grounds of birth ? However, he was confident that it would be ultimately interpreted by the Supreme Court on some basis—caste, community, religion literacy or economic status. The Drafting Committee had thereby, he thought, produced a "paradise for lawyers".[c]

B. R. Ambedkar, in his reply to the criticisms against draft article 10(3) justified inclusion of the word "backward" as "the Drafting Committee had to produce a formula which would reconcile"[d] opposing points of view *viz.* that there should be equality of opportunity without reservations of any sort for any class or community; as opposed to this, the other view-point, while approving of the principle of equality of opportunity in theory, maintains that there should be "a provision made for the entry of certain communities which have so far been outside the administration".[e] Keeping this in mind, it was apparent that "no better formula could be produced than the one that is embodied in sub-clause (3) of article 10".[f] He further pointed out :

> Unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether ..... That I think ..... is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly.

Finally, he referred to two questions which had been raised during the debate in the Assembly *viz.*, definition of "backward community" and justiciability of class III of the draft article. As regards the former he stated, "Any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government".[g] As regards the latter he observed "It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter".[h]

When it was put to vote, the amendments relating to clause 3 of the article were negatived by the Assembly, and it was adopted without any amendment or alteration. However, the Drafting Committee subsequently renumbered it as article 16(4).

Conclusion :

The aim of the Drafting Committee in incorporating this clause in the Constitution has been emphasized by K. M. Munshi, *viz.*, to protect the interests of the "backward classes" by securing representation for them in the services—a protection necessitated by the conditions which prevailed then in several provinces in the country. Since the word "backward" has not been defined anywhere in the Constitution, not surprisingly it has proved controversial. However, its inclusion has been well justified by Ambedkar, Chairman of the Drafting Committee, who rightly pointed out that if "such qualifying phrase" is not used "the exception made in favour of reservation will ultimately eat up the rule altogether"

The Constituent Assembly Debates indicates that the draftsmen themselves were not sure as to the criteria to be adopted in determining "backwardness" they wanted to maintain a flexibility in the matter and to base the matter to every state Government to determine "backwardness" with ultimate review by the court. One or two members did express the view that the case of backwardness may be literacy and occupation, etc. View was also expressed that the term "backward classes" did cover Scheduled Castes.

[1]. C.A.D. Vol. VII, pp. 673.

[1a]. Its deletion was also proposed by Tajamul Hussain. See Comments and suggestions in the Draft Constitution, IV Select Documents 31-2.

[b]. C.A.D. Vol. VII, pp. 679.

[c]. Ibid.

[d]. Ibid.

[e]. Ibid.

[f]. Ibid.

A similar suggestion was put forward by T. A. Ramalingam Chettiar. See 'Comments and suggestions' on the Draft Constitution, IV Select Documents Sl. 2.

Supra note 1 at 681.

Other amendments suggested were : addition of words "economically or e lturally" before "backward" in clause 3 by R. R. Diwakar and S. V. Krishnamoorthy Rao; insertion of the words "the Scheduled Castes" or before the word "backward" See by Upendranath Barman. See supra note 1a.

9. Supra note 1 at 685.
10. Ibid.
11. Id. at 686.
12. Id. at 687.
13. Id. at 686.
14. Id at 688.
15. Ibid.
16. Id. at 698.
17. Ibid.
18. Id. at 690.
19. Id. at 691.
20. Id. at 692.
21. Ibid.
22. Id. at 693.
23. Id. at 696-7.
24. Ud. at 697.
24a. Id. at 699.
25. Ibid.
26. Ibid.
27. Id. at 701.
28. Ibid.
29. Ibid.
30. Id. at 702.
31. Ibid.

II. *Article* 46

Article 46 of the Constitution which corresponds to article 37 of the draft Constitution reads :

> "The State shall promote 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 shall protect them from social injustice and all forms of exploitation".

The article came up for consideration by the Constituent Assembly on 23rd November 1948. Two amendments were moved.

Hukum Singh (East Punjab : Sikh) suggested that "for the words 'Scheduled Castes' the words 'Backward communities of which ever class or religion be substituted".[1] He argued that as the term "weaker sections" had not been "defined anywhere", it might well be apprehended that attention would be focussed on the latter part which relates to 'Scheduled Castes' ; as a result 'weaker sections' would pale into insignificance and "not mean anything at all".[2] He stated that his only objective in proposing the amendment was to eliminate any possible discrimination. He pointed out, in this context, that 'Scheduled Castes' had been generally understood by the masses to "exclude the members of the same castes professing Sikh religion".[3] In his view, since the article promoted "educational and economic interests" "it should be made clear that it is to be done for all backward classes, and not for persons professing this or that particular religion or belief".[4]

The second amendment was moved by A. V. Thakkar (United States of Kathiawar : Saurashtra) which suggested "Inclusion of the backward classes among Hindus and among Muslims".[5]

At this stage, B. R. Ambedkar, Chairman of the Drafting Committee, intervened expressing his view that both the aforesaid amendments "would be more appropriate to the Schedule"[6] and could be considered at the time of dealing with it. As such, he suggested postponement of their consideration.

Consequently, A. V. Thakkar stated that he would not move his amendment at this stage while Hukum Singh sought leave to withdraw his amendment which was granted.

The motion "that article 37 do stand part of the Constitution"[7] when put to the vote of the House was adopted and article 37 was subsequently renumbered as article 46 and added to the Constitution.

1. VII C.A.D. 552.
2. Id. at 553.
3. Ibid.
4. Ibid.
5. Ibid.
6. Ibid.
7. Ibid.

III. *Article* 340

Article 340 of the Constitution which corresponds to article 301 of the Draft Constitution, Provides :

(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be given for the purpose by the Union any State and the conditions subject to which such grants should be given, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented, together with a memorandum explaining the action taken thereon to be laid before Parliament.

The draft article 301 came up for consideration of the Constituent Assembly on 16th June 1949. At that time various amendments were suggested.

H. V. Kamath (C. P. & Berar : General) proposed deletion of the words consisting of such persons as he thinks fit in clause 1 of the draft article, as he considered them "wholly superfluous".[1] He even went to the extent of stating that "they cast a reflection upon the wisdom of the President".[2] He further suggested another amendment, *viz.*, "for the word "difficulties" in clause 1 of the draft article, the word "disabilities" be substituted".[3] In his opinion the latter conveyed the idea better than the former. He pointed out that in article 9 (article 15 of the Constitution which prohibiting discrimination on grounds of religion, race, caste, sex or place of birth) the word "difficulty" was absent. Instead, it refers to "any disability, liability, restriction, condition" etc. This particular article had already been passed by the Assembly. In his view, the word "difficulty" was hardly a constitutional term and the word "disability" was "far more appropriate".[4] Many more amendments were suggested by him.

1. The words 'grants should be given' in clause (1) of article 301 be substituted by the words 'grants should be made'.

2. For the word 'and' in clause (1) of article 301 (line 10) the words 'as well as' be substituted.

3. The words 'a report setting out' the facts as found by them and occurring in clause (2) of article 301 be substituted by the words 'a report thereon'.

4. Deletion of the words 'together with a memorandum explaining the action taken thereon' in clause (3) of the draft article and addition of the words 'for such further action as may be necessary' at the end.

As regards (1) he stated that it was purely a verbal amendment and he left it to the collective wisdom of the Drafting Committee. The second, he also left to them, after expressing his view that the meaning was better expressed by the phrase "as well as" than by the word "and". The third was with a view to securing "brevity and precision".[5] Referring to the fourth and last, he argued that it was not "wise" to regulate the manner of report to be submitted by the President to Parliament. The second part of this amendment was based on the argument that the Parliament, and not the President, should take any necessary further action.[6]

B. R. Ambedkar, Chairman of the Drafting Committee suggested that the word Parliament occurring in clause 3 of the draft article be substituted by the words 'each House of Parliament'.

Two more amendments, of which notice had been given by Thakur Das Bhargava (East Punjab : General) were not moved by him, and instead he expressed a desire to speak on the article.

At this stage, the article and amendments were thrown open to discussion by the President. Both Thakur Das and Bhargava and Shibban Lal Saxena (United Provinces : General) expressed support of the draft article.

Thakur Das Bhargava described it as "the soul of the Constitution".[7] The aim of the article, he pointed out, was to "complete the process of bringing them (the backward classes) up to normal standards. This article places upon the entire nation the obligation of seeing that all the disabilities and difficulties are removed and therefore it is really a character of the liberties of the backward classes . . . . .".[8] Till such time as they reached "normal standards" facilities should be extended to them, the period of time should not be limited to a specific number of years. However, on attaining this standard, they should then be taken away from the category of "backward classes".[9]

He further submitted that with reference to clause (1) of the draft article, which states that "The President may by order appoint, etc." he had given notice of an amendment to the effect that the word "may" be substituted by the word "shall".[10] He argued that even if the former was used, the President should be under the obligation to appoint such a Commission. The word "may" therefore ought to be construed as "shall". He pointed out that the safeguard for minorities e.g. Muslims and Sikhs had now been taken away, the sole responsibility of Parliament being the scheduled castes and the backward classes. He stated that the draft articles was only the material form of the objectives Resolution and gave only the mechanism by which such Resolution was executed. He pleaded for a provision in the article that it would "apply not only to the communities for whom reservation has been made but also are all the same backward".[11]

Shibban Lal Saxena expressed the hope that the Commission which would be investigating the conditions of the backward classes throughout the country would be able to define the term "backward classes", since in spite of its use, it had not so far been defined anywhere in the Constitution.

When the amendments were put to vote, all except the one suggested by Ambedkar, were negative. The motion that draft article 301 as amended[13] be incorporated into the Constitution was carried. As such it was subsequently renumbered as 340 and added to the Constitution.

1. VIII C.A.D. 943.
2. Ibid.
3. Ibid.
4. Ibid.
5. Id. at 944.
6. Ibid.
7. See id. at 945.
8. Id. at 946.
9. Ibid.
10. Ibid.
11. Ibid.
12. Id. at 947.
13. The Drafting Committee at a later stage, incorporated the amendment suggested by H. V. Kamath that in clause 1 of draft article 301 "grants should be made" be substituted for "grants should be given".

SUPREME COURT
AND
HIGH COURT CASES

Venkataramana v. State of Madras and another

AIR 1951 SC 229

Facts

The petitioner applied under Article 32, alleging infringement of his fundamental right to employment in the state service.

The petitioner was a graduate in Mathematics. He had also a B. L. degree for over seven years he had been practising as an Advocate.

In 1949 the Madras Public Services Commission invited applications for 83 posts of District Munsifs in the Madras Subordinate Civil Judicial Services. Out of 83 posts to be filled by direct recruitment, 12 were earmarked for persons holding certain classes of employment in the Madras Civil Judicial Deptt. The remaining 71 posts were to be filled up from among the official Receivers, Assistant Public Prosecutors and practising members of the Bar. It was also notified that selection of candidates would be made from various castes, religions and communities in persuance of the rules set out in what was popularly described as Communal G.Os., namely for Harijans 19, Muslims 5, Christians 6, Backward Hindus 10, Non-Brahmin Hindus 32 and Brahmins 11.

It was admitted that the marks secured by the petitioner would have entitled him to be selected if the provisions in the Communal G.O. could be disregarded. It was claimed that in the *viva voce* examination too he did well.

The results published in 1950 listed the selected candidates (in respect of the remaining 71 posts) on the basis of each community Harijan 1, Muslims 7, Christians 4, Backward Hindus 13, Non-Brahmins Hindus 32 and Brahmins 4.

The petitioner, thereafter, filed this petition, praying for an order declaring the rule of communal rotation, in pursuance of which selection to posts of District Munsifs were made, to be unconstitutional.

Issue

Whether the Madras Communal G.O. by which reservation of posts in the State Services was made for various communities (not coming within the category of backward classes) according to their race, caste and religion, infringed the fundamental right guaranteed under Article 16.

Judgment

A seven-judge Bench comprising Kania C. J., Fazl Ali, Patanjali Sastri, Mahajan, B. K. Mukherjea, S. R. Das and Bose JJ, held that the Communal G.O. was repugnant to Article 16 and therefore void and illegal.

The Court's decision was based on the followtng grounds :

(1) Equality of opportunity in public employment was guaranteed by Article 16(1) while Article 16(2) further guaranteed that there should be no discrimination as regards this matter only on the grounds of religion, race, caste, sex, descent, place of birth of residence. Article 16 (3)—(5) provided the exceptions to this guarantee.

(2) Ineligibility for a post only on the ground that a person belonged to a particular caste, religion, etc. contravened Article 16(2).

(3) Article 16 (4) expressly permitted reservation of posts for backward classes, who were in the opinion of the State not adequately represented in the State services. It did not permit reservation for those persons who did not belong to this category nor did it enable the State to reserve posts on Communal basis. Any distribution of posts amongst communities having a fixed ratio infringed Art. 16(1) and (2).

The Court concluded with the following words :

"This ineligibility created by the communal G.O. does not appear to us to be sanctioned by cl. (4) of Art. 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Art. 16(1) and (2). This Communal G.O. in our opinion, is repugnant to the provisions of Art. 16 and is as much void and illegal."

Proposition laid down

The Government cannot make reservations for posts under it amongst the various communities not coming in the category of "backward classes".

General Manager, S. Rly. v. Rangachari

AIR 1962 SC 36

Facts

The respondent, L. K. Rangachari filed a writ petition in the Madras High Court under Art. 226 of the Constitution. The High Court issued a writ of mandamus restraining the appellants, *i.e.* G. M. Southern Rly. and Personnel Officer (Reservation) Southern Rly., from giving effect to directions of the Rly. Board, ordering reservation of selection posts in Class III of the railway service in favour of Scheduled Castes and Tribes from persons already holding posts of court inspectors in class III, one of which was held by the respondent. Following the issue of the writ, the appellant applied for and was granted a certificate under Art. 132 (1) by the High Court as it involved a substantial question of law, namely scope of Art. 16 (4).

Issues

(i) Whether the reservation under Art. 16(4) could be made in the case of promotions or only at the stage of appointment only.

(ii) Art. 16 (4) speaks of only "backward classes". Whether the term "backward classes" included "Scheduled Castes and Tribes" as well. The High Court on this matter had taken the view that the term did include Scheduled Castes and Scheduled Tribes. There was no dispute about this before the Supreme Court.

(iii) Whether retrospective operation could be given to an order of reservation.

Majority judgment

The Court by a majority of three to two reversed the decision of the Madras High Court and held that the reservation did not exceed the limits of Art. 16(4) and was accordingly valid.

The majority was of the view that the term "matters of employment" in Art. 16(1) covered not only initial appointment but also promotions and such other matters as salary and periodical increments and terms of leave, gratuity, pension and age of superannuation. Art. 16(4) was an exception to Art. 16(1) but there cannot be any exception even in regard to backward classes with regard to matters other than appointment and promotion. "Post" does not mean post outside services or ex-cadre posts. Art 16 (4) covered both initial appointment and promotion. The court also held that the reservation can be provided both retrospectively and prospectively. The State should be satisfied before making representation that the backward classes are not adequately represented both quantatively and qualitatively. "The advancement of the socially-and educationally backward classes requires not only that they should aspire to secure adequate representation in selection posts in the services as well".

The Court was also of the view that in exercising the power of reservation under Art. 16(4) "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".

The majority, therefore, allowed the appeal. The decision of the Madras High Court was reversed and the respondent's application for writ was dismissed.

Minority judgment

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

Wanchoo J. agreed with the majority judgment in that Article 16(4) was to be read together with Art. 335 of the Constitution, and that the word "posts" in that clause referred to posts within the service and not to those outside the services. However, he differed with the majority view that the word "posts" covered both selection posts and initial "appointments" and "posts" referred only to the initial appointment. He observed :

> "Reservation of appointments ..... means reservation of a percentage of initial appointments to the service, Posts refer to the total number of posts in the service and when reservation is by reference to posts it means reservation of a certain percentage of posts out of the total number of posts in the services."

The conclusion that all appointments or posts could not be reserved under Art. 16(4) who arrived at on the basis that it would be destructive of the fundamental right guaranteed under Art. 16(1). Further Art. 16(4) was an exception to Art. 16(1) and it could not be the intention of the Constitution-makers that it be so interpreted as to render nugatory the main provision. It was pointed out that even reservation of a majority of appointments or posts under Art. 16(4) though it would not completely destroy the fundamental right guaranteed by Article 16(1) it would, nevertheless, make it "practically illusory" which again could not be the intention of the Constitution-makers.

Ayyangar J was in agreement with the view expressed by Wanchoo J, that reservation could be made only for the initial appointment and held that the appeal should be dismissed.

He was in disagreement with the majority view which laid down that reservation under Article 16(4) could be made either prospectively or retrospectively. In his view the clause contemplated action only as regards the future. He observed :

> "If an inadequacy exists today, to give retrospective effect to the reservation, as the impugned notification has done, would be to redress an inadequate representation which took place in the past by an order issued today. In my judgment that is not contemplated by the power conferred to reserve which can only mean for the future."

However, since this point had not been argued he did not rest his judgment upon it. *Propositions laid down* : Art. 16 (4) covered both initial appointments and promotions. The reservation can be made both retrospectively and prospectively.

T. Devadasan v. *India*

AIR 1964 SC 179

Facts

The appeal was brought by the petitioner under article 32 of the Constitution challenging the instructions issued by the Government of India which in effect resulted in the carry forward rule which resulted in reservations of more than 50% vacancies being made in a particular year.

The petitioner, a graduate, was an Assistant in grade IV of the Central Service since 1956, and became permanent on January 1, 1958. The next higher post was that of Section Officer (Assistant Superintendent). One of the three methods of recruitment to this post was by promotion from grade IV to Grade III on the basis of a departmental examination by the U.P.S.C. held at intervals. This accounted for 30 per cent of the recruitment. Accordingly, a notification relating to the examination for promotion to be held in June 1960 was issued by the U.P.S.C. on February 6, 1980. A reservation of 12½ per cent of vacancies for Scheduled Castes and 5 per cent for Scheduled Tribes was stated therein, but there was "carry forward" rule according to which unfilled reserved vacancies in the two years preceding the year of recruitment were to be added to these perecentages. The result was announced in April 1961. The U.P.S.C. recommended for appointment 16 candidates in unreserved vacancies and 28 candidates in reserved vacancies as per the prescribed percentage plus the carry forward quota. Subsequently 2 more candidates from Scheduled Tribes were added to the latter. The number of posts expected to be filled was stated to be 48 comprising 16 unreserved and 32 reserved though the UPSC recommended only 30 for the latter category. The Government, however, filled up only 45 of the vacancies, 29 of these from among candidates belonging to the Scheduled Castes and Tribes.

The contentions of the petitioner were :

(1) The pecentage of marks secured by him was 61 whereas some of the 29 Scheduled Castes and Tribes candidates secured as low as 35. He pleaded that the U.P.S.C. was not competent to prescribe one qualifying standard for them and another for the rest of the candidates.

(2) If the Government of India and the U.P.S.C. had adhered to 17½% quota reservation for them, he would have stood a fair chance to get selected. However, the reservation made in fact amounted to 65 per cent and was thus far in excess of that stated in the U.P.S.C. notification. A reservation limitation of 17½% would have meant that only 8 vacancies could be filled by members of Scheduled Castes and Tribes, the remainder to other candidates by merit.

(3) The "carry forward rule" relied upon by the U.P.S.C. and Government of India was unconstitutional.

Subsequent to September 13, 1950 when the Government of India published a resolution indicating their policy relating to communal representation in the services, supplementary instructions were issued on January 28, 1952 which had the effect of adopting the principle of "carry forward" in the second and third year but not beyond that.

The petitioner challenged these instructions. He argued that article 16 (1) provides for equality of opportunity in matters relating to employment. While conceding that under article 16 (4) the state can make reservation for any backward class, he urged that this reservation could not be so extensive as to nullify or destroy the right conferred by article 16 (1). He pointed out that according to previous decisions of the Supreme Court, art. 16 (4) is "merely an exception to art. 16 (1), and being subservient to the latter, it could not be so interpreted as to render meaningless the main provision. He further contended that art. 16 (4) was to be read with art 335 of the Constitution, which while providing for claims of Scheduled Castes and Tribes reiterates the maintenance of efficiency in administration.

The respondents claimed that the carry forward rule was valid, that it had been in force before the commencement of the Constitution and was continued after its commencement as a matter of public policy and for giving effect to provisions of the Constitution. As such the supplementary instructions were issued in 1952. They relied upon the provisions of Art. 16(4) and art. 335 in support of these instructions. They denied that the rule was a negation of equality before law and equal opportunity as regards appointment to posts under the State.

Issue

1. The main question was whether the carry forward rule as modified in 1955 was unconstitutional as violative of article 16(1) or article 14 of the Constitution.

2. The question also arose for consideration whether the impugned provision of reservation of posts for Scheduled Castes and Tribes offends article 16(4).

Majority decision

The majority of the 5 judges comprising S. K. Das, Acting C.J., Raghubir Dayal, N. Rajagopala Ayyangar and J. R. Mudholkar JJ. (Subba Rao J. dissenting) answered the main issue in the affirmative and held the modified carry forward to be invalid and unconstitutional.

Mudholker J., delivering the judgment of the court, was of the opinion that equality in art. 14 meant equality among equals. The purpose of article 16(4) was to ensure that backward classes (which included Scheduled Castes and Tribes) should not be unduly handicapped in matters relating to employment in the States. The provision, therefore, contemplates reservation of posts in favour of such classes where they are not adequately represented in the services in the State. As such a rule providing for such reservation cannot be said to have violated article 14. However, if such reservation was excessive so as to deny a reasonable opportunity for employment to members of other communities, any member of the latter could then complain of denial of equality by the State.

As regards the contention of the petitioner that the carry forward rule violated article 16(1) because it permitted excessive reservation, he referred to the court's ruling in *M. R. Balaji* v. *State of Mysore* AIR 1963 SC 649 where it was pointed out

> "..... what is true in regard to article 15(4) is equally true in regard to Art. 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Art. 16(4) care would be taken not to provide for unreasonable, excessive or extravagent reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Art. 15(4) reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution."

This would apply to the present case. From the Balaji case it would appear that reservation of more than 50% of the vacancies would be violative of article 15(1).

In the present case, vacancies had been filled, 29 of which went to the reserved category as a result of the modified carry forward rule in 1955. The reservation, therefore, accounted for 64.4% of the vacancies filled. This being the result of the carry forward rule, the court, basing its decision on Balaji held it to be bad. It also relied on *General Manager, Southern Railway* v. *Rangachari*, AIR 1962 SC 36.

The court emphasized that the guarantee contained in Art. 16(1) is to ensure equality of opportunity in matters relating to employment. To effectuate the guarantee each year of recruitment would have to be considered by itself and reservation for backward communities should not be so excessive as to create a monopoly or unduly disturb legitimate claims of other communities.

Art. 16(4) is in the nature of a proviso or exception to Art. 16(1). It cannot be so interpreted as to nullify or destroy the main provision. It was observed : "To hold that unlimited reservation of appointments could be made under cl. (4) would in effect efface the guarantee contained in cl. (1) or at best make it illusory. No provision of the Constitution or of any enactment can be so construed as to destroy another provision contemporaneously enacted therein. . . . The over-riding effect of cl. (4) on cls. (1) and (2) could only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances".

The court concluded that the petition succeeded partially, and the carry forward rule as modified in 1955 was invalid.

Minority decision

The dissenting judgment of Subba Rao J. on the other hand answered the main issue in the negative and held the carry forward rule to be constitutionally valid.

In his view article 335 had no bearing in construing article 16(4). It was, therefore, necessary to fall back upon art. 16(4) alone to ascertain validity of the provisions made by the Government.

Article 14 laid down the general rule of equality. Art. 16 was an instance of its application with special reference to opportunity of appointments under the State. In his view art. 16(4) was not an exception to art. 16(1). He observed : "If it stood alone all the backward communities would go to the wall in a society of uneven basis structure. . . . They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced cl. (4) in Art. 16. The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article".

As regards the carry forward rule he observed :

> "There are no merits in the contention that, the principle of 'carry forward' has resulted in the third year in the selection of candidates belonging to the Scheduled Castes and the Scheduled Tribes to a tune of 80 per centum of the total applicants for that year and, therefore, the selection amounted to distruction of the fundamental right. If reservation was within the competence of the State, I do not see how the said fortuitous circumstances would affect the reservation so made.
>
> ..... The effect of the operation of the principle of 'carry forward' is practically the

same. Reservation made in one selection or spread over many selections is only a convenient method of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the said Castes and Tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right. There is neither an allegation nor evidence in this case to that effect.

If the provision deals with reservation which I hold it does—I do not see how it will be bad because there will be some deterioration in the stand and of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad. Indeed, the State laid down the minimum qualifications and all the appointments were made from those who had the said qualifications. How far the efficiency of the administration suffers by the provision is not for me to say, but it is for the State; which is certainly interested in the maintenance of standards of its administration."

He referred to the Balaji case. In his view that case laid down no proposition as regards quantum of over 50% reservation being unconstitutional. He pointed out that :

> "These general observations made in the context of admissions to colleges cannot, in my view, be applied in the case of a reservation of appointments in the matter of recruitment to a cadre of particulars service. The doctrins of "destruction" of the fundamental right depends upon the entire cadre strength and the percentage reserved out of that strength. Further, the expression used in the observations, *viz.*, "generally" and "broadly", show that the observations were intended only to be a workable guide but not an inflexible rule of law even in the case of admissions to colleges."

Proposition laid down : Even if reservations standing by itself in a particular year may not be unconstitutional on account of the reservations being not excessive (not more than 50%), but if such reservations added by the reserved seats under a carry forward formula results in making the reservations excessive in a particular year, they would become unconstitutional.

Triloki Nath v. *State of Jammu & Kashmir*

AIR 1967 SC 1283

Facts

Under art. 32, a petition was filed by two teachers for the issue of an appropriate writ to quash the orders of promotion of respondents 3 to 83 and to direct the first and second respondent, the State of Jammu and Kashmir and Director of Education, Jammu and Kashmir State, Srinagar respectively to promote them with retrospective effect to the cadre of gazetted teachers.

Petitioner 1 and 2 were both teachers in government schools in the state, having entered the service in 1943 and 1952 respectively. From time to time seniority lists were prepared by respondent 1 and a higher cadre was filled up by promotion of teachers from the lower grade as per the seniority list. The last list prepared in 1961 gave the 1st and 2nd petitioner the serial numbers 104 and 140 respectively. It was alleged that in effecting the promotions respondents 1 and 2 adopted the following basis :

(1) 50 per cent were given to Muslims.

(2) 60 per cent of the remaining 50 per cent were filled by Jamvi Hindus; and

(3) Remaining 40 per cent of the 50 per cent of the posts were given to Kashmiri Pandits, and sometimes one or two posts were given to Sikhs out of turn.

Though such a basis was not the result of any order made by the state, it was arrived at by an analysis of the recruitments by promotion made by the state from time to time.

It was contended by the petitioners that promotions were made not on grounds of merit and seniority but purely on the religion, caste and place of birth. As a result, the two petitioners, who though senior in the Seniority list, were superseded by respondents 3 to 83 only on account of the fact that they happened to be Kashmiri Pandits while respondents to 83 were either Muslims or Jammu Hindus.

The State in the counter-affidavit did not deny the manner of making promotions but supported the reservation on the ground the Muslims of the entire State and Hindus of Jammu province constituted "backward classes".

Issue

1. Whether Mohammedan of the entire State and Hindus of Jammu province are backward for purpose of article 16(4).

2. Whether percentage of reservations were reasonable ?

Judgment

Subba Rao, J. delivered the judgment of the Court comprising J. C. Shah, S. M. Sikri, Ramaswami, C. A. Vaidialingam, JJ. and himself.

The Court referred to its earlier decisions in *H. R. Balaji* v. *State of Mysore* AIR 1963 SC 649 and *R. Chitralekha* v. *State of Mysore* AIR 1964 SC 1823, where certain tests for "ascertaining whether a particular class is backward or not had been laid down. It was pointed out that though *Balaji* turned on the interpretation of art. 15(4) the principles decided therein would apply equally to the instant case. It reiterated the criterion, laid down therein *i.e.*, backwardness must be social and political and social backwardness must be the result of poverty to a large extent.

The Court then referred to *Chitralekha* and stated that it had accepted the criteria adopted by the Mysore government, that classification of backward classes should be made on the following conditions : (i) Economic conditions, and (ii) Occupation. Though the caste might be a relevant circumstances, yet it could not be the sole or dominent test.

The contention of the government in the present case "that the sole test of backwardness under Article 16(4) ..... is the inadequacy of representation in the services ..... if accepted, would exclude the really backward classes from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured, have taken to other avocations of life".

As such the court prescribed two conditions to attract art. 16(4) *i.e.*, "(1) a class of citizens is backward *i.e.* socially and educationally in the sense explained in Balaji's case ....., and (ii) the said class is not adequately represented in the services under the State".

However, the court could not arrive at any conclusion on the material placed before it, and called for a report to be supplied by the High Court of Jammu and Kashmir, which contained further material, *e.g.* total population of entire states, break-up figure of the two provinces, the extent of social and economic backwardness of the different communities *etc.*

Proposition laid down : Merely inadequacy of representation of a class in the services of the State is not a criterion of backwardness. Caste can be relevant factor but not the dominent one. Economic conditions and occupations are important relevant factors. While the state has necessarily to ascertain whether it is a justiciable issue and the court can examine whether the power has been abused by the State.

Triloki Nath v. *State of Jammu and Kashmir*

AIR 1969 SC 1

Facts

The matter came up for hearing again after the High Court had submitted its report incorporating the required material as directed by the Supreme Court together with oral and documentary evidence produced by the parties. There was, however, no formal order of the state making reservations of posts in favour of the backward classes. The state still followed the policy of communal reservation as was struck down by the court in the *first Triloki Nath* case.

Judgment

The judgment of the court comprising M. Hidayatullah, C.J. J. C. Shah, S. M. Sikri, V. Ramaswami and Bhargava, JJ. was delivered by Shah, J.

The court rejected the contentions of the State. It held that for purposes of article 16(4) in determining whether a particular section forms a backward class, "a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted" as it would infringe directly article 16(2). It pointed out that the normal rule contemplated by the Constitution "is equality between aspirants to public employment". However, in view of the backwardness of certain classes, the state could make some provision for reservation of posts for them. But, in the present case, the reservation was not in favour of any backward class. It was merely an instance of the distribution of the total number of posts or appointments on the basis of community or place of residence. Such distribution was "contrary to the constitutional guarantee under Art. 16(1) and (2) and is not saved by Cl. (4)".

The court asserted that provision making reservation under art. 16(4) need not be by a statutory enactment an executive order or direction would suffice. In the State scheme of distribution, however, there was not even a formal executive order. The court did not consider it necessary to express its opinion on the question "whether a provision under art. 16(4) is not effective, unless it is made by legislation, or by an executive order formally established".

The promotions given to respondents 3 to 83 were declared by the court to be contrary to the provisions of arts. 16(1) and (4) and, hence, void. It was, however, left open to the State to device a scheme which would be consistent with the constitutional guarantee for reservation of appointment to posts or promotions in favour of a backward class, which the state considered to be not adequately represented in the services.

Proposition laid down: A test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be the criterion for backwardness. An entire caste or community may be declared to be "backward" but this would not be because of their characteristic as a caste or community as such, but because they are backward at a given point of time in the social, economic and educational, scale of values. The expression "backward class" is not synonymous with "backward caste" or "backward community".

Makhan Lal v. *State of J&K*

AIR 1971 SC 2207

Facts

This case occurred on the facts of *Triloki Nath* v. *State of J&K*. This petition brought under art. 32 showed the attempt made to circumvent the law laid by this court in *Triloki Nath* (AIR 1960 SC 1) where the state policy of community-wise reservation of seats was declared unconstitutional as violating article 16. This case is hardly of any relevance in the matter of constitutional interpretation of art. 16. In the *Triloki Nath* though the court had stated that the state should prepare a scheme of reservations consistent with art. 16, no such scheme had been devised. However, an ingenious device had been thought of by officers of the Education department to give ostensible effect to the court's decision in *Triloki Nath*, but really to continue the respondent-teachers whose promotions had become illegal in view of the decision in the Triloki Nath case in the same higher positions. As this was again violative of art. 16, the court struck down the promotions.

Janki Pd. v. Jammu and Kashmir

AIR 1973 SC 930

Facts

"Three petitions were filed under article 32 as a sequel to the action taken by the State of Jammu and Kashmir as a result of the decision in Makhanlal v. State of J&K. The Jammu and Kashmir Scheduled Castes and Backward Classes Reservation Rules, 1970 were framed. This listed the criteria applicable for including a person within the definition of "backward classes".

The petitioners had filed these petitions seeking to set aside the promotions granted to the respondent teachers. They claimed that despite seniority, and having officiated as Head Master for some years they had been deliberately dropped in favour of the respondents who were junior. They alleged that the old communal proportion was being still maintained. They claimed that though some posts had been reserved for backward classes under the Rules, it was merely an exercise to secure about 90% of the posts to Muslims.

Issue

1. Scope of the expression "backward class of citizens under article 16(4).

2. Whether J&K Scheduled castes and Backward Classes Reservation Rules of 1970 are unconstitutional and violated article 16(4).

Judgment

The petitions came up for hearing before a 5 member Bench comprising S. M. Sikri, C.J. A. N. Ray, D. G. Palekar, M. H. Beg and S. M. Dwivedi, JJ. Speaking for the court, Palekar, J. observed that the expression "backward class of citizens" in article 16(4) was identical in meaning with the expression "any socially and educationally backward class of citizens" in article 15(4). He emphasised that merely educational backwardness or socially backwardness alone would not suffice to render a class of citizens backward. To constitute backwardness both elements *i.e.* social and educational backwardness must be present.

The court noted :

> Though the two words 'socially' and 'educationally' are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced, it is generally also socially advanced because of the reformative effect of education on that class.

The Court exhaustively reviewed the rules whether the classification made by the State was correct or not. The rules framed by the Government were based on the recommendations of the Backward classes committee appointed by the State Government under the chairmanship of J. N. Wazir, retired Chief Justice of Jammu and Kashmir High Court, which had submitted its report in November 1969. The rules had classified backward classes into six categories as follows :

(1) Certain specified traditional occupations.

(2) 23 specified social castes.

(3) Small cultivators.

(4) Low paid pensioners.

(5) Residents in the area adjoining the ceasefire line.

(6) Some areas in the State as "bad pockets" and every person belonging to that area regarded as backward.

The Supreme Court found fault, partly or wholly practically with all these categories. It has been thought appropriate by us to reproduce fully the analysis of the court on this aspect instead of making an attempt to summarise it. The photostat copy of the relevant extracts of the judgment is appended.

27. The Jammu and Kashmir Scheduled Castes and Backward Classes Reservation Rules, 1970 are comprised of 5 parts. Part 1 contains 6 chapters and rule 3 says that the permanent residents of the State belonging to the categories of persons in these six chapters are declared as socially and educationally backward classes of citizens. Chapter I enumerates occupations which are regarded as traditional occupations and Rule 4 says that every person whose traditional occupation is one of the 62 mentioned therein must be regarded as a person belonging the backward class. Chapter II mentions 23 social castes and persons belonging to these social castes are regarded as backward. Chapter III describes small cultivators as backward. Chapter IV groups low paid pensioners as backward. Chapter V puts residents in an area adjoining the ceasefire line in the backward class. Chapter VI specifies some areas in the State as "bad pockets" and every person belonging to that area is to be regarded as belonging to that area is to be regarded as belonging to the backward class. We are not directly concerned with the other parts of these rules. Objection is taken by Mr. Sen, on behalf of the petitioners to the several types of backward classes designated under the rules and also to the peculiar manner in which the definitions have been framed.

28. Chapter I gives the class designated by traditional occupations. In all, about 62 occupations have been identified as traditional. They follow closely the classes designated as traditional occupational classes by the Committee in Chapter XIV of its report. In para 124 the Committee has stated that with a view to sorting out backward classes from others the claim of each and every occupational and industrial category listed in the census report of 1961 had been carefully examined and it is obvious that the list of traditional occupations is made as exhaustive as possible. A class can be identified on the basis of traditional occupation. A traditional occupation means an occupation followed in a family in which it is handed down by an ancestor to his posterity. If there is a section of the population following an occupation of that description that section can be regarded as a class. Such occupations are generally occupations in which some special skills are necessary like those of an artisan or a craftsman. It is contended by Mr. Sen that though 62 occupations have been mentioned as traditional occupations a good many of them are not really traditional occupations and with regard to others there has been no investigation in depth as to whether they are traditional occupations or not. It is also contended by him that the definition of traditional occupations given in the rules actually distorts the whole picture because whether the father of the person claiming reservation follows the traditional occupation or not, he becomes entitled to be considered as of the class if his grandfather did.

29. There is no doubt that a large number of occupations mentioned in the list is capable of being followed as a traditional occupation. But some of them, at least, do not deserve to be called traditional occupations. Take for example an "agricultural labourer". We have grave doubts if agricultural labour can be regarded as a traditional occupation. The occupation is seasonal and, as is well-known, it is the last refuge of the landless unskilled labourer who has no other source of employment in the rural community. Indeed, if any one deserves special consideration it is the agricultural labourer, but the objection is to its identification as a traditional occupation. An agricultural labourer is just a labourer whose services are utilised wherever unskilled labour is required. In fact, he is the source material for hamals and the like-occupations which merely require physical strength and capacity to work. Similarly it would be difficult to say that the following occupations are traditional occupations.

(5) Bearer, boy, waiter,

(7) Book binders,

(11) Cook,

(20) grass seller,

(21) Hawkers, pedlars,

(23) Load carriers,

(29) Old garment sellers,

(48) Watch repairers,

(51) Grocers in rural areas,

(53) Milk-sellers in rural areas,

(58) Vegetable sellers in rural areas,

(62) Drivers of Tongas and other animal driven vehicles.

All these occupations do not require special skills developed by traditions and can be resorted to by anybody with the requisite resources. Then again, at serial Nos. 34 and 56 we have a category of priestly classes who, though following a traditional profesison can hardly be regarded as socially and educationally backward. We, therefore, think that there must be a proper revision of the traditional occupations to fall properly under rule 4.

30. But the most serious objection is to the artificial definition given in rule 2(1). The traditional occupation in respect of a person means the main occupation of his living or late grandfather and does not include casual occupation. This would mean that if a person wants the special advantage as a member of the backward class it is enough for him to show that his grandfather was following a traditional occupation. His father may not be following the traditional occupation at all. He might have given it up to follow some other occupation or trade. It is not enough, it is contended, that a traditional occupation was followed by the grandfather but that the occupation should have descended to his son also so that at the date when the grandson is asking for the benefit of reservation the traditional occupation must be still in the family and continues to be the living of the family. There is great force in this contention. If the father of the person who claims special treatment under Articles 15(4) and 16(4) has given up his low income occupation and become a trader or a Government servant it will be wrong to give the person the special benefit merely on the ground that his grandfather was following a certain traditional occupation. It was against such misuse that the Committee had issued a warning in para 129 of its report. It observed :

> "While making the foregoing provisions, every possible care should be taken by the State to ensure that the benefit of such provisions is availed of only by those who are *bona fide* members of the classes declared backward and not by imposters". As already stated it is quite open to the State to declare that persons belonging to low income families following a traditional occupation should be regarded as person belonging to a backward class if, on the whole, that class is socially and educationally backward. But it is equally essential that at the time when a person belonging to that class claims the special treatment his family must be still following the traditional occupation. Since the rule does not completely ensure this it is likely to be abused and the real person for whose benefit the rule is made will not get the benefit. The rules, therefore, pertaining, to traditional occupations must be suitably revised.

31. Chapter II deals with some 23 low social castes. The Committee in Chapter XIII had identified the first 19 out of them and stated that these castes are

considered inferior in society as the service which they render carry a stigma in it. They suffer from social disabilities and both educationally and economically they are extremely backward. The last four castes in rule 5 have not been mentioned in chapter XIII of the report. It is not also known on what basis they have been included as socially and educationally backward. There may be good reasons for the State Government to do so but we have no material before us. As at present advised, therefore, we are not prepared to proceed on the basis that serial Nos. 20 to 23 are backward classes.

32. Chapter III identifies cultivators of land with small holding as a backward class. The limits of his holdings differ according to the type of land cultivated and the region in which such land is situated. The cultivator may be an owner or a tenant. He may even be a non-cultivator provided he wholly depends on land for his livelihood. The cultivator is designated as a class on the basis of the recommendations made by the Committee in chapter XII of its report. The reasons given by the Committee go to show that the overriding consideration was economic. A class, as already observed, must be a homogeneous social section of the people with common traits and identifiable by some common attribute. All that can be said about the cultivators is that they are persons who cultivate land or live on land and the simple accident that they hold land below a certain ceiling is supposed to make them a class. In such a c > the relevance of social and educational backwardness takes a subordinate place. In some areas as in Kashmir Valley the ceiling for a cultivator is 10 Kanals of irrigated land. If a cultivator holds 10 kanals of land or less he is to be regarded as backward, *i.e.* to say socially and educationally backward. But if his own brother living in the same village owns half a kanals more than the ceiling he is not to be considered backward. This completely distorts the picture. It will be very difficult to say that if a person owns just 10 kanals of land he should be considered socially and educationally backward while his brother owning half of a kanal more should not be so considered. The error in such a case lies in placing economic consideration above considerations which go to show whether a particular class is socially and educationally backward. The same error is repeated in Chapter IV wherein the dependent of a pensioner is supposed to belong to the backward class if such pensioner had retired from certain Government posts mentioned in Appendix 1 and if the maximum of the scale of pay of these posts did not exceed Rs. 100 p.m. They also included defence service pensioners of the ranks of Sepoy, Naik, Havildars etc. This again is based upon the recommendation of the committee which in chapter XI of the report says "Among others, representatives of the pensioners also called on the committee and explained the difficulties faced by them because of being in receipt of a meagre income in the shape of pensionary emoluments. The memorialists contended that they cannot keep pace with the ever rising price index as rates of pension have remained static and have not been enhanced as is being done from time to time in the case of Government servants in regular service. It was further argued that they could ill afford to spare any part of their meagre earnings for the education of their children". The Committee felt that these pensioners deserve on these grounds to be shown consideration as backward classes because most of them held class IV or similar posts. Ex-servicemen who fall in this class are about 90,000 and civil posts pensioners are about 15,000. It is difficult to say that these pensioners are a class in the sense that they are a homogeneous group. They are an amorphous section of Government Servants who by the accident of receiving Rs. 100 or less as pay at the time of retirement or being ex-servicemen of certain graded are pushed into an artificially created body. It may be that they belong to class IV or similar grade service of the State. But that is not the test of their social and educational backwardness. In days when sources of employment were few, many people, though socially advanced, might have accepted low paid jobs. Some of them may have failed to make the educational grade and were hence forced by necessity to accept such low paid jobs. Some others might have pre-maturely retired from posts carrying the scale referred to above. The accident, therefore, that they belong to a section of Government servant of certain category is no test of their social backwardness. The test breaks down if the position of a brother of such a pensioner is considered. If the brother also a Government servant, has the misfortune of retiring when holding a post the maximum of which was Rs. 105 he was liable to be regarded as not socially and educationally backward, when in all conscience, so far as the two brothers are concerned, they remain on the same social level. Another brother who is privately employed and retires from service without any pensionary benefits would not be entitled to be classed as backward under the test. These anomalies arise because of the artificial nature of the group created by the Committee. If all the brothers are socially and educationally backward, you will be differentiating between them by calling some more backward and others less backward, a thing not permitted by Balaji's case, 1963 Supp. (1) SCR 439 (AIR 1963 SC 649). There is, therefore, substance in the contention of Mr. Sen that the Committee has created these two artificial groups of "cultivators" and pensioners for the purpose of affording certain benefits under the Constitution instead of identifying socially and educationally backward classes.

33. Chapter V & VI of the Rules identify residents of certain areas as backward. In chapter V the residents of certain villages mentioned in Appendix II are considered as backward, these villages being within five miles of the ceasefire line. In Chapter VI some areas in the State are regarded as "bad pockets" and all the residents of those areas are stated to be backward. These two chapters incorporate the recommendations made by the Committee in Chapter X and IX respectively of the report. Chapter IX relates to "bad pockets" 10 such bad pockets have been identified by the Committee and cover 696 villages in certain Districts and Tehsils far away in the interior. The population of these areas according to 1961 census

wis about three lakhs. The Committee reports as follows :—

"There are, for instance well known rather notorious backward areas which have to be treated differently from the rest of the state. There are others which because of difficult terrain, In accessibility and absence of vehicular communications still retain their primitive character. There are still some others which suffer from deficient production on account of soil being rocky and sandy and irrigation facilities being scanty and inadequate. Besides, there are areas where due to non-availability of electric power, industrial development even on the scale of cottage industry had yet to come into existence. There are certain areas which combine all or some of these characteristics."

Ten such pockets were then examined in detail and the Committee came to the conclusion that owing to lack of communication, inaccessibility, lack of material resources and the like the residents of these areas are living in almost primitive conditions and they are all socially and educationally backward. The civilizing influence of modern life is yet to reach them. These areas are carefully mapped. They are situated in the recesses of inaccessible mountains which have primarily led to the residents therein being almost in a primitive state. The population is about 8% of the total population of Jammu & Kashmir and in our opinion, there is no serious difficulty in regarding the residents of these areas being backward. Similar consideration apply to areas adjoining the ceasefire line. They comprise about 179 villages with a population of about a lakh. The difficulties of their situation near the ceasefire line for the last 25 years seem to have contributed to this area being cut of from the main stream of life. The Committee noticed that the difficulties inherent in the living conditions in these areas had inevitably lead the inhabitants of these areas living in economic and educational backwardness. There are restrictions on their free movement and they have to remain indoors after sun set. The male members cannot leave their villages in search of livelihood elsewhere for fear of their wives and children being left behind unprotected. The land is unproductive, no investments could be made in the land because of the nearness of the ceasefire line. Raids accompanied by cattle lifting and damage to property are not uncommon. Loss of life also takes place occasionally. The inhabitants find it equally difficult to pursue their traditional arts and crafts. The effect of all these contributory factors have kept these areas, in so far as social and educational progress is concerned, very much behind the rest of the State. We thus find that special reasons have been given by the Committee why it considered these areas socially and educationally backward and since the classification is made merely on the ground of place of birth, we do not think that there is any serious objection to regard the residents of the bad pockets and the ceasefire areas as socially and educationally backward. But rules 10 and 12 have been so framed that the advantage is likely to be misused by imposters. A person wanting the advantage of reservation would be regarded as belonging to these areas if his father is or has been resident of the area for a period of not less than 10 years in a period of 20 years preceding the year in which the certificate of backwardness is obtained. The rules do not insist that either the father or the son should be a resident of the area when the advantage is claimed. Nor does it require that the son should have his earlier education in these areas to ensure that he and his father are permanent residents of that area. Any trader or Government servant from outside who is residing for about 10 years in these areas within 20 years of the date when the advantage is claimed would be entitled to be regarded as belonging to the backward class. In order that the benefit may go to the residents of these areas, Government ought to frame rules with adequate safeguards that only genuine residents will get the advantage of special reservations and not the outsiders. As the rules stand, outsiders, who, in the course of their trade or business happened to live in these areas for 10 years out of past 20 years would be able to claim the benefit. This loophole must be plugged and till that is done the production of a certificate from the Tehsildar as to the backwardness of any person would be of little value.

34. We have shown above the defects in the rules which purport to identify certain residents of the State as backward. Till the defects are cured the rules are not capable of being given effect to.

35. In view of the above findings the selections made by Departmental Promotion Committee have to be set aside.

C. A. Rajendran v. *Union of India and others*

A.I.R. 1968 S.C. 507

Facts

The petitioner obtained rule from the Supreme Court calling upon the respondents to show cause why a writ in the nature of mandamus under art. 32 should not be issued for quashing, the office Memorandum of 1963 and restoring the orders earlier passed in office Memorandum in 1955 and 1957.

The petitioner was a permanent assistant in Grade IV, *i.e.* Class III, non-gazetted-ministerial, of the Railway Board Secretariat Service. The next higher post, to which he claimed promotion, was that of Section Officer, classified as Class II, Grade III.

The Government in 1955 issued an office Memorandum whereby as regards posts to be filled by promotion there was to be no reservation for Scheduled Castes and Scheduled Tribes, though certain concessions were to be granted. A further Memorandum in 1957 decided on a 12½ per cent reservation for Scheduled Castes and 5 per cent for Scheduled Tribe.

In Southern Rly. v. Rangachari (AIR 1962 SC 36) this Court had by a majority judgment held the impugned circulars of the Railway Board to be within the ambit of art. 16 (4) and as such allowed the appeal.

Consequent to this judgment, the Union Government in 1963 reviewed the matter and decided that there should be no reservation of post for promotion to classes II and I where such promotions were the result of seniority and competitive examination. However, the reservation in favour of backward classes was to continue in respect of class III and IV posts. The petitioner assailed this order on the ground that discontinuance of reservation in respect of class I and II posts directly infringed the fundamental right guaranteed to the backward classes by article 16 (4).

Issue

Whether a Constitutional duty is imposed on Government by article 16 (4) to make reservation in favour of backward classes.

Judgment

The matter came up before K. N. Wanchoo, C. J. R. S. Bachwat, V. Ramaswami, G. K. Mitter, and K. S. Hegde, JJ.

The Court decided the issue in the negative, and held there was no such constitutional duty. Ramaswami, J. delivering the judgment of the Court, observed that article 16 (4) did not confer any fundamental right on backward classes as regards reservation of posts, whether it be at the stage of recruitment or promotion. It was only an enabling provision which conferred "a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which in its opinion is not adequately represented in the service of the States" (p. 513). In making reservations for appointments or posts the Government has to take into account not only the claims of the members of the backward classes but also the maintenance of efficiency of administration which is of paramount importance.

The Court held that the petitioner's writ petition failed, and the Government order was valid.

Proposition laid down.—It is discretionary with the Government to provide for reservations. Even if by an earlier order the Government adopted a policy of reservations it could give it up by a subsequent order.

State of Punjab v. Hiralal

AIR 1971 SC 1777

Facts

In September 1963 the Government of Punjab reserved some higher posts for the scheduled castes, scheduled tribes and backward classes. Further clarification on this order was issued by a letter in March 1964.

Respondent Nos. 1 and 3 were working as Head Assistants in the Forest Department of the Government of India. Resp. 1 was senior to resp. 3 who belonged to a scheduled caste. As a result of the government order, respondent 3 was temporarily promoted as Superintendent, ignoring the claim of resp. 1. As such, aggrieved by the order, resp. 1 moved the Punjab High Court to quash the promotion of resp. No. 3, and for his own promotion to that post. The High Court quashed the promotion. The State appealed.

In the opinion of the High Court, reservation for backward classes was not impermissible in view of article 16(4) as interpreted by the Supreme Court in The General Manager, Southern Rly. *v.* Rangachari AIR 1962 SC 36. But the Government had violated art. 16(1) by reserving the first out of a group of 10 posts for such classes. It held that such reservation could lead to various anomalies *e.g.* person who benefited might be able to jump over the heads of several senior.

Issue

Whether the reservation made under art. 16(4) offends art. 16(1).

Judgement

The matter came up for hearing before J. C. Shah C.J., K. S. Hegde and A. N. Grover JJ. The Court speaking through Hegde J. upheld the State's appeal and held that the reservation did not violate art. 16(1). It was pointed out that "the mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad." (p. 1780). The court noted that every reservation under art. 16(4) did introduce an element of discrimination particularly as regards matters of promotion. An inevitable consequence of such reservation was that junior officers were allowed to steal a march over their senior officers. Some of them might get frustrated "but then the Constitution makers have thought fit in the interests of the society as a whole that the backward class of citizens in this should be afforded some protection ..." (p. 1781).

It concluded that there was no material before the High Court and no material before it from which the conclusion could be reached that the order violated art. 16(1). "Reservation of appointments under Article 16(4) cannot be struck down on hypothetical grounds or on imaginary possibilities. He who assails the reservation under that Article must satisfactorily establish that there has been a violation of Article 16(1)."

Propositions laid down

The mere fact that the reservations made may give extensive benefits to some of the persons who had the benefit of the reservations does not by itself make the reservation bad. Similarly the length of the leap is immaterial and it depends upon the gap to be covered (*e.g.* a person in the reserved category having 73rd position in the list prepared for promotion, could get precedence over the 72 others if there is a single post to be filled up and that post belongs to the reserved category).

State of Kerala v. Thomas

AIR 1976 SC 490

Facts

The appeal was brought by the State of Kerala against the decision of the High Court, and concerned the validity of Rule 13AA of the Kerala State and Subordinate Services Rules, 1958, and two orders.

The respondent was a Lower Division Clerk in the Registration Department. Under Rule 13A of the Services Rules promotion from this cadre to the higher cadre of upper division clerks on the basis of seniority depended on passing the prescribed test within two years. Rule 13AA and the two orders dated 13 January 1972 and 11 January 1974 had the effect of granting scheduled castes and scheduled tribes a longer period for passing the test, *viz.*, two extra years. The respondent's grievance was that in view of this concession to members of Scheduled Castes and Scheduled Tribes, they were able to obtain promotions earlier than him though they had not passed the tests.

In the High Court the respondent's main contentions were that Rule 13AA of the Service Rules and the orders for pomotion made thereunder were violative of articles 16(1) and 16(2). Further, apart from article 16(4), which is an exception to article 16(1) the right guaranteed under 16(1) could not be curtailed. The State, on the other hand, contended that the impugned rule and orders were not only legal and valid but also supported a rational classification under article 16(1).

The High Court upheld the contentions of the respondent that Rule 13AA was discriminatory and violative of Art. 16(1) of the Constitution and was also beyond the reservation permitted by Art. 16(4).

Before the Supreme Court, the appellant contended that firstly the Rule 13AA did not provide for reservation as provided by article 16(4). As such the High Court had erred in striking down the Rule on the ground that it was beyond the reservation permitted by article 16(4). Secondly, members of the scheduled castes and tribes were members of one caste, who for historical reasons constituted by themselves a special class, and the Constitution itself had accorded them an exalted status. As such, Art. 16(1) did not prevent the State from making reasonable classification, so as to boost up members of the Scheduled Castes and Tribes by granting them certain concessions to implement the service.

The Supreme Court by a majority of five out of seven upheld the appeal.

Issues

1. The main issue was whether Rule 13AA and the two orders were unconstitutional as violating article 16(1). 2. Incidentally, the question arose for consideration as to whether article 16(4) is an exception to article 16(1).

Majority Judgment

As to whether Rule 13AA and the two orders were unconstitutional as violating article 16(1), the majority view answered this main issue in the negative and held them to be not unconstitutional.

Ray C.J. expressed the view that article 16(1) permits reasonable classification in a manner similar to that of article 14 *i.e.*, where there is a nexus to the objects to be achieved. As such the classification of members of Scheduled Castes and Tribes under Rule 13AA which exempted them from passing the special tests for promotion was "just and reasonable having rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public office". He noted that the granting of such temporary exemptions to this class dated back to 1 November 1956 the date of inception of service conditions in Kerala. Rule 13AA now merely gave it a statutory basis. The historical background, therefore, justified the classification made under the Rule. The Constitution itself, makes a classification of scheduled castes and scheduled tribes in various provisions to accord them favoured treatment. Art. 335 in particular gives a mandate that their claims should be considered in matters of employment consistent with maintaining administrative efficiency. He pointed out that without providing the exemption for a temporary period under Rule 13AA, adequate promotion to them would not have been possible. The seniority principle in promotion was however, still adhered to. The temporary relaxation under the Rule was warranted by their backwardness and inadequate representation in the State services. As such the impugned Rule and the two orders made thereunder came within the ambit of article 335, since they claimed to redress an imbalanced public service and to achieve parity among all communities in the public services. The test of efficiency in administration was not impaired by the Rule in as much as it did not after promotion exempt from passing the test altogether but only for a further period of two years. If article 14 permits classification, article 16 equally permits it since with lay down equality. To achieve "equality of opportunity" in services under article 16(1) the State could adopt all legitimate methods. Article 16(1) permitted classification on the basis of

object and purpose of law. In the present case, such classification was justified in as much as it enabled members of Scheduled Castes and Scheduled Tribes to find adequate representation in the services by promotion to a limited extent. A differential treatment was given to them only from the point of view of time "for the purpose of giving them equality consistent with efficiency".

For the foregoing reasons he upheld the validity of Rule 13AA and the two orders as constitutional and not violating article 16(1).

Mathew J., stressed compensatory state action in addition to reasonable classification. He was of the view that "though complete identity of equality of opportunity is impossible . . . measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1)".

Like Ray, C.J. he too referred to Article 335 which enabled members of Scheduled Castes and Tribes to claim adequate representation in the State services consistent with maintenance of efficiency. He traced the idea of "compensatory state action" to the Supreme Court of United States and saw "no reason why this Court should not also require the state to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens . . . ."

To ensure "equality of opportunity" the state could adopt any measure to enable members of the Scheduled Castes and Scheduled Tribes to have adequate representation in the services "and justify it as a compensatory measure" provided it did not dispense with the consideration of efficiency of administration.

He agreed with Ray C.J. that article 16(1) permits of classification in a manner akin to article 14; and that the classification in favour of Schedule Castes and Tribes made in Rule 13AA had a "reasonable nexus with the purpose of the law, namely to enable the members of the Scheduled Castes and Scheduled Tribes to get them due share of promotion without impairing the efficiency of administration".

He agreed with the conclusion of Ray C.J. and allowed the appeal.

Krishna Iyer J. too stressed "reasonable classification" under article 16(1) as in article 14 and referred to article 335. He observed :

> "In the present case, the economic advancement and promotion of the claim of the grossly under-represented and pathetically neglected classes, otherwise described as Scheduled Castes and Scheduled Tribes, consistently with *the maintenance of administrative efficiency, is the* object constitutionally sanctioned by Article 46 and 335 and reasonably accommodated in Art. 16(1)."

He cautions that not all caste backwardness is to be recognised in this formula, as it would be subversive of both art. 16(1) and (2). To serve as a foundation for legitimate discrimination, the social disparity must be grim and substantial. Only the Scheduled Castes and Scheduled Tribes constituted such a class. Any other caste getting exemption from Art. 16(1) and (2) by exerting political or other pressure would run the risk of unconstitutional discrimination.

He concluded by concurring with the Chief Justice, but "with the admonition . . . that no caste, however, seemingly backward . . . can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens".

Fazl Ali J. too stressed the concept of "reasonable classification". He observed :

> "Clause (1) of Art. 16 clearly provides for equality of opportunity to all citizens in the services under the State . . . This . . . can be achieved by making a reasonable classification so that every class of citizens is duly represented in the services which will enable equality of opportunity to all citizens."

As regards Rule 13AA he was of the view that the State's action in incorporating Rule 13AA did not violate the mandate in Art. 335 as contended by the respondent and other promotees. He was satisfied that the concession provided in Rule 13AA amounted to a reasonable classification under article 16(1) and not violative of it.

He cautioned that the Court "has to apply strict scrutiny to the classification made by the Government and to find out that it does not destroy or fructify the concept of equality. In other words, the State cannot be permitted to invoke favouritism or nepotism under the cloak of equality".

In this particular case he was satisfied that the classification made by the government by incorporating Rule 13AA was fully justified under Article 16.

Beg J., however, justified Rule 13AA and the orders as "partial or conditional reservation under article 16(4). He pointed out that if this article could include complete reservation of higher posts to which promotion might take place, there was no reason why it could not be partial or "hedged round with the condition that a temporary promotion would operate as a complete and confirmed promotion only if the temporary promotee satisfies some tests within a given time".

If the Rule and orders could be viewed as qualified or partial or conditional reservation which satisfied the requirements of substantial equality in keeping with Article 335, and met the demands of equity and justice looked at from the points of view of Art. 46, they would, in his view be also justified under Article 16(4) of the Constitution.

He distinguished the cases of T. Devadasan v. Union of India AIR 1964 SC 179, M. R. Balaji, v. State of Mysore. AIR 1963 SC 649 which laid down tests for absolute or complete reservation under article 16(4) on the ground that in the present case there was only a "partial of temporary or conditional reservation".

He was not satisfied that the High Court's decision that the impugned rules and orders fell outside the purview of art. 16(4) was substantiated. In his view the respondent's petition ought to have been dismissed on the ground that he had failed to discharge "the burden of establishing a constitutionally unwarranted discrimination against him". Accordingly, he allowed the appeal.

Minority Judgment

The dissenting judgment of two judges, on the other hand, answered this issue in the affirmative and held the Rule to be violative of article 16(1).

Khanna J. emphasised that article 16(1) ensures equality of opportunity in matters of employment. It applies to all equally—the least deserving and the most virtuous. Preferential treatment accorded to some "would be anti-thesis of the principle of equality of opportunity". Equality of opportunity under this article is not "abstract or illusory" to be "reduced to shambles under some cloak". Exemption granted to a class, however, limited, would be tantamount to according to that class a favoured treatment. He further observed :

> "To countenance classification for the purpose of according preferential treatment to persons not sought to be recruited from different sources and in cases not covered by clause (4) of Article 16 would have the effect of eroding, if not destroying altogether, the valid principle of equality of opportunity enshrined in clause (1) of Article 16."

He pointed out that to overdo classification was to undermine equality as in the case of Art. 16(1). Introduction of fresh notions of classification in this article, as was being sought to done in the present case, would "have the effect of vesting the State under the garb of classification with power of treating sections of population as favoured classes for public employment." (p. 509).

He concluded that the Rule and orders were not constitutionally permissible under article 16(1) because apart from the fact that it would violate the principle of equality of opportunity under that article, "it would also in effect entail overruling of the view which has so far been held by this court in the cases of *Champakam* (AIR 1951 SC 226) *Rangachari* (AIR 1962 SC 36) and Devadasan (AIR 1964 SC 179) The State had ample power under article 16(4) to safeguard the interests of the backward classes Failure on its part to do so, in his opinion did not justfiy a strained construction of article 16(1).

Gupta J. while agreeing with Khanna added a few words on one aspect of the issue :

He admitted that article 16(1) permits classification. but only that which is reasonable. In his view the sub-division of lower division clerks into two categories—those belonging to Scheduled Castes and Tribes and those who did not was not reasonable. He observed :

> "In the context of Article 16(1) the sub-class made by Rule 13AA within the same class of employees amounts to, in my opinion, discrimination only on grounds of race and caste which is forbidden by clause (2) of article 16."

Is article 16(4) an exception to article 16(1) ?

Majority followed the dissent of Subba Rao J. in Devadasan and held article 16(4) is not an exception to article 16(1).

Ray C.J. observed that article 16(4) merely "classifies and explains that classification on the basis of backwardness does not fall within Art. 16(2) and is legitimate for the purposes of Article 16(1)". He concluded that article 16(4) only "indicates one of the methods of achieving equility embodied in Art. 16(1)"

Mathew J. held the view that "equality of opportunity" visualised in article 16(1) could be measured only by equality attained in the result and not merely as a result of numerical or literal equality He observed :

> "I agree that Art. 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualised in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of Scheduled Castes and Scheduled Tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried *viz.*, even upto the point of making reservation." (p. 519).

Krishna Iyer J. held that article 16(4) was not an exception to article 16(1) but an emphatic statement. It served merely as a mode of "reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to". To support his view, he cited Subba Rao J.'s dissenting opinion in *Devadasan*.

He pointed out that though it was true that it might be loosely said that Art. 16(4) is an exception. but on closer examination it can be seen to be "an illustration of constitutionally sanctified classification". It is not "a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt."

Fazl Ali J. viewed article 16(4) as an explanation containing an exhaustive and exclusive provision regarding reservation which is one of the forms of classification, other forms of classification being permissible under article 16(1). Article 16(4) making provision for reservation overrides article 16(1) to that extent and no reservation could be made under article 16(1). He disagreed with the view earlier

taken by this court that clause (4) is an exception to article 16(1), for the following reasons :

Firstly, assuming it to be an exception, the only conclusion would be that classification under article 16(1) would not be permissible because article 16(4) has expressly provided for it. This was contrary to the basic concept of equality under article 14 which permits of classification in any form subject to certain conditions. Secondly, if classification under article 16(1) could not be made except the reservation contained in article 16(4), it would defeat the mandate contained in article 335.

The minority Judgment of Khanna, Gupta and Beg JJ, however, raised serious objections to the majority view that art. 16(4) constituted an exception to art. 16(1).

Khanna J. put forwarded the argument that the *non-obstante* clause in article 16(4) indicated that reservations would not have been permissible for the backward classes had it not been for this provision. Further if art. 16(1) permitted special treatment, there was no necessity of incorporating art. 16(4). He pointed out that if inroads were allowed into the equality notion beyond what was permissible under art. 16(4), it would mean that "ideals of supremacy of merit, the efficiency of services and the absence of discrimination in sphere of public employment would be the obvious casualties". (p. 512).

Beg and Gupta JJ's views on this aspect, were more or less similar.

In a nutshell, in the opinion of these three judges, the aim of article 16(1) is to safeguard the claims of merit and efficiency. It could not, by itself, have been intended to remove socio-economic inequalities.

Proportion laid down.—Even if the State does not adopt the policy of reservation in favour of backward classes so as to clearly come within the purview of article 16(4), but adopts a scheme which gives some preference to scheduled castes and tribes the court may uphold it under the rubric "reasonable classification" under article 16(1) and (2). However, this preference may not be given to an unlimited extent; the state can give preference to these classes consistent with the "needs of efficiency of administration." Thus the two considerations in giving preference to backward classes are (1) their under-representation is the services, and (2) this preference should not be 'undue'. In other words reasonable relaxation of rules in their favour is permissible and not 'undue' relaxation.

Kesava v. State of Mysore

AIR 1956 Mys. 20

Facts

The petitioner filed an application under art. 226 of the Constitution for issue of a writ of *mandamus*, *certiorari* and *quo warranto* against twelve respondents, consisting of the State, the Commission who held the examination under Mysore Munsiffs (Recruitment and Promotions) Rules 1954; and ten persons appointed to the ten posts of Munsiffs. His grievance was that in the competitive examination the first ten persons should have been appointed as Munsiffs. Instead, the appointments had been made on communal basis in the absence of reservation as contemplated under art. 16 (4). He urged that in the absence of such reservation the appointments of various candidates other than respondents 3, 4 and 5 must be declared to be invalid. The government had specified all communities other than the Brahmin community as the backward community.

Issue

Whether the contention of the petitioner that appointments were invalid as offending art. 16 (4) of the Constitution was tenable

Judgment

The Mysore High Court (Padmanabhiah and Hombe Gowda JJ) held that the appointments did not infringe art. 16 (4). However, separate judgments were given, though the conclusions arrived at were the same. Padmanabhiah J. held that the Order of the Mysore Government dated 16-5-1921 which classified all communities other than Brahmins as 'Backward communities' was not repugnant to art. 16 (4) of the Constitution.

He referred to Venkataramana v. State of Madras, AIR 1951 SC 229 where the reservation had not been made by any legislative provision, yet the appointments had been held valid. He was therefore of the view that it could not be said that the word 'provision' in art. 16 (4) meant a "legislative provision" and not a provision made by the executive government.

It was further held that art. 16 (4) was an enabling provision and that it was not obligatory for the State to make provision for reservation.

In his opinion art. 16(4) was an exception to art. 16(1). The word 'reservation' in art. 16(4) signified that it could be a small portion of the main. It pointed out that each backward class of citizens was an independent class for purposes of appointment under art. 16(4). In such cases, the reservation for each such class must be considered as one out of ten, which was but a small fraction of the total appointments. He, therefore, concluded :

> "For ten appointments to be filled up, if there are candidates belonging to ten backward classes of citizens who, in the opinion of the State are inadequately represented in the service, it will not be wrong for the State to allot all the appointments to the ten communities coming under the heading backward classes of citizens. A member belonging to a class which is well-represented in a particular service cannot have, and should not have, any grievance as against such appointments."

The petition was accordingly dismissed.

A separate judgment was delivered by Hombe Gowda, J. who while agreeing with his decision that the petition should be dismissed, added some further grounds in support of the conclusions arrived at by Padmanabhiah J.

Of particular relevance was his observation that the term "Backward class" had not been defined anywhere in the Constitution. In his view it was wide enough to include all kinds of backwardness, social, educational, economical or any other kind. The State was doubtless the sole authority to classify the communities as "backward classes".

Comments

This is an old case and its holding that all communities other than the Brahmins could be regarded as 'backward' is of doubtful validity.

K. N. Chandra Lekhara & others v. *State of Mysore and others*

AIR 1963 Mys. 293

Facts

The State Public Service Commission conducted a competitive examination for the posts of Munsiff in the Judicial Service of the State of Mysore. The results were announced by a notification, and the names listed in order of merit. Out of 229 candidates only 52 succeeded. The petitioners, who were not successful in the examination, challenged the notification as having been made without lawful authority.

The examination had been conducted under the Mysore Munsiffs Recruitment Rules, 1958 framed by the Governor of the State under Article 234 and the proviso to Article 309 of the Constitution. Under Rule 12 the impugned notification had been published by the Commission. Prior to that, a decision taken by it, fixed the qualifying marks for success as 45% for candidates belonging to scheduled castes and scheduled tribes and 55% for the others.

Issue

(1) Whether the Governor can delegate the power to the P.S.C. for prescribing qualifying marks.

(2) Whether the prescribing of two sets of qualifying marks, one for scheduled castes and the other for others is legal and amounts to reservation within article 16(4).

Judgment

The matter came up for hearing before A. R. Somnath Iyer and Mir Iqbal Hussain, JJ.

Somnath Iyer, J. delivering the judgment of the court, held that from the language of rules 6 and 12 of the Mysore Munsiffs Recruitment Rules it was not possible to deduce that the Governor could delegate to the P.S.C. his authority to prescribe qualifying marks.

By way of *obiter* the court expressed its opinion on the second issue. It pointed out that the fixing of two sets of qualifying marks by the P.S.C. was illegal and not authorised either by the proviso to rule 12 of the Rules or article 16(4). Under art. 16(4) the reservation could be made only "by the State and not by the Governor enacting rules either under the proviso to Article 309 or under Article 234". Prescribing a smaller percentage of marks for success in a competitive examination, did not amount to "reservation in any sense of the term under Article 16(4)". Even the State had no power to make such reservation.

The Court did not consider it necessary to express any definite opinion on this question, since the commission was not in the first place competent to fix the qualifying marks.

The Court therefore concluded that the list was not valid.

Sudama Prashad v. Divl. Supdt. W. Rly. Kota and others

AIR 1965 Raj. 109

Facts

A writ petition under article 226 was filed by Sudama Prashad, who was officiating in the Western Railway as Chief Clerk, against an order reverting him to the lower rank :

The railway authorities had drawn up a panel approved for promotion, where the petitioner was assigned No. 1 position, and Shankar Lal, Respondent No. 3, who was holding an equivalent position as Head Clerk was placed at No. 2. Two higher posts of Chief Clerk fell vacant, one temporarily and the other permanent. Both the petitioner and Respondent No. 3 were promoted to officiate against the termporary and permanent vacancy respectively. Some months' later the petitioner was assigned to the post of Respondent No. 3 as he was senior, while respondent No. 3 was reverted to his post as Head Clerk. Long after his reversion, respondent No. 3 obtained a certificate, testifying that he belonged to Scheduled Castes and made a representation to the railway authorities that he was entitled to be appointed to the post of Chief Clerk in reference to the petitioner, who did not belong to the Scheduled Caste, according to the roster for reservation for scheduled castes. Thereupon an order was issued reverting the petitioner as Head Clerk and appointing respondent No. 3 in his place.

On behalf of the petitioner it was contended :

(1) Since there was only one vacancy and he was working against it, it could not be treated as reserved in accordance with the pronouncement of the Supreme Court in *Devadasan*.

(2) His reversion on the grounds mentioned in the impugned order resulted in denying him equal opportunity of employment guaranteed by article 16.

(3) Reliance was placed also on article 311.

The respondents, on the other hand, contended that the impugned orders were passed in pursuance of an administrative policy based on constitutional provisions, giving special treatment to members of scheduled castes. Further, on the date of the common order, there were two vacancies and respondent No. 3 could properly claim reservation in respect of one of them. The order reverting respondent No. 3 was erroneous, and they had corrected it by passing the impugned order which could not violate articles 16 or 311.

Issues

1. Whether articles 16(4) could be utilized for demoting the petitioner who had once been lawfully appointed.

2. Whether the order was illegal as violating article 16(1) and (2).

Judgment

The court comprising D. S. Dave C. J. and Kan Singh J. held :

(1) Article 16(4) could not be utilized for demoting the petitioner, subsequent to his lawful appointment. The court remarked : "It is remarkable that the Respondent No. 3 had never asserted at the time the promotions were made, or even when his reversion was ordered that the authorities knew that he was a member of the Scheduled Caste. The certificate had been obtained by respondent No. 3, sufficiently long time after his reversion. That certificate, to our mind, could not be utilized for the purpose of creating a fresh opportunity for respondent No. 3".

(2) The order was illegal as it violated article 16(1) and 16(2).

Desu Rayudu and another v. *A.P Public Service Commission and another*

AIR 1967 AP 353

Facts

This writ appeal and writ petition involved a common question regarding interpretation of art. 16(4) and art. 15(4) of the Constitution. The writ appeal was made from the order of Gopalakrishnan Nair J. by which the writ petition was dismissed *in limine*.

The Andhra Pradesh Public Service Commission had by order dated 29-10-1964 invited applications for competitive examinations for direct recruitment to posts in Group I. The two petitioners in the writ appeal filed an application for issue of a writ of *mandamus* for declaring that notification *ultra vires* and issue of a direction to restrain them from conducting the examination. The grievance of the petitioners, who both belonged to members of backward classes, was that their caste was approved in a list of backward classes which had been in vogue till 1-4-1964, but that list had been cancelled by respondent No. 2, and the rules amended by G.O. Nos. 913 dated 11-8-1964. The ground for cancellation by the state was that it was based solely on caste. As a result, the petitioners were not eligible for the examination.

Issue

What was the criterion for determining backward classes under article 16(4) ?

Judgment

The Court comprising Basi Reddy and Gopal Rao Ekbote JJ. considered the meaning of and criteria for the term "backward classes" in art. 16(4). Relying upon Rangachari v. General Manager, AIR 1961 Mad. 35 ; and Devadasan v. Union of India, AIR 1964 SC 179, the court pointed out that art. 366(24) and (25) defined the Scheduled Castes and Tribes respectively, and the Constitution itself recognised that irrespective of whether they consisted merely of scheduled castes or not, the Scheduled Castes were to be regarded as backward classes. Hence, special mention was made of them in art. 15(4). The absence of the term Scheduled Castes in art. 16(4) did not make any difference because the term 'backward classes' used therein would naturally include scheduled castes and Scheduled Tribes.

As regards the criteria for determining backward classes, the court was of the view that art. 340 left it to a commission to recommend it for determination by the President. However, the President had not decided the list of other backward classes, nor had the Government of India or any State yet determined the criteria. It was well settled though, that caste merely could not be the criterion. The term 'backward classes' was not confined to Hindu backward classes, nor did it mean castes amongst Hindus only. It relied upon Balaji v. Mysore, AIR 1963 SC 649 and Chitralekha v. State of Mysore, where it had been laid down that caste alone could not be the sole basis for determining criteria of backwardness under art. 15(4). It referred to an explained Venkataraman v. State of Madras, where the communal G.O. had been struck down as outside the limits of art. 16(4) and infringement of art. 16(1) and (2).

An argument advanced on behalf of the petitioners, that castes could not be the sole basis for determining backward classes was good for art. 15 but not for art. 16, was rejected by the court. It held that the term "backward classes" in art. 16(4) could not be "decided exclusively or predominantly on the basis of caste" and referred to two decisions of the Supreme Court to support this conclusion *viz.*, General Manager Southern Rly. v. Rangachari, AIR 1962 SC 36 and Devadasan v. Union of India, AIR 1964 SC 179. To invoke art. 16(4) two conditions were required : (a) a backward class of citizens (b) their inadequate representation in the State services. Reservation could be made only on compliance of these conditions. The above cases decided that excessive reservation would be bad in law, as infringing the main clauses of art. 16. On the same analogy, if castes were the sole criterion, then other castes would be denied what is guaranteed to them under the main clauses of art. 16. Hence, while it could be one of several factors to determine criteria of backwardness under art. 16(4) it could not form the sole or predominant basis. There was no difference in this respect between art. 15(4) and art. 16(4). The absence of some words in art. 16(4) hardly made any difference.

It was pointed out that the economic consideration which had been accepted as a basis for extending facilities under art. 15(4) would perhaps not fully apply to art. 16(4), while other useful criteria might have to be found for art. 16(4), but it did not mean that list of backward classes could be prepared solely or predominantly on the basis of caste. However, keeping in view, art. 335, the criteria which might be found ultimately for art. 16(4) would have to take into account consideration of efficiency of administration. It was not for the court to lay down even broadly the basis for determining the criteria for purposes of art. 16(4). However, it was clear that caste could not be the sole or predominant consideration.

The court was of the opinion that the list of backward classes which was in vogue till 1-4-1964 was exclusively based on caste and as such was had for purposes of both art. 15(4) and 16(4). As such the State Government was justified in cancelling it.

The court, therefore, dismissed the writ appeal , the writ petition.

Hariharan Pillai v. State

AIR 1968 Ker., 42

Facts

The petitioner applied for the post of Munsiff when such post was advertised by the Public Service Commission on instructions from the State Government. A written examination, interview of suitable candidates and observation of the "rule of rotation" prescribed in rules 14—17 of the General Rules under Part II of the Kerala State and Subordinate Services Rules, 1958 were mentioned. On the results being published, out of 195 names, the petitioner's rank was listed as 24 and the rank of respondents 3—12 ranged between 26 and 72. The Commission advised the name of 31 candidates by applying the "rule of rotation". The petitioner, who was not included, alleged he had been discriminated against and respondents 3—12 selected only on the ground of religion or caste. The State in reply asserted that he did not get a chance of employment as it felt that reservations should be made in favour of backward classes under article 16(4).

The basis for reservation was caste and the following castes were classified as backward :

(1) Ezhuvas and Thiyyas

(2) Muslims

(3) Latin Catholics, S.I.U.C. and Anglo-Indians

(4) Backward Christians (Other Christians)

(5) Other Backward Classes put together, *i.e.*, Communities other than those mentioned in item 1 to 4 above included in the list of "Other Backward Classes."

Issue

The issue was whether the Caste could be the criterion of backwardness. In other words, whether the backward classes could be delineated with reference to religion and/or caste.

Judgment

The majority (2 : 1) upheld the classification. The court pointed out that determining backward classes was a complex matter and required laborious investigation into economic, social and other data. On the basis of counter affidavit filed by the State, the majority upheld the classification even though the data on which the classification was based was more than two to three decades old. Though the court agreed that caste cannot be the sole criterion, yet where the classification is made on the basis of caste because of backwardness, by and large, of the members of that caste, the dominant criterion is not caste but backwardness. However, the court made the following suggestions :

(1) The relevant data must be collected periodically.

(2) That the State should take a fresh detailed survey as soon as possible.

(3) That there may be a possibility of some sections in the caste classified by the State as backward not being backward ; and there may also be a possibility that there may be backward people in other communities not classified as backward by the State.

The dissenting judge was of the view that the classification made by the State was without an intelligible appraisal of the situation and a proper application of the mind. He pointed out that the opinions formed by the State nearly two decades or more back could not be a proper basis for classification. He was also of the view that even if a substantial portion of a caste was backward that caste could not be classified as backward, in view of the fact that some people belonging to that caste may not be backward. "The assessment of educational backwardness seems to have proceeded on a test, by no means adequate, on data meagre, and not upto-date ; and the result of application of the test to the meagre data, is unsatisfactory."

Comment

The manority opinion is not satisfactory and the majority itself points out the limitations and the deficiencies of the classification by the State. The court merely went by the obsolete data in determining backwardness which is not correct.

Mangal Singh v. *Punjab State*

A.I.R. 1968 Punj. 306

Facts

The appellant Mangal Singh appealed under clause 10 of the Letter Patent from the Order of a Single Judge. He challenged the Punjab Government notification of 1966 by rule 15 of which the Government sought to relax the Punjab Civil Secretariat (State Service, Class III) Rules (1952) as regards rule of seniority.

Issue

Whether the State could make provision under an executive order in favour of backward classes under art. 16(4).

Judgment

The court comprising Mahar Singh C. J. and R. S. Narula J. held that such an executive order was valid and legislation was not necessary.

The court following *Hira Lal* v. *Chief Conservator of Forests, Punjab* (Civil Writ No. 271 of 1966, D/ 29-11-1966 Punjab) rejected the contention of the appellant that by an executive order or instruction, the Rules of 1952 could not be amended. It also relied on Balaji where it has been laid down that the argument that provision under article 15(4) could be made by the State only by legislation had to be repelled. In this respect article 16(4) stood in the same position as article 15(4).

The court therefore rejected the appeal.

R. N. Pramanick v. *Union of India*

AIR 1969 Cal. 576

Facts

The petitioner, a member of the Scheduled Caste, was appointed and confirmed as a typist against the quota reserved for Scheduled Castes. His grievance was that though in the Seniority List prepared by the Respondent Eastern Rly. in 1961 he was given the 75th place (on the basis of his seniority which arose out of his earlier confirmation on account of he being a member of the Scheduled Caste), its subsequent revision by the impugned order in 1963, gave the petitioner the serial number 194-A (on the basis of merit). Consequently, the petitioner alleged he lost a chance of being promoted to the next higher scale, which he would have had, if his original 75th position had been retained. The government had decided that "there would be no reservation for Scheduled Castes for promotion to the next grade and that seniority for such promotion will be computed not from the respective dates of confirmation, but according to the seniority position on merit".

Issue

Whether in a case for promotion to a higher grade, where the original recruitment is against reservation of seats for Scheduled Caste candidates, merit alone can be considered.

Judgment

D. Basu, J. following *Rangachari* and *Devadasan* held that the Constitution had not been violated. He observed :

> "The special provision in Article 16(4) must be read with the provision in Article 335, so that no reservation or special provision in favour of members of the Scheduled Castes can be carried to the length of impairing the 'efficiency of the administration'. The Respondents have not, therefore, violated the Constitution in providing that merit shall be the only consideration for promotion to the higher grade even though there was reservation for Scheduled Castes for recruitment to the lower posts."

M. Natarajan v. The Director General of Posts and Telegraphs, New Delhi and another

A.I.R. 1970 Mad. 459

Facts

This was the result of two writ petitions filed by the petitioner. Since 1953 he had joined the railway mail service, Madras Circle, of the Posts and Telegraphs Department as Sorter and was still continuing as such. The Posts and Telegraphs Department had four arms of service, of which the Postal arm and the RMS arm were two such. The RMS had a cadre of posts called Inspectors of RMS while the postal arm had a corresponding cadre called Inspector of Post Offices. These posts were filled up by promotion on the basis of a departmental competitive examination from candidates belonging to respective arms of service. In making the selection, some reservations were made for Scheduled Castes and Scheduled Tribes. In the departmental competitive examination held in December 1965 for the posts of inspectors, RMS in the Madras Circle, the petitioner was one of the candidates. In his branch, the vacancies were only 3 while the other branch had 29 vacancies. Out of the total of 32 posts in both branches combined, four vacancies were reserved for Scheduled Castes. For making this reservation the two branches of services were treated as one unit by respondent No. 1. As a result, the candidate standing first from the RMS section was the only one to be selected from the other communities. For the remaining two posts, Scheduled caste candidates were selected. The petitioner who stood second from the other communities was thus excluded. Hence, he filed these two writ petitions for certiorari and mandamus to quash the selection of the second respondent and to direct Respondent No. 1 to select him instead.

Issue

Whether the clubbing together of two branches of service for the sole purpose of selected Scheduled Caste candidates was illegal and violated article 16(4).

Judgment

Sadasivam J., relying upon *Balaji* and *Devadasan* held it to be illegal. He pointed out that in *Balaji* it had been laid down that while making adequate reservation under Article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation, since such a course by eliminating general competition in a large field and creating widespread dissatisfaction among employees, would affect efficiency. In Devadasan it was pointed out that reservation should not be so excessive as to practically deny a reasonable opportunity to other members in employment matters. Reservation of over 50% was held violative of article 16(4).

In the instant case, the two cadres of Inspectors were distinct ones. An administrative circular or order clubbing them as a single unit so as to select Scheduled Caste candidate was bound not only to cause hardship but also infringe the fundamental rights of persons belonging to one or the other section. Since 2 out of 3 posts had been allotted to Scheduled Caste candidates it amounted to 66⅔% of the posts. Reservation of over 50% would be unreasonable and violative of article 16(4) as made clear by Devadasan. He, therefore, concluded :

> "There can be no doubt that fundamental rights of the petitioner for equal opportunity have been violated in this case".

The writ petitions were accordingly allowed.

The Director General of Posts and Telegraphs v. *N. Natarajan and another*

(1971) 2 Mad. L. J. 79 from A.I.R. 1970 Mad. 458

Facts

Against a common order of Sadasivam J., who had allowed the respondents' petition, these appeals were made. He had held that grouping in the circumstances, which had resulted in excessive representation to the Scheduled Castes in the Railway Mail Service cadre was illegal.

The court (K. Veeraswami, C. J., and P. R. Gokulkrishnan, J.) agreeing with the decision of Sadasivam J., dismissed the appeal. It held that while the Union Government was entitled to group cadres of service in order to give to the Scheduled Castes due representation, as provided in Art. 16(4), this was subject to the limitation that such representation should not be excessive, as it would be unreasonable.

To arrive at this conclusion the court relied on *M. R. Balaji* v. *State of Mysore* and *Devadasan* v. *Union of India* where the Supreme Court had held that reservation exceeding 50 per cent of the vacancies to be filled at any time was bad.

G. N. Gudigar v. State of Mysore and others

(1972) 2 Mys. L.J. 202

Facts

For recruitment to the posts of Health Officers Class II-cum-Assistant Surgeons Grade II and Assistant Dental Surgeons made under the Mysore State Civil Service (Direct Recruitment by Selection) Rules, 1967, reservations in accordance with Notification G.O. No. GAD 177 SSR 62, dt. 16-9-1963 were made in favour of backward classes. The criteria of backwardness were income and occupation. The notification provided that a person is backward if he falls in following categories : The income of the parent and guardian was below Rs. 1200 per annum, and the parent/guardian was engaged in any of the following occupations : (a) actual cultivator ; (b) artisan ; (c) petty businessman ; (d) inferior services (class IV in government services and corresponding class of any service in private employment) including casual labour ; and (e) any other occupation involving manual labour

Issue

Whether the criteria applied *i.e.* for determining backward classes under the Notification of 1963 were unconstitutional and violated Art. 15(4) and Art. 16(4).

Judgment

The Mysore High Court (Narayana Pai, C. J. and Malimath, J.) held that the criteria applied, poverty and nature of occupation were relevant for determining backward classes, and as such were not unconstitutional.

The court pointed out that the mere fact that in the 16-9-1963 Notification for purpose of classification of backward classes under Art. 16(4) the criterion of income was limited to that of parent or guardian alone, whereas in the previous Notification dated 26-7-1963 for a similar purpose under Art. 15(4) it was related to income of the entire family, would not render the impugned Notification invalid.

The court referred to Triloki Nath's case (AIR 1967) which had laid down the test for backward classes as being socially and educationally backward in the sense explained in *Balaji's* case. The court was of the view that this simply meant that such social and educational backwardness could be ultimately traceable to poverty and nature of occupation as explained in Balaji's case. It was observed :

> "There is no prohibition against applying different figures of income or larger or smaller number of occupations provided the former has relation to poverty and the latter has relation to a tendency for backwardness."

(Sm.) Parvatnalini Mallik v. State of Orissa and Others

ILR (1972) Cut. 1372

Facts

The petitioner, applied for relief under Arts. 226 and 227 of the Constitution. The Orissa Public Service Commission had on the request of the State Government in the year 1969-70 issued an advertisement calling for application for 18 posts of Lecturers in Political Science. 16 per cent posts were reserved for Scheduled Castes and 24 per cent for Scheduled Tribes subject to the condition that they satisfied "a minimum standard of suitability". Certain minimum qualifications were prescribed for a person to be eligible to apply for the post. The petitioner who belonged to one of the Scheduled Castes was not selected for appointment, though she fulfilled the eligibility requirement, on the ground that she was not found "suitable" by the Commission after interview. In view of the non-availability of "suitable" candidates the reserved posts except one were filled up from the non-reserved category of 'suitable candidates'.

Issue

Whether the petitioner, who possessed the minimum academic qualification was entitled to be appointed to the post irrespective of the fact that the Commission, after interviewing her, found her not suitable.

Judgment

The court (S. K. Ray, Actg. C. J. and B. K. Patra, J.) decided the issue in the negative and held that she was entitled to be appointed only if selected by the Public Service Commission.

To arrive at this conclusion the court followed T. Devadasan v. Union of India and General Manager, S. E. Railway v. Rangachari. This it was observed that Art. 16(4) had to be interpreted in the context of Art. 335 of the Constitution. (See Rangachari). Further, it was pointed out that clause 4 of Art. 16 was in the nature of an exception to clause 1, and reservation under that clause could not be said to have violated Art. 14.

Art. 16(4) permitted the State to reserve a reasonable percentage of posts for members of Scheduled Castes and Tribes. What the percentage ought to be would depend upon circumstances obtaining from time to time (See Devadasan). However, in the present case there was no complaint about the percentage of reservation.

It was also pointed out that the language of Art 16(4) showed clearly that there was no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Tribes. It was left to their discreation and if in exercise of it, they made such reservation subject to the satisfaction of a minimum standard of suitability, its validity could not be questioned.

The petition was therefore dismissed.

Ch. Rajaiah and others v. *The State of Andhra Pradesh*

ILR (1973) A.P. 516

Facts

The petitioners six in number, who were temporary class IV employees in the Collectorate, Warrangal, sought a writ under Article 226 to direct the respondents to forbear from implementing G.O.Ms. No. 686 which stated that whenever retrenchment was to be effected, senior temporary employees, probationers and even approved probationers who did not belong to scheduled castes and scheduled tribes must face retrenchment before junior-most employees belonging to Scheduled Caste and Scheduled Tribe, if the total representation of the last mentioned fell below a certain percentage. The petitioners who did not belong to Scheduled Castes and Tribes thus faced retrenchment though they were much senior to temporary employees in the same category belonging to Scheduled Castes and Tribes.

Issue -

1. Whether the G.O. was illegal and void, as being violative of Article 16(1) and (2) of Constitution.

2. Whether retrenchment from employment was a matter which fell under the axe of Art. 16(4)

Judgment

Chinnappa Reddy J., applying *General Manager Southern Railway* v. *Rangachari*, held the G.O. to be violative of Article 16(1) and (2). The court considered the question whether the rule could be justified under Article 16(4) of the Constitution. *Rangachari* had held that the power of reservation conferred on the State under Article 16(4) could be exercised by providing for reservation of appointments and also for reservation of selection posts. However, it was recognised that Article 16(4) did not cover the entire field covered by Article 16(1) and (2). Some matters relating to employment such as condition of service like salary, increment, gratuity pension, age of superannuation, wherein equality was guaranteed by Articles 16(1) and (2) did not fall within Article 16(4).

On behalf of the petitioners it was contended that retrenchment from employment did not fall within Article 16(4). The question, however, was left open though Reddy J. proceeded on the assumption that Article 16(4) could be exercised even while considering retrenchment.

Considering the scope of reservation under Article 16(4) the interpretation given by the Supreme Court in *General Manager, Southern Railway* v. *Rangachari*; *Devadasan* v. *Union of India*; and *Balaji* versus *State of Mysore* on this aspect was noted. In these cases excessive reservation for backward classes which disturbed the legitimate claims of other communities had been held to be violative of Article 16(1). The court mentioned that there should be a reasonable balance between the claims of the backward classes and the claims of other employees. Each year of recruitment should be considered by itself and "the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities".

The court, therefore, holding the G.O.Ms. to be illegal and void allowed the writ petition.

K. S. Nair v. Oil & Natural Gas Commission and others

1974 Guj. L. R. 7

Facts

The petitioner who was a temporary Chief Storekeeper challenged in the first petition the validity of the action taken by Resp. 1, the Oil and Nautral Gas Commission, by which it refixed his seniority and that of Resp. Nos. 2 and 3 so as to treat these backward class respondents as senior to him. The second petition challenged the interview given by the Commission to Resp. 4, Gyansingh, for the post of Executive Engineer, on the ground of his belonging to the backward classes, while the third challenged his confirmation and preferential treatment by the Commission.

Issue

Whether the impugned circular dated May 26, 1970 could be read as a duly promulgated order of reservation within Art. 16(4).

Judgment

The court (J. B. Mehta and S. H. Sheth JJ.) held that the impugned circular could not be so read and, therefore, allowed the three petitions.

Reference was made to *Triloki Nath*, AIR 1969 SC 1 where it was laid down that reservation under Art. 16(4) need not be by statutory enactment. It could be made by executive order or direction. However, it is necessary that such an order or direction should be published. ". . . . . when employees' rights are to be prejudiced and a prejudicial treatment to be supported by such an exceptional order under Art. 16(4), it is obvious that it cannot be by a mere executive instruction on the office file". An order under Art. 16(4) by its very nature must be published so as to bring it to the notice of all the employees concerned.

Urmila Ginda v. Union of India

A.I.R. 1975 Del. 115

Facts

The petitioner who belonged to a high caste family (Malhotras of Punjab) filed this writ petition. Claiming that by her marriage to Flt. Lt. C. D. Ginda (who belonged to the Scheduled Caste) she was also entitled to be treated as Scheduled Caste candidate in respect of a public office which was reserved for backward communities, Scheduled Castes and Tribes. She applied for the post of Senior Russian-to-English translator in the Ministry of Defence. However, she was selected for Junior Russian English Translator. She was placed at Sr. No. 2. Sr. No. 1 had been appointed on the ground that the post was reserved for a Scheduled Caste candidate, and being a member of the higher caste herself, she could not be considered merely on the ground of her marriage with a Scheduled Caste person.

Issue

Whether by marriage to a Scheduled Caste husband, a high caste lady can claim to be treated as Scheduled Caste candidate in respect of a public office reserved for backward communities under Article 16(4).

Judgment

The Court speaking through S. Rangarajan J. held that she could not claim the post. He pointed out if it was permitted for a lady like the petitioner, who belonged to a higher caste "to compete for a seat reserved for such socially and educationally backward class of people, merely by reason of her marrying a person belonging to such a caste", it might result in even defeating the provision made by the State in favour of such classes by reserving certain posts for them.

The petition was accordingly dismissed.

Haripada Ray v. *Union of India and others*

(1975) 79 CWN 834

Facts

The petitioner brought this appeal against an order made by M. M. Dutt J. in 1974 by which he had discharged a Rule. The petitioner had by this rule challenged an order made by his employer, the Commissioners for the Port of Calcutta, who promoted Respondent Nos. 4 to 30 from Assistant Medical Officers to Senior Assistant Medical Officers. It was claimed by the petitioner that he being a member of a Scheduled Caste was entitled to the benefit of reservation of appointments and posts in the service of respondent No. 2 on account of a resolution made in 1958.

Issue

1. Whether under Art. 16(4) reservation of posts for backward classes can be made at the initial stage of appointment or for posts to be filled by promotion.

2. Whether resolution of authority reserving certain percentage of posts for scheduled castes and scheduled tribes "in all their services" contemplated reservation in posts to be filled by promotion.

Judgment

The Calcutta High Court comprising S. K. Mukherjea and Sudhamay Basu JJ. held :

1. The use of the words "appointments or posts" in article 16(4) clearly indicated that the article contemplated not merely initial appointments but also offices or posts which were to be filled up by promotion.

2. The word "in all their services" used in the resolution passed by the authorities of the Port of Calcutta reserving a certain percentage of vacancies for Scheduled Castes and Scheduled Tribe candidates should be equated with "all appointments or posts" as contemplated by art. (16(4). As such it would include not only initial appointment but also filling up by promotion of any post.

To arrive at this conclusion the court relied on *General Manager, Southern Rly.* v. *Rangachari*. The Supreme Court, in that case had laid down that "the power of reservation which is conferred on the State under Art. 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts". The court, therefore, allowed the appeal.

J. C. Malik and Others v. *Union of India and others*

1978 (1) SLR 844

Facts

A petition was filed under Art. 226. The petitioners No. 1 to 6, who were holding the posts of Grade B and Grade C Guards in the service of the Northern Railway, challenged the appointment to the posts in Grade A Guards of respondent Nos. 4 to 8 who were C Grade Gaurds and were junior to petitioners. The petitioners claimed relief for quashing the selection of these respondents. The Railway Board had fixed 15% reservation for Class III and IV employees. The petitioners claimed that as the Board sought to apply 15% reservation to vacancies occurring due to retirement or resignation etc., it resulted in excessive reservation in favour of Scheduled Castes and Tribes.

Issue

1. Whether the percentage of reservation made under article 16(4) relates to the vacancy or to the total posts.

2. Whether the reservation was excessive and violated article 16(1).

Judgment

The court (K. N. Singh and S. D. Agarwala JJ.) upheld the contention of the petitioners that the percentage of reservation related to the vacancy and not to the posts. It was pointed out by K. N. Singh J., delivering the judgment, that acceptance of the contention of the respondents to the contrary would result in discrimination against those employees not belonging to the Scheduled Castes. In the instant case, there were a total number of 37 posts of A Grade Guards. If 15% of the vacancies occurring in a particular year were filled by promotion of scheduled caste candidates, after some time it would result in the percentage of scheduled caste candidates in that grade to reach upto 66%, which would be detrimental to others who might be senior or meritorius but could not be promoted due to the reservation in favour of Scheduled Castes. The Court further pointed out that the 1970 circular gave to scheduled class employees belonging to lowest category of C Grade Guards an edge over B Grade Guards, who were undeniably senior to them. The chart drawn up by the petitioners displaying the vacancies available upto 1984 on account of retirement of A Grade Guards indicated that the quota of 15% against the available vacancies would result in the Scheduled Castes having 56% of the posts of A Grade Guards. The court applying the law as laid down in *Devadasan* held that this would violate art. 16(1). Art. 16(4) was an exception to art. 16(1). However, the power conferred under cl. (4) could not be exercised in a manner which would make the reservation excessive, so that it denies to members of other communities, a reasonable opportunity of employment.

The court, therefore, allowed the petition.

Chhotey Lal and others v. *State of Uttar Pradesh*

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Facts

This was a petition under art. 226 to challenge the reservation of posts in the State Judicial Service for Backward Classes, dependants of freedom-fighters, ex-detenus under MISA and DISIR and their dependants.

The petitioners who were advocates had appeared at the State Judicial Service Examination which had been held in April 1978 to fill 150 temporary posts. Of the total posts, 27 were reserved for Scheduled Castes, 3 for Scheduled Tribes, 8 for dependants of freedom-fighters, 12 for disabled officers of Military services, and 23 for backward classes.

Of relevance here in the petitioner's attach on reservation for so-called "backward classes".

An order of the U.P. government enumerated the "backward classes" as comprising Ahirs, Kurmis, and some other castes. The petitioners alleged that many belonging to these castes were not economically and socially backward. Many were doing well, some were highly educated and occupying high offices, while others were in professions such as lawyers, doctors, etc. Hence, the entire castes mentioned in G.O. could not be termed 'backward class' within the scope of art. 16(4). Therefore, there was no rational basis for creating reservation for them.

Issues

1. What was the scope and extent of the expression "Backward Classes of Citizens". What were the tests to determine whether a group of people constituted a 'backward class of citizens'?

2. Whether the U.P. Government had correctly determined as to who should be included in the 'Backward classes'? If not whether the G.O.S. issued in 1955, 1958 and 1977 were a fraud on the constitutional powers conferred on the State by art. 16(4) construed in the light of art. 15(4) and, therefore, void.

Judgment

The Court (T. S. Misra and K. N. Goyal, JJ.) held that reservation for backward classes under these government orders was void.

The court was of the view that for recruitment to state services, three basic principles as emerged from D. N. Chanchala v. State of Mysore AIR 1971 SC 1762 were involved, namely, (i) the State has power to lay down classifications or categories of persons from whom recruitment to the public service may be made; (ii) the principle underlying arts. 15(4) and 16(4) was that a preferential treatment could validly be given because it was needed by the socially and educationally backward classes so that in the course of time they could stand in an equal position with the more advanced sections and (iii) this principle could be applied to those who were handicapped but not to those who fell under art. 15(4).

On the basis of these principles reservations for children of Defence and ex-Defence personnel could validly be made. The extension of these principles in the G.O. to ex-detenus under MISA and DISIR and their dependants could be considered permissible. However, in so far as the G.O. provided for reservation of seats for "backward classes", on the basis of caste alone, without any investigation having been made as to the 'backwardness' of the various castes, it could not be sustained under art. 15(4) and art. 16(4).

As regards the scope and extent of the expression "Backward Classes of Citizens", which occurred in arts. 15(4) and 16(4) the court considered the relevant constitutional provisions and case-law on the subject. Art. 366(24) and (25) defined Scheduled Castes and Scheduled Tribes respectively but there was no clause defining 'backward class of citizens". In fact, art. 15(4) which made special provision for backward classes treated them as being similar to Scheduled Castes and Scheduled Tribes. It was thought that provision should be made for some other classes of citizens who were equally or somewhat less backward than these Scheduled Castes and Tribes. Such was the purpose of art. 15(4) and art. 16(4) of the Constitution.

However, the extent of the reservations under art. 15(4) or 16(4) could not be excessive. The Supreme Court in *Devadasan* approved "below 50%" reservation in favour of backward classes, in the identification of which, caste could be one but not the sole criterion. The court also referred to observations made by the Supreme Court in *Balaji*'s case, where 68 per cent reservation had been struck down. The court observed that the Solicitor General, appearing for the State of U.P. conceded that the aggregate reservation for all categories had to be less than 50%.

The executive action making such reservation should not transgress the authority conferred on it by the Constitution whether implicitly or explicitly, or it would be struck down as a fraud on the relevant constitutional power as laid down in M. R. Balaji.

After reviewing the case-law the court summed up the law regarding determination of "backward classes" as follows :—

"(i) the bracketing of socially and educationally backward classes with the Scheduled Castes and Tribes in Art. 15(4), and the provision in Article 338(3) that the reference to Scheduled Castes and Tribes were to be construed as including such backward classes as the President may by order specify on receipt of the report of the Commission appointed under Art. 340(1), showed that in the matter of their backwardness they were comparable to Scheduled Castes and Scheduled Tribes;

(ii) the concept of backward classes is not relative in the sense that any class which was backward in relation to the most advanced class in the community must be included in it;

(iii) the backwardness must be both social and educational and not either social or educational;

(iv) Article 14(4) refers to 'Backward classes' and not backward castes'; indeed the test of caste would break down as regards several communities which have no caste;

(v) caste is a relevant factor in determining social backwardness but is not the sole or dominant test ;

(vi) social backwardness is in the ultimate analysis the result of poverty to a very large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens;

(vii) a classification based only on caste without regard to other relevant factors is not permissible under Art. 15(4); some castes are, however, as a whole socially and educationally backward;

(viii) the occupations followed by certain classes (which are looked upon as inferior) may contribute to social backwardness; and so may be habitation of people, for, in a sense, the problem of social backwardness is the problem of rural India;

(ix) the division of backward classes into backward and most backward classes is in substance a division of the population into the most advanced and the rest, the rest being divided into backward and most backward classes and this is not warranted by Art. 15(4).

(x) Art. 16(4) does not confer any right on a person to require that a reservation should be made. It confers a discretionary power on the State to make such a reservation if in its opinion a backward class of citizens is not adequately represented in the services of the State. Mere inadequacy of representation of a caste or class in the services is, however, not sufficient to attract Art. 16(4) unless that class (including a caste as whole) is also socially and educationally backward;

(xi) the object of reservation would be defeated if on the inclusion of a class in a list of backward classes, the class is treated as backward for all times to come. Hence the State should keep under constant periodical review the list of Backward Classes and the quantum of the reservation of seats for the classes determined to be backward at a point of time;

(xii) the aggregate reservation of posts for various categories (including backward classes) should be less than 50%; and

(xiii) the courts' jurisdiction is limited to deciding whether the tests applied by the State in determining the Backward Class of citizens are valid or not. If the relevant tests have not been applied it is not open to the Court either to modify the list of "backward classes" prepared by the State or to modify the extent of reservation but it must strike down the offending part, leaving it to the State to take a fresh proper decision after applying the correct criteria."

The court examined the question of burden of proof where a challenge to the State's determination of backward classes is made. It referred to the following two Supreme Court decisions. *State of Punjab* v. *Hira Lal*, AIR 1971 SC 1777 where the court held that the burden of establishing that a reservation was offensive to art. 16(1) was on the person making the plea. *State of U.P.* v. *Pradip Tandon*, AIR 1975 SC 563, where the onus of proof was departed ("The onus of proof is on the State to establish that reservations are for socially and educationally backward classes of citizens").

The Court, however, was of the opinion that these conflicting views on onus in *Hira Lal* and *Pradip Tandon* could be reconciled. It pointed out that in cases where proper investigations had not been made by the Government as regards backwardness of a class, the government orders had been struck down as in *Triloki Nath* (AIR 1969 SC 1); Janki Prasad v. State of Jammu and Kashmir (AIR 1973 SC 930); M. R. Balaji (AIR 1963 SC 649) and State of Andhra Pradesh v. P. Sagar, AIR 1968 SC 1379. On the other hand, where the petitioners laid no foundation for the challenge and failed to point out that a class had been wrongly included in the list of backward classes, such challenge was thrown out as in P. Rajendran v. State of Madras (AIR 1968 SC 1012) and State of Punjab v. Hira Lal (AIR 1971 SC 1777). Hence, the burden of proof was mixed one : As held in *Hira Lal* reservation of appointments could not be struck down on hypothetical grounds, but as held in

P. Sagar it was the duty of the government "to demonstrate by evidence and argument before the courts that the guaranteed right is not infringed"

After examining the affidavit of the petitioners and the counter-affidavit of the State and also the materials (such as Chhedi Lal Sethi Commission Report and the Report of the Kaka Kalelkar Commission) referred to therein, the court concluded: "Neither the impugned G.O. nor the counter affidavit filed on behalf of the State reveals that any other survey or data collection on any manner was done by the State Government. Similarly, as regards, the list prepared by the Education Department, it is not mentioned in the counter-affidavit on what basis these castes were found even educationally backward class of citizens at the point of time. No such finding enquiry was alleged to have been made". In sum, the court was of the view that the basis for reaching the conclusion by the State that the enumerated castes were backward was not disclosed. The court also emphasised that though the Supreme Court in several cases has upheld the enumeration of backward classes on the basis of castes, but in all those cases the caste as a whole was socially and educationally backward. "It is only in respect of these castes that the Supreme Court has accepted validity of castes for its being treated as socially and educationally backward for purposes of art 16(4)".

As regards the burden of proof, the court was of the view that the petitioners had discharged their burden by specifically pleading that at least two castes were not economically and socially backward. The State has not come out with any material to refute this. "In the very nature of things, it is not possible for private citizens to make detailed investigation and survey all over the State or to supply the relevant data. It is only with the resources of Government that such data can be collected and supplied to the Court".

PART IV

Analysis of Cases under Article 16(4)

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Analysis of Court Cases under art. 16(4)

I. *What are Backward Classes*

Art. 16(4) uses the term "backward classes" as compared with the words "socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes" used in art. 15(4). This difference in terminology raises two questions: Firstly, whether art. 16(4) covers Scheduled Castes and Scheduled Tribes or not. Secondly, whether the term "backward classes" is to be understood in the same sense as in art. 15(4), *i.e.*, socially and educationally backward classes. It has been held in several cases that the term backward classes under art. 16(4) covers Scheduled Castes and Scheduled Tribes,[1] and also the term is identical with "any socially and educationally backward classes", *i.e.*, there is no difference between art. 15(4) and 16(4) as far as the definition of backward classes goes.[2]

Two other factors which have to be borne in mind in making reservations for the backward classes are that reservations can be made for backward classes which in the opinion of the State are not adequately represented in the services under the State,[3] and that any reservation made in their favour does not materially affect administrative efficiency.[4]

There are only four Supreme Court cases where the validity of classification of backward classes was an issue and those are cluster of cases dealing with reservations made in the State of Jammu and Kashmir. The High Court cases dealing with the definition of backward classes have arisen from the States of Mysore, Kerala, Andhra Pradesh and Uttar Pradesh.

The first Supreme Court case under which the question arose is *Triloki Nath* v. *State of Jammu and Kashmir*.[5] This case arose after the Supreme Court judgments in *Balaji* v. *State of Mysore* and *Chiterlekha* v. *State of Mysore* under art. 15(4), and these two cases have been discussed by us in the section under that article. The facts in 1st *Triloki Nath* were that the Government had adopted the following policy of reservations in the matter of promotion to certain posts, without any formal rule or announcement: (1) 50 per cent for Muslims; (2) 60 per cent of the remaining 50 per cent for Jamvi Hindus; and (3) Remaining 40 per cent of the 50 per cent for Kashmiri Pandits, and sometimes one or two posts for Sikhs out of turn.

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

The matter again came before the Supreme Court in the second *Triloki Nath* case[6] after the High Court had submitted its report. The Supreme Court found that the report of the High Court did not contain any formal order making a provision for reservations or appointments of posts in favour of any backward classes of citizens. From the evidence, the court found that the policy of giving representation to different communities was based only on the fact that they were not adequately represented in the services and also on the policy of giving due provincial representations. This was contrary to art. 16(4) and was invalid under art. 16(1) and (2). The court stated that test based solely on caste, community, race, religion, sex, descent, place of birth or residence cannot be the criterion for backwardness. The expression backward class is not synonymous with backward caste or backward community. The entire caste or community may be declared to be backward but this would not

1 *General Manager, S. Railway* v. *Rangachari*, A.I.R. 1962 S.C. 36; *Dasu Rahulu* v. *A.P. Public Service Commission*, A.I.R. 1967 A.P. 353; *T. Devadasan* v. *Union of India*, A.I.R. 1964 S.C. 179.

2 *Triloki Nath* v. *State of Jammu & Kashmir*, A.I.R. 1967 S.C. 1283; Janki Pd. v. State of J&K, A.I.R. 1973 S.C. 930.

3. *The Rangachari* case, *supra*; the *Triloki Nath* case, ibid

4. *The Rangachari* case, *ibid*; *T. Devadasan* v. *Union of India* A.I.R. 1964 S.C. 179

5. A.I.R. 1967 S.C. 1283

6. *Triloki Nath* v. *State of J & K* A.I.R. 1969 S.C. 1

be because of its characteristic as a caste or community as such, but because it is backward at a given point of time in the social, economic and educational, scale of values. While passing the final order, the court stated that the order made by the court did not prevent the State for devising a proper scheme.

Subsequent to the second *Triloki Nath* case occurred *Makhan Lal* v. *State of Jammu and Kashmir*.[7] This case occurred on the facts of Triloki Nath. *Makhan Lal* is hardly of any significance for the constitutional interpretation. In Triloki Nath, though the court had stated that the State should prepare a scheme of reservation consistent with art. 16, no such scheme had been devised. However, the State adopted an ingenious device by which the State gave ostensible effect to the court's decision in *Triloki Nath*, but really to continue the respondent-teachers, whose promotions had become illegal in view of the decisions in *Triloki Nath*, in the same higher position. As this was violative of sec. 16, the court again struck down these promotions.

Finally, on the facts of the above three cases, there occurred Janki Pd. v. State of Jammu and Kashmir.[8] The state of Jammu and Kashmir, as a result of the decision in *Makhan Lal* v. *State of Jammu and Kashmir*, promulgated the Jammu and Kashmir Scheduled Castes and Backward Classes Reservation Rules, 1970. The petitioners alleged that the old communal representation was still being maintained, and claimed that though some posts had been reserved for backward classes under the rules, yet it was merely an exercise to secure about 90 per cent of the posts to Muslims.

The rules framed by the Government were based on the recommendations of the Backward Classes Committee appointed by the State Government under the chairmanship of J. N. Wazir, retired Chief Justice of Jammu and Kashmir High Court, which had submitted its report in November 1969. The rules had classified backward classes into six categories as follows :

(1) Certain specified traditional occupations.

(2) 23 specified social castes.

(3) Small cultivators.

(4) Low paid pensioners.

(5) Residents in the area adjoining the cease-fire line.

(6) Some areas in the State as "bad pockets" and every person belonging to that area regarded as backward.

The court in this case emphasised that a backward class should be backward both socially *and* educationally. Merely educational backwardness *or* social backwardness would not be sufficient.

The Supreme Court found fault, partly or wholly, practically with all the categories specified in the rules.

7. A.I.R. 1971 S.C. 2207.

8. A.I.R. 1973 S.C. 930.

The main views of the court on these categories were : Firstly, with regard to the traditional occupations, the court agreed that it is quite open to the State to declare that persons belonging to low income family following a traditional occupation should be regarded as persons belonging to a backward class if, on the whole, the class is socially and educationally backward. But the defect of the government classification was that a person became backward if his grand father followed the traditional occupation but not his father, thus the benefit not going to the really person concerned.

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

The rules had identified cultivators of land with a small holding as "backward classes". The limits of the holding were to differ according to the land cultivated and the region in which it was situated. The reasons for this categorisation were economic. The court discounted this approach as in its view a class must be a homogenous social section of the people with common traits, and identifiable by some common attribute. In the classification in question the relevance of social and educational backwardness took a subordinate place. Taking an example, the court said that a person holding 10 Kanals of land or less is regarded as backward, *i.e.*, socially and educationally backward, but not the brother of such a person if he owned half a Kanal more. The court found a similar defect in the classification which had regarded the dependents of a pensioner, if the maximum of the scale of pay to the post to which he belonged did not exceed Rs. 100, as backward.

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

In an early Mysore High Court decision, the Government had specified all communities other than

9. *Kesava* v. *State of Mysore*, A.I.R. 1956 Mys. 20.

the Brahmin Community as backward. The classification was upheld by the High Court. The government had done it on the recommendations of a Committee known as the Millers Committee. The decision of the Court is of doubtful validity. No material was placed before the court as to on what basis the blanket classification was made that all communities other than Brahmins were backward. The court here had proceeded on the basis that the courts had hardly any power of judicial review over the matter.

In another Mysore case,[10] the criteria of backwardness adopted by the State were the income limit and the nature of occupation. A person was regarded as backward if the income of the parent and guardian was below Rs. 1,200 per annum and he was engaged in any of the following occupations : (a) Actual cultivator; (b) artisan; (c) petty businessman (d) certain inferior services including casual labour; and (e) any other occupation involving manual labour. The High Court upheld the order of classification of backward classes of the government. This ruling is not in accord with the Supreme Court judgment in Janki Pd., discussed above, where the court stated that the group should be socially homogeneous and that the income criterion would lead to marginal difficulties. However, in another Supreme Court case occurring under art. 15(4), subsequent to Janki Pd., the court upheld the caste criterion subject to the income limit.[11]

It may be said by way of comment that it is difficult to adopt a classification which is perfect and such marginal difficulties as pointed out by the court in *Janki Pd.* would remain in any classification. The choice is between "no classification" at all and "Classification with some marginal" difficulties.

In *Desu Raydu* v. *A. P. Public Service Commission*[12] the government had cancelled its earlier order of backward classes as it was entirely based on castes. The petitioner challenged this cancellation of the order by the Government. It was held by the High Court that the government was justified in doing so on the ground that caste cannot be the sole or predominant basis of classification.

In a Kerala case, *Hariharan Pillai* v. *State*,[13] the government had adopted caste as the basis for backwardness. The data on which the classification was based was more than two to three decades old. The High Court in a 3 to 2 decision upheld the order of the government. It stated that though caste cannot be the sole criterion, yet where the classification is made on the basis because of backwardness, by and large, of the members of that caste, the dominant criterion is not caste but backwardness. The dissenting judge thought that the opinion formed by the State nearly two decades or more back could not be a proper basis of classification. Further, even if a substantial portion of a caste was backward, still that caste could not be regarded as backward, in view of the fact that some people belonging to that caste might not be backward. As far as the approval of the criterion of caste by the minority is concerned, it is an accord with the views expressed by the Supreme Court in the second Triloki Nath case, discussed above. The difficulty, as pointed out by the dissenting judge in *Hariharan Pillai* in adopting caste as the criterion, even where the caste *as a whole* is educationally and socially backward, is that there may be some person in that caste who are not backward and may claim the benefit. This is again a kind of marginal difficulty, and we have to live with this kind of marginal difficulty if we wish to provide reservations for the backward classes.

An order of the Uttar Pradesh Government enumerated the backward classes as comprising Ahirs, Kurmis and other castes. The petitioners in *Chhotey Lal* v. *State of Uttar Pradesh*[13a] alleged that many belonging to castes like Ahirs and Kurmis were not economically and socially backward. Many of them were doing well, some were highly educated and occupying high offices, while others were in professions such as lawyers, doctors, etc. The Court stated that a caste could be regarded as backward if it was *as a whole* socially and educationally backward. However, the High Court quashed the order of the Government. After examining the affidavit of the petitioners and the counter-affidavit of the State and also the materials (such as Chhedi Lal Sethi Commission Report and the Report of the Kaka Kalelkar Commission) referred to therein, the court concluded : "Neither the impugned G.O. nor the counter affidavit filed on behalf of the State reveals that any other survey or data collection on any manner was done by the State Government. Similarly, as regards the list prepared by the Education Department, it is not mentioned in the counter-affidavit on what basis these were found even educationally backward class of citizens at the point of time. No such-finding inquiry was alleged to have been made." In sum, the court was of the view that the basis for reaching the conclusion by the State that the enumerated castes were backward was not disclosed. In this case there was also dispute as to the burden of proof—whether the burden was on the state to prove that the classes enumerated by it were really backward or on the person challenging it that they were not backward. The court took the view that it was on the individual to plead specifically that the classification made by the Government was not proper, and once this had been done the burden shifted on the government. Here, in the opinion of the court, the petitioners had discharged their burden by specifically pleading that at least two castes were not economically and socially backward. The State has not come out with any material to refute this. "In the very nature of things, it is not possible for private citizens to make detailed investigation and survey all over the State or to supply the relevant data. It is only with the resources of Government that such data can be collected and supplied to the Court".

The Court in *Chhotey Lal* also emphasised that the object of reservation would be defeated if on the

10. G.N. Gudigar v. State of Mysore, (1972) 2 Mys. L.J. 202.

11. K. S. Jayasree v. State of Kerala, A.I.R. 1976 S.C. 2881.

12. A.I.R. 1967 A.P. 353.

13. A.I.R. 1968 Ker. 42.

13a. A.I.R. 1970 All. 135.

inclusion of a class in a list of backward classes, the class is treated as backward for all times to come. Hence the State should keep under constant periodical review the list of Backward Classes and the quantum of the reservation of seats for the classes determined to be backward at a point of time.

In *Urmilla Ginda* v. *Union of India*,[14] the Delhi High Court was faced with the question whether a woman belonging to a higher caste would come in the category of "backward class" by marrying a person belonging to that class. It was held that she did not and could not claim the benefit.

II. *Excessive Reservations*

The question of excessive reservation occurred in a few cases. In *T. Devadasan* v. *India*,[15] the Supreme Court following the *Balaji* case discussed under art. 15(5) held that art. 16(4) is only an exception to art. 16(1) and cannot provide for excessive reservation as excessive or extravagant reservation would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction among the employees, materially affect administrative efficiency. The court agreed with *Balaji* that reservation of more than 50% of the vacancies would be violative of art. 15(1). In this case, the reservation of 12½ of vacancies for Scheduled Castes and 5% for Scheduled Tribes was made. This by itself was reasonable. However, there was a carry-forward rule according to which unfilled reserved vacancies in two years preceding the year of recruitment were to be added to these percentage. As a result of this carry-forward rule, in a particular year, the reservation quota came to be 64.4% of the vacancies filled. As this was more than 50%, the court regarded it excessive and held the carry-forward rule to be invalid.[16]

Thus, though the percentage of reservation by itself may not be excessive, yet if certain method followed in applying these percentages results in excessive reservation in a particular year, it will be bad. This is further illustrated by the following cases. In one High Court case the facts were that there were two cadres of railway inspectors known as Inspectors of RMS and Inspectors of Post Offices and these cadres were distinct ones. In a particular year, there were three vacancies in the former and 29 vacancies in the latter, thus a total of 32 vacancies in both the cadres combined. Four vacancies were reserved for Scheduled Castes by treating the two cadres as one unit. This resulted in going one post of RMS Inspector to the first candidate (general category) from the RMS section and two posts going to Scheduled Castes candidates. The petitioner, who stood second from the general seat, was thus excluded from the post of RMS Inspector. It was held by the High Court that since two out of three seats as a result of clubbing the two distinct cadres resulted in 66⅔% of posts for Scheduled Castes, it was an excessive reservation. The two branches were distinct ones and should not have been clubbed for purposes of reservation.[17]

In *Rajaiah* v. *State of Andhra Pradesh*,[18] the petitioners six in number, were temporary Class IV employees of the Government and did not belong to Scheduled Castes and Scheduled Tribes. The Government sought to retrench these employees under a policy that whenever retrenchment was to be affected, senior temporary employees, probationer and even approved probationers who did not belong to Scheduled Castes and Scheduled Tribes, must face retrenchment before the junior-most employees belonging to the Scheduled Castes and Scheduled Tribes were retrenched, if the total representation of these two categories fell below a certain percentage. The first question before the Court was whether retrenchment from employment came within an art. 16(4) as it was contended that since different ages of superannuation cannot be fixed for persons belonging to the backward classes and persons not belonging to backward classes, even for the purposes of maintaining the percentages of employees belonging to backward classes, different considerations should not apply in the case of retrenchment. This question was left open by the Court and it proceeded on the basis that art. 16(4) covered even retrenchment. The court quashed the retrenchment of the petitioner by the Government as in a particular year the scheme of retrenchment followed by the Government resulted in "excessive reservation" for the backward classes.

In another case,[19] the Railway Board followed the policy of 15% reservation for class III and IV employees but this 15% rule was applied as a matter of practice to vacancies occurring due to retirement or resignation, etc., and not to the total posts. The court found that if 15% reservation was applied to vacancies and not to posts, it would result in the percentage of scheduled candidates in that grade to reach upto 60%. It, therefore, struck down the policy of the government on account of excessive reservation.

III. *Publication of order of reservation*

The Government can made reservation in favour of the backward classes under art. 16(4) through an executive order and no legislation is necessary. In *Mangal Singh* v. *State of Punjab*,[20] it was held that the relevant service rules stood amended as a result of an

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14. A.I.R. 1975 Del. 115.

15. A.I.R. 1964 S.C. 179.

16. Fazl Ali, J., in *State of Kerala* v. *Thomas*, A.I.R. 1976 S.C. 490, however, was of the view that carry-forward rule was not bad even if it resulted in more than 50% posts to be fulfilled by backward classes. "In fact if the carry-forward rule is not allowed to be adopted it may result in inequality to the backward classes of citizens who will not be able to be absorbed in public employment in accordance with the full quota reserved for them by the Government." At 555.

17. *M. Natarajan* v. *Director General of Posts & Telegraphs* A.I.R. 1970 Mad. 459; affirmed by the Division Bench, (1971) 2 Mad. L. J. 79.

18. I.L.R. (1973) A.P. 516.

19. *J. C. Malik* v. *Union of India*, 1978 (1) SLR 844.

20. A.I.R. 1968 Punj. 306. Also *Trilok Nath* v. *State of J.&K.* A.I.R. 1969 S.C. 1.

executive order issued by the government under art. 16(4). In *K. S. Nair* v. *Oil & Natural Gas Commission*,[83] it was held by the Gujarat High Court that though reservation under art. 16(4) could be made by an executive order, such an order or direction must be published. "..... When employees' rights are to be prejudiced and a prejudicial treatment is to be supported by such an executive order, it is obvious that it cannot be by a mere executive instruction on the office file." An order under art. 16(4) by its very nature must be published so as to bring it to the notice of all the employees concerned.

IV *Retroactive Reservation*

Under art. 16(4) the state can make reservation both retrospectively and prospectively. This is the holding of the Supreme Court in *General Manager, Southern Railway* v. *Rangachari*.[32] However, once a person was duly appointed and his rival did not contend that he belonged to the reserved category, the production of a certificate to that effect subsequently would be of no avail. Art. 16(4) could not be utilized for demoting a person subsequent to his lawful appointment.[84]

V. *Discretionary with the government to provide for reservations*

It is discretionary with the government to provide for reservation for backward classes or not either in the initial appointments or promotions. There is no constitutional right in any individual to ask for reservation. This point has been brought out in several cases. In *C. A. Rajendran* v. *Union of India*,[85] the Supreme Court stated that art. 16(4) did not confer any fundamental right on backward classes as regards reservation of posts, whether it be at the stage of recruitment or promotion. It was only an enabling provision which conferred "a discretionary power on the State to make reservation of appointments in favour of backward classes of citizens which in its opinion is not adequately represented in the service of the State." In making reservations the government has to take into account not only the claims of the members of the backward classes but also the maintenance of efficiency of administration which is of paramount importance. Here the government had made reservations in promotions to classes II and I posts which was subsequently abolished. The court upheld the action of the government in abolishing the reservations.

In *R. N. Pramanick* v. *Union of India*,[86] the petitioner was appointed as a typist against the quota reserved for Scheduled Castes. His grievance was that though in the Seniority List prepared by the government he was given 75th place (on the basis of his seniority which arose out of his earlier confirmation on account of his being a member of the Scheduled Caste), its subsequent revision by the government gave him serial number 194-A (on the basis of merit). Consequently he lost a chance of promotion. The government had decided that for promotions there would be no reservations. The court upheld the governmental action. It was within the right of the government to decide that promotions will be made on the basis of merit and not seniority based on reservations.

Similarly, it has been held that while making the reservations the government may lay down not only the minimum requirement of eligibility for purpose of making an application but also a "minimum standard of suitability to be determined by the Public Service Commission after interview." A person belonging to Scheduled Caste has no right to complain that he should be appointed to the post once he fulfilled the "eligibility test" though not the "suitability test."[87]

VI. *Scope of reservations and other concessions to Backward Classes*

In *General Manager, S. Railway* v. *Rangachari*,", the court took the position that matters of employment under article 16(1) covered not only initial appointment but also promotions and such other matters as salary and periodical increments and terms of leave, gratuity, pension and age of superannuation. Art. 16(4) is an exception to art. 16(1) and it does not cover the entire ground by art. 16(1). Thus, there cannot be any exception or different rules even in regard to backward classes with regard to matters other than initial appointments and promotions. Art. 16(4) covered both initial appointments and promotions. The State can make reservations in favour of the backward classes both in initial appointments and promotions.

The leading case on the grant of concession in government employment by ways other than reservations is *State of Kerala* v. *Thomas*.[88] Here, the service rules provided for promotion from one particular cadre to a higher cadre on the basis of seniority subject to passing the prescribed test within two years. However, the rules also provided for giving a longer period (two extra years) for passing the test by the candidate belonging to Scheduled Castes and Scheduled Tribes. It was held that the concession given to the backward classes was valid. Though the concession may not fall under art. 16(4) still it does not violate art. 16(1) which permits reasonable classification. The court regarded the present concession to fall under the rubric "reasonable classification." Art. 335 in particular gives a mandate that the claims of Scheduled Castes and Scheduled Tribes should be considered in matters of employment consistent with maintaining administrative efficiency. Temporary relaxation of the rule passing the prescribed examination in the case

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83. (1974) Guj. L. R. 7.
32. A.I.R. 1962 S.C. 36.
84. Sudama Prashad v. Supdt., W. Rly., AIR 1965 Raj. 109.
85. A.I.R. 1968 S.C. 507.
86. A.I.R. 1969 Cal. 576.
87. Pravatnalini Mallik v. State of Orissa, ILR (1972) Cut. 1372.
32. A.I.R. 1962 S.C. 36.
88. A.I.R. 1976 S.C. 490.

of Scheduled Castes and Scheduled Tribes was warranted by their backwardness and inadequate representation in the state services, and did not unreasonably affect administrative efficiency. The preference of the concessions in favour of these classes cannot be to an unlimited extent. The State has to give preference to these classes consistent with the needs of efficiency of administration. In other words, reasonable relaxation of a rule in their favour is permissible but not "undue" relaxation.

In *K. N. Chandea* v. *State of Mysore*,[29] there were two sets of qualifying marks for success at a competitive examination held by the State Public Service Commission—45% for candidates belonging to Scheduled Castes and Scheduled Tribes, and 55% for others. The Mysore High Court expressed the opinion by way of *obiter* that prescribing a smaller percentage of marks for success in a competitive examination did not amount to "reservations in any sense of the term under art. 16(4)".

VII. *No reservations amongst communities not coming under the category of backward classes*

In *Venkataramana* v. *State of Madras*,[30] a case occurring in 1951, the facts were that the G.O. known as a Communal G.O. had notified that selection of candidates to certain posts would be made from various castes and religious communities as follows : Harijans 19, Muslims 5, Christians 6, Backward Hindus 10, Non-Brahmins 32, and Brahmins 11. It was held that such an order was bad under art. 16(1) and (2) which specifically prohibits the State from discriminating against persons in respect to government employment on the basis of religion, race and caste, etc. Under the Government order in issue the basis of eligibility for a post was that a person belonged to a particular caste, religion, etc. Art. 16(4) permitted reservations only for "backward classes" and not other classes.

VIII. *Miscellaneous*

It has been held that the mere fact that the reservations made may give extensive benefits to some of the persons who had the benefit of the reservations earlier does not by itself make the reservation bad. Similarly, the length of the leap is immaterial and it depends upon the gap to be covered (*e.g.*, a person in the reserved category having 73rd position in the list prepared for promotion could get precedence over the 72 others if there is a single post to be filled up and that post belongs to the reserved category).[31] However, it may be commented that the State under art. 16(4) does not possess an unlimited power in this regard for as the Supreme Court has held in several other cases (like *Rangachari* and *Devadasan*) that the reservations in favour of backward classes should not materially affect administrative efficiency.

29. A.I.R. 1963 Mys. 293.

30. A.I.R. 1951 S.C. 229.

31. State of Punjab v. Hiralal, A.I.R. 1971 S.C. 1777.

The spirit of equality prevades the provisions of the Constitution of India as the main aim of the Founders of the Constitution was to create an egalitarian society wherein social, economic and political justice prevail and equality of status and of opportunity are made available to all. However, owing to historical and traditional reasons certain classes of Indian citizens are under severe social and economic disabilities that they cannot effectively enjoy either equality of status or of opportunity. Therefore, the Constitution accords to these weaker sections of society protective discrimination in various articles including article 15(4). This clause empowers the state, notwithstanding anything to the contrary in articles 15(1) and 29(2) to make special reservation for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. As for instance, a notification purporting to acquire land for providing accommodation for Harijans could not be challenged on the ground of discrimination in view of article 15(4).[1] But the Constitution neither enumerates the class of citizens who are backward nor provides the state with criteria for classifying backward classes of citizens.[2] The task of the policy makers, be it at the central or state level, becomes complex as they have to keep in mind the definite prohibitions enumerated in articles 15(1) and 29(2). The identification of backward classes in the Indian Society is not an easy task. The influence of "caste" on the social, educational and economic backwardness of classes of people in the Indian Society has been the subject of debate and research by sociologists. Is the factor of "caste" alone significant in the making of social and educational backwardness or are there other factors? What is the correlation between caste and such other factors and the importance to be given to all these factors (including caste), with reference to different communities and regions? A number of variables are relevant in the determination of these questions.

The wide language of article 15(4), "indicates that the Constitution makers relied primarily on the discretion of the politicians and administrators of the future rather than on the courts to keep the principle of preference within boundaries consistent with the Constitution's overall scheme of eliminating caste, religious and other discrimination. These provisions are an expedient hopefully a temporary one—giving the executive and legislatures broad discretion in their application. However, this discretion is not so broad as to exclude entirely *judicial* review of determinations of backwardness."[3] The main areas of concretisation of legislative and executive discretion are education, welfare and economic activities such as housing, grant of land etc. and public services.

I. *Who are Backward Classes?*

The first decision of the Supreme Court on the scope of article 15(4) was Balaji v. State of Mysore.[4] Since 1958 the state of Karnataka (then Mysore) had been attempting to make special provisions for the advancement of its socially and educationally backward classes of citizens under article 15(4) and whenever any order was passed, its validity was challenged in the High Court which quashed them. The petitions in this case were filed under article 32 to challenge the validity of the order of the Mysore Government in 1962. The effect of the order was to divide backward classes into two categories (i) Backward classes and (ii) More Backward classes. Out of the 50 per cent as the quota for the backward classes 28 per cent of seats in technical and professional institutions were reserved for backward classes and 22 per cent for more backward classes, 15 per cent for the scheduled castes and 3 per cent for the scheduled tribes. Thus we find that the total quantum of reservation was 68 per cent. Only 32 per cent of the seats was available to the merit pool. This order of the Mysore government was a sequel to the recommendation of an expert committee set up by the state government known as the Nagan Gowda Committee which had investigated the problem of identifying criteria for classifying backward classes in the state. The Committee felt that in India a higher social status was generally accorded on the basis of caste and the low social position of any class or community was, therefore, merely on account of the caste system. Social backwardness was considered to be mainly based on racial, tribal and caste differences even though economic backwardness might have also contributed. The Committee had felt that in the prevalent circumstances, the only practicable method of classifying the backward classes in the state was on the basis of caste and communities. According to the Committee, the entire Lingayat Community was socially forward and that all sections of Vokkaligas excluding Bhunts were socially backward. With regard to Muslims, majority of the committee felt that they should be classified as backward. The committee further felt that the backward classes should be subdivided into two categories—backward and the more backward.

1. *Moosa v. State of Kerala*, A.I.R. 1960 Ker. 355.

2. In the case of Scheduled Castes and Scheduled Tribes the President specifies them by public notification under art. 341 (1) and 342(1) respectively. Only Parliament is empowered to include and exclude from the List. Further, Art. 366(24) and (25) define these groups respectively.

3. Marc Galanter, "*Protective Discrimination for Backward Classes In India*", 3 Journal of the Indian Law Institute 39 at 66 (1961).

4. A.I.R. 1963 S.C. 649.

"The test adopted for such categorisation was : Was the standard of education in the community in question less than 50% of the state average ? If it were, the community was *more* backward. If it was not, the community was backward.

In determining the educational backwardness of the classes of citizens, the government proceeded on the basis of the average of student population in the last three high school classes of all high schools in the state in relation to 1,000 people of that community. On the basis of data supplied it was found that the state average of student population in the last three high school classes was 6.9 per thousand. The government decided that all castes whose average was even just less than the state average of 6.9 per thousand should be regarded as backward classes, and if the average of any community was less than 50 per cent of the state average, it should be regarded as constituting more backward classes. The government order was challenged as unconstitutional.

The Supreme Court in an unanimous opinion delivered by Justice Gajendragadkar held the order of state government unconstitutional. In deciding on the validity of classification of backward classes, the Court had to determine the factor for social backwardness and educational backwardness. On the question of social backwardness, the court said that in the Hindu Social structure, caste unfortunately played an important role in determining the status of citizens, yet the special provisions were contemplated for classes of citizens and not for individual citizens as such. It may not be irrelevant to consider the caste of the group but its primacy should not be over emphasised. The caste system had been the greatest obstacle to the achievement of an egalitarian society and the recognition of specific castes as backward might maintain and perpetuate the existing distinctions on the basis of castes. In addition, the sole test of "caste" would break down in relation to many sections of Indian societies, as for instance, Muslims and Christians, who do not recognise castes in the Hindus conventional sense. "Social backwardness is in the ultimate analysis the result of poverty to a very large extent.[5] The classes of citizens who are deplorably poor automatically become socially backward". The court also referred to occupations and place of habitation as contributing to social backwardness. The backward classes can, in the matter of their backwardness, be compared with the Scheduled Castes and the Scheduled Tribes. The concept of backwardness is not relative in the sense that classes which are backward in relation to the most advanced classes should be included in it. If such relative tests are applied by reason of the most advanced classes, there will be several layers of backward classes and each of them may claim to be included under exception clauses. It is significant that the Court referred to the Report of the Backward Classes Commission 1955 (appointed by the Central Government in 1953 and known as Kaka Kalelkar Commission), the Memorandum of the Government thereon,[6] the Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 1959,[7] and also the method adopted in Maharashtra. The Maharashtra Government had defined backward classes on the basis of annual income of the family. Monetary grants were given to students pursuing higher education where it was shown that the annual income of their families was below a prescribed minimum. Though the Court did not express any final opinion, it seemed to view with approval such a scheme coupled with the establishment of more technical and vocational institutions and reservation of seats therein.

As regards educational backwardness the court observed that (a) it was doubtful if the test of the average of student population in last three High School classes (as recommended by the Nagen Gowda Committee and approved by the Government) was appropriate ; (b) it might not be necessary or proper to put the test as high as has been done by the committee and (c) even if the tests were valid, and the state average was 6.9 per thousand, a community which just satisfied that the said test or was just below the said test could not be regarded as backward. It must be well or substantially below the state average. Here again the court did not articulate any definite rule on the point but approved that below 50% of the state average would obviously be backward. Lingayats with an average of 7.1 per thousand, Gangias with 7 and Muslims with 5 (when the state average was 6.9 per thousand) could not be treated as backward. So according to the Supreme Court, for a class to be educationally backward, its average must be well below the state average.

The Supreme Court, however, made it clear that backwardness must be social and educational and not either social or educational. If that were so, then

5. *Id.* at 656.

6. The Memorandum of the Government of India on the Commission's Report pointed out that (a) recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste, (b) some of the tests applied by the Commission were more or less of an individual character, and even if they were accepted, they would encompass a large majority of the country's population (out of a list of 2399 communities which the Commission designated as backward, 930 alone accounted for an estimated population of 115 million or about 33 per cent of the then population of India, excluding the Scheduled Castes and Tribes). If the entire community, barring a few exceptions, has to be regarded as backward, the really needy would be swamped by the multitude and hardly receive any special attention or adequate assistance. The Commission having failed to determine any objective criteria, the Government of India made further endeavours to devise some positive and workable criteria. As no acceptable conclusions could be arrived at, the Government of India decided not to issue any list of backward classes other than Scheduled Castes and Tribes. They also indicated that while the state government have the discretion to choose their own criteria for defining backwardness, in the view of the Government of India it would be better to apply economic tests than to go by caste.

7. The Report mentions the finding of the Deputy Registrar General of India that it is possible to determine social and educational backwardness on the basis of occupations. The basis is (a) any non-agricultural occupations in any state in India in which 50% or more of the persons belong to the Scheduled Castes or Scheduled Tribes or (b) any non-agricultural occupations in which literacy percentage of the persons depending thereon is less than 50% of the general literacy in the state.

common criteria should be evolved for determining social backwardness and educational backwardness. If different standards are applied for both, it is possible that the classes listed as educationally backward may not be so socially and *vice versa*. In fact the Supreme Court in *Balaji's* case actually considered the two separately in discussing different criteria for determining social and educational backwardness.

On the quantum of reservation, the Court said that the interest of weaker sections of society had to be adjusted with the interests of the community as a whole. The adjustment of these competing claims undoubtedly was a difficult exercise but under the guise of making a special provision, the state could not reserve all the seats available. The court was reluctant to lay down a definite yard-stick. However, a broad guidline for policy makers was laid down in these words :

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

Applying the above guideline the court found 68 per cent reservation for backward class, Scheduled Castes and Scheduled Tribes excessive and declared it unconstitutional.

Close on the heels of the *Balaji* case the Supreme Court in *Janardhan Subbaraya* v. *Mysore* clarified that the *Balaji* decision did not affect the validity of reservation made in favour of the Scheduled Castes and Scheduled Tribes. The said reservation (15 per cent for Scheduled Castes and 3 per cent for Scheduled Tribes) continued to be operative. The 1962 order of the Mysore government had been quashed solely with reference to the reservation made in respect of the socially and educationally backward classes. In other words for Scheduled Caste and Scheduled Tribes separate percentages of reservations could be provided.

In the light of the Court's observations in the *Balaji* case, the Mysore Government order of July 1963 had evolved a profession-*cum*-means test for identifying social and educational backwardness :

(i) A family whose income was 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 were, in general, socially and educationally backward. The government listed the following occupations as contributing to social backwardness;

(ii) Actual cultivator ;

(iii) artisan ;

(iv) Petty businessman ;

(v) inferior service (*i.e.* class IV in government services and corresponding class); or

(vi) any other occupation involving manual labour.

The literacy level among the classes stated above was lower than the general level of literacy in the state.

As regards the quantum of reservation, the order had provided for 30 per cent reservation for backward classes, 15 per cent for Scheduled Castes and 3 per cent for Scheduled Tribes.

Here we find that the government took into account the economic condition and occupation of the family. In *D. G. Viswanath* v. *Government* of Mysire,[9] the above order of the Mysore Government providing a reservation of 30 per cent of the seats for students of backward classes for admissions to professional colleges in medicine and engineering was challenged, on the basis that out of the four criteria for determining socially and educationallly backward classes, *viz.* occupation, income, residence and caste, in the case of Hindus, the government had altogether ignored the caste basis and hence the scheme set out in the order was invalid. In this case while determining the social and educational backwardness, the state applied the "occupation" and "poverty" test only and altogether ignored the "caste" and "residence" basis. Accepting the contention of the petitioner, Justice Hegde observed that the Supreme Court in *Balaji's* case had very specifically stated that caste in relation to Hindus was a relevant factor to be considered in determining the social backwardness of groups or classes of citizens. It had nowhere stated that caste basis should not be adopted in determining the socially and educationally backward classes. Accordingly "caste" had a relevant basis in determining the classes of backward Hindus but it should not be made the sole basis; it might be adopted alone with such other tests as occupation, poverty, residence etc. As the government had ignored caste and residence basis altogether in the instant case the court felt that the classification of backward classes adopted did not really help the really backward classes among the Hindus. The Court illustrated that *Kurubas* and *Bedars* who were the really backward got very few seats in the Engineering Colleges from the backward classes quote whereas Brahmins, *Lingayats* and *Vokkaligas* got more seats.

As regards the quantum of reservation, 30 per cent was held not excessive on the materials placed before the court

In *R. Chitralekha* v. *State of Mysore*[10] on appeal from the above judgment the correctness of the Mysore High Court's interpretation of the *Balaji* case came up for decision by the Supreme Court. The Supreme Court considered again whether a caste was also a class of citizens and whether caste as a whole could be classified as backward. Justice Subba Rao (as he then was) on behalf of the majority observed :

Article 15(4)—does not speak of castes but only speaks of classes. If the makers of the Constitution intended to take caste also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and

9. *Id* at 663.

9. A.I.R. 1963 S.C. 1702.

10. A.I.R. 1964 Mys. 132.

11. A.I.R. 1964 S.C. 1823.

the Scheduled Tribes. Though it may be suggested that the wider expression "class" is used in clause (4) of Art. 15 as there are communities without caste, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression "backward classes or castes".[36] The juxtaposition of the expression "Backward Classes" "Scheduled Castes" in Art 15 (4) also leads to a reasonable inference that the expression *classes is not synonymous with castes.*

In tune with the conspectus of constitutional provisions, "caste" and "classes" cannot be considered synonymous. The Judge said :

> If we interpret the expression "classes" as "castes" the objective of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve.[37]

This anomaly would not arise, if without equating caste with class, caste is taken as only one of the factors to determine whether a person belongs to a backward class or not. The majority held that under no circumstance a "class" could be equated to a "caste" though the caste of an individual or a group of individuals might be considered along with other relevant factors in placing him in a particular class. Accordingly, Mysore Government's Order of July 1963 was upheld.

Justice Mudholkar who constituted the minority on other aspects of the *Chitralekha* case felt that "Castes have no relevance in determining what are socially and educationally backward communities" as that would go against clause (1) of article 15 or clause (2) of article 29. This is so despite the non-obstante clause in clause 4 of article 15.

In *Balaji* and *Chitralekha* the Court did not approve of classification of a *caste as a whole as backward*. Justice Subba Rao in Chitralekha had suggested that if any *sub-caste* was wholly backward, it might be included in the scheduled castes by following the procedure laid down in article 341(2) of the Constitution.[38]

The interpretation of the scope of Mysore Government's order of July, 1963 came up in several cases. In *Ratnakara Shetty* v. *State of Mysore*[39] involving 30 per cent reservations for admission to pre-medical course, the Mysore High Court held that an applicant may be regarded as belonging to socially and educationally beakward class if :

> (i) he and/or his parents or either of them or his guardian in the event of his being an orphan, pursue or pursues any one of the occupations enumerated in the Government order, and
>
> (ii) that total earnings of the income from property, if any, belonging to the parents (or in the event of the death of both of them, the guardian) of the applicant together with the earnings and the income from properties, if any, belonging to the applicant, his brothers or sisters or other relatives living with them available to the family does not exceed Rs. 1,200.
>
> If any of the siblings of the applicant do not contribute to the family's income, then his or her income is not available for computation.

"Family" in the order was construed to be natural family and not Hindu undivided family because there are families of persons who are not Hindus but belong to other religions such as Islam and Christianity etc.

The court observed :

> The word "family" used in the Government order is an expression which is intended to apply to all persons irrespective of the rules of family law applicable to them. If so, the most obvious inference is that the reference is to the normal or natural family consisting of a husband, wife and their children living together, along with such other relatives as may be living with them[40].

In *B. Sayeed Ahmed* v. *State of Mysore*[41] the question was whether the son of a "mechanic" whose annual income was Rs. 624 was entitled to be considered for admission to pre-professional course leading to M.B.B.S. degree on the basis of belonging to socially and educationally backward classes. The court interpreting the Mysore Government order of July 1963 held that a "mechanic" was one who clearly answered the description of the word "artisan" and hence, the petitioner should be considered for admission as he belonged to such backward class.

Human ingenuity being what it is, the legal device of adoption was resorted to in order to take advantage of the provisions of the reservations in favour of backward classes by the Mysore Government Order of July 1963. In *Shantha Kumar* v. *State of Mysore*[42] the petitioner was given in adoption by his natural father at the age of sixteen years to his own uncle who was socially and economically in a weaker position than his father. The Mysore High Court held :

> "Whatever may be the position in regard to a boy who has been given in adoption at a comparatively early age like 4 or 5 years, in the case of the petitioner who is stated to have been given in adoption when he was about 16 years of

36. *Id* at 1833.

37. *Id* at 1833

38. Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

39. (1969) 1 Mys. L. J. 149.

40. *Id* at 155.

41. 1969(1) Mys. L.J. 79.

42. 1971(1) Mys. L.J. 21.

> age and had all the while imbibed the better environmental advantages of his natural father's income and occupation it is not reasonable to hold that the income and occupation of his adoptive father and not those of his natural father that should determine whether he belongs to socially and educationally backward classes" [9]

Any other view would defeat the aim of reservation for such backward classes and whittle down the protection to those who suffer from environmental disadvantages.

In *Sudha* v. *S. C. of Medical College*[10] the scope of the Mysore Government's order of July 1963 came up for scrutiny which involved admission to Medical Colleges. The petitioner's claim that she belonged to socially and educationally backward classes was not accepted and she was refused the benefit of reservation. She had contended that the occupation of her father as "purohit" fell within the category of "any other occupation involving manual labour" and that he was a petty purohit having to do "*parichariku*" which an assistant has to do. Justice Chandrashekar applied the test of "predominant nature" to decide whether an occupation involves manual labour or intellectual labour. Every occupation involving intellectual labour may also involve some manual labour. Though a *purohit* may use his hands in performing certain rituals and ceremonies, the predominant character of his occupation requires study and knowledge of the Scriptures and Vedas. The Court endorsed the view of the Selection Committee that a *purohit's* occupation did not involve manual labour. Accordingly, the petitioner was not entitled to the reservation meant for backward classes.

In Subhashini v. State,[11] the Mysore Government's order of July, 1963 which made reservations for admission to medical colleges was challenged. One basis of attack against the order was that under it more than 50 per cent of the available seats were reserved and hence, the quantum of reservation exceeded the *Balaji* limit. Factually, the total number of seats available in the medical colleges were 750. Out of those 3 seats were for cultural scholars of Indian origin domiciled abroad: 2 seats for Columbo Plan Scholars; 4 seats for students of Indian origin migrating from Burma; 4 seats for students from Asian and African countries; 2 seats for L.A.M.S. and L.U.M.S.; 3 seats for students coming from Goa; 2½% of the seats for children of Defence Personnel; 1% of the seats for those who have shown exceptional skill and aptitude in sports and games; 75 seats as central quota for students from other states. If any of those seats were not filled, the unfilled seats would be transferred to the general pool. Out of the remaining 18 per cent were reserved for Scheduled Castes and Scheduled Tribes and 30 per cent for the socially and educationally backward classes.

It was argued that the total reservations for all groups exceeded the Balaji limit of 50 per cent. Rejecting this argument, the Mysore High Court held that the validity of reservation of seats for socially and educationally backward classes have to be judged by the conditions laid down in article 15(4). The validity of the reservations for classes other than those socially and educationally backward classes Scheduled Castes and Scheduled Tribes had to be tested on the basis of the requirements of article 14. Such reservations should not be mixed up with the special reservations under article 15(4). The upper limit laid down in Balaji's case has application only to the reservation to be made under article 15(4). It does not include any reservation otherwise made.

Gurinder Pal Singh v. *State of Punjab*[12] involved challenge to the government orders making reservations in favour of Scheduled Castes, Scheduled Tribes, backward classes and residents of backward areas and other classified categories for admission to medical colleges against 50 per cent seats. The quantum of reservations was :

(i)	Scheduled Castes/Tribes	20%
(ii)	Backward classes.	2%
(iii)	Backward areas	10%
(iv)	Sportsmen/women	2%
(v)	Central Government nominees including from Jammu and Kashmir	6%
(vi)	Women candidates	1%
(vii)	Candidates from border areas of Punjab	5%
(viii)	Children of political sufferers of the freedom struggle with Punjab domicile	2%
(ix)	(a) Children of defence personnel who have lost their lives (b) Children of defence personnel disabled (c) Children of the personnel of the Border Security Force killed/disabled (d) Children of the ex-servicemen of Indian Armed forces.	2%

With regard to backward classes it was argued that reservation could not be made for any particular caste or community because backwardness depended more or less upon the economic condition of a family. The State of Punjab in reply pointed out the existence of a circular letter No. 2662-5WGII-63/6934 dated 20th April, 1963, issued by the State Government which provided that a family whose annual income was less than Rs. 1,000 should be regarded as a backward family and some communities which are *socially looked* down upon by the people of the State and whose annual income did not exceed Rs. 1,800 and who were so declared by the State Government were also to be regarded as backward communities. The

[9] *Id*, at 23.

[10] A.I.R. 1967 Mys. 21.

[11] A.I.R. 1966 Mys. 40.

[12] A.I.R. 1974 Punj. 125.

Punjab High Court held that the circular amply highlights the aspect of the backwardness of a family before such a family could be declared to belong to a backward class. Such a classification was admissible under the Constitution and could not be struck down.

The reservation for residents of backward areas was, however, declared unconstitutional.

Candidates hailing from backward areas were required to submit along with their applications a certificate from Deputy Commissioner or any other designated official that they fell under one of the following categories laid down by Punjab Government order :

(a) A person who with the family members had been residing in a village or town for a period of ten years and would continue to reside there.

(b) A person who had been residing in a village or town for a period of less than ten years but would continue to reside on account of gainful employment or settled there after retirement, if the stay was not less than five years.

(c) In the case of a person who had been residing in a village or town in the said area, the total period of his stay at both places would be counted towards his residence in that area.

The court striking down the classification for backward areas as unconstitutional said that the order was based only on the ground of residence irrespective of the economic circumstances of the candidates. "A millionaire and a pauper living in such areas have been treated at par", the court added. The Punjab Government order did not provide any yardstick for determining the comparative prosperity of the residents in the backward areas. Hence such classification was held to be violative of article 15(1) and could not be saved by article 15(4).

The *Chitralekha* approach was departed from in the subsequent decision of the Supreme Court in *P. Rajendran v. State of Madras*.[18] The Court had to consider the validity of rules made by the State of Madras for the selection of candidates for admission to the first year integrated M.B.B.S. course. Rule 5 classified as socially and educationally backward and reserved seat for the classes specified in group III of the revised appendix 17-A to the Madras Educational Rules. In this case the petitioners challenged, among other things, the validity of Rule 5 reserving the seats for backward classes as violative of article 15(1) because the list prepared by the state was exclusively on the basis of caste. It was contended on behalf of the state that the list of backward classes was made starting from 1906 and was kept updated and that the main criteria for inclusion in the list was the social and educational backwardness of the caste based on occupations pursued by these castes. As the members of the caste as a whole were found to be socially and educationally backward they were placed in the list. The Court also found that the classes of persons referred to in Rule 5 as socially and educationally backward were only castes. However, it accepted the contention of the state that each of those castes as a whole was socially and educationally backward and in view of the petitioner's failure to rebut the state's plea and to establish that even one of those castes was not as a whole backward, it held rule 5 as valid and constitutional. The Court further held that :-

(A) caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).[19]

In the *Rajendran* case the state conceded and the Court found that rule 5 classified certain castes as socially and educationally backward and reserved seats for them. This on the face of it, amounted to a violation of article 15(1) and rule 5 was void unless protected by article 15(4). The burden of proof must have been placed on the state to show that rule 5 came under the umbrella of article 15(4). This burden of proof was not satisfactorily discharged by the state except that it indicated that the main criterion for inclusion in the list was the social and educational backwardness of the caste based on occupations pursued by these castes. To place the burden of proof on the petitioner to prove that the castes were not backward was too difficult an onus in the absence of the state specifying the criteria for classifying the castes as backward.

The upshot of *Rajendran's* case was that castewise classification was held valid for identifying social and educational backwardness. The criterion of caste[20] as the sole basis of classification was rejected by *Balaji* and *Chitralekha*. But *Rajendran* without overruling these cases (it does not at all refer to *Chitralekha* approved of castewise classification on the basis that "a caste is also a class of citizens".[21] Though the court gives countenance to "caste" as a basis of classification provided the *whole* caste is socially and educationally backward, yet the court does not answer the question as to persons not backward in that caste. The difficulty in adopting caste as a sole criterion (assuming as a whole it is socially and educationally backward) is that some people in that caste who are socially and educationally advanced may get the benefit of backwardness.

Hridaya Narain v. Mohd. Sharif[22] dealt with the main constitutional questions relating to the validity

[18]. A.I.R. 1968 S.C. 1012.

[19]. *Id.* at 1014-15.

[20]. For High Court cases which considered "caste" as a synonym for caste. See *State of Kerala v. R. Jacob*, A.I.R. 1964 Ker. 316.

[21]. A.I.R. 1968 Pat. 296.

of section 49M of the Bihar Tenancy Act and notification Nos. A/T-1015/55-1091-R, dated the 7th February, 1956, of the Government of Bihar, describing Hajams as a backward community.

The Patna High Court held that the counsel for the appellant had not been able to produce any material for holding that Hajams (Hindu and Muslims) were not socially and educationally backward. On the other hand, the Court relied on Mr. P. C. Roy Choudhry's Gazetteer of Darbhanga District, at page 86, wherein it was pointed out :

> "The incidence of literacy among them appears to be very low but a few of them who are educated have taken up other professions also."

Their educational backwardness was thus beyond question. Socially also, there was no data to show that they were not backward. *Hence there was no ground for striking down the notification for the sole reason that the classes had been described by their caste name.*

B. C. Swain v. Secy. W. & T Deptt. involved challenge to the government order for leasing out of the road-side lands to the Express Highway No. 1 for agricultural and pisicultural purposes temporarily on annual basis to landless Harijans preference being given to the Fishing Cooperative Societies of the landless Harijans.

It was contended that Harijans did not come under the Scheduled Castes enumerated under the Constitution. Unless Harijans come under the category of "any socially and educationally backward classes of citizens", the order would be a violation of article 15 on the ground of discrimination based on *caste* as it was. Further, there was no evidence nor was there any presumption that *Harijans* as a class were socially and educationally backward.

The court held that there was no caste as '*Harijans*'. There is no definition of 'Harijan at any place. This term is of recent origin—towards the middle of 1920s, the father of which was Mahatma Gandhi. According to the Lexicon (Bhashakosh) the caste Hindu who looked down upon the non-caste Hindus took some of the castes as untouchables and that comprised this category. So Harijans are people of those castes whom the non-Harijans, or the caste-Hindus or Sabarna-Hindus viewed as untouchables. It follows, therefore, that *Harijans* is not a caste but a conglomeration of people of different castes who were taken to be untouchables by the Sabarna-Hindus. The argument, therefore, that a classification like Harijan was based on caste, was not correct. The term, 'Harijan' carried with it something more than the concept of a caste. The interveners in the instant writ petition had averred in the affidavit that the Harijans were landless labourers cultivating the lands of others and had formed a society to evolve ways and means for their employment. The court found the evidence sufficient to infer that the Harijans belonged to backward classes. The court also went a step further adding that it could take judicial notice of the fact that they were backward socially and economically. The court upheld the government order.

In *State of A.P. v. P. Sagar*[22] however, the Supreme Court invalidated the castewise classification made by the State on the basis that the State had failed to specify the criteria on which it had made that classification. Orders of the Government of Andhra Pradesh regulating admission to Medical colleges and making reservation for socially and educationally backward classes were challenged. In the instant case Justice Shah on behalf of the Supreme Court refused to accept as final the state's avarment in the affidavit and observed :—

> When a dispute is raised before a court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under cl. (4) of Article 15, the assertion by the state that the officers or the State had taken into consideration the criteria which had been adopted by the courts ..... or that the authorities had acted in good faith in determining the socially and educationally backward class of citizens would not be sufficient to sustain such claim ..... By merely asserting that the law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the courts to determine whether by making the law a fundamental right has been infringed is not excluded.[23]

The Supreme Court in this case upheld the decision of the Andhra Pradesh High Court in *P. Sagar v. State of Andhra Pradesh*[24] and agreed with the latter's view that no enquiry or investigation had been made by the state government before preparing the list of backward classes enumerated in the government order and the State had placed no material before the Court on the basis of which the list was prepared.

Shah J. further pointed out that the expression 'class' meant a homogenous section of the people grouped together because of certain likeness or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion, and the like. In determining whether a particular section forms a class, caste could not be excluded altogether. But in the determination of a class a test solely based upon the caste or community would not also be accepted. Parliament by amending the Constitution and enacting clause (4) attempted to balance as against the right of equality of citizens, the special necessities of the weaker sections of the people, by allowing a provision to be made for their advancement. Reiterating *Balaji* principles, the judge said that the criterion must not be based solely on religion, race, caste, sex or place of birth and the backwardness

[22]. A.I.R. 1968 S.C. 1379.

[23]. *Id.* at 1384.

[24]. A.I.R. 1968 A.P. 165.

[21]. A.I.R. 1974 Orissa 115.

being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer.

In the *Sagar* case the Supreme Court had a good opportunity to remove the gloss put on *Balaji* and *Chitralekha* cases by *Rajendran* decision. But what the court has done in Sagar was to invalidate castewise classification of backward citizens without distinguishing Rajendran. Further, certain observations of the Court in Sagar tend to make the confusion more confounded by quoting two contradictory statements from Chitralekha and Rajendran respectively. From *Chitralekha* :

> The juxtaposition of the expression "backward classes" and "Scheduled Caste" in Article 15(4) also leads us to a reasonable inference that the expression "Classes" is not synonymous with castes.[30]

From Rajendran :

> But it must not be forgotten that a caste is also a class of citizen.[31]

After quoting the above two statements the Court concluded that Rajendran "makes no departure from the earlier cases".[32] The way to reconcile the two cases—*Rajendran* and *Sagar*—is that in the former "castes" classified as "backward" were classified on the basis of their backwardness and not because they were "castes" as such and the state had produced evidence in support of the classification made by it, but in *Sagar* the state had failed to produce evidence in support of its order.

Next came the decision of the Supreme Court in *T. Pariakaruppan* v. *State of Tamil Nadu*.[33] In this decision unitwise distribution of seats for the Medical Colleges was invalidated as violative of articles 14 and 15. Nevertheless, reservation of 41% of the seats for backward classes in Medical Colleges of the State of Tamil Nadu, was held to be valid and the list of backward classes prepared on the basis of caste was approved as valid on the authority of the decision in *Rajendran*. Justice Hegde, on behalf of the Court, though cited *Balaji* and *Chitralekha* to the effect that caste may be considered as a relevant factor in the determination of the backward classes, proceeded to observe that, "A caste has always been recognised as a class". For this proposition he relied on the authority of Rajendran that the classification of backward classes on the basis of caste is within the purview of article 15(4) if those castes are shown to be socially and educationally backward. He also referred to the report of the Backward Classes Commission (Kaka Kalelkar Commission) appointed by the President under article 340 of the Constitution on the primacy of "Caste" in determining the backwardness prevalent in the Indian Society. The list of backward classes impugned in this case was the same as that in the *Rajendran* case wherein certain castes were classified as socially and educationally backward on the basis of occupations pursued by them. As stated already *Rajendran* was referred to as authority for the decision in this case. The court further added that the petitioners had also not discharged their onus to prove that the reservation for backward classes made was not in accordance with article 15(4).

In the instant case candidates of backward classes had secured about 50% of the seats in the general pool. There ore, the judge also impressed on the state the need to revise the list of backward classes in the light of progress made by such classes socially and educationally.[34]

The reservation of 41 per cent for backward classes, Scheduled Castes and Scheduled Tribes, was held to be not excessive.

In *Sardool Singh* v. *Medical College*[35] petitioners who were candidates and who had been refused admission to medical colleges in the state of Jammu and Kashmir challenged the admission of some of the respondent candidates on the basis that such admissions were not permissible under articles 14, 15 and 29 of the Constitution.

Reservation for the Scheduled Castes and Other backward classes were made in the following manner :

(a) Permanent Resident Scheduled Caste 5%

(b) Permanent residents of Ladakh District 2%

Among other things, it was contended that reservation for persons belonging to Ladakh or to the Scheduled Castes was also not proper. This argument, was rejected because article 15(4) specifically authorises the State to make special provisions for the advancement of socially and educationally backward classes of citizens or members of the Scheduled Castes. In the instant case the Government had indicated the data on the basis of which it reached the conclusion that members belonging to the district of Ladakh and those belonging to the Scheduled Castes were backward classes of citizens. The materials on the basis of which the notification of the government was passed had not been challenged, nor had it been shown to the satisfaction of the court that persons coming from Ladakh were not backward. The High Court relied on (*P. Rajendran* V. *State of Madras*) wherein reservation on the ground that certain candidates belonged to a particular district which was backward was upheld, provided the reservation was not made purely on the *basis of the place of birth*. In this connection the judge said that Ladakh was only one of the districts of the State and the citizens belonging to that area had been declared by the Government to be socially and educationally backward so as to come within the protection given by Art. 15(4) of the Constitution of

30. *Chitralekha* at 1039 quoted in *Sagar* at 1383.
31. *Rajendran* at 1014, quoted in *Sagar* at 1383.
32. *Sagar* at 1383.
33. A.I.R. 1971 S.C. 2303.
34. *Id.* at 2310-11.
35. A.I.R. 1970 J.&K. 45.

India. Thus, the reservation made by the Government for candidates from the Ladakh district and members of the Scheduled Castes was held to be valid and could not be struck down as being violative of articles 14, 15 or 29 of the Constitution.

As a sequel to the Supreme Court decision in the Sugar case the Andhra Pradesh Government set up a Backward Classes Commission to determine criteria to be adopted in classifying backward classes in the State of Andhra Pradesh. The Commission was required to investigate and determine the various matters regarding the preparation of list of backward classes for providing reservation in educational institutions and also for appointment for posts in government service. The Commission submitted its report in 1970 to the Government and recommended a list of 92 classes, which in its opinion were socially and educationally backward for whom reservations have to be made. With respect to social backwardness the Commission after making an exhaustive study through questionnaries and personal visits, of the trade or occupations, carried on by the persons concerned and other allied matters, indicated that only those belonging to a caste or community who have traditionally followed unclean and undignified occupation could be grouped under the classification of backward classes. It particularly referred to the *general poverty* of the class, the occupations of the class of people the nature of which is considered inferior or unclean or undignified or unremunerative or which does not carry influence or power and caste in relation to Hindus.

As regards educational backwardness the Commission took into account the fact that the average student population in classes X and XI in the State worked out to about 4.55 per thousand. On this basis, it concluded that communities whose student population in those classes is well below the state average, have to be considered as educationally backward. The Commission recommended 30% of seats to persons belonging to backward classes. On the basis of the Report of the Commission, the Government of Andhra Pradesh accepted the following criteria recommended by the Commission :

(i) The general *poverty* of the class or community as a whole.

(ii) *Occupation* of the class of people the nature of which must be inferior or unclean or undignified and unremunerative or one which does not carry influence or power.

(iii) *Caste* in relation to Hindus.

(iv) Educational backwardness.

The state government by G.O. No. 1793/Education of September, 1970 made a reservation of 25 per cent of the seats in the Medical colleges for backward classes enumerated therein on the basis of the report of the Backward Classes Commission. The reservation for Scheduled Castes and Scheduled Tribes was 14% and 4% respectively. Thus, the total reservation was 43%.

This order was challenged in the High Court of Andhra Pradesh which invalidated it, *on the basis* that the Commission had classified groups as backward classes mainly on the basis of caste which was contrary to the principle evolved in the *Balaji* case by the Supreme Court. On appeal the Supreme Court speaking through Justice Vaidialingam reversed the High Court decision in *State of A.P.* v. *Balaram*[37] and upheld the Andhra Pradesh Backward Classes Commission's determination of social and educational backwardness. He surveyed the salient recommendations of the Commission and held that if a caste was *wholly* socially and educationally backward, its inclusion in the backward classes by their caste name was not violative of article 15(4). He also observed :

> It should not also be missed that a caste is also a class of citizens and that a caste as such may be socially and educationally backward. If after collecting the necessary data it is found that the caste as a whole is socially and educationally backward, in our opinion, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. There is no gainsaying the fact that there are numerous castes in the country which are socially and educationally backward and therefore a suitable provision will have to be made by the State as charged in Article 15(4) to safeguard their interest.[38]

The Court referred with approval its observation in the earlier case of *Triloki Nath* v. *State of Jammu and Kashmir*[39] on the scope of article 16(4) relating to reservation for backward classes in public employment. In that case the Court held that the members of an entire caste or community may in the social, economic and educational scale of values, at a given time, be backward and may be on that account be treated as backward classes, but that is not because they are members of a caste or community, but because they form a class. Therefore, assuming that a list of backward classes is based exclusively on caste, if it is clear from the materials and reasons given by the state that the entire caste is socially and educationally backward its inclusion in the list of backward classes is not unconstitutional.

However in *State of U.P.* v. *Pradip Tandon*[40] involving reservation of seats in the medical colleges of U.P. for hill, Uttarkhand and rural areas, Chief Justice Ray, on behalf of the Supreme Court, emphasised that the use of prohibited grounds of discrimination such as race, religion or caste for purpose of determining social and educational backwardness would stultify the prohibition of discrimination on those grounds in article 15(1). In view of this prohibition in article 15(1)

36. W.P. Nos. 4090 of 1970, 221 of 1971 and 543 of 1971 dated 13-5-1971 (Andhra Pradesh).
37. A.I.R. 1972 S.C. 1375.
38. *Id.* at 1395-1396.
39. A.I.R. 1969 S.C. 1.
40. A.I.R. 1975 S.C. 563.

and the emphasis on classes in article 15(4). "The socially and educationally backward classes of citizens are groups other than groups based on caste". He further said that classes of citizens meant a homogeneous group of people with some common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. He emphasised the *economic* element in backwardness :

> Backwardness is judged by economic basis that each region has its own measurable possibilities for the maintenance of human numbers, standards of living and fixed property. From an economic point of view the classes of citizens are backward when they do not make effective use of resources.[41]

The facts of this were : There were in all 758 seats in the six medical colleges of Uttar Pradesh. Of those 26 had been allotted for nominees of the Union Government. The remaining 732 seats were to be filled up by the combined pre-Medical list. By different orders issued by the State Government a number of seats were reserved for various classes :

(i)	Girl candidates	20%
(ii)	Candidates from rural areas	12%
(iii)	Candidates from hill areas	3%
(iv)	Candidates from Uttarkhand Division	3%
(v)	Candidates belonging to Scheduled Castes	7%
(vi)	Candidates belonging to Scheduled Castes from rural areas : and	3%
(vii)	Candidates belonging to Scheduled Tribes	1%
	Total	49%

Consequently, 368 seats remained as general seats which amounted to 51% of the total number of seats open to the Test :

On challenge before the Allahabad High Court, the Court in Subhash Chandra v. State of U.P.[42] upheld the reservation. With regard to reservation for candidates from rural areas, hill areas and Uttarkhand division, the court stated that the citizens of those areas formed socially and educationally backward class of citizens. 49 per cent reservation was held to be not excessive. On appeal to the Supreme Court in the *Pradip Tandon* case[43] Chief Justice Ray upheld reservations in medical colleges for persons from hill and Uttarkhand areas in U.P. He felt that absence of means of communications, technical development and educational facilities kept the poor and illiterate people in those remote and sparsely populated areas backward.

Chief Justice Ray, however, invalidated reservation of seats in medical colleges for *rural* areas. He repudiated the argument of the Attorney-General that poverty was one of the elements in determining social backwardness. The proposition that rural population was poor and urban population was not, was not substantiated by facts. He said that the rural population consisting of 80 per cent of the total population of U.P. was heterogeneous in character and that not all of them were socially and educationally backward. "Population cannot be a class by itself. Rural element does not make it a class"." The poor marks obtained by the rural candidates was not a valid criterion for determining social and educational backwardness. The admission of 85 candidates from rural areas into the medical colleges in the instant case bore testimony of the high standards of education in rural areas. Also, the special need for doctors in rural areas did not render all the people in those areas backward.

As the criterion of place of birth in rural areas made the "basic qualification" it was held that the classification violated article 15(1).

Chief Justice Ray also held that the onus of proof was on the State to establish that "the reservations are for socially and educationally backward classes". This amounted to a repudiation of the rule in *Rajendran* and *Balram* cases which required the petitioners to prove that an entire caste group classified as backward was not backward—a very difficult burden to discharge particularly in cases when the State does not state the criteria it has employed in the classification of social and educational backward classes.

The Supreme Court in this case partly upheld (reservations in respect of hill and Uttarkhand areas) and partly reversed (reservations in respect of rural areas) the Allahabad High Court judgement in *Subhash Chandra* v. *State of U.P.*[44]

Another Supreme Court decision of recent vintage was *K. S. Jayasree* v. *State of Kerala*[45] an off-shoot of the acceptance of the recommendations of the Kerala Backward Classes Commission (Kumara Pillai Commission) by the Kerala Government. This Commission was set up in 1964 and it submitted its report in 1965. The Commission adopted a means-cum-caste/community test (application of income test within the

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41. *Id.* at 567.

42. A.I.R. 1973 All. 295 decided on 27-10-1972. However in *Dilip Kumar* v. *Government of U.P.* A.I.R. 1973 All 592 (decided on 31-1-1973), the Allahabad High Court quashed the reservation in favour of candidates from hill and rural areas. Though there was justification for reservation of candidates from Uttarkhand, the same could not be said of reservation for hill areas other than Uttarkhand and rural areas. Apparently, *Satish Chander* decision was not even referred to by the Court in *Dilip Kumar* which invited the caustic comment of the Supreme Court in *Pradip Tandon*'s case in the following manner.

> "It is desirable from the point of view of judicial propriety to refer to earlier decisions of the same High Court." A.I.R. 1975 S.C. 563 at 565".

43. *Supra* note 40.

44. A.I.R. 1975 S.C. 563 at 568.

45. A.I.R. 1973 All. 295.

46. A.I.R. 1976 S.C. 2381.

backward classes) and recommended that people in Kerala who are members of families which have an aggregate income of less than Rs. 4,200 per annum from all sources and which belong to caste or communities stated in Appendix VIII, constitute backward classes. Kerala Government agreed with the Commission's recommendations but raised the financial ceiling initially to Rs. 6,000 and subsequently to Rs. 10,000. Those government orders were challenged in the Kerala High Court. In *Shameem* v. *Medical College, Trivandram*,[47] the single Judge quashed the government order holding that irrespective of their economic status all families from the backward classes were entitled to protective discrimination as "the test of poverty cannot be the determining factor of social backwardness". The ceiling of Rs. 6,000 was also held to be arbitrary. However, on appeal, the Division Bench of the same High Court in *State of Kerala* v. *Krishna Kumari*[48] reversed the decision of the Single Bench and upheld the government's order. The High Court held that economic backwardness plays a part in social and educational backwardness. So poverty or economic standard is a relevant factor. In the view of the Chief Justice Nair :

> The real question is, should a social and educational backwardness of the castes resulting from historical reasons be perpetual and the castes as a whole treated as socially and educationally backward even if there is a group of persons in the castes who are not socially and educationally backward. Should all the members of such a community always remain backward... The communities described in Appendix VIII to the Report as such therefore do not lose a single seat that had been reserved for them earlier before the present Report of the Commission had been accepted by the order of the Government. The Competition is between the more advanced section of the castes and the less advanced.

The Court felt that the Commission had material before it to conclude that those among the castes who were economically better off were not socially backward. The Court also felt that it was not for it to weigh the quantum of evidence before the Commission or substitute its own view for that of the Commission in this matter.

The Supreme Court in *Jayasree* v. *State of Kerala*[49] upheld the decision of the Kerala High Court. Chief Justice Ray held that neither caste nor poverty would be the sole determining factor of social backwardness. He upheld the validity of the impugned order on the basis that the classification made by it was based not on income but social and educational backwardness. He also declared that a classification based only on poverty was not logical.

In reality the classification in the instant case was made on the ground of poverty. The test of poverty was based on the income. The purpose of classification was to group the backward castes listed by the Commission into more affluent and less affluent on the basis of certain income limit and to deny protective discrimination to the former group. This is clearly brought out by Chief Justice Nair in *Krishna Kumari's* case :

> The idea in making the reservation is to give the members of such caste or community an equal opportunity with those who are treated as socially and economically advanced classes of the society. If a group in those castes/communities were able to advance socially and educationally and economically to make reservations for them would be to deprive the chances of the really socially and educationally backward classes of people in those communities/castes.[50]

The basis of the proportion of population of backward classes, scheduled castes and scheduled tribes to the total population of the State of Maharashtra in fixing the quantum of reservation for admission to Medical Colleges in the State and the provision for carrying forward of vacant reserved seats of one sub-group to the other group were challenged in *S. G. Pandit* v. *State*.[51]

Rules framed by the Government of Maharashtra for admission to Government Medical Colleges in the state were challenged by the petitioner who sought admission in B. J. Medical College in Poona and was refused admission following the rules.

Rules were :

Admissions are granted once a year only at the Medical Colleges in the beginning of the academic year. Except the seats for the nominees of the Government of India and the seats of the B. J. Medical College, Poona and Miraj Medical College, Miraj all the seats at each medical college are earmarked for the students of the universities to which the particular medical college is affiliated.

Rule 4(d) provided as follows :

The percentage of seats reserved at each medical College will be :

Categories	*Percentage of reservation*
1. Scheduled Castes and Nav Budhas converted from Scheduled Castes.	13 per cent

47. A.I.R. 1976 Ker. 54. See also however, *Lalla Chacko* v. *State*, A.I.R. 1967 Ker. 124, involving a challenge to the means-cum-caste test formulated by the Kumara Pillai Commission. In this case, the petitioner, a Nair boy whose father's annual income was less than Rs. 6,000/- challenged the reservation on the ground that members of the Ezhava community, the income of whose families is below Rs. 6,000/- had been treated as backward class. If income were the criterion for classifying backward classes, he was entitled for reservation. Rejecting his claim, Justice Mathew (as he then was) held that the identification of backward classes was a complex question. Several factors came into play -It was not on the basis of income alone that the issue was determined.

48. A.I.R. 1976 Ker. 54.

49. A.I.R. 1976 S.C. 2381.

50. A.I.R. 1976 Ker. 54 at 60.

51. A.I.R. 1972 Bom. 243.

2.	Scheduled tribes including those outside specified areas.	7 per cent
3.	Denotified tribes and nomadic tribes.	4 per cent
4.	Other Backward Classes.	10 per cent

Reserved seats remaining vacant in any of the above groups for want of students in that group should go to other groups even if the percentage in a particular group exceeds the percentage prescribed for that group provided that the total *percentage of the seats does not exceed 34 per cent of the total seats for backward classes.* These seats should go to the members of the general public only when backward class students from any of the above mentioned group are not available to fill up the seats. *The above percentage should be inclusive of the numbers of students who get admission on merit and should not be in addition thereto.*

One ground which was urged by the petitioner was that the reservations made for the scheduled castes and scheduled tribes and backward classes on the basis of the proportion of these communities to the population of the State, as stated in the affidavit filed by the State, was irrational, and further that the classification of the other backward classes on the basis of castes was illegal. He contended that the provision in rule 4(d) that the reserved seats remaining vacant in any of the reserved group for want of students in that group should go to the other groups of scheduled castes and scheduled tribes and backward classes, was also unworkable and irrational.

The High Court found no substance in any of those contentions. It was possible that some other mode of reserving the seats might be adopted, but it could not be said that the basis of the proportion of population adopted by the Government of Maharashtra in reserving seats for scheduled castes and scheduled tribes and other backward classes on the basis of the last census was in any manner unreasonable. The court relied on the *Balaji* case and applying the principles enunciated therein to the facts of the present case, found that the Government had adopted an objective and just test for determining the proportion of seats to be reserved in the medical colleges.

The petitioner further submitted that since the rest of the population of the State was not concerned with the Shivaji and Poona Universities, it was illogical to adopt the basis of the proportion of those communities to the entire population of the whole State in determining the proportion of seats to be reserved in medical colleges in the areas of Shivaji and Poona Universities. The court found nothing illogical in it. Reservation was permitted under Art. 15(4) for the backward classes, perhaps there was no better basis for such reservation than the proportion of the population of the backward classes to the whole population of the State. It would be totally unreasonable to expect the State to take a separate Census of the backward classes population only of the areas of the two universities or of each of the Universities in the whole State. The contention of the petitioner that the rest of the population of the State was not interested in the admissions of the medical colleges at those two Universities had to be rejected because the Government of Maharashtra was justified in adopting a uniform rule of reservation in respect of all parts of the State; and if it had adopted a uniform rule on the basis of the population, there was nothing in it which was irrational or was hit by Article 14 or 15.

It was further contended that the reservation of the seats to students of these communities was also vitiated by the fact that they were qualified to apply for admission even if they got 40 per cent marks as against the minimum of 45 per cent prescribed for other students and thereby the Government instead of advancing the backward communities was encouraging them to be less advanced than the others. This argument ignored the very purpose for which Article 15(4) was enacted. One of the ways by which the conditions of backward classes could be ameliorated is to make students, who get even somewhat lower marks, to be eligible for admission to medical colleges; and this must be considered as a measure in advancement of these backward communities.

Similarly, the contention of the petitioner that the rule of carrying forward the vacant seats in a particular group to the groups in the backward classes was unworkable, had no merit because, Rule 4(d) was very practical and reasonable and easy of application. The four groups mentioned in the rule are "socially and educationally backward classes of citizens and scheduled castes and scheduled tribes". Under the rule 34 per cent seats were reserved for all the four groups together and within the said 34 per cent seats, further a special provision was made for filling up vacant seats reserved for any one or more of the four groups by throwing them open to students belonging to the remaining groups. All the four groups formed one category of socially and educationally backward citizens and they were to be given preference. Therefore, provisions were made for filling up vacant seats among the seats reserved for them. The sub-division into the four groups was made obviously only to allocate the reservation to the four groups falling under the one category of socially and educationally backward citizens so that the comparatively brighter students in one group may not keep out the students of the other groups. This was permissible under Art. 15(4) of the Constitution and consistent with Art. 46 which requires the State "to promote with special care the educational and economic interests of the weaker section of the people, and in particular, of the scheduled castes and scheduled tribes". The petitioner could not, therefore, challenge Rule 4(d) on the basis that after reserving seats for each of the groups, it further made special provision for the benefit of those groups by throwing open the vacant seats in one group for students of the other groups or on the grounds that vacant seats in any of the four groups should be thrown open to all students on merit without making them again available to students belonging to the said groups.

II. *Quantum of Reservation : When Excessive ?*

The quantum of reservation to be made is primarily a matter for the state to decide. However, it should not be excessive. What is the limit? The Supreme Court in *Balaji's* case[40] while striking down 68 per cent total reservation in favour of Backward Classes, Scheduled Castes and Scheduled Tribes aptly observed that a special provision envisaged by Article 15(4) must be within reasonable limits. The interests of weaker sections of society which are to be protected by the state have to be adjusted with the interest of the community as a whole. The adjustment of those competing claims is a complex task but,

> if under the guise of making special provision, a state reserves practically all the seats available..... that clearly would be subverting the object of Art. 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make speaking generally and in a broad way a special provision, should be less than 50 per cent, how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.

Accordingly the Court held that reservation of 68 per cent made by the impugned order of the Mysore Government was violative of Article 15(4) and as such was "a fraud on the constitutional power conferred on the State".

A scheme providing for excessive reservation in favour of Harijans, Adivasis and backward classes in the disposal of riverbed lands was challenged in *Dahyabhai Chaturbhais* v. *State*[41]. A Government circular had regulated the disposal of riverbed lands to certain groups of people to the exclusion of others after cancellation of the existing order regarding the disposal of such lands by public auction. The priority for disposal of such lands were :

(i) *Bona fide* agriculturists of the village holding not less than 5 acres, preference will be given to Harijans, Adivasis and Backward Classes people.

(ii) Holders of land adjoining *Bet Bhatha* lands holding land less than 16 acres and who in the collector's opinion have a genuine need of additional lands for maintenance of their families *inter se* preference in this case also will be as per (i) above.

(iii) Co-operative farming societies of Harijans, Adivasis and Backward Class persons.

(iv) Co-operative farming society consisting of landless labourers or small holders.

(v) Any of the priority holders under the Water Land Rules.

The Gujarat High Court held that the effect of those clauses was not to make a special provision for small land holders or landless people who need the land for their maintenance and who could not bid at the public auction as against rich people. The whole classification was based on two essential principles—that the individual would be excluded both by co-operative society and by an individual member of Harijans, Adivasis and Backward class people. The state did not produce any list even though the State had been given proper opportunity to file an additional affidavit of persons who were regarded as backward class people and for whose benefit this reservation was sought to be made. There was, therefore, no material whatever to indicate the category of "backward class people" as understood in the relevant Government Resolution. Besides, the reservation was so excessive as in cases of Harijans, Adivasis and Backward Class people that they would completely exclude *bona fide* agriculturists having no land or having landless than 5 acres who would have fallen otherwise under the first category of priority holders. Almost all the 100 per cent land would go to those Harijans, Adivasis and Backward persons and the reservation would cease to be a reservation within the meaning of Article 15(4). The Government order was held to be unconstitutional.

Excessive reservation in favour of Scheduled Castes and Scheduled Tribes in the settlement of *ganja* shops was struck down by the Patna High Court in *Abdul Latiff* v. *State*.[42] The Bihar government had issued the following guidelines for the settlement of *ganja* shops in favour of the Scheduled Caste and Scheduled Tribe applicants by an order of 20th August, 1958.

(i) Intimation to be given to the Department of social welfare who would give due publicity among the Scheduled Castes and Scheduled Tribes.

(ii) When there are several candidates for an excise shop out of whom *one* is a Scheduled Caste or Scheduled Tribe candidate who is suitable, the settlement should be made not by lot but by offering to that applicant.

(iii) If there are more than one suitable Scheduled Caste or Scheduled Tribe candidates, settlement is to be done by lot among such suitable candidates and the winner would get the shop.

(iv) Scheduled Caste and Scheduled Tribe candidates should not be rejected except after careful consideration of the matter.

The application of petitioner, who was one among the 39 applicants, was rejected and he applied for a writ in the High Court of Patna for quashing the government order incorporating the guidelines.

The court held that Article 15(4) was not an independent or substantive enactment but was an exception or a qualification to the main guarantee under Article 15(1). Therefore, it was not possible to interpret Article 15(4) in such a manner as to destory or nullify the guarantee under Article 15(1). It was because the interest of the society as a whole was served by promoting the advancement of the

[40] A.I.R. 1963 S.C. 649.

[41] *Id* at 663.

[42] II Gui. L.R. 386 (1970).

[42] A.I.R. 1964 Pat. 393.

weaker elements of that society that Article 15(4) authorises special provision to be made.

The net effect of the government's order was to exclude candidates from all *other* communities in situations where there was a single candidate belonging to Scheduled Castes or Scheduled Tribes. This amounted to 100 per cent reservation which was not warranted under Article 15(4).

III. *No Degrees of Backwardness among the Backward Classes*

The question whether it is constitutionally permissible to sub-classify the backward classes on the basis of relative backwardness came up for decision in *Balaji's* case[28]. In that case the Mysore Government's order of 1962 had divided the backward classes into two categories, namely (i) Backward classes and (ii) More Backward Classes. Out of 50 per cent fixed as the quota for backward classes 28 per cent was fixed for backward classes and 22 per cent for *more* backward classes. The Supreme Court held that such sub-classification of the backward classes was unconsttitutional under Article 15(4). In effect Article 15(4) makes special provision for the really backward classes in making two categories of backward classes, the Order in substance had devised measures for the benefit of all the classes who were less advanced compared to the most advanced classes in the State. The upshot of the method adopted by the Order was that nearly 90 per cent of the population was treated as backward. This case is authority for the proposition that the concept of backwardness is not *relative* in the sense that classes which are backward in relation to the most advanced classes should be included in it.

The Mysore High Courtt in *Ramakrishna Singh* v. *State of Mysore*[29] (pre-Balaji decision) held that the list of backward classes including 95 per cent of the population of the state was a "fraud" on the Constitution because it excluded communities who represented five per cent of the population. This was more a discrimination against the excluded class of population than a provision for the backward classes. Besides it was a provision not for socially and educationally backward classes, but for the classes who were comparatively backward to the most advanced classes. This was not warranted under Article 15(4).

IV. *No Prohibition on Backward Classes to Compete With Others*

In *V. Raghuramulu* v. *State of Andhra Pradesh*[30] (a pre-*Balaji* decision) the applicants belonging to backward classes applied for admission to Medical Colleges. They were interviewed but were not selected on the basis that a maximum of 15 per cent of the total number of seats allotted for the backward classes was exhausted by the other applicants from backward classes who secured higher marks than the petitioners, though in fact they got higher marks than the two candidates who were selected for the seats thrown open for general competition. The two candidates challenged the selection as violative of Articles 15 and 29 (2).

Chief Justice K. Subba Rao (as he then was) invalidated the reservation on a maximum percentage basis for the backward classes on the ground that such a provision would not be for the advancement of the backward classes. On the other hand, if a maximum is fixed, instead of providing for the advancement of those classes in the contingency visualised above, it would retard their progress; for students of those classes who secure more marks than students who compete for the general seats and get less marks than students belonging to their classes, would not get seats. To this extent the order of the government would be in excess of the power conferred on it under clause (4) and, therefore, could not affect the fundamental rights of the citizens whether they belonged to the backward classes or not.

The Court suggested that the rule may be modified by substituting the words "minimum of 15 per cent" for the words "maximum of 15 per cent".

In *P. Sudarshan* v. *State of Andhra Pradesh*[30] (a pre-*Balaji* decision) which involved similar facts as the *Raghuramulu* case Chief Justice Subba Rao holding such government order invalid as violative of Article 29(2) pointed out that the rule should be evolved in such a manner as to protect the interests of students of the backward classes without simultaneously causing prejudice to students of other communities. The judge suggested that this could be achieved by pooling all the candidates together and guaranteeing minimum seats for the students of backward classes. By way of illustration, if 100 applicants were to be admitted to the Medical College, they would be arranged in the order of merit and even if more than 15 per cent of the candidates belonging to the backward classes could be selected on merit alone, they would be selected. If they fell short of that number they would be selected to make up their number on the basis of merit *inter se* between them, though they secured less marks than boys belonging to other communities. This process would protect students of backward classes without doing any injustice to the forward ones.

In *Ramakrishna Singh* v. *State of Mysore*[29] (a pre-*Balaji* decision) two orders of Mysore Government dated 14th May, 1959 and 22nd July, 1959 listing backward classes and their reservation for admission to professional colleges were challenged. The list of backward classes included 95 per cent of the population of the State and all communities and castes of the Hindus other than Brahmins, Banias, Kayastha and all the communities in the state except Anglo-Indians and Parsis had been included in the list.

The two orders had fixed 20 per cent for Scheduled Castes and Scheduled Tribes and 45 per cent for the socially and educationally backward classes and the

[28]. A.I.R. 1963 S.C. 649.

[29]. A.I.R. 1960 Mys. 338; this case is discussed in detail, see *infra*.

[30]. A.I.R. 1958 A.P. 129.

[30]. A.I.R. 1958 A.P. 569.

[29]. A.I.R. 1960 Mys. 338