

PETITIONER:
K.C. VASANTH KUMAR & ANOTHER.

Vs.

RESPONDENT:
STATE OF KARNATAKA

DATE OF JUDGMENT 08/05/1985

BENCH:
CHANDRACHUD, Y.V. ((CJ)
BENCH:
CHANDRACHUD, Y.V. ((CJ)
DESAI, D.A.
REDDY, O. CHINNAPPA (J)
SEN, A.P. (J)
VENKATARAMIAH, E.S. (J)

CITATION:
1985 AIR 1495 1985 SCR Supl. (1) 352
1985 SCC Supl. 714 1985 SCALE (1)832
CITATOR INFO :
RF 1988 SC 959 (14)
E 1988 SC2287 (2)

ACT:

Constitution of India, 1950, Articles 15(4), 16(4), 29(2), 338(3) and 340- Validity of the Means test adopted in State of Karnataka order dated 22.2.1977 as modified by the Government Order dated March 1, 1979 and June 27, 1979- Guidelines for making special provision for the advancement of any socially and educationally backward classes of citizens and provision for the reservation of appointments or posts in favour of any backward classes of citizens which in to opinion of the State, is not adequately represented in the services of the State- Conflict between "the menitoriam principle and" the "compensatory principle" of discrimination' in the matter of admissions into institutions imparting higher education and of entry into Government service, how to be solved-Statutory construction of the word "Backward classes" ejusdem genesis Rule or Rule Noscitur a sociis, explained-Construction of Articles 338(3) and 340 of the Constitutions-Government's power to make reservations under Articles 15(4) and 16(4) and the extent of reservation that can be made, explained-Words and Phrases-Meaning of "backwardness" "backward classes", socially and educationally backward classes",

HEADNOTE:

In the pre-independent period, the former princely State of Mysore which now forms part of the State of Karnataka is one of the earliest States in the country in which the system of reservation for backward classes in public services was introduced. In 1918, the Government of His Highness the Maharaja of Mysore appointed a committee under the chairmanship Or Sir Leslie C. Miller, Chief, Justice of the Chief Court of Mysore to investigate and report on the problem of backward classes. The questions referred to that Committee were (i) changes needed in the then existing rules of recruitment to the public services; (ii) special facilities to encourage higher and professional

education among the members of backward classes and (iii) any other special measures which might be taken to increase the representation of backward communities in the public service without materially affecting the efficiency, due regard being paid also to the general good accruing to the State by a wider diffusion of education and feeling of increased status which will thereby be produced in the backward communities. The expressions 'backward classes' and 'backward communities', were used almost interchangeably and that the contained in Article 335 of the Constitution that any reservation made should not impair efficiency was anticipated more than three decades before the Constitution was enacted. The committee submitted its report in 1921 containing its opinion that all communities in the State other than Brahmins should be understood as backward communities regarding whom it made certain recommendations.

The

353

Government orders issued on the basis of the Report continued to be in force till 1956 i.e. there organisation of States which brought together five integrating A units- the former State of Mysore (including Bellary District), Coorg, four districts of Bombay, certain portions of the State of Hyderabad and the district of Sough Kanara and the Kollegal Taluk which formerly formed part of the State of Madras. There were different lists of backward communities in the five integrating units and they were allowed to continue for sometime even after the reorganisation of States.

In order to bring about uniformity the State Government issued a notification containing the list of backward classes for the purpose of Article 15(4) of the Constitution at the beginning of 1959. The validity of that notification and of another notification issued thereafter on the same topic which according to the State Government had treated all persons except Brahmins, Baniyas and Kayasthas as backward communities was challenged before the High Court of Mysore in Rama Krishna Singh v. State of Mysore, AIR 1950 Mysore 338. The two notifications were struck down by the High Court holding (a) in as much as the impugned notifications contained list of backward classes including 55 per cent of the population of the State and all Hindu communities other than Brahmins, Baniyas and Kayasthas and all other non-Hindu communities in the State except Anglo-Indians and Parsees had been treated as backward classes it resulted more in a discrimination against the few excluded communities consisting of about 5 per cent of the total population rather than making provision for socially and educationally backward classes; (b) making provision for communities which were slightly backward to the so called forward communities did not amount to making provision for the communities which really needed protection under Article (15(4) of the Constitution; (c) socially and educationally backward classes can in some cases be determined on the basis of castes.

Therefore, the State Government constituted a Committee on January 8, 1960 under the Chairmanship of Dr R. Nagan Gowda for the purpose of determining the criteria for the classification of backward classes in the State with the following terms of reference: (i) to suggest the criteria to be adopted in determining which sections of the people in the State should be treated as socially and educationally backward and (ii) to suggest the exact manner in which the criteria thus indicated should be followed to enable the State Government to determine the persons who should secure

such preference as may be determined by Government in respect of admissions to technical institutions and appointment to Government services. The said committee submitted its Interim Report on February 19, 1960. On the basis of the Interim Report of the Committee, the State Government passed an order dated June 9, 1960 regarding admissions to professional and technical institutions reserving 22 per cent of seats for backward classes, 15 per cent for Scheduled Castes and 3 per cent for Scheduled Tribes and the remaining 60 percent of seats were allowed to be filled upon the basis of merit. The order of the Government was challenged before the High Court of Mysore in S.A. Partha & Ors. v. The State of Mysore & Ors. A.J.R. 1961 Mys. 220. The High Court found that the direction contained in the Government order to the effect that if any seat or seats reserved for candidates belonging to the Scheduled Castes

354

and Scheduled Tribes remained unfilled, the same shall be filled by candidates of other backward classes was unconstitutional. It also gave some directions regarding the manner in which the calculation of the quota of reservation be made. Thereafter the Final Report was submitted by the Nagan Gowda Committee on May 16, 1961. After taking into consideration the recommendations made in the said Report, the State Government issued an order for the purpose of Article 15 (4) of the Constitution on July 10, 1961. By that order, the State Government specified 81 classes of people as backward classes and 135 classes of people as more backward classes and reserved 30 percent of seat-professional and technical institutions for backward and more backward classes. 15 per cent and 3 per cent of the seats were reserved for Scheduled Castes and Scheduled Tribes respectively and the remaining 52 per cent of the seats were allowed to be filled up on merit. This order was challenged before the Supreme Court under Article 32 of the Constitutions in M. R. Balaji & Ors v. State of Mysore [1963] Supp. 1 SCR 439.

In this landmark decision of the Supreme Court, the meaning of the term "socially and educationally backward classes" appearing in Article 15(4) was explained as "The backwardness under Article 15(4) must be social and educational. It is not either social or educational but it is both social and educational." After explaining as to how social and educational backwardness has to be determined, and the question of determination of the classes which were educationally backward, the court held that the inclusion of the members of the Lingayat community in the list of backward classes was erroneous. On the question of extent of reservation that can be made the Court held that speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent should depend upon the relevant prevailing circumstances in each case." and thus allowed the petition

Thereafter, the Government passed another order dated July 26, 1963 which directed that 30 per cent of the seats in professional and technical colleges and institutions should be reserved for backward classes as defined in that order and that 18 per cent of the seats should be reserved for the Scheduled Castes and Scheduled Tribes. The criteria laid down in that order for determining social and economic backwardness were two-fold-income and occupation. It stated that those who followed occupations of agriculture, petty business, inferior service, crafts or other occupations involving manual labour and whose family income was less

than Rs. 1,200 per annum were to be treated as belonging to backward classes. This order was questioned before the High Court in D.G. Viswanath v. Government of Mysore & Ors. A.l.R. 1964 Mys. 132 by some petitioners on various grounds. The High Court dismissed the petitions observing that the determination of the backward classes without reference to caste altogether was not correct and it expressed the hope that the State would make a more appropriate classification lest its bonafides should be questioned. In the appeal filed against this judgment in R. Chitrlekha & H. Anr. v State of Mysore & Ors [1964] 16 SCR 368 the Supreme Court explained the inconsistency between the High Court judgment with the decision in Balaji's case and observed that "Two principles stand out prominently from 355

Balaji, namely, (i) the caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness; and (ii) though it is a relevant A factor to determine the social backwardness of class of citizens, it cannot be the sole or dominant test in that behalf-castes is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of the Supreme Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste." While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of compelling circumstances, affording a basis for the ascertainment of backwardness of a class.

Thereafter the State Government appointed the Karnataka Backward Classes Commission under the Chairmanship of Sri L.G. Havanur which after an elaborate enquiry submitted its report in four massive volumes on November 19,1975. The Commission recommended that person belonging to backward classes for purposes of Article 15(4) of the Constitution should be divided into three groups-(a) backward communities consisting of 15 castes (b) backward castes consisting of 128 castes and (c) backward tribes consisting of 62 tribes. For purposes of Article 16(4) of the Constitution, the Commission divided the backward classes into (a) backward communities consisting of 9 castes(b) backward castes consisting of 115 castes and (c) backward tribes consisting of 61 tribes. According to the Commission, backward communities were those castes whose student average of students passing SSLC examination in 1972 per thousand of population was below the State average (which was 1.69 per thousand) but above 50 per cent of the State average and backward castes and backward tribes were those castes and tribes whose student average was below 50 per cent of the State average except in the case of Dombars and Voddars and those who were Nomadic and de-notified tribes. The total population of these backward classes (other than Scheduled Castes and Scheduled Tribes), according to the Commission, was about 45 per cent of total population of the State. The difference between the two lists-one under Article 15(4) and the other under Article 16(4) of the Constitution was due to the exclusion of certain communities, castes and tribes which were socially and educationally backward but which had adequate representation in the services from the list prepared for the purpose of Article 16(4). The Commission recommended both for purposes of Article 15(4) and Article 16(4) the percentage of reservations: (i) Backward communities 16 per cent; (ii) Backward Castes 10 per cent; and (iii) Backward Tribes 6 per cent and total 32 per cent. The reservation of 32 per cent along with 18 per cent

reserved for Scheduled Casts and Scheduled Tribes together amounted to 50 per cent of the total seats or posts, as the case may be. The Commission further recommended if seats/posts remained unfilled in the quota allotted to backward tribes, they should be made over to backward communities and backward castes. Similarly if seats/posts remain unfilled in the quota allotted to backward castes, they should be made over to backward communities and backward tribes. If, however, seats/posts remain unfilled in the quota allotted to any of those three categories, they should be made over to Scheduled Castes and Scheduled Tribes. In the event of seats/posts remaining unfilled by any of these categories they should be transferred to the general pool.

356

After considering the said Report, the State Government issued an order A dated February 22, 1977 whereunder it listed the Backward communities. Backward Castes and Backward Tribes who shall be treated as Backward classes for purposes of Articles 15(4) and 16(4) of the Constitution of India. The order clarified, (a) that only such citizens of these Backward Classes whose family income per annum from all sources is Rs. 8000 (Eight thousand only) and below shall be entitled to special treatment under these Articles and (b) that five categories, namely; an actual cultivator, an artisan, a petty businessman, one holding an appointment either in Government service or corresponding services under private employment including casual labour; and any person self employed or engaged in any occupation involving manual labour" of citizens shall be considered as a special group such citizens of this special group whose family income is Rs. 4,800 (Rupees four thousand and eight hundred only) and below per annum shall be eligible for special treatment under the two Articles. The order further noted that (i) Family income means income of the citizen and his parents and if either of the parents is dead, his legal guardian; and (b) to fix the reservation for purposes of Articles 15(4) and 16(4) of the Constitution in respect of the Backward classes and the special group of citizens at 40 per cent, the allocation being -Backward Communities (20 per cent), Backward castes (10 per cent, Backward Tribes (5 per cent), and special group (5 per cent). In the list of backward communities mentioned in the Government order, the State Government included 'Muslims' thus making a total of 16 backward communities. In the list of backward castes there were 129 castes including converts into Christianity from Scheduled Castes/Scheduled Tribes upto second generation and 62 Scheduled Tribes. The reservation for backward classes was 40 percent and taken along with 18 per cent for Scheduled Castes and Scheduled Tribes, the total reservation of seats/posts came to 58 per cent leaving only 42 per cent for merit pool.

The Government order dated February 22, 1977 and another notification dated March 4, 1977 issued for purposes of Article 16(4) had also been challenged in a number of writ petitions filed under Article 226 of the Constitution before the High Court of Karnataka in S Somashekarappa & Ors. v State of Karnataka & Ors (Writ Petition No 43;1 of 1977 and connected writ petition disposed of on April 9, 1979). Allowing the petitions; the High Court quashed (i) the inclusion of 'Arasu' community in the list of 'Backward Communities' both for purposes of Article 15(4) and Article 16(4); (ii) the inclusion of the (a) Baliya (b) Devadiga (c) Ganiga (d) Nayinda (e) Rajput and (f) Satani in the list of backward communities and the inclusion of (a) Banna (b)

Gurkha (c) Jat (d) Konga (e) Kotari (f) Koyava (g) Malayali (h) Maniyanani or (Muniyani) (i) Padatti (j) Padiyar (k) Pandavakul (l) Raval and (m) Rawat in the list of backward classes for purposes of Article 16(4) of the Constitution; and (iii) reservation of 20 percent made for Backward communities in the State Civil Services under Article 16(4), reserving liberty to the State Government to determine the extent of reservation in accordance with law. The classification and reservation in other respects was upheld. Special Leave Petitions (Civil) No. 6656 of 1979 and 985411979 are filed against the said Judgment of the High Court under Article 136 of the Constitution.

357

After the said judgment of the High Court, by an order dated May 1, 1979, the reservation for backward communities was reduced to 18 per cent for purposes of Article 16(4). By an order dated June 27, 1979, the State Government modified the Government order dated February 22, 1977 by increasing the reservation for 'Special Group' from 5 per cent to 15 per cent both for purposes of Article 15(4) and Article 16(4) of the Constitution. Thus as on date, the total reservation for purposes of Article 15(4) is 68 per cent and for purposes of Article 16(4) is 66 per cent. There are only 32 per cent seats in professional and technical colleges and 34 per cent posts in Government services which can be filled up on the basis of merit. These writ petitions filed under Article 32 of the Constitution of India, seek to challenge the Constitutional validity of the State Government orders dated February 22, 1977 as modified by the Government orders dated May 1, 1979 and June 27, 1979.

Disposing of the petitions and the appeals by Special Leave, the Court expressed their following opinions,
Per Chandrachud, C.J.

The following propositions on the issue of reservation may serve as a guideline to the Commission which the Government of Karnataka proposes to appoint, for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and other Backward Classes which problem is a burning issue today.

1. The reservation in favour of scheduled castes and scheduled tribes must continue as to present, there is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation. [376 C-D]

2. The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time. [376E-F]

3. In so far as the Other Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions. [376 F-G]

4. The policy of reservations in employment, education

and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (i) to the State to rectify distortions arising out of particular facts of the reservation policy and (ii) to the people, both backward and, non-

358

backward, to ventilate their views in a public debate on the practical impact of A the policy of reservations. [376 H; 377 A]

Per Desai J

For a period of three and half decades, the unending search for identifying socially and educationally backward classes of citizens has defined the policy makers, the interpreters of the policy as reflected in statutes or executive administrative orders and has added a spurt in the reverse direction, namely, those who attempted to move upward (Pratilom) in the social hierarchy have put the movement in reverse gear so as to move downwards (Anulom) in order to be identified as a group or class of citizens socially and educationally backward. The Constitution promised an egalitarian society; it was a caste ridden stratified hierarchical society. Therefore, in the early stages of the functioning of the Constitution it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Article 15(4). [377 D-G]

The language of Article 15(4) refers to 'class' and not caste. Preferential treatment which cannot be struck down as discriminatory was to be accorded a class, shown to be socially and educationally backward and not to the members of a case who may be presumed to be socially and educationally backward. [378 A B]

It is clear from the decisions of the Supreme Court that same vacillation on the part of the judiciary on the question whether the caste should be the basis for recognising the backwardness. Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities. The expression 'backward classes' is not defined. Courts, therefore have more or less in the absence of well-defined criteria not based on caste label has veered round to the view that in order to be socially and educationally backward classes, the group must have the same indicia as Scheduled Castes and Scheduled Tribes. [378 E; 384 E-F]

State of Madras v. Srimathi Champakam Dorairajad & Anr [1951] SCR 525; M R. Balaji & Ors v State of Mysore [1963] Supp. 1 SCR 439; T. Devadesan v The Union of India & Anr [1964] 4 SCR 680; R. Chitralkha & Anr. v State of Mysore & Ors. [1964] 6 SCR 368; Triloki Nath & Anr v. State of Jammu

JUDGMENT:

State of Jammu & Kashmir & Ors [1969] I SCR 103; A. Peeriakaruppan etc. v. State of Tamil Nadu [1971] 2 SCR 430, State of Andhra Pradesh & Ors. v. U.S.V. Balram etc [1972] 3 SCR 247; Janki Prasad Parimoo & Ors etc etc v State of Jammu & Kashmir & Ors. [1973] 3 SCR 236; State of Uttar Pradesh v Pradip Tandon & Ors [1976] 2 SCR 761; State of Kerala & Anr v N M Thomas & Ors. 11976] 1 SCR 906; Kumari K S Jayasree & Anr v The State of Kerala & Anr. [1977] 1 SCR 194; and Akhil Bhartiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association v Union of India & Ors. [1981] 2 SCR 185, referred to.

A caste is a horizontal segmental division of society spread over a district of a region or the whole State and also sometimes outside it. The

359

concept of purity and impurity conceptualises the caste system. There are four essential features of the caste system which maintained in homo hierarchicus character; (i) hierarchy (ii) commensality (iii) restrictions on marriage and (iv) hereditary occupation. Most of the caste are endogamous groups. Inter-marriage between two groups is impermissible. But 'Pratilom' marriages are not wholly unknown. Similarly with the onward movement of urbanisation, members of various castes are slowly giving up, traditional occupations and the pure impure avocations is being frowned upon by developing notion of dignity of labour. As the fruits of independence were unequally distributed amongst various segments of the society, in each caste there came into existence a triple division based on economic resurgence amongst the members of the caste. Those who have become economically well off have acquired an upper class status (class consciousness) and the one on the step below is the middle class and the third one belongs to poorer section of the caste. This led to the realisation that caste culture does not help economic interest. In fact the upper crust of the same caste is verily accused of exploiting the lower strata of the same caste. Therefore, the basis of the caste system namely, purity and pollution is slowly being displaced by the economic condition of the various segments of the same caste. It is recognised on almost all hands that the important feature of the caste structure are progressively suffering erosion. The new organisation, the so-called caste organisation, is substantially different from the traditional caste structure and caste councils. Economic differentiation amongst the members of the caste has become sharp, but not so sharp as to bury caste sentiments and ties. In the face of this transformation of the caste structure, caste label can not be accepted as the basis for determining social and educational backwardness, but the class or the social group should be examined [385 C-H; 386 A-D]

Caste in rural society is more often than not mirrored in the economic power wielded by it and vice versa. Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste So sadly and oppressively deep-rooted is caste in our country that it has cut across even the barriers of religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioner of other religious faiths and Hindu dissentients are some times as rigid adherents to the system of caste as the conservative Hindus. [386 E-H]

Shared situation in the economic hierarchy, caste gradation, occupation, habitation, style of consumption, standard of literacy and a variety of such other factors appear to go to make towards social and educational backwardness. Thus there is a mad rush for being recognised as belonging to a caste

360

which by its nomenclature would be included in the list of socially and educationally backward classes. Certain castes are known by a number of synonymy which vary from one region to the other and making their complete coverage almost impossible. The only way out would in such a situation is to treat, if a particular caste has been treated as backward, all its synonyms whether mentioned in the State lists or not as backward. Again, some of the castes just for the sake of being considered socially and educationally backward, have degraded themselves to such an extent that they had no hesitation in attributing different types of vices to and associating other factors indicative of backwardness, with their castes. The only remedy for such a malaise is to devise a method for determining socially and educationally backward classes without reference to caste, beneficial to all sections of people irrespective of the caste to which they belong. [387 B-H; 388 A]

A few other aspects for rejecting caste as the basis for identifying social and educational backwardness are: (i) If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness; the danger looms large that this approach alone would legitimise and perpetuate caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution. The assumption that all members of some caste are equally socially and educationally backward is not well-founded. Such an approach provides an over simplification of a complex problem of identifying the social and educational backwardness: (ii) it is recognised reservation has been usurped by the economically well-placed section in the same caste; and (iii) the caste is, as is understood in Hindu Society unknown to Muslims, Parsis, Jews etc. As such, caste criterion would not furnish a reliable yardstick to identify socially and educationally backward group in the aforesaid communities though economic backwardness would.

[388 P-G; 389 A;F]

Therefore, the only criterion which can be realistically devised is the one of economic backwardness. To this may be added some relevant criteria such as the secular character of the group, its opportunity for earning livelihood etc, but by and large economic backwardness must be the load-star. [389 F]

Chronic poverty is the bane of Indian Society. Market economy and money spinning culture has transformed the general behaviour of the society towards its members. Upper caste does not enjoy the status or respect, traditional, voluntary or forced any more even in rural areas what to speak of highly westernised urban society. The bank balance, the property holding and the money power determine the social status of the individual and guarantee the opportunities to rise to the top echelon. How the wealth is acquired has lost significance. Purity of means disappeared with Mahatma Gandhi and we have reached a stage where ends determine the means. This is the present disturbing situation whether one likes it or not. [389 G-H; 390 A-B]

Reservation in one or other form has been there for decades. If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefits of preferred treatment, it would

361

unmistakably show that the benefits of reservations are snatched away by the top creamy layer of the backward castes. This has to be avoided at any cost.

[390 E]

If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate the disadvantageous sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty. However, this does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes. Thousands of years of discrimination and exploitation cannot be wiped out in one generation. But even here economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefited by it and improved their position. And finally reservation must have a time span otherwise concession tend to become vested interests. [391 E-H; 392 A]

Per Chinnappa Reddy .r.

The paradox of the system of reservation that may be made under Articles 15(4),16(4) read with 29(2) of the Constitution is that it has engendered a spirit of self denigration among the people. Nowhere else in the world do castes, classes or communities queue up for the sake of gaining the backward status. Nowhere else in the world is there competition to assert backwardness and to claim 'we are more backward than you'. This is an unhappy and disquieting situation, but it is stark reality. [392 E-F]

2. The Scheduled Castes, the Scheduled Tribes and other socially and educationally backward classes, all of whom have been compendiously described as 'the weaker sections of the people', have long journeys to make unsociety. They need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity, and not charity. They claim their constitutional right to equality of status and of opportunity and economic and social justice. Several bridges have to be erected, so that they may cross the Rubicon. Professional education and employment under the State are thought to be two such bridges. Hence the special provision for advancement and for reservation under Articles 15(4) and 16(4) of the Constitution. [393 C-D]

3. Courts are not necessarily the most competent to identify the backward classes or to lay down guidelines for their identification except in a broad and very general way. Courts are not equipped for that; Courts have no legal barometers to measure social backwardness and are truly removed from the people, particularly those of the backward classes, by layer upon layer of gradation and degradation. And, India is such a vast country that conditions
362

vary from State to State, region to region, 'district to district and from one A ethnic religious, linguistic or caste group to another. A test to identify back ward classes which may appear appropriate when applied to one group of people may be wholly inappropriate and unreasonable if applied to another group of people. There can be no universal test; there can be no exclusive test; there can be no conclusive test. In fact, it may be futile to apply and

rigid tests. One may to look at the generality and the totality of the situation. [398 A-C]

4. Before attempting to lay down any guideline for the purpose of determining the methods to be adopted for identifying the socially and educationally backward classes one should guard against the pitfalls of the traditional approach to the question, which has generally been superior, elitist and, therefore, ambivalent. The result is that the claim of the Scheduled Castes and Scheduled Tribes and other backward classes to equality as a matter of human and constitutional right is forgotten and their rights are submerged in what is described as the "Preferential principle" or "protective or compensatory discrimination". Unless these superior, patronising and paternalist attitudes are got rid off. It is difficult to truly appreciate the problems involved in the claim of the Scheduled Castes, Scheduled Tribes and other backward classes for their legitimate share of the benefits arising out of their belonging to humanity and to a country whose constitution preaches justice, social, economic and political and equality of status and opportunity for all. [393 E-H]

5. There is neither statistical basis nor expert evidence to support the assumption that efficiency will necessarily be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts. The word 'efficiency' is neither sacro-sanct nor is the sanctorum has to be fiercely guarded. 'Efficiency' is not a Mantra which is whispered by the Guru in the Sishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. This does not mean that efficiency in civil service is unnecessary or that it is a myth. However, one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and for admission to such courses. The rules may provide for an appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different courses of study having regard to the requirements of the posts and the courses of study. But, efficiency cannot be permitted to be used as a camouflage to let the upper classes monopolise the services, particularly the higher posts and the professional institutions. In view of Articles 15(4) and 16(4), the so called

363

controversy between the moratorium and compensatory principles is not of any significance. [395 D; G-H; 396 C-G; 397 F]

6. The three dimensions of social inequality are class, status and power. Everyone of these three dimensions are intimately and inextricably connected with economic position. Viewed from any of these three dimensions it is clear that the economic factor is at the bottom of backwardness and poverty is the culprit cause and the

dominant characteristic. The economic power has firm links with the castes system, land and learning, two of the primary sources of economic power in India have been the monopoly of the superior castes. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. Shared situation in the economic hierarchy, caste gradation, occupation, habitation, style of consumption, standard of literacy and a variety of such other factors appear to go to make towards social and educational backwardness. [398 F; 399 C-H 400 G-H]

7. "The backward classes of citizens" referred to in Article 16(4), despite the short description, and the same as 'the socially and educationally backward classes of citizens and the scheduled castes and the scheduled tribes' so fully described in Article 15(4). Again the 'special provision for advancement' is a wide expression any may include many more things besides 'mere reservation of seats in colleges. It may be by way of financial assistance, free medical, educational and hostel facilities, scholarships, free transport, concessional or free housing, exemption from requirements insisted upon in the case of other classes and so on. Under Article 16(4), reservation is to be made to benefit those backward classes, who in the opinion of the Government are not adequately represented, in the services. Reservation must, therefore, be aimed at securing adequate representation. It must follow that the extent of reservation must match the inadequacy of representation. There is no reason why this guideline furnished by the Constitution itself should not also be adopted for the purposes of Article 15(4) too. The reservation of seats in professional colleges may conveniently be determined with reference to the inadequacy of representation in the various professions. Similarly, the extent of reservation in other colleges may be determined with reference to the inadequacy in the number of graduates, etc. Naturally, if the lost ground is to be gained, the extent of reservation may even have to be slightly higher than the percentage of population of the backward classes. [403 H; 404 A-F]

8. The ordinary rules of statutory interpretations cannot be applied to interpret constitutional instruments which are sui generis and which deal with situations of significance and consequence. The Constitution must be given a generous interpretation so as to give all its citizens, the full measure of justice promised by it. [406 D-E]

There is no reason whatever to narrow the concept of equality in Article 16(1) and refuse to read into it broader concepts of social justice and equality. In fact it is necessary to read Article 16(1) so as not to come into any conflict

364

with Articles 46 and 335. A constitutional document must be read so as to synthesise its provisions and avoid disharmony. To say that equality means that unequals cannot be treated equally is merely to say what is self-evident and common place. Article implies it and it is not implied in Article 16(1) also. True, on a first glance, Article 16(4) appears to save power of the State to make provision for the reservation of appointments and posts in favour of any backward class of citizens, but a second look shows that it really recognises a pre-existing power and expresses the recognition in an emphatic way lest there should be any

doubt caste upon that power. Such a device is not unknown to legislatures and constitution making bodies. Article 16(4) is more in the nature of a rule of interpretation to guide the construction of Article 16(1). The possibility of interpreting Article 16(1) so as to promote the narrower equality rather than the greater equality is excluded by Article 16(4). [425-CE]

9. The test of nearness to the conditions of existence of the Scheduled Castes would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes, would perpetuate the dominance of existing upper classes, and would take a substantial majority of the classes, who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the 'enlightened' classes of body will capture all the 'open' posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very the Scheduled Castes and Tribes. The bulk of these behind the 'enlightened' classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of improving themselves. [406 G-H; 407 A]

10. On principle, there can be a classification in to Backward Classes and More Backward Classes, if both classes are not merely a little behind but far behind the most advanced classes. In fact such a classification would be necessary to hold the More Backward Classes; otherwise those of the Backward Classes who might be a little more advanced than the More Backward Classes might walk away with all the seats, just as, if reservation was confined to the More Backward Classes and no reservation was made to the slightly more advanced Backward Classes, the most advanced Classes would walk away with all the seats available for the general category leaving none for the Backward Classes. [409 A-D]

11. As to the adoption of the test average student population in the last three High School Classes of all High Schools in the State in relation to a thousand citizens of that community as the basis for assessing relative backwardness, the adoption of a lower basis may give a false picture. After all, if one is considering the question of admission to professional colleges or of appointment to posts, the basis possibly should be the average number of students of that community who have passed the examination prescribed as the minimum qualification for admission to professional colleges, say in the last three years and perhaps the average number of persons of that community who have graduated in the last three years, since graduation is generally, the minimum extent qualification for most posts possibly, the extent of reservation may even vary with reference to the class of post. [490 D-H]

365

12. The percentage of reservation is not a matter upon which a Court may pronounce with no materials at hand. For a Court to say that reservations should not exceed 40 per cent, 50 per cent or 60 per cent would be arbitrary and the Constitution does not permit us to be arbitrary. [410 E-F]

13. From the historical and sociological background of caste and class the philosophy, the reason and the rhetoric behind reservation and anti-reservation, the Constitutional provisions and the varying judicial stances, the following emerges; (a) clearly there exist large sections of people who are socially and educationally backward who stand midway between the forward classes such as the landed, the learned, the priestly and the trading classes on one side and the

out-caste and depressed classes, i.e. the Scheduled Castes and the Scheduled Tribes on the other; (b) Poverty, Caste, occupation and habitation are the principal factors which contribute to brand a class as socially backward. The customs which they honour and observe, the rituals which they fear and practice the habits to which they adapt and conform, the festivals which they enjoy and celebrate and even the Gods that they revere and worship are enlightening elements in recognising their social gradation and backwardness; (c) Amongst very many classes and communities considered socially inferior, child marriage persists, the rule of Saptapadi is not followed; divorces are granted by a caste panchayat; (d) dress and work habit is yet another indication that economic situation and social situation often reflect each others; (e) there are many other customs, rituals or habits of significance mark out the socially backward class; (f) the weight to be attached to these factors depends upon the circumstances of the case which can only be revealed by thoughtful, penetrating investigation and analysis. It cannot be done by means of mathematical formulae but only by looking in the round or taking a look at the entire situation. Sometimes it may be possible to readily identify certain castes or social groups as a whole as socially forward or socially backward classes. Poverty, of course, is basic, being the root cause as well as the rueful result of social and educational backwardness. But mere poverty it seems is not enough to invite the constitutional branding because of the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backward. In a country like India where 80 per cent of the people live below the breadline, even the majority of the so called socially forward classes may be poor. In the rural social ladder they are indeed high up and despite the economic backwardness of sizeable sections of them, they cannot be branded as socially backward. On the other hand, there are several castes or other social groups who have only to be named to be immediately identified as socially and economically backward classes, identified as socially backward classes. [431 F-H; 432 A-F; 433 A-E]

R. Chitrlekha v. State of Mysore, [1964] 6 SCR 368; Rajendran v. State of Madras, 1968] I SCR 721; State of Andhra Pradesh v. P. Sagar, [1968] 3 SCR 595; Triloki Nath v. State of Jammu & Kashmir, [1969] 1 SCR 103; A. Peeriakaruppan v. State of Tamil Nadu. [1971] 1 SCC 38; State of Andhra Pradesh v. Balram AIR 1972 SC 1375; State of Uttar Pradesh v. Pradeep Tandon 1975] 2 SCR 761; X.S. Jayasree v. State of Kerala [1976] 3 SCC 730; State of Kerala v. N.M. Thomas [1976] I SCR 906; Akhil Bhartiya Soshit Karamchari Sangh v Union of India & Ors. [1981] 1 SCR 185 referred to.

366

(g) True, a few members of those caste or social groups may have progressed far enough and forged ahead so as to compare favourably with the leading forward classes economically, socially and educationally. In such cases, perhaps and upper income ceiling would secure the benefit of reservation to such of these members of the class who really deserve it; (h) In the cases of poorest sections of the forward classes, the State will have to-and it is the duty of the State to do-to discover means of assisting them means other than reservations under Article 15(4) and 16(4). [433 G-H]

14. In the ultimate analysis, attainment of economic equality is the final and the only solution to the besetting problems. There is also one danger in adopting individual

property as the criterion to identify a member of the backward classes. The truly lower classes who need the certificate most to prove their poverty will find it difficult to get the certificate from the official or the legislator or any named person [434 B-C]

15. Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. Despite individual exceptions, it may be possible and easy to identify social backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature. notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they must be recognised for what they are along with other less primary sources. There is and there can be nothing wrong in recognising poverty wherever it is reflected as an identifiable group phenomena whether you see it as a caste group, a sub regional group, an occupational group or some other class. Once the relevant factors are taken into consideration, how and where to draw the line is a question for each State to consider since the economic and social conditions differ from area to area. Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined, it will not be for the court to interfere in the matter. But certainly, judicial review will not stand excluded. [334 D-G]

Per A.P. Sen, J.

1. Conceptually, the making of special provisions for the advancement of backward classes of citizens under Art. 15(4) and the system of reservation of appointments or posts as envisaged by Art. 16(4) as guaranteed in the Constitution, is a national commitment and a historical need to eradicate age-old social disparities in our country. But unfortunately the policy of reservation higher to formulated by the Government for the upliftment of such socially and educationally backward classes of citizens is caste-oriented while the policy should be based on economic criteria. Then alone the element of caste in making such special provisions or reservations under Arts. 15(4) and 16(4) can be removed. [435B-D]

2. It is true that mere economic backwardness would not satisfy the rest of educational and social backwardness under Article 15(4), and is only

367

One of several tests to be adopted. The predominant and the only factor for making special provisions under Article 15(4) or for reservations of posts and appointments under Art. 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes or Scheduled Tribes, till such members of backward classes attain a state of enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life. [435 H; 436 C-D]

3. The adequacy or otherwise of representation of the backward classes in the services has to be determined with reference to the percentage of that class in the population and the total strength of the service as a whole. The representation does not have to exactly correspond to the percentage of that class in the population; it just has to be adequate. Moreover, in the case of services the extent of representation has to be considered by taking into account

the number of members of that class in the service, whether they are holding reserved or unreserved posts. [436 E-F]

4. The State should give due importance and effect to the dual constitutional mandates of maintenance of efficiency and the equality of opportunity for all persons. The nature and extent of reservations must be rational and reasonable. The state of backwardness of any class of citizens is a fact situation which needs investigation and determination by a fact finding body which has the expertise and the machinery for collecting relevant data. The Constitution has provided for the appointment of such a Commission for Backward Classes by the President under Art. 340 to make recommendations and left it to the States to make special provisions for advancement of such backward classes. It may be, and often is, difficult for the Court to draw the line in advance which the State ought not to cross, but it is never difficult for the Court to know that an invasion across the border, however ill-defined, has taken place. The Courts have neither the expertise nor the sociological knowledge to define or lay down the criteria for determining what are 'socially and educationally backward classes of citizens' within the meaning of Art. 15(4) which enables the State to make 'special provisions for the advancement' of such classes notwithstanding the command of Art. 15(2) that the State shall not discriminate against any citizens on the ground only of religion, race, caste, descent, place of birth, residence or any of them. The Supreme Court is ill-equipped to perform the task of determining whether a class of citizens is socially and educationally backward, but, however a duty to interpret the Constitution and to see what it means and intends when it makes provision for the advancement of socially and educationally backward classes. In considering this situation then, Courts must never forget that it is the Constitution they are expounding. Except for this, the Court has very little or no function.

[436 G-H; 437 A-D]

5. The Preamble to our Constitution shows the nation's resolve to secure to all its citizens: Justice-Social, economic and political. The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but surely tear apart the fabric of society. It is primarily the
368

duty and function of the state to inject moderation into the decisions taken under Arts. 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fueled by unwise State action, will destroy, not advance, social justice. If the State contravenes the constitutional mandates of Art. 16(1) and Art. 335, the Supreme Court will of course, have to perform its duty. [437 F-G]

6. The extent of reservation under Art. 15(4) and Art. 16(4) must necessarily vary from State to State and from region to region within a State, depending upon the conditions prevailing in a particular State or region, of the Backward Classes. Since the problems pertaining in reservation can never be resolved through litigation in the Courts, the Central Government should consider the feasibility of appointing a permanent National Commission for Backward Classes which must constantly carry out sociological and economic study from State to State and from region to region within a State. The framers of the Constitution by enacting Art. 340 clearly envisaged the

setting up of such a high-powered National Commission for Backward Classes at the Centre. [437 H; 438 A-B]

7. The doctrine of protective discrimination embodied in Arts. 15(4) and 16(4) and the mandate of Art. 29(2) cannot be stretched beyond a particular limit. The State exists to serve its people. There are some services where expertise and skill are of the essence. Medical services directly affect and deal with the health and life of the populace. Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments. [438 C-E]

Per Venkataramiah, J.

1. Equality of opportunity revolves around two dominant principles- (i) the traditional value of equality of opportunity; and (ii) the newly appreciated-not newly conceived-idea of equality of results. The Society which cherishes the ideal of equality has to define the meaning and consent of the concept of equality and the choices open to it to bring about an egalitarian society would always be political. But the Courts have been forced to scrutinise a variety of choices, while society for which they have to answer has been issuing a proliferation of demands. Many inequalities in the past seemed almost to have been part of the order of nature. The Courts, however deal with the problems that society presents. 'Levels of awareness and corresponding senses of grievance have arisen at different times for particular historical reasons often tending to differentiate among the categories of equality rather than unifying them. Inequalities of class, race, religion and sex have presented themselves at different periods as primary grievances'. The Courts must remind themselves that for those who are suffering from deprivation of inalienable rights, gradualism can never be a sufficient remedy. Ours is a 'struggle for status, a struggle

369

to take democracy off parchment and give it life.' 'Social injustice always balances its books with red ink'. Neither the caprice of personal taste nor the protection of vested interests can stand as reasons for restricting opportunities of any appropriately qualified person. These are the considerations which sometimes may be conflicting that should weigh with the courts while dealing with cases arising out of the doctrine of equality. It should, however, be remembered that the courts by themselves are not in a position to bring the concept of equality into fruitful action. They should be supported by the will of the people of the Government and of the legislators. These should be an emergence of united action on the part of all segments of human society. This is not all. Mere will to bring about equality under the existing economic level might worsen the situation. There should be at the same time a united action to increase the national resources so that the operation of equality will be less burdensome and every member of the society is carried to a higher social and economic level leaving nobody below a minimum which guarantees all the basic human needs to every member of the society. If there is no united action the pronouncements by courts would become empty words as many of the high principles

adumbrated in the chapter on the Directive Principles of State Policy in the Constitution have turned out to be owing to several factors. [440 B-H; 441 A]

2. The need for social action is necessitated by the environmental factors and living conditions of the individuals concerned. The application of the principle of individual merit, unmitigated by other considerations may quite often lead to inhuman results [441 G]

3. An examination of the question of the background of the Indian Social conditions—caste ridden atmosphere shows that the expression "backward classes" used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward. This is so because a caste is based on various factors, sometimes it may be a class, a race or a racial unit and the caste of a person is governed by his birth in the family. [459 E; 457 F]

It is significant that the expression "backward classes" used in Part XVI of the Constitution and in particular in Article 338(3) is used along with the Scheduled Castes, the Scheduled Tribes and the Anglo-Indian Community. The meaning of "backward classes" has, therefore, to be deduced along with the other words preceding it. [462 G]

It is a rule of statutory construction that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. It is true that this rule which is called as the ejusdem generis rule or the rule noscitur a sociis cannot be carried too far. But it is reasonable to apply that rule where the specific words refer to a distinct genus or category. [462 H; 463 A]

Part XVI of the Constitution deals with certain concessions extended to certain castes, tribes and races which are Scheduled Castes and Scheduled Tribes and to the Anglo-Indian community. In the context of Article 338(3) and 370

Article 340 are construed, the expression 'backward classes' can only refer to a certain castes, races tribes or communities or parts thereof other than Scheduled Castes, Scheduled Tribes and the Anglo-Indian community, which are backward. Clause (6) of the resolution regarding the aims and objects of the Constitution moved by Pandit Jawaharlal Nehru on December 13, 1946 and the history of the enactment of Part XVI of the Constitution by the Constituent Assembly lead to the conclusion that backward classes are only those castes, races, tribes or communities, which are identified by birth, which are backward. It is, therefore, difficult to hold that persons or groups of persons who are backward merely on account of poverty which is traceable to economic reasons can also be considered as backward classes for purposes of Article 16(4) and Part XVI of the Constitution. [463 C-D; 466 G-H]

The Drafting Committee by qualifying the expression "class of citizens" by "backward" in Article 16(4) of the Constitution tried to reconcile three different points of view and produced a workable proposition which was acceptable to all, the three points of view being (i) that there should be equality of opportunity for all citizens and that every individual qualified for a particular post should be free to apply for that post to sit for examinations and to have his qualifications tested so as to determine whether he was fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation

of the principle of equality of opportunity; (ii) that if the principle of equality of opportunity was to be operative there ought to be no reservations of any sort for any class or community all and that all citizens if they qualified should be placed on the same footing of equality as far as public services were concerned; and (iii) that though the principle of equality of opportunity was theoretically good there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. The whole tenor of discussion in the Constituent Assembly pointed to making reservation for a minority of the population including Scheduled Castes and Scheduled Tribes which were socially backward. [465 G-H; 466 A-B]

4. In Balaji's case and in Chitralkha's case, the Supreme Court exhibited a lot of hesitation in equating the expression 'class' with 'caste' for purposes of Article 15(4) and 16(4) of the Constitution. The juxtaposition of the expression 'backward classes' and 'Scheduled Castes' in Article 15 of the Constitution, according to the above two decisions, led to a reasonable inference that expression 'classes' was not synonymous with 'caste'. The Court while making these observations did not give adequate importance to the evils of caste system which had led to the backwardness of people belonging to certain castes and the debates that preceded the enactment of Part XVI and Article 15(4) and Article 16(4) of the Constitution. What was in fact over looked was the history of the Indian social institutions. The makers of the Indian Constitution very well knew that there were a number of castes the conditions of whose members were almost similar to the conditions of members belonging to the Scheduled Castes and to the Scheduled Tribes and that they also needed to be given adequate protection in order to tide over the difficulties in the way of their progress which were not so much due to poverty but due to their birth in a particular caste. Part XVI was not enacted for the

371
purpose of alleviating the conditions of poorer classes as such which was taken care of by the provision of Part IV of the Constitution and in particular by Article 46 and by Article 14, Article 15(1) and Article 16(1) of the Constitution which permitted classification of persons on economic grounds for special treatment in order to ensure equality of opportunity to all persons. The views expressed by the Supreme Court, however stood modified by the later decisions. [466- D-H; 467 A-B]

Minor P. Rajendran v. State of Madras & Ors. [1968] 2 SCR 786; State of Andhra Pradesh & Anr. v. P. Sagar [1968] 3 SCR 595; Triloki Nath & Anr. v. State of Jammu & Kashmir & Ors. [1969] 1 SCR 103; A. Peeriakaruppan etc. v. State of Tamil Nadu & Ors. [1971] 2 SCR 430; State of Andhra Pradesh & Ors. v. U.S.V. Balram etc. [1972] 3 SCR 247 referred to.

5. If the view that caste or community is an important relevant factor in determining social and educational backwardnesses for purposes of Articles 15(4) and 16(4) of the Constitution, is departed from several distortions are likely to follow and may take away from the sole purpose for which these constitutional provisions were enacted. Several factors such as physical disability, poverty, place of habitation, the fact of belonging to a freedom fighter's family, the fact of belonging to the family of a member of the armed forces might each become a sole factor for the purpose of Article 15(4) or Article 16(4) which were not at all intended to be resorted to by the State for the purpose

of granting relief in such cases. While relief may be given in such cases under Article 15(1) and Article 16(1) by adopting a rational principle of classification, Article 14, Article 15(4) and Article 16(4) cannot be applied to them. Article 15(4) and Article 16(4) are intended for the benefit of those who belong to castes/communities which are 'traditionally disfavoured and which have suffered societal discriminations' in the past. The other factors mentioned above were never in the contemplation of the makers of the Constitution while enacting these clauses. [472 A-D]

D.N. Chanchala v. State of Mysore & Ors. etc. [1971] Supp. SCR 608; State of Kerala v. Kumari T.P. Roshana & Anr. [1979] 2 SCR 974; Kumari M.S. Jayasree & Anr. v. State of Kerala & Anr. [1977] 1 SCR 94; State of Uttar Pradesh v. Pradip Tandon & Ors. (1975) 2 SCR 761; Subhash Chandra v. The State of U.P. & Ors. AIR 1973 All. 295; Dilip Kumar v. The Government of U.P. & Ors. AIR 1973 All. 592 referred to.

6. Article 14 of the Constitution consists of two parts. It asks the State not to deny to any person equality before law. It also asks the State not to deny the equal protection of the laws. Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to meet out differential treatment to persons in different situations in order to establish an equilibrium amongst all. This is the basis of the rule that equals should be treated equally and unequals must be treated unequally if the doctrine of equality which is one of the corner stones of our Constitution is to be duly implemented. In order to do justice amongst unequals, the State has to resort to compensatory or protective discrimination. Articles 15(4) and 16(4) of the Constitution were enacted as measures of compensatory or protective
372

discrimination to grant relief to persons belonging to socially oppressed castes and minorities. Under them, it is possible to provide for reservation of seats in educational institution and of posts in Government services to such persons only. But if there are persons who do not belong to socially oppressed castes and minorities but who otherwise belong to weaker sections, due to poverty, place of habitation, want of equal opportunity etc. the question arises whether such reservation can be made in their favour under any other provision of the Constitution such as Article 14, Article 15(1), Article 16(1) or Article 46. According to Thomas's case, (a) no reservation of posts can be made in Government services for backward classes including Scheduled Castes and Scheduled Tribes under Article 14 or Article 16(1), and (b) preferential treatment as was done in this case on the basis of classification ordinarily could be given under Article 16(1) to the Scheduled Castes and Scheduled Tribes only. Other backward classes could not, except in exceptionally rare cases be extended the same benefit and their only hope was Article 16(4) of the Constitution. [477 A-E; 485 G-H]

7. As to the power of the Government to make reservations under Article 15(4) and 16(4) of the Constitution: The determination of the question whether the members belonging to a caste or a group or a community are backward for the purpose of Article 15(4) and Article 16(4) of the Constitution is not open to the Government to call any caste or group or community as backward according to its sweet will and pleasure and extend the benefit that may be granted under those provisions to such caste or group or community. The exercise of uncontrolled power by the Government in this regard may lead to political favoritism

leading to denial of the just requirements of classes which are truly backward. The power of the Government to classify any caste or group or community as backward has to be exercised in accordance with the guidelines that can be easily gathered from the Constitution. It is now accepted that the expressions 'socially and educationally backward classes of citizens' and the Scheduled Castes and the Scheduled Tribes' in Article 15(4) of the Constitution together are equivalent to 'backward classes of citizens' in Article 16(4). [486 A-D]

Further the criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffered. This view is in conformity with the intention underlying clause 6 of the resolution regarding the aims and objects of the Constitution moved by Jawaharlal Nehru on December 13, 1946 which asked the Constitution Assembly to frame a Constitution providing adequate safeguards for minorities, backward and tribal area and depressed and other backward classes and also wish the provisions of Article 338 and Article 340 of the Constitution. Unless the above restriction is imposed on the Government, it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the State as backward even though in fact it may be an advanced caste or group or community but just below some other forward community.

[486 H; 487 C-D]

373

There is another important reason why such advanced castes or groups or communities should not be included in the list of backward classes and that is that if castes or groups and communities which are fairly well advanced and castes and groups and communities which are really backward being at the rock-bottom level are classified together as backward classes, the benefit of reservation would invariably be eaten up by the more advanced sections and the really deserving sections would practically go without any benefit as more number of children of the more advanced castes or group or communities amongst them would have scored higher marks than the children of more backward castes or groups or communities. In that even the whole object of reservation would become frustrated. [487 D-F]

Hence as far as possible while preparing the list of backward classes, the State Government has to bear in mind the above principle as a guiding factor. The adoption of the above principle will not unduly reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4) of the Constitution since over the years the level of the Scheduled Castes and Scheduled Tribes is also going up by reason of several remedial measures taken in regard to them by the State and Central Government. At the same time, it will also release the really backward castes, groups and communities from the strangle-hold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades. It is time that more attention is given to those castes, groups and communities who have been at the lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many of the Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of the Scheduled Castes and

the Scheduled Tribes.

[487 H; 488 A-B]

Janki Prasad Parimoo & Ors. etc. etc. v. State of Jammu & Kashmir & Ors. [1973] 3 SCR 236 referred to.

8. Since economic condition is also a relevant criterion, it would be appropriate to incorporate a 'means test' as one of the tests in determining the backwardness as was done by the Kerala Government. These two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). For the purpose of Article 16(4) however, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services. [488 C-i]

9. The classification styled as 'special' group which is based on occupation-cum-income considerations and which has received the approval in Chitralkha's case; is yet another valid and useful test which can be adopted for the purpose of reservation which can be more legitimately traced to Art. 14 and not to Art. 15(4) and Art. 16(4). [491 H] 374

10. From a careful consideration of all the seven opinions in the A Thomas's case it cannot be said that the settled view of the Supreme Court that the reservation under Article 15(4) or Article 16(4) could not be more than 50 per cent has been unsettled by a majority on the Bench which decided this case. [491 B]

11. If reservation is made only in favour of those backward castes or classes which are comparable to the Scheduled Castes and Scheduled Tribes, it may not exceed 50 per cent (including 18 per cent reserved for the Scheduled Castes and Scheduled Tribes and 15 per cent reserved for 'special group') in view of the total population of such backward classes in the State of Karnataka. The Havanur Commission has taken the number of students passing at SSLC examination in the year 1972 as the basis for determining the backwardness. The average passes per thousand of the total population of the State of Karnataka was 1.69 in 1972. The average in the case of the Scheduled Castes was 0.56 and in the case of Scheduled Tribes was 0.51. Even if we take all the castes, tribes and communities whose average is below 50 per cent of the State average i.e. below 85 per cent for classifying them as backward, large chunks of population which are now treated as backward would have to go out of the list of backward classes. Consequently the necessity for reservation which would take the total reservation under Article 15(4) and 16(4) beyond 50 per cent of the total number of seats/posts would cease to exist. The present arrangement has been worked for more than five years already. It is now necessary to redetermine the question of backwardness of the various castes, tribes and communities for purposes of Article 15(4) and Article 16(4) in the light of the latest figures to be collected on the various relevant factors and to refix the extent of reservation for backward classes. The reservation of 15% now made under Article 15(4) and Article 16(4) but which may be traced to Articles 14 and 16(1) to 'special group' based on occupation-cum-income can in any event be availed of by members of all communities and castes.

[491 C-G]

12. However, it should be made clear that if on a fresh determination some castes or communities have to go out of the list of backward classes prepared for Articles 15(4) and 16(4), the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive principle contained in Article 46 of the Constitution. There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete successfully with persons belonging to richer classes. The Government may provide for them liberal grants of scholarships, free studentships, free boarding and lodging facilities, free uniforms, free mid-day meals etc. to make the life of poor students comfortable. The Government may also provide extra tutorial facilities, stationery and books free of cost and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for the qualifying examination he may be able to attain a high degree of proficiency in his studies.

[491 H; 492 A-C]

^

&
ORIGINAL JURISDICTION: Writ Petitions NOS. 1297-98, 1407 of 1979, 4995-97 of 1980 and 402 of 1981.
375

(Under Article 32 of the Constitution of India.)

F.S. Nariman, K.N. Bhat, B. Veerbhadrappa, H.S. Renuka Prasad, Vijay Kumar Verma, Nanjappa Ganpathy and P.K. Manohar for the Petitioners in W.P. Nos. 1297-98, of 1979.

K. Chennabasappa, S.S. Javali and B.R. Agarwal for the Petitioners in W.P. No. 1407 of 1979.

K.K. Venugopal and C.S. Vaidyanathan for the Petitioners in W.P. Nos. 4995-97180 & 402 of 1981.

R.K. Garg and A.V. Rangam, for the Respondents in W.P. Nos. 4995-97180 and 402 of 1981.

P.H. Parekh and Gautam Philip, for the Intervener Akhil Bharat Anusuchit Jati in W.P. Nos. 1297-98 of 1979. L3

L.G. Havenur, K.M.K. Nair and Narayana Nettar for the Intervener President Karnataka Legislative in W.P. No. 1407 of 1979.

K. Rajendra Chaudhury for the Intervener Dravida Kazhagam in W.P. No. 402 of 1981.

K.M.K. Nair for the Intervener All India Nayaka Sangh in W.P. No. 1297-98 and 1407 of 1979.

The following Judgments were delivered:

CHANDRACHUD, C.J. : My learned Brethren have expressed their respective points of view on the policy of reservations which, alas, is even figuratively, a burning issue to-day. We were invited by the counsel not so much as to deliver judgments but to express our opinion on the issue of reservations; which may serve as a guideline to the Commission with the Government of Karnataka proposes to appoint, for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and other Backward Classes. A somewhat unusual exercise is being undertaken by the Court in giving expression to its views without reference to specific facts. But, institutions profit by well-meaning innovations. The facts will appear before the Commission and it

376

will evolve suitable tests in the matter of reservations. I

cannot resist expressing the hope that the deep thinking and sincerity which has gone into the formulation of the opinions expressed by my learned Brethren will not go waste. The proposed Commission should give its close application to their weighty opinions. Mine is only a skeletal effort. I reserve the right to elaborate upon it, but the chances of doing so are not too bright.

I would state my opinion in the shape of the following propositions:

1. The reservation in favour of scheduled castes and scheduled tribes must continue as at present, there is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.

2. The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.

3. In so far as the Other Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

4. The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an oppor

377

tunity (i) to the State to rectify distortions arising out of particular facets of the reservation policy and (ii) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations.

DESAI, J 'India embraced equality as a cardinal value against a background of elaborate, valued, and clearly perceived inequalities.' (1) 'Art. 14 guaranteed equality but the awareness of deep rooted inequality in the society reflected in Art. 15 and 16. Fifteen months of the working of the Constitution necessitated amplification of Art. 15(3) so as to ensure that any special provisions that the State may make for the educational, economic or social advancement of any backward class citizen, may not be challenged on the ground of being discriminatory.' (2) Sec. 2 thereof provided for addition to sub Art (4) of Art. 15 For a period of three and a half decades, the unending search for identifying socially and educationally backward classes of citizens has defied the policy makers, the interpreters of the policy as reflected in statutes or executive/administrative orders and has added a spurt in the reverse direction, namely, those who attempted to move upward/(Pratilom) in the social hierarchy have put the movement in reverse gear so as to move downwards (Anulom) in order to be identified as a group or class of citizens socially and educationally backward. As the awareness of concessions and benefits grows with

consequent frustration on account of their non-availability confrontation develops amongst various classes of society. The Constitution promised an egalitarian society. At the dawn of independence Indian Society was a compartmentalised society comprising groups having distinct and diverse life styles. It was a caste ridden stratified hierarchical society. Though this is well accepted, the concept of caste has defied a coherent definition at the hands of jurists or sociologists.

Tn the early stages of the functioning of the Constitution, it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Art. 15(4).

'This was predicated on a realistic appraisal that caste as a principle of social order has persisted over millennia if much more

(1) Marc Galanter-Competing Equalities 1980.

(2) Objects and Reasons Statement of the Constitution (First Amendment) Act, 1951.

378

disorderly and asymmetrical in practice than classical Hindu socio- legal theory depicted it'.(1) Language of Art. 15(4) refers to 'class' and not caste. Preferential treatment which cannot be struck down as discriminatory was to be accorded/to a class, shown to be socially and educationally backward and not to the members of a caste who may be presumed to be socially and educationally backward. How do we define, ignoring the caste label, class of citizens socially and educationally backward. As we are not writing on a clean slate, let us look at judicial intervention to give shape and form to this concept of a class of citizens who are socially and educationally backward so as to merit preferred treatment or compensatory discrimination or affirmative action.

A brief survey of decisions bearing on the subject would reveal the confusion and the present state of malaise. This review is necessary because a serious doubt is now nagging the jurists, the sociologists and the administrators whether caste should be the basis for recognising the backwardness. There has been some vacillation on the part of the Judiciary on the question whether the caste should be the basis for recognising the backwardness. Therefore, a bird's eye-view of the decisions of the Court may first be taken to arrive at a starting point as to

whether the Judiciary has univocally recognised caste as the basis for recognition of the backwardness,

In State of Madras v. Srimathi Champakam Dorairajan & Anr.,(2) this Court struck down the classification in the Communal G.O. founded on the basis of religion and caste on the ground that it is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen. The decision was in the hey-day of supremacy of fundamental rights over Directive Principles of State Policy. The Court held that Art. 46 cannot override the provisions of Art. 29(2) because the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.

In M.R. Balji & Ors. v. State of Mysore(3) it was observed that though caste in relation to Hindus may be a relevant factor to

(1) Hutton-Caste in India: Its nature, function and Origin 1961.

(2) [1951] S.C.R. 525.

(3) [1963] Supp. I S.C.R. 439.

379

consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. The problem of determining who are socially backward classes, is undoubtedly very complex, but the classification of socially backward citizens on the basis of their castes alone is not permissible under Art. 15(4). The Court could foresee the danger in treating caste as the sole criterion for determining social and educational backwardness. The importance of the judgment lies in realistically appraising the situation when it uttered the harsh but unquestionable truth that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome of social backwardness. The Court drew clear distinction between 'caste' and 'class'. The attempt at finding a new basis for ascertaining social and educational backwardness in place of caste reflected in this decision. Clairvoyance in this behalf displayed in our opinion is praiseworthy.

In *T. Devadesan v. The Union of India & Anr.*(1) the petitioner challenged the carry forward rule in the matter of reserved seats in the Central Secretariat Service as being violative of Art. 14 and 16 of the Constitution. The majority accepting the petition observed that the problem of giving adequate representation to members of the backward class enjoined by Art. 16(4) of the Constitution is not adequate by framing a general rule without bearing in mind its reflections from year to year. What precise method should be adopted for this purpose is a matter for the Government to decide. The Court observed that any method to be evolved by the Government must strike a reasonable balance between the claims of the backwardness and claims of other employees as pointed out in *Balaji's* case.

In *R. Chitralakha & Anr. v. State of Mysore & Ors.*(2) the majority held valid the orders made by the Government of Mysore in respect of admissions to engineering and Medical Colleges, and observed that a classification of backward classes based on economic conditions and occupations is not bad and does not offend Art. 15(4).

(1) [1964] 4 S.C.R. 680.

(2) [1964] 6 S.C.R. 368.

380

The caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness and though it is a relevant factor to determine social backwardness of a class, it cannot be the sole or dominant test in that behalf. If in a given situation caste is excluded in ascertaining a class within the meaning of Art. 15(4) it does not vitiate the classification if it satisfied other tests. The Court observed that various provisions of the Constitution which recognised the factual existence of backwardness in the country and which make a sincere attempt to promote the welfare of the weaker sections thereof should be construed to effectuate that policy and not to give weightage to progressive sections of the society under the false colour of caste to which they happen to belong. Under no circumstances a 'caste' though the caste of an individual or group of individuals may be a relevant factor in putting him in a particular class.

In *Triloki Nath & Anr. v. State Or Jammu & Kashmir & Ors.*(1) reservation of 5() per cent of the Gazetted posts to

be filled by promotion was in favour of Muslims of Jammu & Kashmir. The Court held that inadequate representation in State services would not be decisive for determining the backwardness of the section. The Court accordingly, gave directions for collecting further material relevant to be subject. After the material as directed earlier was collected the matter was placed before the court and the decision is reported in Triloki Nath & Anr. v. State of Jammu & Kashmir & Ors.(1) The Court observed that the expression 'backward class' is not used as synonymous with 'backward caste' or 'backward community'. The members of an entire caste or community may, in the social, economic and educational scale of values at a given time, be backward and may, on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation, the expression 'class' may mean a homogeneous section of the people grouped together because of certain likenesses 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, but for purpose of Art. 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted because it would directly offend the Constitution. The caste as the basis for determining backwardness received a rude jolt.

(1) [1967] 2 S.C.R. 265.

(2) [1969] 1 S.C.R. 103.

381

In A. Peeriakaruppan etc. v. State of Tamil Nadu(1) this Court after referrening to earlier decisions especially in Balaji's case and Chitrlekha's case observed that there is no gain saying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the realities of life. It is difficult to make out whether the court accepted caste as the sole basis for determining social and educational backwardness.

In State of Andhra Pradesh & Ors. v. U.S.V. Balram etc.(2) a list of backward classes which was under challenge prima facie appeared to have been drawn up on the basis of caste. The Court on closer examination found that the caste mark is merely a description of the group following the particular occupations or professions exhaustively referred to by the commission. Even on the assumption that the list is based exclusively on caste, it was clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore, the inclusion of sub-caste in the list of Backward Classes is warranted by Art. 15(4). The caste remained the criterion for determining social and educational backwardness. The assumption that all the members of a given caste are socially and educationally backward is wholly unfounded and lacks factual support obtained by survey.

In Janki Prasad Parimoo & Ors etc. etc. v. State of Jammu & Kashmir & Ors. (8) it was observed that mere poverty cannot be a test of backwardness because in this country except for a small percentage of the population, the people are generally poor-some being more poor, others less poor. In the rural areas some sectors of the population are advancing socially and educationally while other sectors are apathetic, Applying this yardstick, priestly classes following a traditional profession was held not to be

socially and educationally backward. Cultivators of land designated as backward measured by the size of the holding was held to be impermissible on the ground that placing economic consideration alone above other considerations, is erroneous to determine social and educational backwardness.

- (1) [1971] 2 S.C.R. 430.
- (2) [1972] 3 S.C.R. 247.
- (3) [1973] 3 S.C.R. 236.

382

In State of Uttar Pradesh v. Pradip Tandon & Ors.(1) reservations in favour of rural areas was held to be unsustainable on the ground that it cannot be said as a general proposition that rural areas represents socially and educationally backward classes of citizens. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas.

In State of Kerala & Anr. v. N.M. Thomas & Ors.(2) the constitutional validity of Rule 13A giving further exemption of two years to members belonging to Scheduled Tribes and Scheduled Castes in the service from passing the tests referred to in r. 13 or r. 13A, was questioned. The High Court struck down the rule. Allowing the State appeal, Mathew, J. in his concurring judgment held that to give equality of opportunity for employment to the members of Scheduled Castes and Scheduled Tribes, it is necessary to take note of their social, educational and economic backwardness. Not only is the Directive principles embodied in Art. 46 binding on the law makers as ordinarily understood, but it should equally inform and illuminate the approach of the court when it makes a decision as the court also is State within the meaning of Art. 12 and makes law even though interstitially. Existence of equality depends not merely on the absence of disabilities but on the presence of disabilities. To achieve it differential treatment of persons who are unequal is permissible. This is what is styled as compensatory discrimination or affirmative action. In a concurring judgment, Krishna Iyer, J. Observed that the genius of Arts- 14 and 16 consists not in literal equality but in progressive elimination of pronounced inequality. To treat sharply dissimilar persons equally is subtle injustice. Equal opportunity is a hope, not a menace.

In Kumari K.S. Jayasree & Anr. v. The State Kerala & Anr.(3) it was held that the problem of determining who are socially and educationally backward classes is undoubtedly not simple. Dealing with the question whether caste can by itself be a basis for determining social and educational backwardness, the court observed that it may not be irrelevant to consider the caste of group of citizens claiming to be socially and educationally backward. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes.

- (1) [1975] 2 S.C.R. 761,
- (2) [1976] 1 S.C.R. 906.
- (3) [1977] 1 S.C.R. 194.

383

In Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association v. A Union of India & Ors.(1) this Court upheld reservation of posts at various levels and making of various concessions in favour of the members of the Scheduled Castes and Scheduled Tribes. Krishna Iyer, J. extensively quoting from the final address to the Constituent Assembly by Dr. Ambedkar held that the political democracy was not the end in view of the struggle for

freedom but a social democracy was to be Set up by which it was meant the social fabric resting on the principle of one man one value. Translated functionally, it means 'total abolition of social and economic inequalities.'

This brief review would clearly put into focus, the dithering and the vacillation on the part of the Judiciary in dealing with the question of reservation in favour of Scheduled Castes, Scheduled Tribes as well as other socially and educationally backward classes. Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities. A perceptive viewer of judicial intervention observed that the courts turned out to be more limited as a vantage point than I naively assumed at the outset. They act as a balance wheel channelling compensatory policies and accommodating them to other commitments, but it is the political process that shapes the larger contour of these policies and gives them their motive force. Official doctrine-judicial pronouncements or administrative regulations-proved insufficient guide to the shape of the policies in action and the result they produced.'(2) The Indian social scene apart from being disturbing presented the picture of stratified society hierarchically fragmented. At the lowest rung of the ladder stand Scheduled Castes and Scheduled Tribes and any preferential treatment in their favour has more or less ment with judicial approval. But when it came to preferential treatment or affirmative action or what is also called compensatory discrimination in favour of socially and educationally backward classes of citizens, the caste ridden society raised its ugly face. By its existence over thousands of years, more or less it was assumed that caste should be the criterion for determining social and educational backwardness. In other words, it was said, look at the caste, its traditional functions, its position in relation to upper castes by the standard of purity and pollution, pure and not so pure occupation, once these questions are satisfactorily answered without anything more, those who belong to that

(1) [1981] 2 S.C.R. 185.

(2) Marc Galanter-Compoting Equalities, 1980 p. XVIII.

384

caste must be labelled socially and educationally backward. This A over-simplified approach ignored a very realistic situation existing in each caste that in every such caste whose members claim to be socially and educationally backward, had an economically well placed segments. But that may wait. We are at present concerned with the judicial response to the attempt of the Executive to accord preferential treatment to socially and educationally backward classes of citizens. The litigation which came to the court was more often by those who relied on meritocracy and complained that the merit is crucified at the altar of the mirage of equality. The outcome of judicial intervention against preferred treatment is summed up as under:

"Summing up, we may surmise that the gross effect of litigation on the compensatory discrimination policy has been to curtail and confine it. Those who have attacked compensatory discrimination schemes in court have compiled a remarkable record of success, while those seeking to extend compensatory discrimination have been less successful.'"(1)

The controversy now has shifted to identifying socially and educationally backward classes of citizens. The expression 'back ward classes' is not defined. Courts have more or loss in the absence of well-defined criteria not based on caste label has veered round to the view that in

order to be socially and educationally backward classes, the group must have the same indicia as Scheduled Castes and Scheduled Tribes. The narrow question that the being examined here is whether cast label should be sufficient to identify social and educational backwardness? Number of Commissions have attempted to tackle this complex problem. However, both Mandal Commission of Karnataka and Bakshi Commission of Gujrat have finally accepted caste as the identifying criterion for determining social and educational backwardness, though it will be presently pointed out that Mandal Commission had serious reservations about caste criterion. Most of these Commissions and the Government orders based their recommendations used communal units to discriminate the backward class. Rane Commission of Gujrat has chalked out a different path, rejecting caste as the basis for ascertaining social and educational backwardness. The question we must pose and

(1) Marc Gallanter, *Competing Equalities*, p. 511.

385

answer is whether caste should be the basis for determining social and educational backwardness. In other words, by what yardstick, groups which are to be treated as socially and educationally backward are to be identified? To simplify the question: should membership of caste signify a class of citizens as being socially and educationally backward? If 'caste' is adopted as the criterion for determining social and educational backwardness does it provide a valid test or it would violate Art. 15(1) which prohibits discrimination against any citizen on grounds of religion, race, caste, sex, place of birth or any of them.

What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it.(') Homo Hierarchicus is expected to be the central and substantive element of the caste system with differentiate it from other social systems. The concept of purity and impurity conceptualises the caste system. Louis Dumont asserts that the principle of the opposition of the pure and the impure underlies hierarchy, which is the superiority of the pure to the impure, underlies separation because pure and the impure must be kept separate and underlies the division of labour because pure and impure occupations must likewise, be kept separate.(2) There are four essential features of the caste system which maintained its homo hierarchicus character: (1) hierarchy (2) commensality: (3) restrictions on marriages; and (4) hereditary occupation.(3) Most of the caste are endogamous groups. Intermarriage between two groups is impermissible. But 'Pratilom' marriages are not wholly unknown. Similarly with the onward movement of urbanisation, members of various castes are slowly giving up, traditional occupations and the pure and impure avocations is being frowned upon by developing notion of dignity of labour As the fruits of independence were unequally distributed amongst various segments of the society, in each caste there came into existence a triple division based on economic resurgence amongst the members of the caste. Those who have become economically well off have acquired an upper class status (class consciousness) and the one on the step below is the middle class and the third one belongs to poorer section

(1) I.P. Desai: *Should 'caste' be the Basis for Recognising Backwardness* [1985].

(2) Louise Dumont-Home Hierarchicus [1970]

(3) Caste in Contemporary India: G. Shah [1985].

386

of the caste. This led to the realisation that caste culture does not help economic interest. In fact the upper crust of the same caste is verily accused of exploiting the lower strata of the same caste. It is therefore, rightly argued that the basis of the caste system namely, purity and pollution is slowly being displaced by the economic condition of the various segments of the same caste. It is recognised on almost all hands that the important feature of the caste structure are progressively suffering erosion. The new organisation, the so-called caste organisation, is substantially different from the traditional structure and caste councils. Economic differentiation amongst the members of the caste has become sharp, but not so sharp as to bury caste sentiments and ties.

If the transformation of the caste structure as herein indicated is realistically accepted, should the caste label be still accepted as the basis for determining social and educational backwardness. In a recent paper by the noted sociologist Shri I.P. Desai (Alas, he is no more), it has been ably argued that not a caste but the class or the social group should be examined with a view to determining their social and educational backwardness. Caste in rural society is more often than not mirrored in the economic power wielded by it and vice versa. Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus exMachina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. Such we must recognize is the primeval force and omnipresence of caste in Indian Society, however, much we may like to wish it away. So Sadly and oppressively deep-rooted is caste in our country that it has cut across even the barriers of religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioner of other religious faiths and Hindu dissentients are some times as rigid adherents to the system of caste as the conservative Hindus. We find Christian harijans, Christian

387

Madars, Christian Reddys, Christian Kammas, Mujbi Sikhs, etc. etc. In Andhra Pradesh there is a community known as Pinjaras or Dudekulas (known in the North as 'Rui Pinjane Wala'): (Professional cotton-beaters) who are really Muslims, but are treated in rural society, for all practical purposes, as a Hindu caste. Several other instances may be given.

Shared situation in the economic hierarchy, caste gradation, occupation, habitation, style of consumption, standard of literacy and a variety of such other factors appear to go to make towards social and educational backwardness. In some situations and indeed quite often, social investigator may easily be able to identify a whole caste group as a socially and educationally backward class; he may readily recognise people living in certain areas, say mountainous, desert a fresh lease of life. In fact there is

a mad rush for being recognised as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes. To illustrate: Bakshi Commission in Gujrat recognised as many as 82 castes as being socially and educationally backward. On the publication of its report, Government of Gujrat received representations by members of those castes who had not made any representation to the Bakshi Commission for treating them as socially and educationally backward. This phenomenon was noticed by Mandal Commission when it observed: "whereas the Commission has tried to make the State wise lists of OBCS as comprehensive as possible, it is quite likely that severally synonymy of the castes listed backward have been left out. Certain castes are known by a number of synonymy which vary from one region to the other and their complete coverage is almost impossible. Mandal Commission found a way out by recommending that if a particular caste has been treated as backward then all its synonyms whether mentioned in the State lists or not should also be treated as backward." (1) Gujrat Government was forced to appoint a second commission known as Rane Commission. Rane Commission took note of the fact that there was an organised effort for being considered socially and educationally backward castes. Rane Commission recalled the observations in Balaji's case that 'Social backwardness is on the ultimate analysis the result of poverty to a very large extent.' The Commission noticed that some of the castes just for the sake of being considered as socially and educationally backward, have degraded

(1) Mandal Commission Report Vol. Ch. XII p. 55.

388

themselves to such an extent that, they had no hesitation in attributing different types of vices to and associating other factors indicative of backwardness, with their castes. The Commission noted that the malaise requires to be remedied. The Commission therefore, devised a method for determining socially and educationally backward classes without reference to caste, beneficial to all sections of people irrespective of the caste to which they belong. The Commission came to an irrefutable conclusion that amongst certain castes and communities or class of people, only lower income groups amongst them are socially and educationally backward. We may recall here a trite observation in case of N.M.Thomas which reads as under:

"A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over played extravagantly in democracy by large and vocal groups whole burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to weak the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets."

A few other aspects for rejecting caste as the basis for identifying social and educational backwardness may be briefly noted. If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste

system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution. The assumption that all members of some caste are equally socially and educationally backward is not well-founded. Such an approach provides an oversimplification of a complex problem of identifying the social and educational backwardness. The Chairman of the Backward Classes Commission, set up in 1953, after having finalised the report, concluded that 'it would have been better if we could determine the criteria of backwardness on principles other than

389

caste.' (1) Lastly it is recognised without dissent that the caste based reservation has been usurped by the economically well-placed section in the same caste. To illustrate, it may be pointed that some years ago, I came across a petition for special leave against the decision of the Punjab and Haryana High Court in which the reservation of 2-1/2" for admission to Medical and Engineering College in favour of Majhabi Sikhs was challenged by none other than the upper crust of the members of the Scheduled Castes amongst Sikhs in Punjab, proving that the labelled weak exploits the really weaker. Add to this, the findings of the Research Planning Scheme of Sociologists assisting the Mandal Commission when it observed: 'while determining the criteria of socially and educationally backward classes, social backwardness should be considered to be the critical element and educational backwardness to be the linked element though not necessarily derived from the former.' (2) The team ultimately concluded that 'social backwardness refers to ascribed status and educational backwardness to achieved status, and it considered social backwardness as the critical element and educational backwardness to be the linked though not derived element.' 'The attempt is to identify socially and educationally backward-classes of citizens. The caste, as is understood in Hindu Society, is unknown to Muslims, Christians, Parsis, Jews etc Caste criterion would not furnish a reliable yardstick to identify socially and educationally backward group in the aforementioned communities though economic backwardness would.

Therefore, a time has come to review the criterion for identifying socially and educationally backward classes ignoring the caste label. The only criterion which can be realistically devised is the one of economic backwardness. To this may be added some relevant criteria such as the secular character of the group, its opportunity for earning livelihood etc. but by and large economic backwardness must be the load star. Why I say this ?

Chronic poverty is the bane of Indian Society. Market economic and money spinning culture has transformed the general behavior of the Society towards its members. Upper caste does not enjoy the status or respect, traditional, voluntary or forced any more even in rural areas what to speak of highly westernised urban society.

(1) Backward Classes Commission Report Vol. I Ch. XIV.

(2) Part 3 Appendix XIII, p. 99 of the Report of the Team.

390

The bank balance, the property holding and the money power determine the social status of the individual and guarantee the opportunity to rise to the top echelon. How the wealth is acquired has lost significance. Purity of means disappeared with Mahatama Gandhi and we have reached a stage where ends determine the means. This is the present

disturbing situation whether one likes it or not. Rane Commission on the evidence before it and after applying the relevant tests and criteria observed as under:

"We have found on applying relevant tests and on the basis of the evidence on record, that there()re certain castes/communities or classes of people which are backward, but, only lower income groups amongst them are socially and educationally backward. In order to ensure that, no ambiguity remains in regard to the above aspect, we may add that, the above observations hold good even in respect of those classes which are identified as socially and educationally backward without reference to any caste."(1)

Reservation in one or other form has been there for decades. If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefits of preferred treatment, it would unmistakably show that the benefits of reservations are snatched away by the top creamy layer of the backward castes. This has to be avoided at any cost.

If poverty is to be the criterion for determining social and educational backwardness, we must deal with a fear expressed by sociologists. It is better to recapitulate these aspects in the words of a sociologist:

"Now, if the government changes the criteria of reservation from caste to class, persons from the upper strata of the lower castes who are otherwise not able to compete with the upper strata of the upper castes despite the reservations will be excluded from the white collar jobs. And the persons from the lower strata of lower castes will not be able to compete with their counterpart of the upper castes. They too will be excluded. This

(1) Report of Rane Commission Chapter XII prge 12.1.

391

will bridge the gap which is otherwise widening between the rich and the poor of the upper castes and it will strengthen their caste identity. It will wipe out the small poor strata of the upper castes at the cost of the poor strata of lower castes, and in the name of secularism. In course of time the upper caste will also become the upper class. Such a process would hamper the growth of secular forces."(1)

This fear psychosis is effectively answered by an eminent academic. He says that 'if the poor can be operationally defined, categorised and sub-categorised and reservation benefits be stratified accordingly, would the scenario still haunt use? I think not. He recognised that this point is valuable in terms of alerting everyone to the need for further refinement of the notions of poor strata. He recognised that the State is, with all its limitations and resources, to direct and plan social transformation. (The non-revolutionary) choice is between reinforcing 'caste' or reinforcing the extant constitutional values ' (2)

Let me conclude. If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two,

to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty.

Let me make abundantly clear that this approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes. Thousands of years of discrimination and exploitation cannot be wiped out in one generation. But even here economic criterion is worth applying by refusing preferred treatment to those amongst

(1) G. Shah IPW January 17, 1983.

(2) Upendra Baxi, Vice-Chancellor, South Gujarat University, in 'Caste, Class and Reservations: A Rejoinder to Ghansham Shah.

392

them who have already benefitted by it and improved their position. And finally reservation must have a time span otherwise concessions tend to become vested interests. This is not a judgment in a lis in adversary system. When the arguments concluded, a statement was made that the Government of State of Karnataka would appoint a Commission to determine constitutionally sound and nationally acceptable criteria for identifying socially and educationally backward classes of citizens for whose benefit the State action would be taken. This does not purport to be an exhaustive essay on guidelines but may point to some extent, the direction in which the proposed Commission should move.

CHINNAPA REDDY, J. Over three decades have passed since we promised ourselves "justice, social, economic and political" and "equality of status and opportunity". Yet, even today, we find members of castes, communities, classes or by whatever name you may describe them, jockeying for position, trying to elbow each other out, and, viewing with one another to be named and recognised as 'socially and educationally backward classes', to qualify for the 'privilege' of the special provision for advancement and the provision for reservation that may be made under Art. 15(4) & 16(4) of the Constitution. The paradox of the system of reservation is that it has engendered a spirit of self denigration among the people. Now here else in the world do castes, classes or communities queue up for the sake of gaining the backward status. Nowhere else in the world is there competition to assert backwardness and to claim 'we are more backward than you'. This is an unhappy and disquieting situation, but it is stark reality. Whatever gloss one may like to put upon it, it is clear from the rival claims in these appeals and writ petitions that the real contest here is between certain members of two premier (population-wise) caste-community-classes of Karnataka, the Lingayats and the Vokkaligas, each claiming that the other is not a socially and educationally backward class and each keen to be included in the list of socially and educationally backward classes. To them, to be dubbed a member of the socially and educationally backward classes is a passport for entry into professional colleges and State services; so they jostle with each other and in the bargain, some time they keep out and some times they usher in some of those entitled to legitimate entry, by competition or by reservation. Commissions have been appointed in the past to identify the backward classes, Governments have considered the reports of the commissions, and Courts have scrutinised the decisions of Governments, Cases have reached the Court too, then and now again. Once more we are told

393

that the State of Karnataka is ready to appoint another commission and they have asked us will you kindly lay down some guidelines?"

Ours is a country of great economic, social and cultural diversity. Often we take great pride in the country's cultural diversity. While cultural diversity adds to the splendor of India, the others add to our sorrow and shame. The social and economic disparities are indeed despairingly vast. The Scheduled Castes, the Scheduled Tribes and the other socially and educationally backward classes, all of whom have been compendiously described as 'the weaker sections of the people' have long journeys to make society. They need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity, and not charity. The days of Dronacharya and Ekalavya are over. They claim their constitutional right to equality of status and of opportunity and economic and social justice. Several bridges have to be erected so that they may cross the Rubicon. Professional education and employment under the State are thought to be two such bridges. Hence the special provision for advancement and for reservation under Arts. 15(4) and 16(4) of the Constitution.

Before we attempt to lay down any guidelines for the benefit of the Commission proposed to be appointed by the Karnataka Government, will do well to warn ourselves and the proposed Commission against the pitfalls of the traditional' approach towards the question of reservation for Scheduled Castes, Scheduled Tribes and other backward classes which has generally been superior, elitist and, therefore, ambivalent. A duty to undo an evil which had been perpetrated through the generations is thought 'to betoken a generosity and farsightedness that are rare among nations'. So a superior and patronising attitude is adopted. The result is that the claim of the Scheduled Castes and Scheduled Tribes and other backward classes to equality as a matter of human and constitutional right is forgotten and their rights are submerged in what is described as the 'preferential principle' or 'protective or compensatory discrimination', expression borrowed from American jurisprudence Unless we get rid of these superior, patronising and paternalist attitudes, what the French call *Le mentalite hierarchique*, it is difficult to truly appreciate the problems involved in the claim of the Scheduled Castes, Scheduled Tribes and other backward classes for their legitimate share of the benefits arising out of their belonging to humanity and to a country

394

whose constitution preaches justice, social, economic and political and equality of status and opportunity for all.

One of the results of the superior, elitist approach is that the question of reservation is invariably viewed as the conflict between the meritarian principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is not enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated And, what

is merit ? There is no merit in a system which brings about such consequences. Is not a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and society, who has no books and magazines to read at home, no radio to listen, no T.V. to watch, no one to help him with his home work, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and informed that he cannot even hope to seek their advice on any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40% or 50% of the marks at a competitive examination where the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination may secure 70, 80 or even 90% of the marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life. If spring flower he cannot be, autumn flower he may be. Why then, should he be stopped at the threshold on an alleged meritarian principle? The requirements of efficiency may always be safeguarded by the prescription of minimum standards. Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so-called meritarian principle be put against mediocrity when we come to Scheduled Castes, Scheduled Tribes and backward classes?

395

Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceeds 50 per cent; efficiency, it seems, will suffer if the 'carry forward' rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50 per cent or extending to promotional posts and against the carry-forward rule, one would think that the civil service is a Heavenly Paradise into which only the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved castes will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes. There is neither statistical basis nor expert evidence to support these assumptions that efficiency will necessarily be impaired if reservation exceeds 50 per cent, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinions are expressed entirely on an ad hoc presumptive basis. The age long contempt with which the 'superior' or 'forward' castes have treated the 'inferior' or 'backward' casts is now transforming and crystallising itself into an unfair prejudice, conscious and sub-conscious, ever since the 'inferior' casts and classes started claiming their legitimate share of the cake, which

naturally means, for the 'superior' castes parting with a bit of it. Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of Government service and the profession. It is so difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage. Always one hears the word efficiency as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a mantra which is whispered by the Guru in the Sishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good

396

administrator. An efficient administrator, one takes it, must be one A who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of populating constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after independence, the position of the Scheduled Castes, etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is necessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses ! of study only the best may be admitted [f so, rules may provide for reservations for appointment to such posts and for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different courses of study having regard to the requirements of the posts and the courses of study. No one will suggest that the degree t of efficiency required a cardiac or a neuro-surgeon is the same as the degree of efficiency required of a general medical practitioner. Similarly no will suggest that the degree of industry and intelligence expected of a candidate seeking admission to a research degree course need be the same as that of a candidate seeking admission to an ordinary arts degree course. We do not, therefore, mean to say that efficiency is to be altogether discounted. All that we mean to say is that it cannot be permitted to be used as a camouflage to let that upper classes take advantage of the backward classes in its name and to monopolise the services, particularly the higher posts and the professional institutions. We are afraid we have to rid our minds of many cobwebs before we arrive at the core of the problem. The quest for equality is self elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue the quest for equality. It will be advantageous to quote at this juncture

R.H. Tawney in his classic work equality where he says.

397

"The truth is that it is absurd and degrading for me to make much of their intellectual and moral superiority to each other and still more of their superiority in the arts which bring wealth and power, because, judged by their place in any universal scheme, they are infinitely great or infinitely small . . . The equality which all these thinkers emphasise as desirable is not equality of capacity or attainment, but of circumstances, and institutions, and j manner of life. The equality which they deplore is not the inequality of personal gifts, but of the social and economic environment... ..Their views, in short, is that, because men are men, social institutions-property rights, and the organisation of industry, and the system of public health and education-should be planned, as far as is possible to emphasise and strengthen, not the class differences which divide but the common humanity which unite, them.. "

But the controversy between the meritarian and the compensatory principals cannot be allowed to cloud the issues before us. An intelligible consequence of the fundamental rights of equality before the law, equal protection of the laws, equality of opportunity, etc., guaranteed to all citizens under our Constitution is the right of the weaker sections of the people to special provision for their admission into educational institutions and representation in the services. Appreciating the realities of the situation. and least there by any misapprehension, the Constitution has taken particular care to specially mention this right of the weaker sections of the people in Arts. 15(4) and 16(4) of the Constitution. In view of Arts. 15(4) and 16(4) the so-called controversy between the meritarian and compensatory principles is not of any great significance, though, of course, we do not suggest efficiency should be sacrificed. The question really is, who are the scheduled castes, scheduled tribes and backward classes, who are entitled to special provision and reservation in regard to admission into educational institutions and representation in the services. So far as Scheduled Castes and Scheduled Tribes are concerned, the question of their identification stands resolved by the notifications issued by the President under Part XVI of the Constitution. The problem is only in regard to the identification of the other socially and educationally backward classes. The question really is how to identify these backward classes to entitle them to entry through the doors of Arts. 15(4) and 16(4). And, the further question, naturally, is about the limits of reservation.

398

We are afraid the courts are not necessarily the most competent to identify the backward classes or to lay down guidelines for their identification except in broad and very general way. We are not equipped for that; we have no legal barometers to measure social backwardness. We are truly removed from the people, particularly those of the backward classes, by layer upon layer of gradation and degradation. And, India is such a vast country that conditions vary from State to State, region to region, district to district and from one ethnic religious, linguistic or caste group to another. A test to identify backward classes which may appear appropriate when applied to one group of people may be wholly inappropriate and unreasonable if applied to another group of people. There can be no universal test;

there can be no exclusive test; there can be no conclusive test. In fact, it may be futile to apply any rigid tests. One may have to look at the generality and the totality of the situation.

We do generally understand what we mean when we talk of the richer classes, the poorer classes, the upper middle class, the lower middle classes, the ruling class, the privileged class, the working class, the exploited classes, etc. etc. In what senses the word 'classes' used in Art. 15(4) and in Art. 16(4) of the Constitution? What is the meaning of the expression 'socially' and 'educationally backward classes'? What does backwardness consist in? To have a clear understanding of what is meant by 'backwardness', 'backward classes' and 'socially and educationally backward classes', we must have an idea of what social inequality is about. Max Weber gives us a three dimensional picture of social inequality. According to Weber, the three dimensions are class, status and power. A person's class-situation, in the Weber sense, is what he shares with others, similarly placed in the process of production, distribution and exchange, a definition of class which is very near to that of the Marxist conception. The inequality of class depends primarily on inequality of income and to some extent on an equal opportunity for upward mobility. A person's class, according to this definition, is his shared situation in the economic hierarchy. Status, the second of Weber's three dimensions is generally determined by the style of consumption, though not necessarily by the source or amount of income. An impoverished aristocrat is sometimes sought after by the nouveau riche. A desk worker considers himself superior to a manual worker. A professional like a doctor or a lawyer is thought to be of superior status than those belonging to several other walks of life. Status seems to

399

depend on social attributes and styles of life, including dress, speech, I occupation, etc., on what R.H. Tawney describes as 'the tedious A vulgarities of income and social position.' Similarly, class and status are not contemporaneous with power, though power and class can often be seen to be closely connected. Power is participation in the decision making process but those who wield power are not necessarily the best paid nor the most respected. But, it is now obvious even to the most superficial observer that social and political power is wielded in innumerable unseen ways by those who control economic power. Political power is remorselessly manipulated by economic power. We, therefore, see that everyone of the three dimensions propounded by Weber is intimately and inextricably connected with economic position. However, we look at the question of 'backwardness', whether from the angle of class, status or power, we find the economic factor at the bottom of it all and we find poverty, the culprit-cause and the dominant characteristic. Poverty, the economic factor brands all backwardness just as the erect posture brands the homosapiens and distinguishes him from all other animals, in the eyes of the beholder from Mars. But, whether his racial stock is Caucasian, Mongoloid, Negroid, etc., further investigation will have to be made. So too the further question of social and educational backwardness requires further scrutiny. In India, the matter is further aggravated, complicated and pitilessly tyrannised by the ubiquitous caste system, a unique and devastating system of gradation and degradation which has divided the entire Indian and particularly Hindu society horizontally into such

distinct layers as to be v destructive of mobility, a system which has penetrated and corrupted the mind and soul of every Indian citizen. It is a notorious fact that there is an upper crust of rural society consisting of the superior castes, generally the priestly, the landlord and the merchant castes, there is a bottom strata consisting of the 'out-castes' of Indian Rural Society, namely the Scheduled Castes, and, in between the highest and the lowest, there are large segments of population who because of the low gradation of the caste to which they belong in the rural society hierarchy, because of the humble occupation which they pursue, because of their poverty and ignorance are also condemned to backwardness, social and educational, backwardness which prevents them from competing on equal terms to catch up with the upper crust

Any view of the caste system, class or cursory, will at once reveal the firm links which the caste system has with economic power. Land and learning, two of the primary sources of economic power in

400

India have till recently been the monopoly of the superior castes. Occupational skills were practised by the middle castes and in the economic system prevailing till now they could rank in the system next only to the castes constituting the landed and the learned gentry. The lowest in the hierarchy where those who were assigned the meanest task, the out-castes who wielded no economic power. The position of a caste in rural society is more often than not mirrored in the economic power wielded by it and vice versa. Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. Such we must recognise is the primeval force and omnipresence of caste in Indian Society, however, much we may like to wish it away. So Sadly and oppressively deep-rooted is caste in our country that it has out across even the barriers of religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioner of other religious faiths and Hindu dissentients are some times as rigid adherents to the system of caste as the conservative Hindus. We find Christian harijans, Christian Madars, Christian Reddys, Christian Kammas, Mujbi Sikhs, etc. etc. In Andhra Pradesh there is a community known as Pinjaras or Dudekulas (known in the North as 'Rui Pinjane Wala'): Professional cotton-beaters) who are really Muslims, but are treated in rural society, for all practical purposes, as a Hindu. caste Several other instances may be given.

Shared situation in the economic hierarchy, caste gradation, occupation, habitation, style of consumption, standard of literacy and a variety of such other factors appear to go to made towards social and educational backwardness. In some situations and indeed quite often, social investigator may easily be able to identify a whole caste group as a socially and educationally backward class; he may readily recognise people living in certain areas, say

mountainous, desert or forest regions, as socially and educationally backward classes; he may freely perceive those pursuing certain 'Lowly' accusations as socially and educationally backward classes: he may, without difficulty, distinguish the very poor and the destitute as socially and educationally

401

backward classes. The social investigator may be able to do all this by field-reasearch. study, observation, collection and interpretation of data, application of common though not rigid standards. We will refer to these aspects of the question later in our judgment.

With these prefatory, general observations, we may now refer to the relevant Constitutional provisions. Part XVI of the Constitution concerns itself with "Special provisions relating to certain classes". The classes in regard to which the constitution-makers thought fit to make special provision are the Scheduled Caste, the Scheduled Tribes, the Anglo-Indian community and the socially and educationally backwardness classes

Articles 330 and 332 provide for reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People and the Legislative Assemblies of the State. Articles 331 and 333 provide for representation of the Anglo-Indian Community in the House of the People and the Legislative Assemblies of the States. Article 334 provides that the reservation and special representation are to cease after 30 years. There is no reservation or special representation for socially and educationally backward classes either in the House of the People or in the Legislative Assemblies of the State.

Article 335 imposes a constituently obligation to take into consideration the claims of members of the Scheduled Castes and Scheduled Tribes, in the making of appointments to the services and posts in connection with the affairs of the Union or of the States, consistently with the maintenance of efficiency of administration. Articles 336 and 337 make certain special provisions for the Anglo-Indian Community in certain services and with respect to educational grants for the benefit of that community. Article 341 empowers the President, with respect to any State (after consultation with the Governor) or Union Territory, to specify, by public notification, the castes, the races or tribes or parts or groups within castes, races or tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes in relation to that State or Union Territory as the case may be. A notification so issued by the President is not to be varied by any subsequent notification, but may only be varied by law, made, by Parliament. Article 342 makes a similar provisions with respect to Scheduled Tribes.

Article 340 empowers the President to appoint a commission to investigate the conditions of socially and educational

402

ly backward classes within the territory of Indian and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union to remove such difficulties and to improve their conditions and as to the grants that should be made for that purpose by the Union or by the State. The report of the Commission which is to set out the facts and make

recommendations is required to be laid before each House of Parliament, together with a memorandum explaining the action taken thereon.

Article 338 enjoins the appointment of a special officer for the Scheduled Tribes by the President whose duty is to investigate all matters relating to the safeguards provided for the Scheduled Castes and Schedule Tribes under the Constitution and to report to the President upon the working of those safeguards at such intervals as may be directed by the President. The reports are to be laid before each House of Parliament. Article 338(3) expressly provides that n under Art. 338 references to the Scheduled Castes Scheduled Tribes shall be construed as in including references to such other backward classes as the President may on receipt of the report of a Commission appointed under Art. 34a(1). specify and also the Anglo-Indian community.

Thus, while there is a special provision for reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People and the Legislative Assemblies of the States and a provision for the representation of the Anglo-Indian Community in the House of the People and the Legislative Assemblies of the States, there is no such provision for reservation of seats for or reservation socially and educationally backward classes in the House of the People or the Legislative Assemblies of the States. Again, while under Art. 335, there is a constitutional obligation to consider the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments to services and posts in connection with the affairs of the Union and the States and there is a special provision for the Anglo-Indian Community in certain services for a limited period. There is no corresponding provision for the socially and educationally backward classes. But there is a provision under Art. 340 of the Constitution for the appointment of a Commission to investigate the conditions of socially and educationally backward classes and to recommend the steps to be taken to ameliorate such conditions.

403

Article 14 of the Constitution, stated in positive language, guarantees to every person equality before the law and equal protection of the laws, Article 15(1) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 22(2) similarly prohibits the denial of admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. While Art. 15(3) States that nothing in Art. 15 shall prevent the State from making any special provision for women and children, Art. 15(4) provides, "Nothing in this Article or in clause (2) of Art. 29 shall prevent the State from making and special provision for the advancement of any socially, educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes." Art. 16 deals with equality of opportunity in matters of public employment. Art. 16(1) provides that there shall be equality of opportunity in matters relating employment or appointment to any office under the State, and Art. 16(2) prohibits discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Art. 16(4) States, "nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the "that, is not adequately represented in the services under the State. We are primarily concerned in this case with the question as to who are socially and educationally backward classes of

citizens mentioned in Art. 15(4) and the backward class of citizens, not adequately represented in the services under the State mentioned in Art. 16(4).

We see that while Art. 15(4) contemplates "special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes", Art. 16(4) speaks of 'provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in services under the State'- Now, it is not suggested that the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes from whom special provision for advancement is contemplated by Art-15(4) are distinct and separate from the backward classes of citizens who are adequately represented in the services under the State for whom reservation of posts and appointments is contemplated by Art. 16(4). 'The backward classes of citizens' referred to in Art. 16(4), despite the short description, are the same

404

as the socially and educationally backward classes of citizens and the A scheduled castes and the Scheduled Tribe', 90 fully described in Art. 15(4): Vide Trilokinath Tiku v. State of Jammu and Kashmir and other cases. However, for the purposes of Art. 16(4) it is further necessary that the Backward classes should not be adequate in the services. Again, and quite obviously, 'special provision for advancement' is a wide expression and may include many more things besides 'mere reservation of seats in colleges.' It may be by way of financial assistance, free medical, educational and hostel facilities, scholarships, free transport, concessional or free housing, exemption from requirements insisted upon in the case of other classes also on. We are not, for the time being, concerned with the mode advancement, other than reservation of seats in college, we observe that under Art. 16(4), reservation is to be made to benefit those backward classes, who in the opinion of the Government are not adequately represented, in the services. Reservation must, therefore, be aimed at securing adequate representation. It must follow that the extent of reservation must match the inadequacy of representation. There is no reason why this guideline furnished by the Constitution itself should not also be adopted for the purposes Or Art. 15(4) too. For example, the extent of reservation of seats in professional colleges may conveniently be determined with reference to the inadequacy of representation in the various profession. Similarly, the extent of reservation in other colleges may be determined with reference to the inadequacy in the number of graduates, etc. Naturally, if the lost ground is to be gained. the extent of reservation may even have to be slightly higher than the percentage of population of the backward classes.

Since these questions are not altogether res integra, it will be useful to refer to a few of the earlier opinions of this Court touching upon this question.

Until Thomas(1) came on the scene, Balaji(2) was considered by many as the magnum opus on reservations. Balaji was also a case from Karnataka. The very first sentence of the judgment of a Gajendragadkar, J.. is a revelation of the frustrating task that the Government of Karnataka has been undertaking these several years. The first sentence says: "Since 1958, the State of Mysore has been

(1) [1976] 1 S.C.R. 906.

(2) [1963] Suppl. I S.C.R, 4 39

405

endeavouring to make a special provision for the advancement of the socially and educationally backward classes of citizens in the State of Mysore under Art. 15(4) of the Constitution and every time when an order is passed in that behalf, its validity has been challenged by writ proceedings. Four previous orders passed in that behalf were challenged by writ proceedings taken against the State under Art. 226". Balaji was concerned with the question of the validity of the reservation made under Art. 15(4) of the Constitution in regard to admission to the medical colleges of the Mysore and Karnataka Universities. 28 per cent of the seats were reserved for Backward Classes so-called, 20 percent for more Backward classes, 15 per cent for Scheduled Castes and 3 per cent for Scheduled Tribes, making a total of 68 per cent of the seats available for the reserved category only and 32 per cent for the general category, described in the judgment as "merit pool". The reservation was generally made on the basis of the report of the Nagan Gowda Committee appointed by the State Government. The court found that the Committee approached the problem of enumerating and classifying these socially and educationally backward communities on the basis that social backwardness depended substantially on the caste to which the community belonged, though it recognised that economic condition may be a contributing factor. According to the court, the Committee virtually equated 'classes' with castes'. The court observed that in dealing with the question as to whether any class of citizens were socially backward or not, it might not be irrelevant to consider the caste of the said citizens but the importance of caste should not be exaggerated. It was observed that caste could not be made the sole or dominant test to determine the social backwardness of group or classes of citizens. It was noted that social backwardness was in the ultimate analysis the result of poverty, to a very large extent. It was also noticed that the occupation of citizens might also contribute to make classes of citizens socially backwardness. As the Nagam Gowda Committee had adopted the caste test as the predominant test, if not the sole test, without regard to the other factor- which were undoubtedly relevant, the court expressed the view that the classification made by the Committee of socially backward communities was invalid. In passing, at one place, it was remarked that the Backward Classes of citizens for whom special provision was authorised to be made, were treated by Art. 15(4) itself, as being similar to the Scheduled Castes and Tribes. It was observed that the Backward Classes were in the matters of their backwardness comparable to Scheduled Castes and Tribes. Based on these observations and the juxta

406

position of the expressions Scheduled Castes, Scheduled Tribes and A socially and educationally backward classes in Art. 15 and Art. 338, it was suggested by the learned counsel for the petitioner that the socially backward classes of people were those whose status and standard of living was very much the same as those of the Scheduled Castes and Scheduled Tribes. We do not think that these observations were meant to lay down any proposition that the socially Backward Classes were those classes of people, whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes. We say so first because of the inappropriateness of applying the ordinary rules of statutory interpretations to interpret constitutional

instruments which are sui generis and which deal with situations of significance and consequence. It is not enough to exhibit a Marshallian awareness that we are expounding a Constitution; we must also remember that we are expounding a Constitution born in the mid-twentieth century, but of an anti-imperialist struggle, influenced by Constitutional instruments, events and revolutions elsewhere, in search of a better world, and winded to the idea of justice,

economic, social and political to all. such a Constitution must be given a generous interpretation so as to give all its citizens the full measure of justice promised by it. The expositors of the Constitution are to concern themselves less with mere words and arrangement of words than with the philosophy and the prevailing 'spirit and sense' of the Constitution, so elaborately exposed for our guidance in the Directive Principles of State Policy and other provisions of the Constitution. Now, anyone acquainted with the rural scene in India would at once recognise the position that the Scheduled Castes occupy a peculiarly degraded position and are treated, not as persons of caste at all, but as outcastes. Even the other admittedly backward classes shun them and treat them as inferior beings. It was because of the special degradation to which they had been subjected that the Constitution itself had to come forward to make special provision for them. There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes. Such a test would perpetuate the dominance of the existing upper classes. Such a test would take a substantial majority of the classes who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the 'enlightened' classes of body will capture all the 'open' posts and seats and the reserved posts and

407

seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. The bulk of those behind the 'enlightened' classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of imposing themselves.

Earlier we mentioned that poverty was regarded by the Court as the prime cause of social backwardness. It was said at page 460, "Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that 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". We only add that there is an overpowering mutuality between poverty and caste on the Indian scene. Again, referring to some scheme formulated by the Maharashtra Government for financial assistance the Court observed, "However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness social and educational, in ultimately and primarily duties for proverty". Recognising poverty as the true source of the

evil of social and economic backwardness and caste as a relevant factor in determining backwardness, the Court also noticed occupation and habitation as two other important contributing factors and finally stressed the need for a penetrating investigation. It was said,

"The occupations of citizens may also contribute to make classes of citizens socially backward. There are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons. In a sense, the problem of social backwardness is the problem of Rural India and in that behalf, classes of citizens occupying a socially backward position in rural area fall within the purview of Art. 15(4). The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem and

408

evolving proper criteria for determining which classes are socially backward is obviously a very difficult task. It will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way".

The Balaji Court then proceeded to consider the question of educational backwardness. The Nagan Gowda Committee had dealt with the question on the basis of the average of the student population in the last three High school classes of all High Schools in the State in relation to a thousand citizens of that community. The Committee was of the view that all castes whose average was less than the State average should be regarded as Backward communities and those whose average was less than 50 per cent of the State average should be regarded as More Backward. The Court took the view that the adoption of the test of the last three High School classes might be a little high, but even if it was not considered high, it was not right to treat communities which were just below the State average as backward. There can be divergence of views on this question. Where the State average itself is abysmally low, there is no reason why classes of people whose average was slightly above, or very near, or just below the State average, should be excluded from the list of Backward Classes. The adoption of the State average or the 50 per cent of the State average test might lead to quite arbitrary results and This surely cannot be a matter in which the court should try to impose its views.

In fact while observing: "if the test has to be applied by a reference to the State average of student population, the legitimate view to take would be that the classes of citizens, whose average is well or substantially below the State average, can be treated as educationally backward," the court also observed, ' On this point again we do not propose to lay down any hard and fast rule; it is for the State to consider the matter and decide in a manner which is consistent with the requirements of Art. 15(4)".

It was also observed in Balaji that the sub-classification made by the reservation order between Backward Classes and More Backward Classes did not appear to be justified under Art. 15(4) as it appeared to be a measure devised to benefit all the classes of citizens who were less advanced when compared with the most advanced classes in the State, and that was not the scope of Art.

15(4). A result of the sub-classification was that nearly 90 per cent of the

409

population of the State was treated as backward. The propriety of such a course may be open to question on the facts of each case, but we do not see why on principle there cannot be a classification into Backward Classes and More Backward Classes, if both Classes are not merely a little behind, but far far behind the most advanced classes. In fact such a classification would be necessary to help the More Backward Classes; otherwise those of the Backward Classes who might be a little more advanced than the More Backward Classes might walk away with all the seats, just as, if reservation was confined to the More Backward Classes and no reservation was made to the slightly more advanced Backward Classes the most advanced Classes would walk away with all the seats available for the general category leaving none for the Backward Classes. All that we can say is that sub-classification may be permissible if there are classes of people who are definitely far behind the advanced classes but ahead of the very backward classes.

One may say the same thing about the adoption of the average of the student population in the last three High School Classes of all High Schools in the State in relation to a thousand citizens of that community as the basis for assessing relative Backwardness. Balaji thought it was a little high but surely other views are possible. In fact considering the wide spread of elementary education, one would think the basis should be pushed up higher. Having regard to the availability of elementary schools in rural areas, more and more boys of the backward Classes may become literate. But it is a long way from ceasing to be educationally backward. As one goes up class by class it is a notorious fact that there are more 'drop-outs' from the boys of the backward classes than from the boys of the forward classes. The adoption of a lower basis to assess educational backwardness may give a wholly false picture. After all, if one is considering the question of admission to professional colleges or of appointment to posts, the basis possibly should be the average number of students of that community who have passed the examination prescribed as the minimum qualification for admission to professional colleges, say in the last three years, and perhaps the average number of persons of that community who have graduated in the last three years, since graduation is generally the minimum qualification for most posts possibly, the extent of reservation may even vary with reference to the class of post. This is a matter for evaluation by experts.

410

The Balaji Court then considered the question of the extent of the special provision which the State would be competent to make under Art. 15(4). Here the Court brought in the so-called merit principle and thought that large reservation would inevitably affect efficiency. We may perhaps, mention here what a noted sociologist had to say: "So the leading anti-reservationists by hand to find nationalizations for their campaigns. A favourite one is to conjure up the image of a phoney juxtaposition; on one side is 'merit' shown up by candidates on the open list, on the other side is 'incompetence', represented by those on the reserved list. Hence-so the argument runs-if reservations are maintained, standards in the medical professions (or in other professions and senior Government posts) will be deleted. Indeed (it is claimed) there is serious risk that

patients will die if they are treated by (backward' doctors who have reached their positions through reservations. (Such allegations are constantly repeated although they are patently false; in the final at the postgraduate level, the minimum qualifying marks are identical for all candidates, irrespective of their origin.)"(') We should think that is a matter for experts in management and administration. There might be posts or technical courses for which only the best can be admitted and others might be posts and technical courses for which minimum qualification would also serve. The percentage of reservations is not a matter upon which a court may pronounce with no 1 material at hand. For a court to say that reservations should not exceed 40 per cent, 50 per cent or 60 per cent, would be arbitrary and the Constitution does not, permit us to be arbitrary. Though in the Balaji case, the court thought that generally and in a broad way a special provision should be less than 50 per cent, and how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case, the court confessed. "In this matter again, we are reluctant to say definitely what would be a proper provision to make." All that the court would finally say was that in the circumstances of the case before them, a reservation of 68 per cent was inconsistent with Art. 15(4) of the Constitution. We are not prepared to read Balaji as arbitrarily laying down 50 per cent as the outer limit of reservation. What precisely was decided by Balaji has been summed up by the Court itself at page 471 of the S.C.R. in the following words:

(1) Ruth Glass: Divided and degraded: the downtrodden people of India, (Monthly Review July-August) 1982.

411

"We have already noticed that the impugned order in the present case has categorised the Backward Classes on the sole basis of caste A which, in our opinion, is not permitted by Art. 15(4): and we have also held that the reservation of 68 per cent made by the impugned order is plainly inconsistent with the concept of the special provision authorised by Art. 15(4). therefore, it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Art. 15(4)".

We must repeat here, what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess Or 5() percent may impair efficiency. It is a rule of thumb and rules of the thumb are not for judges to lay down to solve complicated sociological and administrative problems. Sometimes, it is obliquely suggested that excessive reservation is indulged in as a mere votecatching device. Perhaps so, perhaps not. One can only say 'out of evil cometh good' and quicker the redemption of the oppressed classes, so much the better for the nation. Our observations are not intended to show the door to genuine efficiency. Efficiency must be a guiding factor but not a smokes-cream. All that a Court may legitimately say is that reservation may h not be excessive. It may not be so excessive as to be oppressive; it may not be so high as to lead to a necessary presumption of unfair exclusion of everyone else.

In R. Chiralekha v. State of Mysore,(') the Supreme Court upheld that classification of socially and educationally backward classes made on the basis of economic condition and occupation, without reference to caste. According to the Government order, a family whose income was Rs. 1200 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; (1) actual cultivators; (2) artisan; (3) inferior services (i.e. Class IV in Government Services and corresponding class or service in private employment) including casual labour; and (4) any other occupation involving manual labour. This criteria was adopted by the Government as a temporary measure pending further detailed study. The order did not take into consideration as a criterion for backwardness the caste of an applicant. Relying heavily on Balaji,

(1) [1964] 6 S.C.R.368.
412

the Mysore High Court held that the scheme adopted by the Government was most imperfect as in their opinion in addition to the occupation and poverty tests, the study should have adopted the caste test as well as the "residence" test in making the classification. It also observed that the decision in the Balaji case said that the caste basis was undoubtedly a relevant, nay an important basis in determining the classes of backward Hindus but it should not be made the sole basis. Subba Rao, J., speaking for this Court, explained how the Mysore High Court had misunderstood Balaji and observed:

"While this Court said that caste is only a relevant circumstance and that it cannot be the dominant test in ascertaining the backwardness of a class of citizens, the High Court said that it is an important basis in determining the class of backward Hindus and that the Government should have adopted caste as one of the test. As the said observations made by the High Court may lead to some confusion in the mind of the authority concerned who may be entrusted with the duty of prescribing the rules for ascertaining the backwardness of classes of citizens within the meaning of Art. 15(4) of the Constitution, we would hasten to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not included caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances affording a basis for the ascertaining of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons; but, if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of person on the basis of other relevant criteria."

Later he further proceeded to explain:-

"This interpretation will carry out the intention of the Constitution expressed in the aforesaid Article. It helps the really backward classes instead of promoting the interests of individuals or groups who, though they

413

belong to a particular caste a majority where of si socially and educationally backward, really belong to a class A which is socially and educationally advanced.

To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be socially and educationally more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression "Classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any advertitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backwardness, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution".

Evidently recognising the difficulty be-setting any attempt by a Court to lay down inflexible criteria, he pointed out:

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

In *Rajendran v. State of Madras*(1) *Ramaswami, J.* took care to say,

(1) [1968] I S.C.R. 721.

414

".. if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Art. 15(1) But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Art. 15(4) . . . It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily means that caste was the sole consideration and that person belonging to these castes are also not a class of socially and educationally backward citizens."

In *State of Andhra Pradesh v. P. Sagar*,(1) *Shah, J.* Observed,

"In the context in which it occurs the expression "class" means a homogeneous section of the people ground 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 cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted-

.....
 Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, case must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer".

(1) [1998] 3 S.C.R. 595.

415

In Tirloki Nath v. State of Jammu & Kashmir, (1) the Court held that while it was open to the State to make a provision for reservation of appointments or posts in favour of socially and educationally backward classes, it could not distribute the number of posts or appointments on the basis of community or place of residence. An order of the Government of Jammu and Kashmir reserving 50 per cent of the vacancies for the Muslims of Kashmir (entire State), 40 per cent for the Jammu Hindus and 10 per cent for the Kashmiri Hindus was struck down. It was pointed out that the expression "backward class" was not used as synonymous with backward caste or backward community but it was noticed, "The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class". The Court further said:

In its ordinary connotation the expression "class" means a homogeneous section of the people grouped together because of certain likenesses 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. But for the purpose of Art. 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution".

In A. Peeriakatuppan v. State of Tamil Nadu, (') the Court observed:

"A caste has always been recognised as a class. there is no gain saying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life."

In State of Andhra Pradesh v. Balaram(3), the order of the Government of Andhra Pradesh enumerating the socially and

(1) [1969] 1 S.C.R. 103

(2) [1971] 1 S.C.C.38.

(3) A.L.R. 1972 S.C. 1375.

416

educationally backward classes for the purpose of admission into the A medical colleges of the State had been struck down by the High Court on the ground that the Government Order was based on the report of the Backward Classes Commission which had adopted caste as the main basis to

determine who were backward classes and this was contrary to the decision of the Court in Balaji. It had also been held by the High Court that the Commission had committed a mistake in adopting the average of student population per thousand of a particular class or community in the 10th or 11th classes with reference to the State average for the purpose of determining educational backwardness. Even so the percentage of literacy of some groups included in the list of backward classes was well above the State average. The High Court had further held that the Commission had ignored the principle that the social and educational backwardness of persons classified in the list should be comparable or similar to the Scheduled Castes and Scheduled Tribes- The Commission had committed a further mistake in subdividing the groups into more backward and less backward classes. It was urged before this Court that the principles thought to have been laid down in Balaji, Chitralkha and Sagar that Art. 15(4) was to be read as a proviso to Arts. 15(1) and 29(2) and that in the matter of backwardness that backward classes must be comparable to Scheduled Castes and Scheduled Tribes, were wrong and required to be re-considered. The Court found that it was not necessary for them to consider this aspect of the matter as in the particular case before them, they were factually satisfied that classes enumerated as backward, were really socially and educationally backward. The Court however took care to say:

"It must be pointed out that none of the above decisions lay down that social and educational backwardness must be exactly similar in all respects to that of Scheduled Castes and Scheduled Tribes.

" The contention that backward classes were classified on the basis of caste was met with the following observation:

"No doubt, we are aware that that any provision {I made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not also be missed that a caste as such may be socially and educationally backward. If after collecting

417

the necessary data, it is found that the caste as a whole is socially and educationally backward, in our opinion, A the reservation made of such persons will have to be up held notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. There is no gain saying 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 charge in Article 15(4) to safeguard their interest.....

..... the members of an entire caste or community may in the social economic, and educational scale of values, at a given time be backward and may on that account be treated as backward classes, but that is not because they are members of a caste of community but because they form a class. Therefore, it is clear that there may be instances of an entire caste or a community being socially and educationally backward for being considered to be given protection under Art. 15(4).....

.....
To conclude, though prima facie the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it only a

description of the group following the particular occupations or professions, exhaustively referred to by the Commission."

The Court then proceeded to observe that the question before them was whether the Backward Classes Commission had relevant data and material before it for enumerating the classes of persons to be included in the list of backward classes was a real question and not whether the Commission was scientifically accurate in conclusion. The Court expressed its satisfaction that there was sufficient relevant material to justify the Commission's conclusion and added:-

"No doubt there are a few instances where the educational average is slightly above the State average, but that circumstance by itself is not enough to strike down the entire list. In fact, even there it is seen that when the whole class in which that particular group is included, is considered the average works out to be less

418

than the State average. Even assuming there are a few A categories which are a little above the State average, in literacy, that is a matter for the State to be taken note of and review the position of such categories of persons and take a suitable decision."

Referring to the observations in Balaji regarding the test of average student population in the last three High Court School classes it was said:

"These observations made by this Court in the above decisions have, in our opinion, been misapplied by the High Court to the case in hand. It has proceeded on the basis that it is axiomatic that the educational average of the class should not be calculated on the basis of the student population in the last three high school classes and that only those classes whose average is below the State average, that can be treated as educationally backward. This Court has only indicated the broad principles to be kept in view when making the provision under Art. 15(4)."

In Janki Prasad Parimoo v. State of Jammu & Kashmir the Court noticed the link between economic backwardness and social and educational backwardness and observed -

"In India, social and educational backwardness is further associated with economic backwardness and it is observed in Balaji's case referred to above that backwardness, socially and educationally is ultimately and primarily due to poverty."

Having said this the Court was not prepared to lay down poverty as the exclusive test on the ground that a large proportion of the population in India was poverty stricken and if poverty was made the sole test for reservation, a resourceless situation might arise. It was said,

"But if poverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward and if reservations are made only on the ground of economic

419

considerations, an untenable situation may arise because even in sectors which are recognised as socially and educationally advanced, there are large pockets of poverty. In this country except for a small percentage of the population, the people are generally poor-some being more poor, others less poor. Therefore, when a social investigator tries to identify socially

and educationally backward classes he may do it with confidence that they are bound to be poor. Though the two wards, 'Socially' and 'educationally' are used cumulatively for the purpose of describing the backwardness class, one may find that if a class as a whole is educationally advanced, it is generally also socially advanced because of the reformatory effect of education on that class. The words "advanced" and "backward" are only relative terms—there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as being socially and educationally backward."

The State of Jammu & Kashmir had declared six classes of citizens as socially and educationally backward. They were (1) persons whose traditional occupation was one of the sixty-two mentioned; (2) persons belonging to 23 social castes; (3) small cultivators (4) low paid pensioners; (5) residents in areas adjoining the cease-fire line; (6) persons belonging to "bad pockets". The court found that some of the sixty-two enumerated occupations were not traditional occupations at all and that that list required review. The court also found that 19 out of the 23 castes had been identified by the Committee as suffering from social disabilities and also educationally and economically backward. In the case of the remaining four castes, there was nothing to indicate that they were backward classes. Referring to the third category of small cultivators, it was observed that they could not be said to be 'a homogeneous social section of the people with common trades and identifiable by some common attributes'. All that could be said about them was that they cultivated or lived on land. Similarly in regard to the fourth category, it was observed that they also do not belong to a homogeneous section of the people, the only thing common between them being that they had retired from Government service. In regard to the fifth and sixth category the court observed that lack of communication, inaccessibility, lack

420

of material resources, primitive living conditions and such considerations made the people living in those areas socially and educationally backward.

In State of Uttar Pradesh v. Pradeep Tandon, (1) the Court recognised poverty as a relevant factor but observed that it was not the determining factor in discovering poor socially and educationally backward classes. Even so the backwardness of the hill and Uttrakhand areas in Uttar Pradesh was sustained on economic basis. It was said,

"The Hill and Uttrakhand areas in Uttar Pradesh are instances of socially and educationally backward classes of citizens for those reasons. 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. When large areas of land maintain a sparse, disorderly and illiterate population whose property is small and negligible the element of social backwardness is observed. When effective territorial specialisation is not possible in the absence of means of communication and technical processes as in the hill and Uttrakhand areas the people are socially backward classes of citizens. Neglected opportunities and people in remote places raise walls of social backwardness of

people."

"Educational backwardness is ascertained with reference to those factors. Where people have traditional apathy for education on account of social and environ mental conditions or occupational handicaps, it is an illustration of educational backwardness. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions and educational aids. People in the hill and Uttrakhand areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have neither meaning and values nor awareness for education."

(1) [1975] 1 S.C.R. 761,

421

The Court struck down the reservation for candidates from rural areas on the ground that rural population which constituted 80% of A the population of the State could not be a homogeneous class. Some people in the rural areas might be educationally backward, some might be socially backward, there may be few who were both socially and educationally backward but it could not be said that all citizens residing in rural areas were socially and educationally backward.

The Court while noticing the difficulty of defining the expression 'socially' and 'educationally' backward classes of citizens allowed itself to make the observation, "the traditional unchanging occupations of citizens may contribute to social and educational backwardness. The place of habitation and its environment is also a determining factor in judging the social and educational backwardness."

In K.S. Jayasree v. State of Kerala, (1) what was in question was a Government Order specifying that only citizens who were members of families which had an aggregate income of less than Rs. 6,000 per annum and which belonged to the caste and community mentioned in the annexures to the Government Order would constitute socially and educationally backward classes for the purposes of Art. 15(4). The Court upheld the order and held:

"In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The commission found that the lower income group constitutes socially and educationally backward classes. The basis of the reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of

(1) [1976] 3 S.C.C. 730.

422

citizens is based solely on the caste of the citizen, it will A perpetuate the vice of caste system. Again, if the classification is based solely on poverty, it will not be logical.....

..... Social backwardness which results from poverty is likely to be magnified by caste considerations. Occupations, place to habitation may also be relevant factors in determining who

are socially and educationally backward classes. Social and economic considerations came into operation in solving the problem and evolving the proper criteria of determining which classes are socially and educationally backward.....

..... The problem of determining who are socially and educationally backward classes is undoubtedly not simple. Sociological and economic considerations come into play in evolving proper criteria for its determination. This is the function of the State. The Court's jurisdiction is to decide whether the tests applied are valid.....

....If the classification is based solely on caste of the citizen, it may not be logical. Social backwardness is the result of poverty to a very large extent. Caste and Poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests

..... Therefore, socially and educationally backward classes of citizens in Article 15(4) cannot be equated with castes. In R. Chitralakha v. State of Mysore [1964] 6 SCR 368 AIR 1964 SC 1823 this Court said that the classification of backward classes based on economic conditions and occupations does not offend Article 15(4)."

State of Kerala v. N.M. Thomas(1) is a very important case decided by a bench of seven judges consisting of Ray, C.J., Khanna, Mathew, Beg. Krishna Iyer, Gupta and Murtaza Fazal Ali, JJ.). The question was about the exemption given to members of the Scheduled Caste and Scheduled Tribes, for a limited period, from passing a (1) [1976] 1 S.C.R. 906.

423 certain departmental test to qualify for promotion from the post of Lower Division Clerk to the post of Upper Division Clerk. The rule A providing for the exemption was attacked on the ground that it was violative of Art. 16(1). One of the arguments in support of the attack was that the result of application of the rule would be to enable the members of the Scheduled Castes and Scheduled Tribes to claim more than 50% of the posts immediately available for promotion. The rule was upheld by Ray, C.J., Mathew, Beg, Krishna Iyer and Murtaza Fazal Ali, JJ. and struck down by Khanna and Gupta, JJ. Ray, C.J. Observed that the equality of opportunity took within its fold "all stages of service from initial appointment to its , termination including promotion". Articles 14 and 16(1) would not be violated by the rule which would ensure equality of representation in the services for unrepresented classes, after satisfying the basic needs of efficiency of administration. A rule giving preference to an underrepresented backward community would not contravene Arts.]4, 61(1) and 16(2). Article 16(4) merely removed any doubt in that respect. The classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing the special tests for promotion was a just and reasonable classification having rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public office. All legitimate methods were available to strive for equality of opportunity in service under Art. 16(1). Article 16(4) enacted one of the methods for achieving equality

embodied in Art. 16(1). Dealing with the arguments that the rule exceeded the permissible limits of the resulting preference shown to Scheduled Castes. Ray, C.J.. Observed:

"The High Court was wrong in basing its conclusion that the result of application of the impeached Rule and the orders are excessive and exorbitant namely that out of 51 posts, 34 were given to the members of the Schedule led Castes and Scheduled Tribes. The promotions made in the service as a whole are no where near 50 per cent of the total number of posts. The Scheduled Castes and Scheduled Tribes constitute 10 per cent of the State's population. Their share in the gazetted service of the State is said to be 2 per cent 184 out of 8,700. Their share in the non-gazetted appointments is only 7 per cent namely 11,437 out of 1,62,784. It is, therefore, correct that Rule 13A and the orders are meant to implement

424

not only the direction under Art. 335, but also the Directive principal under Art. 46."

One other important statement in Ray, C.J. 's judgment is worth noticing. He said, "Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste". He referred *Bhaiyalal v. Harikishan Singh* where it had been held that an enquiry was not permissible into the question whether a particular caste was a Scheduled Caste or not in view of the provision of Art. 341.

Mathew, J. who agreed with the conclusions of Ray, C.J., observed that resort to some sort of proportionate equality was necessary in many spheres to achieve justice. Equality of opportunity was not simply a matter of legal equality, it depended not merely on the absence of disability but on the presence of abilities. The Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims. The Government has an affirmative responsibility for elimination of inequalities, social, economic or otherwise. There was no reason for the court not to require the State to adopt a standard of proportional equality which took account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stood in the way of their equal access to the enjoyment of basic rights and claims. Art. 16(4) was not an exception of Art. 16(1). It was an emphatic way of putting the extent to which the equality of opportunity could be carried, viz., even up to the point of making reservation. The state was entitled to adopt by measure which would ensure an adequate representation of the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure did not dispense with the acquisition of the minimum basic qualification necessary for the efficiency of administration. Beg, J. expressly agreeing with the conclusions of Ray, C.J., Mathew, Krishna Iyer and S. M. Fazal Ali, JJ, added that the protection of Art. 16 continued through out the period of service. He distinguished *Devasana* and *Balaji* on the ground that if the overall position and picture was taken into account by taking the number of employees in all Government departments, the so-called favoured class of employees would be less than 50 per cent of the number of posts.

Beg, J., however, thought that Art. 16(4) was designed 'to reconcile the conflicting pulls of Art. 16(1) representing the dynamics

425

of justice, conceived of as equality in conditions under which candidates actually compete for posts in Government service, and of Arts. 46 and 335 embodying the duties of the State to promote the interest of the economically, educationally and socially backward so as to release them from the clutches of social injustice'. According to Beg, J. the encroachments on the field of Art. 16(1) could only be permitted to the extent they were warranted by Art. 16(4) and to read broader concept of social justice and equality into Art. 16(1) might stultify the provision itself and make Art. 16(4) otiose. We must straight away demur. There is no reason whatever to narrow the concept of equality in Art. 16(1) and refuse to read into it broader concepts of social justice and equality. In fact, it is necessary to read Art. 16(1) so as not to come into any conflict with Arts. 46 and 335. A constitutional document must be read as to synthesis its provisions and avoid disharmony. To say that equality also means that unequals cannot be treated equally is merely to say what is self-evident and common place. Art. 14 implies it and we do not see why it is not implied in Art. 16(1) also. True, on a first glance, Art. 16(4) appears to save the power of the State to make provision for the reservation of appointments and posts in favour of any backward class of citizens, but a second look shows that it really recognises a pre-existing power and expresses the recognition in an emphatic way lest there should be any doubt caste upon that power. Such a device is not unknown to legislatures and constitution making bodies. Art. 16(4) is more in the nature of a rule of interpretation to guide the construction of Art. 16(1). The possibility of interpreting Art 16(1) so as to promote the narrower equality rather than the greater equality is excluded by Art. 16(4).

Krishna Iyer, J., while upholding the validity of Rule 13AA made it quite clear that Art. 16(4) was to be viewed not as a saving clause but as a clause inserted in Art. 16 due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt. He was emphatic that Art. 16 applied to appointments and pro-motions as well. He expressed his agreement with Fazal Ali, J. that arithmetical limit of 50 per cent in one year set by some earlier rulings could not be pressed too far and that overall representation in a department did not depend on the recruitment in a particular year, but the total strength of a cadre He also agreed with Fazal Ali, J's construction of Art. 16(4) and his view about the 'carry forward' rule. But we must point out that Krishna Iyer, J. also made certain observations indicating that he too fell into the elitist

426
trap of viewing the question as one of 'protective discrimination'. A The question to which he addressed himself was 'Is Rule (13AA) valid as protective discrimination to the Heartiness'. Viewing the question in that light, he proceeded to utter some words of purported caution about the fills of reservation. He aid,

A word of sociological caution. In the light of experience, here and elsewhere the danger of 'reservation', it seems to me, is three-fold. TLC benefits, by and large, are snatched away by the top creamy layer of the 'back ward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more

opportunities of employment but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardness. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of a progress registered by the 'under dog' categories is essential lest a once deserving 'reservation' should be degraded into 'reverse discrimination'."

One cannot quarrel with the statement that social science research and not judicial impressionism should form the basis of examination, by Courts, of the sensitive question of reservation for backward classes. Earlier we mentioned how the assumption that efficiency will be impaired if reservation exceeds 50 per cent, if reservation is extended to promotional posts or if the carry forward rule is adopted, is not based on any scientific data. One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are

427
snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer on society itself? Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit it on which the unreserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad? This is a necessary concomitant of the very economic and social system under which we are functioning. The privileged in the whole of society snatch away the unreserved prizes and the privileged among the backward classes snatch away the reserved prizes, This does not render reservation itself bad. But it does emphasize that mere reservation of a percentage of seats in colleges and a percentage of posts in the services is not enough to solve the problem of backwardness. Developmental facility and opportunity must be created to enable the really backward to take full advantage of reservations. It indicates that the ultimate solution lies in measures aimed firmly at all round economic and social development. There is, of course, the danger that it engenders self-denigration and backwardness may become a vested interest. The further real danger is not reservation but reservation without general all round social and economic development. The result of such reservation is that all the young men of merit belonging to the Scheduled Castes and Backward classes are literally 'gobbled up' by the civil services leaving very few educated young men of those classes to make their cause on the social, economic and political fronts. The very constraints of office restrain those who have become civil servants from championing the cause of their brethren. There is also the historical truth that oppressed persons who

improve their lot, in an effort to forget an unhappy past, often, rush to join the elite and imitate their ways, habits and thoughts. In the process they tend to forget their less fortunate brethren.

Fazal Ali, J. expressed his satisfaction that the classification made by the Government by Rule 13(AA) was fully justified by Art. 16 of the Constitution- He held that Art. 16(4) was not to be read in isolation or as an exception to Art 16(1), but was to be read as part and parcel of Art 16(1) and (2). Dealing with the question of the COCKADED excessive reservation, he emphatically observed,

428

"This means that the reservation should be within the permissible limits and should not be a cloak to till all the posts belonging to a particular class of citizens and thus violate Art. 16(1) of the Constitution indirectly. At the same time clause (4) of Art. 16 does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Art. 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Art. 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent. As to read the authorities, this, is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80 per cent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Art. 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate."

Fazal Ali, J. next considered the validity of the 'carry forward' rule and upheld that rule also. He said that if in fact the carry forward rule was not allowed to be adopted, it might result in inequality to the backward classes of citizen.

Thus, we see that all five judges who constituted the majority were clear that Art. 16 applied to all stages of the service of a civil servant, from appointment to retirement, including promotion. Four out of seven judges Ray C.J., Beg, Krishna Iyer and Fazal Ali JJ., were also of the clear view that the so-called fifty percent rule would apply to the total number of posts in the service and not to the number of posts filled up at different times on different occasions. The reservation in appointments made on any single occasion might well exceed 50 per cent. Four out of seven judges, Ray, C.J., Mathew, Krishna Iyer and Fazal Ali, JJ., further expressed the view that Art.

429

16(4) was not an exception to Art. 16(1) and it was merely an emphatic way of stating that reservation was one of the modes of achieving equality for the backward class of citizens.

In Akhil Bharativa Soshit Karamchari Sangh v. Union of India & Ors., (1) the Court had to consider the question of reservation of posts under the State in favour of Scheduled

Castes and Scheduled Tribes and the 'carry forward rule. The reservation and the rule were upheld by the court. One of the arguments vigorously advanced was the usual plea that efficiency would suffer. Krishna Iyer, J. meeting the argument observed:

"The sting of the argument against reservation is that it promotes inefficiency in administration, by choosing sub-standards candidates in preference to those with better mettle. Competitive skill is more relevant in higher posts, especially those where selection is made by competitive examinations. Lesser classes of posts, where promotion is secured mechanically by virtue of seniority except where the candidate is unfit, do not require a high degree of skill as in the case of selection posts. (See [1968] I SCR p. 721 at 734). It is obvious that as between selection and non-selection posts the role of merit is functionally more relevant in the former than in the latter. And if in Rangachari reservation has been held valid in the case of selection posts, such reservation in non-selection posts is an afortiori case. If, in selecting top officers you may reserve posts for SC/ST with lesser merit, how can you rationally argue that for the posts of peons or lower division clerks reservation will spell calamity? The part that efficiency plays is far more in the case of higher posts than in the appointments of the lower posts. On this approach Annexure K is beyond reproach."

"Trite arguments about efficiency and inefficiency are a trifle phoney because, after all, at the higher levels the heartiness harijans girijan appointees are a microscopic percentage and even in the case of Classes III and II posts they are negligible. The preponderant majority coming from unreserved communities are presumably efficient and the dilution of efficiency caused by the minimal induction of
(1) [1981] 1 S.C.R.. 185.

430

a small percentage of 'reserved' candidates, cannot affect the over-all administrative efficiency significantly. Indeed, it will be gross exaggeration to visualise a collapse of the Administration because 5 to 10 per cent of the total number of officials in the various classes happen to be sub-standard. Moreover, care has been taken to give in service training and coaching to correct the deficiency."

While we agree that competitive skill is relevant in higher posts, we do not think it is necessary to be apologetic about reservations in posts, higher or lower so long as the minimum requirements are satisfied. On the other hand, we have to be apologetic that there still exists a need for reservation. Earlier we extracted a passage from Tawney's Equality where he bemoaned how degrading it was for humanity to make much of their intellectual and moral superiority to each other. Krishna Iyer, J. Once again emphasised that Art. 1 6(4) was one facet of the multi-faceted character of the central concept of equality. One of us (Chinnappa Reddy, J.), in the same case, explained how necessary it was to translate the constitutional guarantees given to the Scheduled Castes, Scheduled Tribes and other backward classes in to reality by necessary State action to protect and nurture those classes of citizens so as to enable them to shake off the heart-crushing burden of a thousand years' deprivation from their shoulders and to claim a fair proportion of participation in the administration. It was

pointed out that Art. 16(4) in truth flowed out of Art. 16(1). It was said,

"Art. 16(4) is not in the nature of an exception to Art. 16(1). It is a facet of Art. 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an under privileged and deprived class of citizens to when egalite do droit (formal or legal equality) is not egalite de fait (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between egalite de droit and egalite de fait, It recognises that the right to equality of opportunity includes the right of the under-privileged to conditions comparable to or compensatory of those enjoyed by the privileged Equality of opportunity must be such as to yield 'Equality of Results' and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when the competition is itself otherwise equitable. John Rawls in 'A,

431

Theory of Justice' demands the priority of equality in a distributive sense and the setting up of the Social System "so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return." His basic principle of social justice is: "All social primary goods-liberty and opportunity, income and wealth, and the bases of self-respect- are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured." One of the essential elements of his conception of social justice is what he calls the principle of redress: "This is the principle that undeserved inequalities call for redress, and since inequalities of birth and natural endowment are underserved, these inequalities are somehow to be compensated for". Society must, therefore, treat more favorably those with fewer native assets and those born into less favorable social positions."

The statement that equality of opportunity must yield equality of results was the philosophical foundation of the fulfillment of Art. 16(1) in Art. 16(4).

So we have now noticed the historical and sociological background of Class and Caste, the philosophy, the reason and the rhetoric behind reservation and anti-reservation, the Constitutional provisions and the varying judicial stances. What emerges from these three decades of Parliamentary, Executive, Judicial, Political, and practical wisdom? Clearly there exist large sections of people who are socially and educationally backward, who stand midway between the such as forward classes the landed, the learned, the priestly and the trading classes on the one side and the out-caste and depressed classes, i.e. the Scheduled Castes and the Scheduled Tribes on the other. Poverty, Caste, occupation and habitation are the principal factors which contribute to brand a class as socially backward. The customs which they honour and observe, the rituals which they fear and practice the habits to which they adapt and conform, the festivals which they enjoy and celebrate and even the Gods that they revere and worship are enlightening elements in recognising their social gradation and backwardness- For instance, it may be possible

432

to demonstrate that amongst very many classes, castes or communities, considered socially inferior, Child marriage persists to this day despite the Child Marriage Restraint Act and the Hindu Marriage Act. Despite the wisdom of legal pandits and learned text books on Hindu Laws proclaiming that Saptapadi is essential to a valid Hindu Marriage, most of the socially inferior classes rarely follow the rule; they have their own customs and rituals. Long before the Hindu Widows' Re-marriage Act permitted widows to remarry, long before the Hindu Marriage Act permitted divorce, the custom of the several so called socially inferior classes or communities permitted re-marriage of widows and divorce. The divorce was not by decree of a Court of Law but was granted by a Caste Panchayat. The Caste-Panchayat divorce was impermissible and remarriage of widows was also impermissible among the socially superior classes who used to look down upon these customs as primitive. The so-called inferior classes did not and do not have recourse either to Purohits to perform marriages or the Courts to dissolve them.

Dress habits also throw light, while it is difficult to imagine, persons belonging to upper caste or occupational groups going about their daily work bare-lacked it is not an uncommon sight to see persons belonging to lower caste or occupational groups so going about, Work habits also given an indication. Women belonging to higher social groups would not generally care to serve in other people's homes or fields. Again children of lower social groups take to domestic and field work quite early in their lives. There are certainly good economic reasons for all these factors. As we said economic situation and social situation often reflect each others. We mentioned earlier that even the Gods that they worship give occasional clues. While the Hindu Gods proper, Rama, Krishna, Siva etc. are worshipped by all Hindus generally there are several local Gods and Goddesses in each village worshipped only by the inferior castes. In Andhra Pradesh, for example, in every village the so-called inferior castes worship the goddesses Sunkamma, Gangamma, Polimeramma (the Goddess guarding the village boundary), Yellamma (another Goddess guarding the village limits). They celebrate Hindu festivals like Dasara, Deepawali etc. but also other festivals in which the upper classes do not participate.

There are many other customs, rituals or habits of significance which if one only cares to study them mark out the socially backward classes. The weight to be attached to these factors depends

433

upon the circumstances of the case which can only be revealed by thoughtful, penetrating investigation and analysis. It cannot be done by means of mathematical formulae but only by looking in the round or taking a look at the entire situation. Sometimes it may be possible to readily identify certain castes or social groups as a whole as socially forward or socially backward classes. Poverty, of course, is basic, being the root cause as well as the rueful result of social and educational backwardness. But mere poverty it seems is not enough to invite the Constitutional branding, because of the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backward. In a country like India where 80% of the people live below the bread-line, even the majority of the so called socially forward classes may be poor. For example no one will think of describing Brahmins anywhere in the land as socially and

educationally backward however, poor they might be. The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is too grotesque even to be considered. Similarly no one can possibly claim that the patels of Gujarat, the Kayasthas of Bengal, the Reddys and Kammas of Andhra Pradesh are socially backward classes, despite the fact that the majority of them may be poor farmers and agricultural laborers. In the rural, social ladder they are indeed high up and despite the economic backwardness of sizeable sections of them, they can not be branded as socially backward. On the other hand, there are several castes or other social groups who have only to be named to be immediately identified as socially and economically backward classes, identified as socially backward classes. Again illustrating from rural Andhra Pradesh, one can easily identify caste groups, such as, Kommaras (who traditionally carry on the occupation of black smiths), Kummaris (who traditionally carry on the occupation of potters), Vadderas (who traditionally carry on the occupation of Stone breaking), Mangalis (who traditionally carry on the occupation of Barbers) and Besthas (who traditionally carry on the occupation of Fisher folk), etc. as backward classes by the mere mention of their castes. True, a few members of those caste or social groups may have progressed far enough and forged ahead so as to compare favourably with the leading forward classes economically, socially and educationally. In such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it. But one is entitled to ask what is to happen to the poorer sections of the forward classes? The State will have to-and it is the duty of the State so to do-to

434

discover other means of assisting them, means other than reservations A under Arts. 15(4) and 16(4). All this only emphasises that in the ultimate analysis, attainment of economic equality is the final and the only solution to the besetting problems. There is also one danger in adopting individual poverty as the criterion to identify a member of the backward classes, which needs to be pointed out. How is one to identify the individuals who are economically backward and, therefore, to be classified as socially and educationally backward? Are all those who produce certificates from an official or a legislator or some other authority that their family incomes are less than a certain figure to be so classified? It should be easy to visualise who will obtain such certificates? Of course, the rural elite, the upper classes of the rural areas who don't pay any income tax because agricultural income is not taxed. Who will find it difficult or impossible to obtain such certificates? Of course, the truly lower classes who need them most.

Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. Despite individual exceptions, it may be possible and easy to identify socially backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature. Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they must be recognised for what they are along with other less primary sources. There is and there can be nothing wrong in

recognising poverty wherever it is reflected as an identifiable group phenomena whether you see it as a caste group, a sub-regional group, an occupational group or some other class. Once the relevant conditions are taken into consideration, how and where to draw the line is a question for each State to consider since the economic and social conditions differ from area. Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined, it will not be for the court to interfere in the matter. But, lest there be any misunderstanding, judicial review will not stand excluded.

SEN, J. In view of the importance of the question involved, would like to add a few words of my own.

435

The real question raised is not of excessive reservation for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes under Art. 15(4) or for reservation of appointments or posts in favour of any backward classes of citizens under Art. 16(4) which, in the opinion of the State, is not adequately represented in the services under the State but the question is as to the identification of the socially and educationally backward classes of citizens for whose advancement the State may make special provisions under Art. 15(4) like those for the Scheduled Castes and Scheduled Tribes. Conceptually, the making of special provisions for the advancement of backward classes of citizens under Art. 15(4) and the system of reservation of appointments or posts as envisaged by Art. 16(4) as guaranteed in the Constitution, is a national commitment and a historical need to eradicate age-old social disparities in our country. But unfortunately the policy of reservation hitherto formulated by the Government for the upliftment of such socially and educationally backward classes of citizens is caste-oriented while the policy should be based on economic criteria. Then alone the element of caste in making such special provisions or reservations under Arts. 15(4) and 16(4) can be removed. At present only the privileged groups within the backward classes i.e. the forwards among the backward classes reap all the benefits of such reservation with the result that the lowest of the low are stricken with poverty and therefore socially and economically backward remain deprived though these constitutional provisions under Arts. (15(4) and 16(4) are meant for their advancement.

After 37 years of attainment of independence it cannot be seriously disputed that poverty is the root cause of social and economic backwardness. The problem is about identification of the backward classes for whose benefit the State may make special provisions under Art. 15(4). Or for reservation of appointments or posts under Art. 16(4). In view of the widespread public unrest in the State of Madhya Pradesh and Gujarat in recent days, the Government at the Centre must have a second look at the whole system of reservation. It is true that mere economic backwardness would not satisfy the test of educational and social backwardness under Art. 15(4) but the question is as to the criteria to be adopted. Economic backwardness is only one of the tests to determine social and educational backwardness. If that test were to be the sole criterion of social and educational backwardness, the reservation for the advancement of such classes to special treatment under Art. 15(4) would fail.

436

In retrospect, the answer to the question as to who are

the A members of socially and educationally backward classes for whose advancement the State may make special provisions under Art. 15(4) still eludes us. Why should not the expression 'backward classes' be treated as synonymous with the weaker sections of the society? Does the word 'class' denote a caste or sub-caste among Hindus so far as Hindus are concerned, or a section or a group so far as Muslim, Christian or other religious communities and denomination are concerned? In my considered opinion, the predominant and the only factor for making special provisions under Art. 15(4) or for reservations of posts and appointments under Art. 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes - or Scheduled Tribes, till such members of backward classes attain a state of enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life.

In this context, I must point out that the adequacy or otherwise of representation of the backward classes in the services has to be determined with reference to the percentage of that class in the population and the total strength of the service as a whole. The representation does not have to exactly correspond to the percentage of that class in the population; it just to be adequate. Moreover, in the case of services the extent of representation has to be considered by taking into account the number of members of that class in the service, whether they are holding reserved or unreserved posts. I cannot overemphasize the need for a rational examination of the whole question of reservation in the light of the observation made by us. The State should give due importance and effect to the dual constitutional mandates of maintenance of efficiency and the equality of opportunity for all persons. The nature and extent of reservations must be rational and reasonable. It may be, and often is difficult for the Court to draw the line in advance which the State ought not to cross, but it is never difficult for the Court to know that an invasion across the border, however ill-defined, has taken place. The Courts have neither the expertise nor the sociological knowledge to define or lay down the criteria for determining what are 'socially and educationally backward classes of citizens' within the meaning of Art 15(4) which enables the State to make 'special provisions for the advancement' of such classes notwithstanding the command of Art. 15(2) that the State shall not discriminate against and citizens on the

437
ground only of religion, race, caste, descent, place of birth, residence or any of them. Art. 340 provides for the appointment of a Commission to 'investigate the conditions of socially and educationally backward classes within the territory of India and the 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. The state of backwardness of any class of citizens is a fact situation which needs investigation and determination by a fact finding body which has the expertise and the machinery for collecting relevant data. The Constitution has provided for the appointment of such a Commission for Backward Classes by the President under Art. 340 to make recommendations and left it to the State to make special provisions for the advancement of such backward classes. The Court is ill-equipped to perform the task of determining whether a class of citizens is socially and educationally backward. This

Court has, however, a duty to interpret the Constitution and to see what it means and intends when it makes provision for the advancement of socially and educationally backward classes. In considering this situation then, we must never forget that it is the Constitution we are expounding. Except for this the Court has very little or no function.

Questions as to the validity or otherwise of reservations have been agitated several times before this Court and resolved. The frequency and vigour with which these questions are raised is a disturbing indication of the tension and unease in society in regard to the manner in which Art. 15(4) and Art. 16(4) are operated by the State. The Preamble to our Constitution shows the nation's resolve to secure to all its citizens: Justice-Social, economic and political. The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but surely tear apart the fabric of society. It is primarily the duty and function of the State to inject moderation into the decisions taken under Arts. 15(4) and 16(4), because justice lives in the hearts of men and growing sense of injustice and reverse discrimination, fuelled by unwise State action, will destroy, not advance, social justice. If the State contravenes the constitutional mandates of Art. 16(1) and Art. 335, this Court will of course, have to perform its duty.

The extent of reservation under Art. 15(4) and Art. 16(4) must necessarily vary from State to State and from region to region within

438

a State, depending upon the conditions prevailing in a particular State or region, of the Backward Classes. We do feel that the Central Government should consider the feasibility of appointing a permanent National Commission for Backward Classes which must constantly carry out sociological and economic study from State to State and from region to region within a State. The framers of the Constitution by enacting Art. 340 clearly envisaged the setting up of such a high-powered National Commission for Backward classes at the Centre. These problems can never be resolved through litigation in the Courts.

I wish to add that the doctrine of protective discrimination embodied in Arts. 15(4) and 16(4) and the mandate of Art. 29(2) cannot be stretched beyond a particular limit. The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need medical aid. Medical services directly affect and deal with the health and life of the populace. Professional expertise, term of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, we think there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments.

Reasons for this decision will follow.

VENKATARAMIAH, J. The constitutional validity of certain Government orders issued by the Government of the State of Karnataka making provisions for reservation of some seats in technical institutions and some posts in the

Government services respectively under Article 15(4) and Article 16(4) of the Constitution of India for being filled up by students, 'candidates, as the case may be, belonging to certain castes, tribes and communities which in the opinion of the State Government constituted backward classes (other than the Scheduled Castes and the Scheduled Tribes) is questioned in these petitions.

The questions involved in these cases fare delicate ones and have, therefore, to be tackled with great caution. The issues raised here and the decision rendered on them are bound to have a great

439

impact on society. They are indeed highly sensitive issues. A superficial approach to the problem has, therefore, to be avoided. The questions have to be tackled with sympathy for persons who are really in need of the benign assistance at the hands of the State and with due regard to the interests of the general public.

"India's vast and unparalleled experiment with 'protective' or 'compensatory' discrimination in favour of 'backward sections' of her population betokens a generosity and farsightedness that are rare among nations. The operation of such a preferential principle involves formidable burdens of policy-making and administration in a developing nation. It also places upon the judiciary tasks of great complexity and delicacy. The courts must guard against abuses of the preferential principle while at the same time insuring that the government has sufficient leeway to devise effective use of the broad powers which the Constitution places at its disposal". These are the wise words of Marc Galanter, a member of the faculty on social Sciences, University of Chicago, who has made a special study of the problem of the Indian backward classes. The very fact that the governmental agencies and 'above all the courts have been obliged to examine the constitutional principles in the light of the egalitarian pressures has in its turn opened up hardly foreseen complexities that had lain buried in the doctrine of equality'. The society which cherishes the ideal of equality has to define the meaning and content of the concept of equality and the choices open to it to bring about an egalitarian society would always be political. But the courts have been forced to scrutinise a variety of choices, while the society for which they have to answer has been issuing a proliferation of demands. What is 'coming about, in short, is a transformation of consciousness which is tinged with sensations of injustice and exploitation'. Many inequalities in the past seemed almost to have been part of the order of nature. 'The categories of equality can thus in a sense be seen to correspond to levels of awareness. Perhaps not all inequalities can ever be rectified and it is certain that some can be rectified only by creating new inequalities and new grievances. It is this that has made the judiciary the fulcrum of such continuous tension for it is the judiciary and above all the Supreme Court which has the duty of mediating these conflicting demands back to society through the prism of constitutional interpretation'. The courts, however, deal with the problems that society presents. 'Levels of awareness and corresponding senses of grievance have arisen at different times for particular historical reasons often tend

440

ing to differentiate among the categories of equality rather than unifying them. Inequalities of class, race, religion and sex have presented themselves at different periods as

primary grievances'. Equality of opportunity revolves around two dominant principles-(1) the traditional value of equality of opportunity and (2) the newly appreciated-not newly conceived-idea of equality of results. 'Social justice may demand and political interests may make expedient a policy of correction in favour of individual members of minorities or communities. But at this point whenever any action was taken the principle of individual equality of opportunity lost its direction. Such affirmative action played off not one individual of one group against another of another group, but the present against the past. In past many privileged persons of mediocre ability had benefited from the indulgence of a system that unquestionably biased in favour of higher castes.' 'Individual aspirations claim the protection of society's rules. But they are not always in harmony and sometimes conflict with the same society's broad interest in achieving certain kinds of racial or group balance.' But rectification of imbalance also sometimes tends towards inequality. 'Societies do not work on absolute rationality, excess of rationality often tends to dehumanise human relations'. The courts are also reminded that for those who are suffering from deprivation of inalienable rights, gradualism can never be a sufficient remedy because as Ralph Buoche observed 'inalienable rights cannot be enjoyed posthumously'. Ours is a 'struggle for status, a struggle to take democracy off parchment and give it life'. 'Social injustice always balances its books with red ink'. Neither the caprice of personal taste nor the protection of vested interests can be stand as reasons for restricting opportunities of any appropriately qualified person. These are the considerations which sometimes may be conflicting that should weigh with the courts dealing with cases arising out of the doctrine of equality. It should, however, be remembered that the courts by themselves are not in a position to bring the concept of equality into fruitful action. They should be supported by the will of the people, of the Government and of the legislators. There should be an emergence of united action on the part of all segments of human society. This is not all. Mere will to bring about equality under the existing economic level might worsen the situation. There should be at the same time a united action to increase the national resources so that the operation of equality will be less burdensome

441

and every member of the society is carried to a higher social and economic level leaving nobody below a minimum which guarantees all the basic human needs to every member of the society. If there is no united action the pronouncements by courts would become empty words as many of the high principles adumbrated in the chapter on the Directive Principles of State Policy in the Constitution have turned out to be owing to several factors which need not be detailed here. We shall proceed to consider this case against this background.

In this case, the Court is called upon to resolve the conflict between 'the meritarian principle and the compensatory principle' in the matter of admissions into institutions imparting higher education and of entry into Government service in the State of Karnataka. All the contestants depend upon one or the other clauses of the Constitution in support of their case. Hence the problem is rendered more difficult.

Those who argue in support of merit contend that the State should remove all man-made obstacles which are in the way of an Individual and allow him to attain his goal in an

atmosphere of free competition relying upon his own natural skill and intelligence. Those who argue for compensatory principle contend that in order that the competition may be 'fair and not just free' it is the duty of the State to take note of the unequal situation of the individuals concerned which has led to unequal capacities amongst them and to reduce the rigours of free competition which may, unless looked into by the State, lead to perpetual denial of equality of opportunity to the weak and the neglected sections of society. This argument is based on the well founded assumption that unequal conditions of cultural life at home cause unequal cultural development of children belonging to different strata of society. The need for social action is necessitated by the environment factors and living conditions of the individuals concerned. The application of the principle of individual merit, unmitigated by other considerations, may quite often lead to inhuman results. The following illustration given by Bernard Williams establishes the above statement:

"Suppose that in a certain society great prestige is attached to membership of a warrior class, the duties of which require great physical strength. This class has in the past been recruited from certain wealthy families

442

only ; but egalitarian reforms achieve a change in the rules, by which warriors are recruited from all sections of the society, on the results of a suitable competition, The effect of this, however, is that the wealthy families still provide virtually all the warriors, because the rest of the populace is so under-nourished by reason of poverty that their physical strength is inferior to that of the wealthy and well-nourished. The reformers protest that equality of opportunity has not really been achieved; the wealthy reply that in fact it has, and that the poor now have the opportunity of becoming warriors- it is just bad luck that their characteristics are such that they do not pass the test. 'We are not,' they might say, 'excluding anyone for being poor, we exclude people for being weak, and it is unfortunate that those who are poor are also weak.'

This answer would seem to most people feeble and even cynical This is for reasons similar to those discussed before in connection with equality before the law; that the supposed equality of opportunity is quite empty indeed, one may say any that it does not really exist- unless it is made more effective than this. For one knows that it could be made more effective: one knows that there is a casual connection between being poor and being under nourished, and between being undernourished and being physically weak. One suppose further that something could be done-subject to whatever economic conditions obtain in the imagined society to alter the distribution of wealth. All this being so, the appeal by the wealthy to the 'bad luck' of the poor must appear as disingenuous."

The former princely State of Mysore which now forms part of the State of Karnataka is one of the earliest States in the country in which the system of reservation for backward classes in public services was introduced. In 1918, the Government of His Highness the Maharaja of Mysore appointed a committee under the chairmanship of Sir Leslie C. Miller, Chief Justice of the Chief Court of Mysore to investigate and report on the problem of backward classes.

The questions referred to that Committee were (i) changes needed in the then existing rules of recruitment to public services; (ii) special

443

facilities to encourage higher and professional education among the members of backward classes and (iii) any other special measures which might be taken to increase the representation of backward communities in the public services without materially affecting the efficiency, due regard being paid also to the general good accruing to the State by a wider diffusion of education and feeling of increased status which will thereby be produced in the backward communities. It is significant that the expression 'backward classes' and 'backward communities' were used almost interchangeably and that the idea contained in Article 335 of the Constitution that any reservation made should not impair efficiency was anticipated more than three decades before the Constitution was enacted. The Committee submitted its report in 1921 containing its opinion that all communities in the State other than Brahmins should be understood as backward communities regarding whom it made certain recommendations. The Government orders issued on the basis of that Report continued to be in force till 1956 i.e. the reorganisation of States which brought together five integrating units—the former State of Mysore (including Bellary District), Coorg, four districts of Bombay, certain portions of the State of Hyderabad and the district of South Kanara and the Kollegal Taluk which formerly formed part of the State of Madras. There were different lists of backward communities in the five integrating units and they were allowed to continue for sometime even after the reorganisation of States— In order to bring about uniformity the State Government issued a notification containing the list of backward classes for the purpose of Article 15(4) of the Constitution at the beginning of 1959. The validity of that notification and of another notification issued thereafter on the same topic which according to the State Government had treated all persons except Brahmins, Baniyas and Kayasthas as backward communities was challenged before the High Court of Mysore in Rama Krishna Singh v. State of Mysore.(1) The two notifications were struck down by the High Court. The High Court held that inasmuch as the impugned notifications contained a list of backward classes including 95% of the population of the State and all Hindu communities other than Brahmins, Baniyas and Kayasthas and all other non-Hindu communities in the State except Anglo-Indians and Parsees had been treated as backward classes it resulted more in a discrimination against the few excluded communities consisting of about 5% of the total population rather than making provision for socially and

(1) A.I.R.. 1960 Mys. 338.

444

educationally backward classes. The High Court held that making a provision for communities which were slightly backward to the so called forward communities did not amount to making provision for the communities which really needed protection under Article 15(4) of the Constitution. The argument of the petitioners in that case that socially and educationally backward classes can in no case be determined on the basis of caste was, however, rejected. After the above decision was rendered by the High Court, the State Government constituted a Committee on January 8, 1960 under the Chairmanship of Dr. R. Nagan Gowda for the purpose of determining the criteria for the classification of backward classes in the State with the following terms of reference:

(I) to suggest the criteria to be adopted in determining which sections of the people in the State should be treated as socially and educationally backward and (2) to suggest the exact manner in which the criteria thus indicated should be followed to enable the State Government to determine the persons who should secure such preference as may be determined by Government in respect of admissions to technical institutions and appointment to Government services. The said committee submitted its Interim Report on February 19, 1960. On the basis of the Interim Report of the Committee, the State Government passed an order dated June 9, 1960 regarding admissions to professional and technical institutions reserving 22% of seats for backward classes, 15% for Scheduled Castes and 2% for Scheduled Tribes and the remaining 60% of seats were allowed to be filled upon the basis of merit. The above Government order was, challenged before the High Court of Mysore in S.A. Partha & Ors. v. The State of Mysore & Ors. (1) The High Court found that the direction contained in the Government order to the effect that if any seat or seats reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes remained unfilled, the same shall be filled by candidates of other backward classes was unconstitutional. It also gave some directions regarding the manner in which the calculation of the quota of reservation should be made. Thereafter the Final Report was submitted by the Nagan Gowda Committee on May 16, 1961 After taking into consideration the recommendations made in the said Report, the State Government issued an order for the purpose of Article 15 (4) of the Constitution on July 10, 1961. By that order, the State Government specified 81 classes of people as backward classes and 13 S classes of people as more backward classes and reserved 30% of

(1) A.I.R.. 1961 Mys. 220.

445

seats in the professional and technical institutions for backward and more backward classes. 15% and 3% of the seats were reserved for Scheduled Castes and Scheduled Tribes respectively and the remaining 52% of the seats were allowed to be filled up on merit. The above order was superseded by a fresh Government order made on July 31, 1962 for the purpose of Article 15 (4). By this new order, 28% of the seats were reserved for the backward classes, 22% for the more backward classes, 15 per cent for the Scheduled Castes and 3 per cent for the Scheduled Tribes. Thus 68 per cent of the seats were reserved under Article 15 (4) of the Constitution and only 32 per cent of the seats became available for being filled up on the basis of merit. This order was challenged before this Court under Article 32 of the Constitution in M.R. Balaji and Ors. v. State of Mysore. (1) In the decision rendered in that case which is considered to be land-mark in the constitutional pronouncement made by this Court, Gajendragadkar, J. (as he then was) explained the meaning of the term 'socially and educationally backward classes' appearing in Article 15 (4) of the Constitution at pages 459-461 thus:

"The backwardness under Art. 15 (4) must be social and educational. It is not either social or educational but it is both social and educational; and that takes us to the question as to how social and educational backwardness has to be determined.

Let us take the question of social backwardness first. By what test should it be decided whether a particular class is socially backward or not ? The group of citizens to whom Article 15 (4) applies are

described as 'classes of citizens', not as castes of citizens. A class, according to the dictionary meaning, shows division of society according to status, rank or caste. In the Hindu social structure, caste, unfortunately plays an important part in determining the status of the citizen. Though according to sociologists and Vedic scholars, the caste system may have originally begun on occupational or functional basis, in course of time, it became rigid and inflexible. The history of the growth of caste system shows that its original functional and occupational basis was later over-burdened with considerations of purity based on ritual

(1) [1963] Supp. S.C.R. 439,

446

concepts and that led to its ramifications which introduced inflexibility and rigidity. This artificial growth inevitably tended to create a feeling of superiority and inferiority and to foster narrow caste loyalties. Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection, it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.

Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian Society which do not recognise castes in the conventional sense known to Hindu Society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in to from the operation of Art. 15 (4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically became socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that

447

only shows the relevance of both caste and poverty in determining the backwardness of citizens. A

The occupations of citizens may also contribute to make classes of citizens socially backward. There are some occupations which are treated as inferior according to conventional beliefs and classes of

citizens who follow these occupations are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons. In a sense, the problem of social backwardness is the problem of Rural India and in that behalf, classes of citizens occupying a socially backward position in rural area-fall within the purview of Art. 15 (4) The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way. That is the function of the State which purports to act under Art 15 (4). All that this Court is called upon to do in dealing with the present petitions is to decide whether the tests applied by the impugned order are valid under Art. 15 (4). If it appears that the test applied by the order in that behalf is improper and invalid, then the classification of socially backward classes based on that test will have to be held to be inconsistent with the requirements of Art. 15 (4)."

Dealing with the question of determination of the classes which were educationally backward, Gajendragadkar, J. (as he then was) observed in the same case at pages 463-464 thus:

"It may be conceded that in determining the educational backwardness of a class of citizens the literacy test supplied by the Census Reports may not be adequate; but it is doubtful if the test of the average of student population in the last three High School classes is appropriate in determining the educational backwardness. Having regard to the fact that the test is intended to determine who are educationally backward classes, it may

448

not be necessary or proper to put the test as high as has been done by the Committee. But even assuming that the test applied is rational and permissible under Art. 15 (4), the question still remains as to whether it would be legitimate to treat castes or communities which are just below the State average as educationally backward classes. If the State average is 6.9 per thousand, a community which satisfies the said test or is just below the said test cannot be regarded as backward. It is only communities which are well below the State average that can properly be regarded as educationally backward classes of citizens. Classes of citizens whose average of student population works below 50 per cent of the State average are obviously educationally backward classes of citizens. Therefore, in our opinion, the State was not justified in including in the list of Backward Classes, castes or communities whose average of student population per thousand was slightly above or very near, or just below the State average." (underlining by us)

Applying the above rule the Court held that the inclusion of members of the Lingayat community in the list of backward classes was erroneous. On the question of extent of reservation that can be made, this Court observed in the aforesaid case at pages 469-471 thus:

"The learned Advocate-General has suggested that

reservation of a large number of seats for the weaker sections of the society would not affect either the depth or efficiency of scholarship at all, and in support of this argument, he has relied on the observations made by the Backward Classes Commission that it found no complaint in the States of Madras, Andhra, Travancore-Cochin and Mysore where the system of recruiting candidates from other Backward Classes to the reserve quota has been in vogue for several decades. The Committee further observed that the representatives of the upper classes did not complain about any lack of efficiency in the offices recruited by reservation (p. 135). This opinion, however, is plainly inconsistent with what is bound to be the inevitable consequence of reservation in higher university education. If admission to professional and technical colleges is unduly liberalist it would be idle to contend

449

that the quality of our graduates will not suffer. That is not to say that reservation should not be adopted; A reservation should and must be adopted to advance the prospects of the weaker sections of society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities. A special provision contemplated by Art. 15 (4) like reservation of posts and appointments contemplated by Art. 16 (4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Center have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15 (4). 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. In this particular case, it is remarkable that when the State issued its order on July 10, 1961, it emphatically expressed its opinion that the reservation of 68 per cent recommended by the 'Nagging Gowada Committee would not be in the larger interests of the State. What happened between July 10, 1961 and July 31, 1962, does not appear on the record. But the State changed its mind and adopted the recommendation of the Committee ignoring its earlier decision that the said recommendation was contrary to the larger interests of the State. In our opinion, when the State makes a special provision for the advancement of the weaker sections of society specified in Art. 15 (4), it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. Therefore,

450

we are satisfied that the reservation of 68 per cent directed by the impugned order is plainly inconsistent with Art. 15 (4)." (Emphasis added)

The petition was thus allowed by this Court.

Then came the Government order dated July 26, 1963 which directed that 30 per cent of the seats in professional and technical colleges and institutions should be reserved for backward classes as defined in that order and that 18 per cent of the seats should be reserved for the Scheduled Castes and Scheduled Tribes. The criteria laid down in that order for determining social and economic backwardness were two-fold-income and occupation. It stated that those who followed occupations of agriculture, petty business, inferior service, crafts or other occupations involving manual labour and whose family income was less than Rs. 1,200/- per annum were to be treated as belonging to backward classes. This order was questioned before the High Court in G. Viswanath v. Govt. of Mysore and Ors.(1) by some petitioners on various grounds. While dismissing the said petitions, the High Court observed that the determination of the backward classes without reference to caste altogether was not correct and it expressed the hope that the State would make a more appropriate classification lest its bonafides should be questioned. In the appeal filed against this judgment in R. Chitralekha and Anr. v. State of Mysore and Ors.,(2) the correctness of the above observation was questioned. Dealing with that question Subba Rao, J. (as he then was), who spoke for the majority, said that the observations of the High Court referred to above were inconsistent with the decision in Balaji's case (supra). After referring to the relevant observations made by this Court in Balaji' case (supra), Subba Rao, J. (as he then was) observed at pages 386-387 thus:

"Two principles stand out prominently from the said observations, namely, (i) the caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness; and (ii) though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the sole or dominant test in that behalf.

(1) A.I.R. 1964 Mys. 132.

(2) [1964] 6 S.C.R. 368

451

The observations extracted in the judgment of the High Court appear to be in conflict with the observations of A this Court. While this Court said that caste is only a relevant circumstance and that it cannot be the dominant test in ascertaining the backwardness of a class of citizens, the High Court said that it is an important basis in determining the class of backward Hindus and that the Government should have adopted caste as one of the tests. As the said observations made by the High Court may lead to some confusion in the mind of the authority concerned who may be entrusted with the duty of prescribing the rules for ascertaining the backwardness of classes of citizens within the meaning of Art. 15 (4) of the Constitution, we would hasten to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens,

it has not made it one of the compelling circumstances according a basis for the ascertainment of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons; but, if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria." (Underlining by us)

Proceeding further, Subba Rao, J. (as he then was) observed at pages 388-389 thus:

"The important factor to be noticed in Art. 5(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes 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 the Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used in cl. (4) of Art. 15 as there are communities without castes, if the intention was to equate classes with castes,

452

nothing prevented the makers of the Constitution from using the expression "backward classes or castes". The juxtaposition of the expression "backward classes" and "Scheduled Castes" in Art. 15(4) leads to a reasonable inference that the expression "classes" is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it can not be either the sole or the dominant criterion for ascertaining the class to which he or they belong.

This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles. It helps the really backward classes instead of promoting the interests of individuals or groups who, though they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be socially and educationally far more advanced than another small-sub-caste the total number of which is far less than the said minority. If we interpret the expression "classes" as "castes" the object of the Constitution will be frustrated and the people who do not deserve any preferential aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution".

In 1972, the State Government appointed the Karnataka Backward Classes Commission under the chairmanship of Shri L. G. Havanur which after an elaborate enquiry submitted its Report on November 19, 1975 in four massive volumes, the first volume containing two parts. It is stated that the commission counted a socio-economic survey of 378 villages

and town/city blocks in their entirety covering more than 3,55,000 individuals belonging to

453

171 castes and communities with the help of more than 425 investigators and supervisors. About 365 witnesses were examined by the Commission. The Report of the Commission is full of tabular statements and it refers to a number of writings by sociologists, demographers, jurists and persons well versed in social sciences. The work of the Commission deserves to be commended as such an extensive investigation into the conditions of backward classes had not been conducted in the State so far. Perhaps till then in no other part of India, such an elaborate investigation had been carried out with reference to so many minute details. The Commission recommended that persons belonging to backward classes for purpose of Article 15(4) of the Constitution should be divided into three groups-(a) backward communities consisting of 15 castes, (b) backward castes consisting of 128 castes and (c) backward tribes consisting of 62 tribes. For purposes of Article 16(4) of the Constitution, the Commission divided the backward classes into (a) backward communities consisting of 9 castes, (b) backward castes consisting of 115 castes and (c) backward tribes consisting of 61 tribes. According to the Commission, backward communities were those castes whose student average of students passing S. S. L. C. examination in 1972 per thousand of population was below the State average (which was 1.69 per thousand) but above 50 per cent of the State average and backward castes and backward tribes were those castes and tribes whose student average was below 50 per cent of the State average except in the case of Dombars and Voddars and those who were Nomadic and de-notified tribes. The total population of these backward classes (other than Scheduled Castes and Scheduled Tribes, according to the Commission, was about 45 per cent of the total population of the State. The difference between the two lists-one under Article 15(4) and the other under Article 16(4) of the Constitution was due to the exclusion of certain communities, castes and tribes which were socially and educationally backward but which had adequate representation in the services from the list prepared for the purpose of Article 16(4). The Commission recommended both for purpose of Article 15(4) and Article 16(4) the following percentage of reservations:

(i) Backward communities	16 percent
(ii) Backward castes	10 percent
(iii) Backward tribes	6 percent

Total:	32 percent

454

The above reservation of 32 per cent along with 18 per cent reserved for Scheduled Castes and Scheduled Tribes together amounted to 50 per cent of the total seats or posts, as the case may be. The Commission further recommended that if seats/posts remained unfilled in the quota allotted to backward tribes, they should be made over to backward communities and backward castes. Similarly if seats/posts remain unfilled in the quota allotted to backward castes, they should be made over to backward communities and backward tribes. If, however, seats/posts remain unfilled in the quota allotted to any of those three categories, they should be made over to Scheduled Castes and Scheduled Tribes. In the event of seats/posts remaining unfilled by any of these categories, they should be transferred to the general pool.

After considering the Report of the Backward Classes Commission, the State Government issued an order dated February 22, 1977 the material part of which read as follows:

"1 After careful consideration of the various recommendations made by the Commission, Government are pleased to direct as follows:

I. The Backward Communities, Backward Castes and Backward Tribes as mentioned in the list appended to this Order shall be treated as Backward Classes for purposes of Article 15(4) and Article 16(4) of the Constitution of India. Only such citizens of these Backward Classes whose family income per annum from all sources is Rs. 8,000, (Rupees eight thousand only) and below shall be entitled to special treatment under these Articles.

II. The following five categories of citizens shall be considered as a special group and such citizens of this Special Group whose family income is Rs. 4,800 (Rupees Four Thousand eight Hundred only) and below per annum shall be eligible for special treatment under these Articles:

- (i) an actual cultivator;
- (ii) an artisan;
- (iii) a petty businessman;
- (iv) one holding an appointment either in Government service or corresponding services under A private employment including casual labour; and
- (v) any person self employed or engaged in any occupation involving manual labour.

Note :- Family income under sub-para I and II above means income of the citizen and his parents and if either of the Parents is dead, his legal guardian.

III. To fix the reservation for purposes of Articles 15(4) and 16(4) of the Constitution in respect of the Backward Classes and the Special Group of citizens at 40 per cent, the allocation being as follows:

- (a) Backward Communities 20 (twenty per cent)
- (b) Backward Castes 10 (ten per cent)
- (c) Backward Tribes 5 (five per cent)
- (d) Special Group 5 (five per cent) E

In the list of Backward communities mentioned in the Government order, the State Government included 'Muslims' thus making a total of 16 backward communities. In the list of backward castes, there were 129 castes including converts into Christianity from Scheduled Castes/Scheduled Tribes up to second generation and 62 Scheduled Tribes. The reservation for backward classes was 40 per cent and taken along with 18 per cent for Scheduled Castes and Scheduled Tribes, the total reservation of seats/posts came to 58 per cent leaving only 42 per cent for merit pool. By an order dated May 1, 1979, the reservation for backward communities was reduced to 18 per cent for purposes of Article 16(4). By an order dated June 27, 1979, the State Government modified the Government order dated February 22, 1977 by increasing the reservation for 'Special Group' from 5 per cent to 15 per cent both for purposes of Article 15(4) and Article 16(4) of the Constitution. Thus as on date, the total reservation for purposes of Article 15(4) is 68 per cent and for purposes of Article 16(4) is 66 per cent. There are only 32 per

cent seats in professional and technical colleges and 34 per cent posts in Government services which can be filled up on the basis of merits.

In these writ petitions filed under Article 32 of the Constitution the above Government orders dated February 22, 1977 as modified by the Government orders dated May 1, 1979 and June 27, 1979 are challenged.

It should be stated here that the Government orders dated February 22, 1977 and another notification dated March 4, 1977 issued for purposes of Article 16(4) had also been challenged in a number of writ petitions filed under Article 226 of the Constitution before the High Court of Karnataka in S.C. Somashekarappa & Ors. v. State of Karnataka & Ors.(1) The High Court allowed the writ petitions in part. It quashed the inclusion of 'Arasu' community in the list of 'Backward Communities' both for purposes of Article 15(4) and Article 16(4). It also quashed inclusion of the (i) Balaji, (ii) Devadiga, (iii) Gangia, (iv) Nayiada, (v) Rajput and (vi) Satani in the list of backward communities and the inclusion of (1) Banha, (2) Gurkha, (3) Jat, (4) Konga, (5) Kotari, (6) Koyava, (7) Malayali, (&) Maniyanani or (Muniyani), (9) Padarti, (10) Padiyar, (11) Pandavakulam, (12) Raval and (13) Rawat in the list of Backward Castes for purposes of Article 16(4) of the Constitution. Reservation of 20 per cent made for Backward Communities in the State Civil Services under Article 16(4) was quashed reserving liberty to the State Government to determine the extent of reservation in accordance with law. The classification and reservation in other respects was upheld. S.L.P. (Civil) No. 6656 of 1979 is filed against the said judgment of the High Court under Article 136 of the Constitution. The two Government orders dated May 1, 1979 and June 27, 1979 referred to above modifying the earlier Government orders were passed after the judgment of the High Court was pronounced, as stated above.

Volumes have been written on the caste system prevailing in India. The caste (varna) has its origin in antiquity. We find reference to it in the vedic lore and in the great epics, in the Smritis and in the Puranas. Purusha Sukta refers to the prevalence of the four Varnas (caste) (See Rig Veda X-90-12). The Lord says in the

(1) Writ Petition No. 4371 of 1977 and connected writ petitions disposed of on April 9, 1979.

457

Bhagavadgita (1V- 13) that the fourfold caste was created by him by the varying distribution of guna and karma. Varna Dharma is extolled in many ancient treatises. However laudable the division of society into different castes at the commencement might have been, during the several centuries that followed these castes became petrified making mobility from one caste to another almost impossible. The caste of a person was known by his birth. There arose in course of time a social hierarchy built upon the caste system. The stigma of low caste was attached to a person during his whole life with all the attendant disadvantages. Karua, the tragic hero of the Mahabharata though born of a Kshatriya princess had to suffer ignominy during his entire life time as he came to be known as the son of a charioteer (Suta) belonging to a low caste. He was made to say 'I may be a charioteer or a charioteer's son. I may be anybody. What does it matter? Being born in a (high) caste is God's will but valour belongs to me.' (See Veni Samhara by Bhatta Narayana).

There were many sub-castes of different degrees in the hierarchy. Some were even treated as untouchables. People of low castes became socially backward and they in their turn

neglected studies. Thus they became socially and educationally backward. This part of the Indian history is dismal indeed. A page of history is worth a volume of logic.

We are aware of the meanings of the words caste, race, or tribe or religious minorities in India. A caste is an association of families which practice the custom of endogamy i.e which permits marriages amongst the member belonging to such families only. Caste rules prohibit its members from marrying outside their caste. There are subgroups amongst the castes which sometimes inter marry and sometimes do not. A caste is based on various factors, sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth in a family. Certain ideas of ceremonial purity are peculiar to each caste. Sometimes caste practices even led to segregation of same castes in the villages- Even the choice of occupation of members of castes was predetermined in many cases, and the members of a particular caste were prohibited from engaging themselves in other types of callings, professions or occupations. Certain occupations were considered to be degrading or impure. A certain amount of rigidity developed in several matters and many who

458

belonged to castes which were lower in social order were made to suffer many restrictions, privations and humiliations. Untouchability was practised against members belonging to certain castes. Inter dining was prohibited in some cases. None of these rules governing a caste had anything to do with either the individual merit of a person or his capacity. The wealth owned by him would not save him from many social discriminations practised by members belonging to higher castes. Children who grew in this caste-ridden atmosphere naturally suffered from many social disadvantages apart from the denial of opportunity to live in the same kind of environment in which persons of higher castes lived. Many social reformers have tried in the last two centuries to remove the stigma of caste from which people born in lower castes were suffering. Many laws were also passed prohibiting some of the inhuman caste practices. Article 15 (2) of the Constitution provides that no citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction, or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment or (b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Article 16 (2) declared that no person shall be ineligible to hold any civil post on grounds of religion, race, caste or descent. Article 17 abolished 'untouchability' and its practice in any form. Yet the disadvantages from which many of the persons who belonged to various lower castes were suffering are still persisting notwithstanding the fact that some of them have progressed economically, socially and educationally. Pandit Jawaharlal Nehru writes on the social problems created by the caste system which is peculiar to India in those terms:

"The conception and practice of caste embodied the aristocratic ideal and was obviously opposed to democratic conceptions. It had its strong sense of noblesse oblige, provided people kept to their hereditary stations and did not challenge the established order. India's success and achievements were on the whole confined to the upper classes; those

lower down in the scale had very few chances and their opportunities were strictly limited. These upper classes were not small limited groups but large in numbers and there was a diffusion of power, authority and influence. Hence they carried on successfully

459

for a very long period. But the ultimate weakness and failing of the caste system and the Indian social structure were that they degraded a mass of human beings and gave them no opportunities to get out of that condition— educationally, culturally, or economically. That degradation brought deterioration, all along the line including in its scope even the upper classes. It led to the petrification which became a dominant feature of India's economy and life. The contrasts between this social structure and those existing elsewhere in the past were not great, but with the changes that have taken place all over the world during the past few generations they have become far more pronounced. In the context of society today, the caste system and much that goes with it are wholly incompatible, reactionary, restrictive and barriers to progress. There can be no equality in status and opportunity within its framework nor can there be political democracy and much less economic democracy. Between these two conceptions conflict is inherent and only one of them can survive." (Jawaharlal Nehru: 'The Discovery of India' 1974 Edn. Chapter VI at pp. 256-257).

An examination of the question in the background of the Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward.

It is now necessary to ascertain the true meaning of the expression 'backward classes' found in Articles 15, Article 16, Article 338 (3) and Article 340 of the Constitution. Article 338 and Article 340 are in Part XVI of the Constitution entitled 'special provisions relating to certain classes'. The corresponding part in the Draft Constitution was Part XIV entitled special provisions relating to minorities which contained nine Articles, Articles 292 to 301. Article 292 of the Draft Constitution referred to reservation of seats for minorities in the House of the People, the minorities being, the Muslim community and the Scheduled Castes, certain Scheduled Tribes and the Indian Christian community. Article 293 of the Draft Constitution made special provision regarding the representation of the Anglo-Indian community in the House of the People. Article 294 of the Draft Constitution dealt with reservation

460

of seats for the Muslim community, Scheduled Castes, certain Scheduled Tribes and the Indian Christian community in the State Legislatures. Article 295 of the Draft Constitution authorised the Governor to nominate a representative of the Anglo-Indian community to a State Legislature in certain cases. Article 296 of the Draft Constitution required the Union and the States to appoint members belonging to all minority communities in the State services consistently with the maintenance of efficiency of administration. Article 297 of the Draft Constitution required the Union to appoint members of the Anglo-Indian community in certain services as stated therein and Article 298 of the Draft Constitution

provided for certain educational concessions to the Anglo Indian community over a certain specified period. Article 299 of the Draft Constitution required the President to appoint a Special Officer for minorities for the Union and the Governor to appoint a Special Officer for minorities for a State. Administration of Scheduled areas and welfare of certain Scheduled Tribes were entrusted to the President by Article 300 of the Draft Constitution and it made provision for appointment of a commission for that purpose. Article 301 of the Draft Constitution authorised the President to appoint a commission to investigate the conditions of socially and educationally backward classes. It read as follows:

"301. (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 the 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 or 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.

461

(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 Constituent Assembly after considering the report of the Advisory Committee appointed on July 24, 1947 for the purpose of making its recommendations on the provisions contained in Part XIV of the Draft Constitution referred to above adopted a resolution moved by Sardar Vallabhbhai Patel which read as follows:

"Resolved that the Constituent Assembly do proceed to take into consideration the Report dated the 11th May 1949 on the subject of certain political safeguards for minorities submitted by the Advisory Committee appointed by the resolution of the Assembly on 24th January 1947.

Resolved further-

(i) that notwithstanding any decisions already taken by the Constituent Assembly in this behalf, the provisions of Part XIV of the Draft Constitution of India be so amended as to give effect to the recommendations of the Advisory Committee contained in the said report; and E

(ii) that the following classes in East Punjab, namely, Mazhbis, Ramdasias, Kabirpanthis and Sikligars be included in the list of Scheduled Castes for the Province so that they would be entitled to the benefit of representation in the Legislatures given to the Scheduled Castes".

(Vide 'the Framing of India's Constitution by B. Shiva Rao, Vol. IV p. 606).

In the Revised Draft Constitution which was introduced in the Constituent Assembly on November 3, 1949, the

provisions relating to minorities were incorporated in Part XVI and the title of that Part read as 'Special Provisions Relating to Minorities' and it contained thirteen Articles, Article 330 to Article 342. Article 330 provided for reservation of seats for Scheduled Castes and certain Scheduled Tribes in the Lok Sabha and Article 332 provided for reservation for them in the Legislative Assemblies of States. Article 331 and Article 333 dealt with domination of representatives of the

462

Anglo-Indian community respectively to the Lok Sabha and the A Legislative Assemblies of States. Article 334 fixed the period during which reservations and nominations could be made under the above said Articles. Article 335 required the Union and the States to recognise the claims of members of the Scheduled Castes and the Scheduled Tribes consistently with the maintenance of efficiency of administration in the making of appointments by the Union or the States, as the case may be. Article 336 contained special provision for the Anglo-Indian community in certain services during the first two years after the commencement of the Constitution and Article 337 contained special provision with respect to educational grants for the benefit of the Anglo-Indian community during a certain period after the commencement of the Constitution. Article 338 required the President to appoint a Special Officer for Scheduled Castes and Scheduled Tribes. Article 338(3) stated that references to Scheduled Castes and Scheduled Tribes in Article 338 should be construed as references to such other backward classes as the President might on receipt of the report of the Commission appointed under Article 340 by order specify and also to the Anglo-Indian community. Article 340 provided for the appointment of a Commission by the President to investigate the conditions of socially and educationally backward classes and the difficulties under which they labour, Article 341 and Article 342 explained what the terms 'Scheduled Castes' and 'Scheduled Tribes' meant. The above Articles (Art. 330 to Art. 342 of the Revised Draft of the Constitution) were finally passed by the Constituent Assembly with the amendment that for the word 'minorities' wherever it occurred in Part XVI, the words 'certain classes' be substituted. The heading of the Part was, therefore, changed to 'Special Provisions Relating to certain Classes'.

It is significant that the expression 'backward classes' used in Part XVI of the Constitution and the particular in Article 338(3) is used along with the Scheduled Castes, the Scheduled Tribes and the Anglo-Indian Community. In the original Draft Constitution, the Muslim community and the Indian Christian community also had been referred to in Part XVI. In the course of the debates, the question of the members of the Sikh community was also considered along with these communities. The meaning of backward classes has, therefore, to be deduced having regard to the other words preceding it. It is a rule of statutory construction that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. It is true that this rule which is called as the ejusdem generis rule or

463

the rule *noscitur a sociis* cannot be carried too far. But it is reasonable to apply that rule where the specific words refer to a distinct A genus or category. The Scheduled Castes are those castes, races and tribes or parts of or groups within the castes, races and tribes which are

specified in the Public Notification issued by the President under Article 341(1). Similarly Scheduled Tribes are those tribes or tribal communities or parts of or groups of within tribes or tribal communities which are specified in the Public Notification issued by the President under Article 342(1). This is clear from the definitions of 'Scheduled Castes' and 'Scheduled Tribes' in Article 366(24) and Article 366(25). The notifications issued under Article 341 and Article 342 can be modified only by a law made by the Parliament (Vide Article 341(2) and Article 342(2). It is thus seen that Part XVI of the Constitution deals with certain concessions extended to certain castes, tribes and races which are Scheduled Castes and Scheduled Tribes and to the Anglo-Indian community. In the above context if Article 338(3) and Article 340 are construed, the expression 'backward classes' can only refer to certain castes, races, tribes or communities or parts thereof other than Scheduled Castes, Scheduled Tribes and the Anglo-Indian community, which are backward. Thus view also gains support from the resolution regarding the aims and objects of the Constitution moved by Pandit Jawaharlal Nehru in the Constituent Assembly on December 13, 1946. He said: E

"I beg to move:

- (1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;
- (2) Where in the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India at the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and
- (3) Where in the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and there after according to the Law of the Constitution, shall

464

- possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers, and exercise all powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and
- (4) Wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and
 - (5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law, freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and
 - (6) Wherein adequate safeguards shall be provided for minorities, Backward and tribal areas, and depressed and other backward classes; and
 - (7) Wherein shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to Justice and the law of civilised nations: and
 - (8) this ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind." (Underlining by us)

Clause (6) of the above resolution which was later adopted by the Constituent Assembly pledged to make adequate

safeguards in the Constitution for 'minorities, backward and tribal areas and depressed and other backward classes' The above resolution and the history of the enactment of Part XVI of the Constitution by the Constituent Assembly lead to the conclusion that backward classes are only those castes, races, tribes or communities, which are identified by birth, which are backward. It is, therefore, difficult to hold that persons or groups of persons who are backward merely on account of poverty which is traceable to economic reasons can also be considered as backward classes for purposes of Article 16(4) and Part XVI of the Constitution.

465

The word 'backward' was not there before the words 'class of citizens' in Article 10(3) of the original draft of the Constitution (the personal Article 16(4)). The Drafting Committee presided over by Dr. B.R. Ambedkar deliberately introduced it. Dr. Ambedkar gave the reason for introducing that term as follows:

"Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved, could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective (sic) in operation. If Honourable Member understand this position then we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the state, then, I am sure they will agree that unless you use some such qualifying phrase as "backward' the exception made in favour of reservation will ultimately eat up the rule altogether Nothing of the rule will remain." (Vide Constituent Assembly Debates, 1948-1949, Vol. VII, pp. 701-702). F

The Drafting Committee by qualifying the expression classes of citizens' by 'backward' in Article 16(4) of the Constitution tried to reconcile three different points of view and produced a workable proposition which was acceptable to all, the three points of view being (1) that there should be equality of opportunity for all citizens and that every individual qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he was fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of the principle of equality of opportunity; (2) that if the principle of equality of opportunity was to be operative the Ought to be no reservations of any sort for any class or

466

community at all and that all citizens if they are qualified should be placed on the same footing of equality as far as public services were concerned and (3) that though the principle of equality of opportunity was theoretically good there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. The whole tenor of discussion in the

Constituent Assembly pointed to making reservation for a minority of the population including Scheduled Castes and Scheduled Tribes which were socially backward. During the discussion, the Constitution (first Amendment) Bill by which Article 15(4) was introduced, Dr. Ambedkar referred to Article 16(4) and said that backward classes are 'nothing else but a collection of certain castes' (Parliamentary Debates 1951, Third Session, Part I, Vol. XII at p. 9007). This statement leads to a reasonable inference that this was the meaning which the Constituent Assembly assigned to 'classes' at any rate so far as Hindus were concerned.

In Balaji's case (supra) and in Chifralekha's case (supra) this Court exhibited a lot of hesitation in equating the expression 'class' with 'caste' for purposes of Articles 15(4) and Article 16(4) of the Constitution. It observed, as stated earlier, that while caste might be a relevant circumstance to determine a backward class, it could not, however, be dominant test. One of the reasons given for not accepting caste insofar as Hindu community in which caste system was prevalent was concerned as a dominant test for determining a backward class was that as there were communities without castes, nothing prevented the makers of the Constitution to use the expression 'backward classes or castes'. The juxtaposition of the expression 'backward classes' and 'Scheduled Castes' in Article 15 of the Constitution, according to the above two decisions, led to a reasonable inference that expression 'classes' was not synonymous with 'caste'. The Court while making these observations did not give adequate importance to the evils of caste system which had led to the backwardness of people belonging to certain castes and the debates that preceded the enactment of Part XVI and Article 15(4) and Article 16(4) of the Constitution- What was in fact overlooked ! was the history of the Indian social institutions. The makers of the Indian Constitution very well knew that there were a number of castes the conditions of whose members were almost similar to the conditions of members belonging to the Scheduled Castes and to the Scheduled Tribes and that they also needed to be given adequate protection in order to tide over the difficulties in the way of their

467

progress which were not so much due to poverty but due to their birth in a particular caste. As mentioned elsewhere in the course of this judgement. the word 'classes' was substituted in the place of the word 'communities' by the Constituent Assembly just at the last moment. The word community meant a caste amongst Hindus or Muslims, or Indian Christians or Anglo-Indians. Part XVI was not enacted for the purpose of alleviating the conditions of poorer classes as such which was taken care of by the provisions of Part IV of the Constitution and in particular by Article 46 and by Article 14, Art. 15(1) and Art. 16(1) of the Constitution which permitted classification of persons on economic grounds for special treatment in order to ensure equality of opportunity to all person.

It is of significance that the views expressed by this Court, however, stood modified by the decisions of this Court in *Minor P. Rajendran v. State of Madras & Ors.*, (1) *State of Andhra Pradesh & Anr. v. P. Sagar*, (2) *Triloki Nath & anr. v. State of Jammu Kashmir & Ors.* (s) *A. Peeriakaruppan etc. v. State of Tamil Nadu & Ors.* (4) and *State of Andhra Pradesh & Ors. v. U.S.V. Balram etc.* (5) In Rajendran's case (supra) while holding that the allocation of seats in Medical Colleges on the basis of the district to which a candidate belonged was not warranted by Art. 15(4), the

Court observed that a caste was also a class of citizens and if the caste as a whole was socially and educationally backward reservation could be made in favour of such caste under Art. 15(4). In Sagar's case (supra) reservation of seats was done solely on the basis of caste or community. There appeared to be no determination of the fact whether members belonging to such castes or communities were in fact socially and educationally backward. The court struck down the reservation as being outside Article 15(4) of the Constitution. The Court, however, observed at page 600 thus:

' In the context in which it occurs the expression "class" means a homogeneous 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,

(1) [1968] 2 S.C.R. 786.

(2) [1968] 3 S.C.R. 595

(3) [1969] 1 S.C.R. 103.

(4) [1971] 2 S.C.R. 430.

(5) [1972] 3 S.C.R. 247,

468

religion and the like, In determining whether a particular section forms a class, caste cannot be excluded altogether. But the determination of a class a test solely based upon the caste or community cannot also be accepted. By cl. (1), Art. 15 prohibits the State from discriminating against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them. By cl. (3) Of Art. 15 the State is, notwithstanding the provisions contained in Cl. (1), permitted to make special provision for women and children. By cl. (4) a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is outside the purview of cl. (1). But cl. (4) is an exception to cl. (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of cl. (1). The Parliament has by enacting cl. (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. In order that effect may be given to cl. (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other than the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement. Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer." (emphasis added)

In Triloki Nath's case (supra) which was a case in which Article 16(4) came up for consideration, a Constitution Bench of this Court observed at page 105 thus - "Article 16 in the first instance by cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an

exception to be

469

made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogenous section of the people grouped together because of certain likenesses 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. But for the purpose of Art. 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution." (emphasis added)

In Peeriokaruppan's case (supra) Hegde, J. Observed at page 443 thus;

"A caste has always been recognised as a class. In construing the expression "classes of His Majesty's subjects" found in s. 153-A of the Indian Penal Code, Wassoodew, J. Observed in Narayan Vasudev v. Emperor A I.R. 1943 Bom. 379.

"In my opinion the expression 'classes of His Majesty's subjects' in Section 153-A of the Code is used in restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term 'class' within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community,"

In Paragraph 10, Chapter V of the backward Classes Commission's Report, it is observed:

470

"We tried to avoid caste but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate from social backwardness at the present juncture. In modern times anybody can take to any profession. The Brahman taking to tailoring, does not become a tailor by caste, nor is his social status lowered as a Brahman. A Brahman may be a seller of boots and shoes, and yet his social status is not lowered thereby. Social backwardness, therefore, is not today due to the particular profession of a person, but we cannot escape caste in considering the social backwardness in India"

Paragraph 11 of that Report it is stated:

"It is not wrong to assume that social backwardness has largely contributed to the educational backwardness of a large number of social groups."

Finally in Paragraph 13, the Committee concludes with following observations:

"All this goes to prove that social backwardness is mainly based on racial, tribal, caste and denominational differences."

The learned Judge then proceeded to state at page

444:

"There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence we are able to uphold the contention that impugned reservation is not in accordance with Art. 15(4). But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which

471

are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of A seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50 per cent of the seats in the general pool does show that the time has come for a de novo comprehensive examination of the question. It must be remembered that the Government's decision in this regard is open to judicial review."

In Balaram's case (supra) the State was the appellant. it had come up in appeal against the judgment of the High Court of Andhra Pradesh which had struck down its order making reservation of seats of seats under Article 15(4). This Court allowed the appeal upholding the Government order, Vaidialingam, J. in the course of his judgment observed at page 280 thus:-

"Art. 15(4) will have to be given effect to in order to assist the weaker sections of the citizens, as the State has been charged with such duty. No doubt, we are aware that any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But 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 Art. 15(4) to safeguard their interest."

The learned Judge felt that the Backward Classes Commission on the basis of whose Report the Government order had been passed had given good reasons in support of its recommendations. Accordingly the Government order was upheld.

472

If we depart from the view that caste or community is an important relevant factor in determining social and educational backwardness for purposes of Article 15 (4) and Article 16 (4) of the Constitution, several distortions are likely to follow and may take us away from the sole purpose for which those constitutional provisions were enacted.

Several factors such as physical disability, poverty, place of habitation, the fact of belonging to a freedom fighter's family, the fact of belonging to the family of a member of the armed forces might each become a sole factor for the purpose of Article 15 (4) or Article 16 (4) which were not at all intended to be resorted to by the State for the purpose of granting relief in such cases. While relief may be given in such cases under Article 14, Article 15 (1) and Article 16 (1) by adopting a rational principle of classification, Article 15 (4) and Article 16 (4) cannot be applied to them. Article 15 (4) and Article 16 (4) are intended for the benefit of those who belong to castes/communities which are 'traditionally disfavoured and which have suffered societal discrimination' in the past. The other factors mentioned above were never in the contemplation of the makers of the Constitution while enacting these clauses.

In *D.N. Chanchala v. State of Mysore and Ors. etc.*(1) a classification based on some of these factors was upheld but not under Article 15 (4). The observation made in *State of Kerala v. Kumari T.P. Roshana and Anr.*(2) that 'the principle of reservation with weightage for the geographical area of Malabar District has our approval in endorsement of the view of the High Court' is outside the scope of Article 15 (4) even though it may be sustained under Article 14. While caste or community is a relevant factor in determining the social and educational backwardness, it cannot be said that all members of a caste need be treated as backward and entitled to reservation under Article 15 (4) or Article 16 (4). Caste-cum means test would be a rational test in identifying persons who are entitled to the benefit of those provisions. This principle has received acceptance at the hands of this Court in *Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr.*,(2) In that case a Commission appointed by the Government of the State of Kerala to enquire into the social and economic conditions of the people of that State and

(1) [1971] Supp. S.C.R. 60

(2) [1979] 2 S.C.R. 974.

(3) [1977] 1 S.C.R. 194.

473

to recommend as to what sections of the people should be extended the benefits under Article 15 (4) of the Constitution found that only the rich amongst certain castes or communities were enjoying the benefit of reservations made earlier. It, therefore, recommended adoption of a means-cum-caste/community test for determining the sections of the people who should be given the benefit under the relevant constitutional provisions. The State Government accordingly stipulated that applicants who were members of certain castes or communities and whose family income was less than Rs. 1(),000 per year were only entitled to reservation under Article 15 (4). The petitioner in the above case who belonged to one such community but whose family income was above Rs. 10,000 per year questioned the order before the Kerala High Court on the ground that the imposition of the ceiling of family income was unconstitutional. The learned Single Judge who heard the 'petition allowed it. The Division Bench of the Kerala High Court, however, reversed the decision of the learned Single Judge and dismissed the petition. On appeal, the Court while affirming the decision of the Division Bench in the above case on the question of social backwardness observed at pages 199-200 thus:

"In ascertaining social backwardness of a class of

citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The Commission found that the lower income group constitutes socially and educationally backward classes. The basis of the reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of citizens is based solely on the caste of the citizens it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical. The society is taking steps for uplift of the people. In such a task groups or classes who are socially and

474

educationally backward are helped by the society. That A is the philosophy of our Constitution. It is in this context that social backwardness which results from poverty is likely to be magnified by caste considerations. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes. Social and economic considerations come into operation in solving the problem and evolving the proper criteria of determining which classes are socially and educationally backward. That is why our Constitution provided for special consideration socially and educationally backward classes of citizens as also Scheduled Castes and Tribes. It is only by directing the society and the State to offer them all facilities for social and educational uplift that the problem is solved. It is in that context that the Commission in the present case found that income of the classes of citizens mentioned in Appendix VIII was a relevant factor in determining their social and educational backwardness."

When once the relevance of caste is not adhered to several difficulties might arise as can be seen from the decision in the State of Uttar Pradesh v. Pradip Tandon and Ors., (1) In that case the Court had to examine the validity of a Government order which had made reservation of seats under Article 15 (4) in favour of two classes of students - (1) those who came from rural areas and (2) those who came from hill areas and Uttrakhand. The High Court of Allahabad upheld the said reservations in Subhash Chandra v. The State of U.P. and ors. (2) but struck them down in a later case in Dilip Kumar v. The Government of U.P. and Ors. (3) without noticing its earlier decision in Subash Chandra's case (supra) When the same question came before this Court in an appeal preferred by the State Government, the State Government attempted to justify the classification of students for admission into medical colleges as stated above on the ground that it was a notorious fact that rural, hill and Uttrakhand areas were socially backward because of extreme poverty; that those areas were backward educationally because the

(1) [1975] 2 S.C.R. 761.

(2) A.L.R. 1973 All. 295.

(3) A.I.R. 1973 All. 592.

475

standard of literacy was poor and there was lack of educational facilities and that there was dearth of doctors in the said areas. A The geographical, territorial, historical and the economic conditions in the said areas were emphasised to support the classification. In the State of Uttar Pradesh v. Pradip Tandon's case (supra) Court first rejected the plea that party could be a basis of classification for purposes of Art. I (4) in these terms at page 7

"In Balaji's case (supra) the Court said that social backwardness is on the ultimate analysis the result of poverty to a large extent and that the problem of back ward classes is in substance the problem of rural India. Extracting these observations the Attorney General contended that poverty is not only relevant but is one, of the elements in determining the social backwardness. We are unable to accept the test of poverty as the determining factor of social backwardness." D

Then it held that reservation for rural areas on the ground of poverty was unconstitutional. In doing so it observed at page 769 thus:

"The reservation for rural areas cannot be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. This reservation appears to be made for the majority population of the State. 80 per cent of the population of the State cannot be a homogeneous class. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India. In the instructions for reservation of seats it is provided that in the application form a candidate for reserved seats from rural areas must submit a certificate of the District Magistrate of the District to which he belonged that he was born in rural area and had a permanent home there, and is residing there or that he was born in India and his parents and guardians are still living there and earn their livelihood there. The incident of birth in rural areas is made the basic qualification. No reservation can be made on the basis of place of birth, as this would offend Article 15. "

476

But it upheld the reservations made in favour of the hill and A Uttrakhand areas with these observations at page 767:

"The hill and Uttrakhand areas in Uttar Pradesh are instance of socially and educationally backward classes for these reasons. 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 back ward when they do not make effective use of resources. When large areas of land maintain a sparse, disorderly and illiterate population whose property is small and negligible the element of social backwardness is observed. When effective territorial specialisation is not possible in the absence of means of communication and technical processes as in the hill and Uttrakhand areas the people are socially backward classes of citizens. Neglected opportunities and people in remote places raise walls of social backwardness of people.

Educational backwardness is ascertained with

reference to these factors. Where people have traditional apathy for education on account of social and environ mental conditions or occupational handicaps, it is an illustration of educational backwardness. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions and educational aids. People in the hill and Uttrakhand areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have neither meaning and values nor awareness for education."

The reading of the above passages shows that there is inherent inconsistency between one part of the decision and the other. The Court could not have arrived at the two divergent conclusions set out above since many of the reasons urged by the State Government were almost identical. This is due to the earlier approach adopted by the Court to the question. If caste had been taken into consideration as a relevant test which could not be ignored in determining the classes entitled to the benefit of Article 15 (4) and Art. 16 (4), there would have been no room for the above inconsistency.

477

Article 14 of the Constitution consists of two parts. It asks the State not to deny to any person equality before law. It also asks the State not to deny the equal protection of the laws. Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to meet out differential treatment to persons in different situations in order to establish an equilibrium amongst all. This is the basis of the rule that equals should be treated equally and unequals must be treated unequally if the doctrine of equality which is one of the corner stones of our Constitution is to be duly implemented. In order to do justice amongst unequals, the State has to resort to compensatory or protective discrimination, Article 15 (4) and Article 16 (4) of the Constitution were enacted as measures of compensatory or protective discriminations to grant relief to persons belonging to socially oppressed castes and minorities. Under them, it is possible to provide for reservation of seats in educational institutions and of posts in Government services to such persons only. But if there are persons who do not belong to socially oppressed castes and minorities but who otherwise belong to weaker sections, due to poverty, place of habitation, want of equal opportunity etc. the question arises whether such reservation can be made in their favour under any other provision of the Constitution such as Article 14, Article 15 (1), Article 16 (1) or Article 46. The decision in State of Kerala and Anr. v. N.M. Thomas and Ors.(1) which was rendered by 15 a Bench of seven learned Judges of this Court attempted to deal with the above question. The facts of that case were these: Rule 13 (a) of the Kerala State Subordinate Service Rules, 1958 provided that no person would be eligible for appointment to any service or any post unless he possessed such special qualifications and had passed such special tests as might be prescribed in that behalf in the Ir Special Rules. For promotion of a lower division clerk to the next higher post of upper division clerk, the Government prescribed certain departmental tests. By Rule 13A which was introduced later on temporary exemption was given for a period of two years. That Rule also provided that an employee who did not pass the unified departmental tests within the period of two years from the date of introduction of the tests would be

reverted to the lower post and further stated that he would not be eligible for appointment under that Rule. Proviso (2) to this Rule gave temporary exemption for an extended period of two years in the case of candidates belonging

(1) [1976] I S.C.R 906.

478

to Scheduled Castes and Scheduled Tribes. When the Government A found that a large number of candidates belonging to Scheduled Castes and Scheduled Tribes were facing reversion under that Rule, on a representation made on their behalf, it gave exemption to them for a further period of two years by promulgating Rule 13A. As a result of this Rule, respondent No. I in the above case who had passed the special test in 1971 was not promoted but some candidates belonging to Scheduled Castes or Scheduled Tribes who had not passed the tests were promoted. Respondent No. I there fore challenged the validity of Rule 13A before the High Court of Kerala on the ground that it violated Article 16 (1) of the Constitution. The High Court struck down the Rule holding that it was outside the scope of Article 16 (4) and therefore was violative of Article 16 (1) of the Constitution. The State Government questioned in the above case before this Court the correctness of the decision of the High Court. From the facts narrated above, it is obvious that the case did not concern itself with reservation of posts in the higher cadre as such but only involved the classification of employees of Government into two groups—those belonging to Scheduled Castes and Scheduled Tribes and those who did not belong to Scheduled Castes and Scheduled Tribes for purposes of given exemption from possessing one of the minimum qualifications i.e. from passing the prescribed tests during a further period of two years. Ray, C.J. upheld the Rule by upholding the classification under Article 14 and Article 16 (1). The learned Chief Justice observed at page 933 thus:

"All legitimate methods are available for equality of opportunity in services under Article 16 (1). Article 16 (4) is affirmative whereas Article 14 is negative in language. Article 16 (4) indicates one of the methods of achieving equality embodied in Article 16 (1). Article 16 (1) using the expression "equality" makes it relatable to all matters of employment from appointment through promotion and termination to payment of pension and gratuity. Article 16 (1) permits classification on the basis of object and purpose of law or State action except classification involving discrimination prohibited by Article 16 (2). Equal protection of laws necessarily involves classification. The validity of the classification must be adjudged with reference to the purpose of law. The classification in the present case is justified because

479

the purpose of classification is to enable members of Scheduled Castes and Tribes to find representation by a promotion to a limited extent. From the point of view of time a differential treatment is given to members of Scheduled Castes and Tribes for the purpose of giving them equality consistent with efficiency".

Khanna, J. who upheld the judgment of the High Court was of the view that since the impugned Rule did not get the protection of Article 16 (4) which was the only provision under which preferential treatment could be given to members belonging to backward classes, Scheduled Castes and Scheduled Tribes, the Rule could not be upheld on the basis of classification under Article 14 and Article 16 (1) of the

Constitution. The learned Judge observed at pages 939-940 thus;

"It has been argued on behalf of the appellants that equality of treatment does not forbid reasonable classification. Reference in this context is made to the well accepted principle that Article 14 of the Constitution forbids class legislation but does not forbid classification. Permissible classification, it is equally well established, must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and the differential must have a rational relation to the object sought to be achieved by the statute in question. It is urged that the same principle should apply when the court is concerned with the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. In this respect I may observe that this Court has recognised the principle of classification in the context of clause (1) of article 16 in matters where appointments are from two different sources, e.g. guards and station masters, promotees and direct recruits, degree holder and diploma holder engineers. [See All India Station Masters and Asstt. station Masters' Assn. and Ors. v. General Manager, Central Railway and Ors. [1960] 2 S.C.R. 311, S.G. Jaisinghani v. Union of India and Ors. [1967] 2 S.C.R. 703 and State of Jammu & Kashmir v. Triloki Nath Khesa and Ors. [1974] 1 S.C.R. 771.] The question with which we are concerned, however, is

480

whether we can extend the above principle of classification so as to allow preferential treatment to employees on the ground that they are members of the scheduled castes and scheduled tribes. So far as this question is concerned I am of the view that the provision of preferential treatment for members of backward classes, including scheduled castes and scheduled tribes, is that contained in clause (4) of article 16 which permits reservation of posts for them. There is no scope for spelling out such preferential treatment from the language of clause (1) of article 16 because the language of that clause does not warrant any preference to any citizen against another citizen. The opening words of clause (4) of article 16 that "nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of backward class of citizens" indicate that but for clause (4) it would not have been permissible to make any reservation of appointments or posts in favour of any backward class of citizens."

Khanna, J. proceeded to observe at page 944 thus:

"The matter can also be looked at from another angle. If it was permissible to accord favoured treatment to members of backward classes under clause (1) of article 16, there would have been no necessity of inserting clause (4) in article 16. Clause (4) in Article 16 in such an event would have to be treated as wholly superfluous and redundant. The normal rule of interpretation is that no provision of the Constitution to be treated as redundant and superfluous. The Court would, therefore, be reluctant to accept a view which would have the effect of rendering clause (4) of Article 16 redundant and superfluous".

Mathew, J. more or less agreed with Ray, C.J. He said at pages 954-955 thus:

"It is said that Article 16 (4) specifically

provides for reservation of posts in favour of backward classes which according to the decision of this Court would include the power of the State to make reservation at the

481

stage of promotion also and therefore Article 16 (1) cannot include within its compass the power to give any adventitious aids by legislation or otherwise to the backward classes which would derogate from strict numerical equality. If reservation is necessary either at the initial stage or at the stage of promotion or at both to ensure for the members of the Scheduled Castes and Scheduled Tribes equality of opportunity in the matter of employment, I see no reason why that is not permissible under Article 16 (1) as that alone might put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. Whether there is equality of opportunity can be gauged only by the equality attained in the result. Formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. Equality of result is the test of equality of opportunity".

Beg, J. (as he then was) agreed with the view of Khanna, J. that the principle of classification could not be extended to cases of this nature but upheld the Rule as squarely falling within the scope of Article 16 (4) itself. He observed at page 959:

"Strictly speaking, the view adopted by my learned brother Khanna, that the ambit of the special protection of "equality of opportunity in matters relating to public service", which can be made available to members of backward classes of citizens, is exhausted by Article 16 (4) of the Constitution, seems inescapable. Article 16 is, after all, a facet of the grand principles embraced by Article 14 of our Constitution. It guarantees: "Equality of opportunity in matters of public appointment". It does so in absolute terms. It is a necessary consequence and a special application of Article 14 in an important field where denial of equality of opportunity cannot be permitted. While Article 16 (1) sets out the positive aspect of equality of opportunity in matters relating to employment by the State, Article 16 (2) negatively prohibits discrimination on the grounds given in Article 16 (2) in the area covered by Article 16 (1) of the Constitution. If

482

Scheduled Castes do not fall within the ambit of Article 16 (2), but as a "backward class" of citizens, escape the direct prohibition it is because the provisions of Article 16 (4) make such an escape possible for them. They could also avoid the necessary consequences of the positive mandate of Article 16 (1) if they come within the only exception contained in Article 16 (4) of the Constitution. I respectfully concur with my learned brother Khanna and Gupta that it would be dangerous to extend the limits of protection against the operation of the principle of equality of opportunity in this field beyond its express constitutional authorisation by Article 16 (4) '.

Beg, J. (as he then was) proceeded to hold at page 961 thus:

"Members of a backward class could be said to be discriminated against if severer tests were prescribed for them. But, this is not the position in the case before us. All promotees, belonging to any class, caste, or creed, are equally subjected to efficiency tests of the same type and standard. The impugned rules do not dispense with these tests for any class or group. Indeed, such tests could not be dispensed with for employees from Scheduled Castes, even as a backward class, keeping in view the provisions of Article 335 of the Constitution. All that happens here is that the backward class of employees is given a longer period of time to pass the efficiency tests and prove their merits as determined by such tests. It has been, therefore, argued that, in this respect, there is substantial equality. In other words, the argument is that if Article 16 (1) could be interpreted a little less rigidly and more liberally the discrimination involved here will not fall outside it. Even if this was a tenable view, I would, for all the reasons given here, prefer to find the justification, if this is possible, in the express provisions of Article 16 (4) because this is where such a justification should really lie."

Krishna Iyer, J. after recording the statement of the Advocate General for Kerala that the Rule could not be sustained under Article 16 (4) upheld it under article 14 and Article 16 (1) as it

483

related to members belonging to the Scheduled Castes and Scheduled Tribes. Perhaps he would have struck down the Rule if the benefit A of the Rule had been extended to other backward classes as can be seen from the following passage occurring at page 981:

"If Art. 14 admits of reasonable classification, so does Art. 16(1) and this Court has held so. In the present case, the economic advancement and promotion of the claims 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 Arts. 46 and 335 and reasonably accommodated in Art. 16(1). The differentia so loudly obtrusive, is the dismal social milieu of harijans. Certainly this has a rational relation to the object set out above. I must repeat the note of caution earlier struck. Not all caste backwardness is recognised in this formula. To do so is subversive of both Art. 16(1) and (2). The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search for such a class, we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes. Any other caste, securing exemption from Art. 16(1) and (2), by exerting political pressure or other influence, will run the high risk of unconstitutional discrimination. If the real basis of classification is caste masked as backward class, the Court must strike at such communal manipulation. Secondly, the Constitution recognizes the claims of only harijans (Art. 335) and not of every backward class. The profile of Art. 46 is more or less the same. So, we may readily hold that casteism cannot come back by the back door and, except in exceptionally rare cases, no class other than Harijans can jump the gauntlet of 'equal opportunity' guarantee. Their only hope is in Art. 16(4)". (Emphasis supplied).

Gupta, J. agreed generally with Khanna, J. and upheld the judgment of the High Court. Gupta, J. after referring to Article 335 observed at page 986 thus: H

"This Article does not create any right in the members of the Scheduled Castes and the Scheduled Tribes which

484

they might claim in the matter of appointments to services A and posts; one has to look elsewhere, Article 16(4) for instance, to find out the claims conceded to them. Article 335 says that such claims shall be considered consistently with administrative efficiency, thus is a provision which does not enlarge but qualify such claims as they may have as members of the Scheduled Castes or Scheduled Tribes. Article 335, it seems clear, cannot furnish any clue to the understanding of Article 16(1)".

Fazal Ali, J. also upheld the impugned Rule under Article 16(1). The learned Judge said at page 1001 thus: "

"Article 335 of the Constitution contains a mandate to the State for considering the claims of the members of the Scheduled Castes and the scheduled tribes consistently with the maintenance of efficiency of administration. By giving the special concessions to the promotees this mandate is sought to be obeyed by the Government. Mr. T.S. Krishnamoorthy Iyer, counsel for the respondent No. I submitted that the mandate given in Art. 335 is violated because by granting exemption to the members of the scheduled castes and tribes the standard of efficiency of the services would be impaired. We are, however, unable to agree with the argument. Both the respondent No. I and the promotees were members of the same service and had been working as Lower Division Clerks for a pretty long time. The promotees were members of the scheduled castes and tribes are admittedly senior to respondent No. I and have gained more experience. Further the rule does not grant complete exemption to the promotees from passing the test; it only provides for grant of extension of time to enable them to clear the test. In these circumstances it cannot be held that the State's action in incorporating r. 13-AA in any way violates the mandate contained in Art. 335. In these circumstances, therefore, I am clearly satisfied that the concession given in r. 13-AA amounts to a reasonable classification which can be made under Art. 16(1) of the Constitution and does not amount to the selection of the respondent No. 1 for hostile discrimination so as to be violative of Art. 16(1) of the Constitution of India"

485

But Fazal Ali, J. was, however, of the view that Article 16(4) of the Constitution was a complete code so far as reservation of posts A was concerned. The learned Judge observed at page 1002 thus:

"Clause (4) of Art. 16 of the Constitution cannot be read in isolation but has to be read as part and parcel of Art. 16(1) & (2). Suppose there are a number of backward classes who form a sizable section of the population of the country but are not properly or adequately represented in the services under the State the question that arises is that can be done to enable them to join the services and have a sense of equal participation. One course is to make a reasonable classification under Art. 16(1) in the manner to which

I have already adverted in great detail. The other method to achieve the end may be to make suitable reservation for the backward classes in such a way so that the inadequate representation of the backward classes in the services is made adequate. This form of classification which is referred to as reservation, is, in my opinion, clearly covered by Art. 16(4) of the Constitution which is completely exhaustive on this point. That is to say clause (4) of Art. 16 is not an exception to Art. 14 in the sense that whatever classification can be made can be done only through clause (4) of Art. 16. Clause (4) of Art. 16, however, is an explanation containing an exhaustive and exclusive provision regarding reservation which is one of the forms of classification. Thus clause (4) of Art. 16 deals exclusively with reservation and not other forms of classifiable which can be made under Art. 16(1) itself. Since clause (4) is a special provision regarding reservation, it can safely be held that it overrides Art. 16(1) to that extent and no reservation can be made under Art. 16(1)". (Emphasis added)

The result is that at least according to four learned Judges - Khanna; Beg, Gupta and Fazal Ali, JJ. no reservation of posts can be made in Government services for backward classes including Scheduled Castes and Scheduled Tribes under Article 14 or Article 16(1). According to Krishna Iyer, J. preferential treatment as was done in this case on the basis of classification ordinarily could be given under Article 16(1) to the Scheduled Castes and Scheduled Tribes only. Other backward classes could not, except in exceptionally rare cases be extended the same benefit and their only hope was Article 16(4) of the constitution,

486

Now reverting to the power of the Government to make reservations under Article 15(4) and Article 16(4) of the Constitution, we may state thus: The determination of the question whether the members belonging to a caste or a group or a community are backward for the purpose of Article 15(4) and Article 16(4) of the Constitution is no doubt left to the Government. But it is not open to the Government to call any caste or group or community as backward according to its sweet will and pleasure and extend the benefits that may be granted under those provisions to such caste or group or community. The exercise of uncontrolled power by the Government in this regard may lead to political favouritism leading to denial of the just requirements of classes which are truly backward. The power of the Government to classify any caste or group or community as backward has to be exercised in accordance with the guidelines that can be easily gathered from the Constitution. It is now accepted that the expressions 'socially and educationally backward classes of citizens' and 'the Scheduled Castes and the Scheduled Tribes' in Article 15(4) of the Constitution together are equivalent to backward classes of citizens' in Article 16(4). Dealing with the question whether any particular caste or group or community could be treated as socially and educationally backward for purposes of Article 15(4), the Court observed in Balaji's case (supra) at page 465 thus:

"Therefore, we are not satisfied that the State was justified in taking the view that communities or castes whose average of student population was the same as, or just below, the State average, should be treated as educationally backward classes of citizens. If the

test has to be applied by a reference to the State average of student population, the legitimate view to take would be that the classes of citizens whose average is well or substantially below the State average can be treated as educationally backward."

This was further explained by Shah, J. (as he then was) in Sagar's case (supra) when he observed that the criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffered. A Constitution Bench of this Court reiterated the above principle in Janki Prasad Parimoo & Ors. etc. etc. v. State of Jammu & Kashmir & Ors. in which it was observed at page 252 thus:

(1) [1973] 3 S.C.R. 236.

487

"That accounts for the *raison d'être* of the principle explained in Balaji's case which pointed out that backward classes for whose improvement special provision was contemplated by Article 15(4) must be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally".

This view is in conformity with the intention underlying clause (6) of the resolution regarding the aims and objects of the Constitution moved by Jawaharlal Nehru on December 13, 1946 which asked the Constituent Assembly to frame a Constitution providing adequate safeguards for minorities, backward and tribal areas and depressed and other backward classes and also with the provisions of Article 338 and Article 340 of the Constitution. Unless the above restriction is imposed on the Government, it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the State as backward even though in fact it may be an advanced caste or group or community but just below some other forward community. There is another important reason why such advanced castes or groups or communities should not be included in the list of backward classes and that is that if castes or groups and communities which are fairly well advanced and castes and groups and communities which are really backward being at the rock-bottom level are classified together as backward classes, the benefit of reservation would invariably be eaten up by the more advanced sections and the really deserving sections would practically go without any benefit as more number of children of the more advanced castes or groups or communities amongst them would have scored higher marks than the children of more backward castes or groups or communities. In that event the whole object of reservation would become frustrated. It is stated that it was with a view to avoiding this anomalous situation, the Government of Devaraj Urs had to appoint the Havanur Commission to make recommendations for the purpose of effectively implementing the objects of Article 15(4) and Article 16(4). Hence as far as possible while preparing the list of backward classes, the State Government has to bear in mind the above principle as a guiding factor. The adoption of the above principle will not unduly reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4) of the Constitution since over the years the level of the Scheduled Castes and Scheduled Tribes is also going up by reason of several remedial

488

measure taken in regard to them by the State and Central Government. At the same time, it will also release the really backward castes, groups and communities from the strangle-hold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades. It is time that more attention is given to those castes, and groups communities who have been at the lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many of the Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of the Scheduled Castes and the Scheduled Tribes.

Since economic condition is also a relevant criterion, it would be appropriate to incorporate a 'means test' as one of the tests in determining the backwardness as was done by the Kerala Government in Jayasree's case (supra). These two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). For the purpose of Article 16(4) however, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services.

There is one other basis on which a classification made for purposes of Article 15 (4) or Article 16 (4) of the Constitution has received the approval of this Court in Chitralekha's case (supra). In that case the Court was concerned with a list of backward classes prepared on the basis of economic condition and occupation. According to that Government order, persons whose family income was Rs. 1,200 per annum or less and who were engaged in occupations such as agriculture, petty business, inferior services, crafts or other occupations involving manual labour were treated as belonging to backward classes. The petitioner who had filed the petition in the High Court did not challenge the validity of the said classification. But on a submission made on behalf of the State Government, the Court expressed its general approval to the method of classification. Even in the case before us now, there is a reservation of 15 per cent of seats of posts in favour of members falling under a classification styled as 'special group' which is based on similar

489

occupation-cum-income considerations. Even here no serious objection is taken by any party to the said classification treating A persons who satisfied the prescribed tests as being eligible for reservation. It is apparent that this 'special group' is a creature of social, economic and political necessity. Since a classification made on the above said basis has received the approval of a Constitution Bench of equal strength and its correctness is not challenged before us, we treat this classification as a valid one even though a criticism of this kind of classification was made, not unjustifiably as we now see, by the Mysore High Court in D.G. Viswanath's case.(1) This classification would include persons of all castes, groups and communities provided the two tests namely, occupation test and income test are satisfied.

Next comes the vexed question relating to the extent of reservation that can be made under Art. 15 (4) and Art. 16

(4) of the Constitution. In Balaji's case (supra) this Court took the view that since Article 15 (4) is an exception to Article 16 (1) and Article 16 (4) is an exception to Article 16 (1) and (2) any reservation made under Article 15 (4) and Article 16 (4) should not exceed 50 per cent of the total number of seats or posts, as the case may be. The Court held that reservation of 68 per cent of seats under Article 15 (4) which was a special provision was invalid. The Court further held that 'speaking generally and in a broad way a special ID 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'. This statement was understood by a Constitution Bench of this Court in T. Devadasan v. The Union of India and Anr. (2) as laying down the rule that reservation under Article 15 (4) or Article 16 (4) could not be more than 50 per cent of seats or posts. In that case Mudholkar, J. speaking for the majority said at page 698:

"Even if the Government had provided for the reservation of posts for Scheduled Castes and Tribes a cent per cent reservation of vacancies to be filled in a particular year or reservation of vacancies in excess of 50 per cent would, according to the decision in Balaji's case, not be constitutional".

(1) A.I.R. 1964 Mys. 132.

(2) [1964] 4 S.C.R. 680.

490

But in the State of Kerala and Anr. v. N.M. Thomas and Ors. (supra) the question relating to the permissible extent of reservation arose for consideration. Ray, C.J. came to the conclusion that taking into consideration the entire Government service, there was no excessive concession shown to the employees belonging to the Scheduled Castes and Scheduled Tribes. Beg, J. (as he then was) was also of the same view. Fazal Ali, J. observed at page 1005 thus:

"This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Art. 16 (1) of the Constitution indirectly. At the same time clause (4) of Art. 16 does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Art. 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Art. 16 (1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 per cent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Art. 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate."

Krishna Iyer, J. in the same case observed at page 981

thus:

"I agree with my learned brother Fazal Ali, J. in the view that the arithmetical limit of 50 per cent in any one

491

year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Art. 16 (4) and his view about the 'carry forward' rule."

After carefully going through all the seven opinions in the above case, it is difficult to hold that the settled view of this Court that the reservation under Article 15 (4) or Article 16 (4) could not be more than 50 per cent has been unsettled by a majority of the Bench which decided this case. I do not propose to pursue this point further in this case because if reservation is made only in favour of those backward castes or classes which are comparable to the Scheduled Castes and Scheduled Tribes, it may not exceed 5() per cent (including 18 per cent reserved for the Scheduled Castes and Scheduled Tribes and 15 per cent reserved for 'special group') in view of the total population of such backward classes in the State of Karnataka. The Havanur Commission has taken the number of students passing at S S.L.C. examination in the year 1972 as the basis for determining the backwardness. The average passes per thousand of the total population of the State of Karnataka was 1.69 in 1972. The average in the case of the Scheduled Castes was 0.56 and in the case of Scheduled Tribes was 0.51. Even if we take all the castes, tribes and communities whose average is below 50 per cent of the State average i.e. below .85 per cent for classifying them as backward, large chunks of population which are now treated as backward would have to go out of the list of backward classes. Consequently the necessity for reservation which would take the total reservation under Article 15 (4) and Article 16 (4) beyond 50 per cent of the total number of seats/posts would cease to exist. The present arrangement has been worked for more than five years already. It is now necessary to redetermine the question of backwardness of the various castes, tribes and communities for purposes of Article 15 (4) and Article 16 (4) in the light of the latest figures to be collected on the various relevant factors and to re-fix the extent of reservation for backward classes. The reservation of 15 per cent now made under Article 15 (4) and Article 16 (4) but which may be traced to Article 14 and Article 16 (1) to 'special group' based on occupation-cum-income can in any event be availed of by members of all communities and castes.

At this stage it should be made clear that if on a fresh determination some castes or communities have to go out of the list of

492

Backward classes prepared for Article 15 (4) and Article 16 (4), the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive principle contained in Article 46 of the Constitution. There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete successfully with persons belonging to richer classes. The Government may provide for them liberal grants of scholarships, free studentship, free boarding and lodging facilities, free uniforms, free mid-day meals etc. to make

the life of poor students comfortable. The Government may also provide extra tutorial facilities, stationery and books free of cost and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for the qualifying examination he may be able to attain a high degree of proficiency in his studies.

The State Government shall now proceed to redetermine the whole question of reservation of seats/posts under Article 15 (4) and Article 16 (4) of the Constitution in this judgment.

S.R.

493

JUDIS