
CHAPTER ELEVEN
THE CONSTITUTIONAL DIMENSIONS OF AFFIRMATIVE
ACTION IN INDIA

11.1 The IC and the Equality Principle

The effort to secure equality by means of preferential treatment in India must also be seen in its constitutional context. The drafters of the IC were aware of the prevailing horrifying conditions of the backward groups who had remained segregated from the national and social mainstream, and, who had continued to be socially oppressed and economically exploited for centuries due to various types of disabilities. The drafters recognised that due to these historical reasons certain castes and classes were for decades socially oppressed and economically destined to live the life of abject poverty. To simply declare caste discrimination unlawful after years of its practice would not be enough to bring about equality and therefore something more was needed to overcome these problems.¹

Further, an inflexible insistence on formal equality would in fact exacerbate and maintain inequality.² Therefore India has embraced equality as the principal value against the background of discriminatory practices. Since society as a whole was responsible for the discriminations resulting from societal intolerances such as caste structures compensatory programmes for the socially, educationally and historically disadvantaged groups will be justified where these differences stand in the way of equal access to basic advantages enjoyed by the forward classes.

The Preamble to the IC secures to all citizens equality of status and opportunity. This doctrine was imported into the IC from the Constitutions of France and the USA. The IC has abolished Untouchability and its practice has been made a criminal offence.³ To secure further equality amongst its people all Titles have been abolished.⁴

¹ See Ghurye G S Caste and Class (1967) in Betielle Andre Castes, Old and the New (1969).

² Galanter Marc Law and Society in Modern India (1992) (Law and Society).

³ Article 17 of the Constitution of India.

⁴ Article 18 of the Constitution of India.

Equality of opportunity is provided by the guarantee of the rule of law. The term “equality before the law” corresponds with the “Rule of Law” in England. The IC has also made unlawful practice to discriminate amongst people in the matter of public employment.⁵ As can be seen from the previous chapters people of India have been divided into various groups at different levels. Such a situation may however, not be conducive to a democratic system.⁶ The doctrine and interpretation of equality in the Constitution therefore plays a significant role.

The Constitution of India seeks to secure to all its citizens justice, equality and fraternity. Equality and fraternity have a special significance in the context of the Indian society, as explained by the SC in its judgment in *Indra Sawhney v Union of*.⁷ The content of the concept of “equality before law” guaranteed by Article 14 has to be gathered from a reading of the constitution as a whole, and in particular, from Articles 14 to 18 and 38 and 39. Besides guaranteeing equality before the law, Article 14 also ensures equal protection of the laws, which expression occurs in the Fourteenth Amendment to the US Constitution.

As discussed in previous chapters, Articles 14 to 18 of the IC guarantees the fundamental right of equality to every citizen in India. Article 14 is the core Article which guarantees, in its negative aspect “equality before the law” and in its positive aspect, “equal protection of the law”. In its negative aspect, the right to equality or equality before the law is similar to the principles of formal equality in SA. It was the realisation that the mere provision of formal equality would not suffice to bring about the desired “equality of status and of opportunity” that led to the adoption of these provisions. A Full Bench of the Kerala High Court observed that —

“It has been realised that in a country like India, where large sections of the people are backward socially, economically, educationally and politically, these declarations and guarantees [of equality] would be meaningless unless provision is also made for the upliftment of such backward classes who are in no position to compete with the more advanced classes. Thus to give meaning and content to the equality guaranteed by Articles 14, 15, 16 and 29, provision has been made in

⁵ The terms of Article 16 of the Indian Constitution are emphatic on this point.

⁶ Mahajan V D Constitutional law of India (1991) 7ed at 45.

⁷ Reported in (1993) AIR SC 477.

Articles 15(4) and 16(4) enabling preferential treatment in favour of the weaker sections.”⁸

Like SA, the Indian laws have recognised that even though men and women are equal they are not equal in all circumstances and in all situations. This is the positive form of the right to equality and known as substantive equality in South African law. In both cases equal justice is the aim of the Constitutions. The rule of law requires that no person shall be subjected to “harsh, uncivilised or discriminatory treatment even when the object is to secure the paramount exigencies of law and order”.⁹ Indeed the SC of India has observed that the guarantees of equality might by themselves aggravate existing inequalities if taken literally —

“Instead of giving equality of opportunity to all citizens, it will lead to glaring inequalities. The predominant concept underlying [Article 16] is equality of opportunity in the matter of employment; and, without detriment to said concept; the State is enabled to make reservations in favour of backward classes to give a practical content to the concept of equality.”¹⁰

The phrase “equality before the law” is found in the South African Constitution and in almost all Constitutions which guarantee fundamental rights. The phrase “equal protection of the laws” has its origin from the American Constitution. Both expressions aim at establishing equality of status. According to Patanjali Sastri, CJ, “the equal protection of the laws is a corollary of the expression equality before the law. The violation of one leads to the violation of the other”.¹¹ The guarantee of “equal protection of the laws” is similar to the one embodied in the Fourteenth Amendment of the US Constitution.

Official legal encounter with compensatory discrimination occurs almost entirely at the top of India’s hierarchical judiciary, which is the SC. The SC has the final word on the interpretation of the Constitution. Its orders, being law, are binding and

⁸ *Hariharan Pillai v State of Kerala* (1968) AIR 42 (Ker.) at 47-8.

⁹ *Rupinder Singh v Union of India* (1983) 1 SCC 140 at 140.

¹⁰ *Triloki Nath Tiku v State of Jammu and Kashmir* (1967) AIR 1283 (SC) at 1285.

¹¹ *State of Madras v V G Row* (1952) 196 SC 75 at 196.

enforceable by all authorities including executive, legislative and judicial branches of the law.¹² The following decisions relate to the interpretation of affirmative action measures by the ISC. The value of equality is important in the Indian context because the courts have interpreted affirmative action measures by looking at the right to equality.

(11.1.2) *Justifying Positive Discrimination under the IC*

(11.1.2.1) *Article 14 — The Right to Equality in General*

Under the IC the right to equality has been divided into two parts namely — the right to equality in general (Article 14); and the right to equality in particular (Article 15). Article 14 guarantees equality before the law whilst Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.

(11.1.2.2) *The Legislative or Permissible Classification of Equality*

What Article 14 forbids is discrimination between persons who are substantially in similar circumstances or conditions. The rule is that like should be treated alike and not that unlike should be treated alike.¹³

In the case of *Ram Krishana Dalmia v Justice S R Tendolkar*¹⁴ Das, CJ summed up the principles which must be borne in mind by a court while determining the validity of a statute on the ground of a violation of Article 14. Das, CJ has pointed out that Article 14 forbids class legislation but does not forbid classification or differentiation on reasonable grounds of distinction for the purpose of legislation.¹⁵ Therefore, persons may be classified into groups and like South African law, such differentiation must have a reasonable or rational basis.

¹² *Union of India v Raghubir Singh* (1989) 2 SCC 754 at 766. Article 142 of the Constitution declares that any order of the Supreme Court is enforceable throughout the territory of India and article 144 mandates that all civil and judicial authorities shall act in aid of the SC.

¹³ *State of W B v Anwar Ali* (1952) AIR 75 (SC).

¹⁴ *Rama Krishna v Justice Tendolkar* (1958) AIR 538 (SC).

¹⁵ *Budhan Choudary v State of Bihar* (1955) AIR 191 (SC).

In India, in order to pass the test of permissible classification there are two conditions that must be satisfied. Firstly, the classification must be founded upon an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group. Secondly, the differentiation must have a rational relation to the object sought to be achieved by the statute in question. These qualifications are similar to the tests adopted by the CC of SA in deciding whether or not a classification is reasonable.¹⁶ Like SA, the classifications may also be founded on different bases, namely, geographical or territorial basis.¹⁷ What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.¹⁸

In the case of *Chiranjit Lal Chowdhry v Union of India*¹⁹ the management of the Sholapur Spinning and Weaving Company was involved in producing an essential commodity in India but it was not effective in doing so. They were then taken over by the Government of India subject to an Ordinance which was later re-enacted in the form of an Act. A share holder of the Company made an application under Article 31 of the IC for a declaration that the re-enacted Act was void. Amongst other things the ISC held that the restrictions that were imposed were reasonable restrictions in the interests of the public. These restrictions were imposed to ensure and secure the supply of a commodity essential to the community and to prevent serious unemployment amongst a section of the people who were completely protected by Article 19(5).²⁰

More importantly, the ISC stated that to guarantee against the denial of equal protection of the laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. The court held that there should be no discrimination

¹⁶ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC).

¹⁷ *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC).

¹⁸ Also see the case of *U P Electric Power and Supply Company Limited v State of U P* (1969) 1 SCC 817.

¹⁹ *Chiranjit Lal Chowdhry v Union of India* (1951) AIR 41 (SC).

²⁰ Also see the case of *Mohd. Hanif Quareshi v State of Bihar* (1959) SCR 629.

between one person and another if as regards the subject matter of the legislation their position is the same.

In the *Budhan Choudhary* case the SC held that section 30 of the Code of Criminal Procedure did not violate Article 14 of the Constitution.²¹ Here the classification on which Section 30 was based related to the power that was to be conferred on specified Magistrates in certain localities only and in respect of some offences only. The SC also held that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation.²²

In *Pathumma v State of Kerala*,²³ it was held that classifications must be founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group.

In *Maru Ram v Union of India*²⁴ the question for decision was whether Section 433-A of the Code of Criminal Procedure violated Article 14 or not. The SC held that it was not violative of Article 14. Section 433-A provides for the imposition of at least a fourteen year imprisonment for a murderer as opposed to other criminals. It was held that the classification was not arbitrary, unusually cruel or unconstitutional.

In the case of *Rajendra v State of Madras*,²⁵ the SC struck down Rule 8 which laid down district-wise distribution of seats in the State of Medical Colleges on the basis of the ratio of the population of each district to the total population of the State. It was pointed out that there was no nexus between such distribution and the object to be achieved; namely, admission of the best talent among the candidates.

²¹ *Budhan Choudhary v State of Bihar* (1955) 1 SCR 1045.

²² Also see the case of *State of Bombay v F N Balsara* (1951) AIR 318 (SC).

²³ *Pathumma v State of Kerala* (1978) AIR 771 (SC).

²⁴ *Maru Ram v Union of India* (1980) AIR 2147 (SC).

²⁵ *Rajendra v State of Madras* (1968) AIR 1012 (SC).

In *Press Trust of India v Union of India*,²⁶ the SC held that even where legislative action or any action taken is under any law against a single individual or things or several individual persons or things where no reasonable basis for classification may appear on the face of it or deducible from the surrounding circumstances, that action is liable to be struck down as an instance of discrimination.

(11.1.2.3) Article 15 — The Right to Equality in Particular

While Article 14 deals with the provision relating to equality in general and is available to citizens as well as non-citizens, Articles 15 to 18 deals with the aspects of equality in particular. These Articles are available to citizens only. Article 15 prohibits discrimination subject to certain exceptions so far as Indian citizens are concerned whilst Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion,²⁷ race,²⁸ caste,²⁹ sex,³⁰ and place³¹ of birth or any of them.

Article 15(2) lays down 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 access to shops, public restaurants, hotels and places of public entertainment; or the 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 15(2) is a specific application of the general prohibition contained in Article 15(1). While Article 15(1) prohibits discrimination by the State, Article 15(2) prohibits both the State and private individuals from making any discrimination. The object of Article 15(2) is to eradicate the abuses of the Hindu social system. This can be equated to the indirect discrimination law under the South African and American legal systems.

²⁶ *Press Trust of India v Union of India* (1974) AIR 1044 (SC).

²⁷ *Nain Sukh Das v State of UP* (1955) AIR 334 (SC).

²⁸ *Sanghar Umar Ravmal v State of Saurashtra* (1952) AIR 124 (Saurashtra).

²⁹ *Jai Lal v Padam Singh* (1954) AIR 23 (MP).

³⁰ *A Cracknell (Mrs) v State of U P* (1952) AIR 746 (All.).

³¹ *Shaikh Hussain v Bombay State* (1951) AIR 285 (Bom.).

Article 15(3) embodies one of the two exceptions to the prohibition contained in clauses (1) and (2) of Article 15. Article 15(3) provides that nothing in this article shall prevent the State from making any special provision for women and children. Article 15(4) states that nothing in this Article or in Article 29(2) shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the SC's and the ST's.

Article 15(4) contains the other exception to clauses (1) and (2) of Article 15. It should be noted that clause (4) is an enabling provision. It does not impose an obligation on the State to make special provisions, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary.

Article 15(4) was added by the Constitution (First Amendment Act) of 1951 as a result of the decision of the SC in *State of Madras v Champakam Dorairajan*.³² In this case the SC struck down the communal Government order of the Madras Government. The object of the order was to help the backward classes and therefore the Madras Government had fixed the proportion of students of each community that could be admitted to the State Medical Colleges. Although Article 46 of the Constitution lays down that the State should promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice, the SC held that the Directive Principles of State Policy embodied in Article 46 could not override the fundamental rights secured to the citizen by Part III of the Constitution.

The exception now embodied in clause (4) enables the State to make special provisions for the educational, economic, or social advancement of socially and educationally backward classes of citizens or for the SC's and ST's.

11.2 The IC and the System of Reservation

The occasion for the first challenge to the preferential policy (reservation in higher education) came in the very first year after adoption of the Constitution. In *State of Madras v Champakam Dorairajan*, the SC invalidated a governmental order, issued by the State of Madras when the Constitution came into force, but based on the 1927

³² *State of Madras v Champakam Dorairajan* (1951) AIR 226 (SC).

GO enacted in response to the efforts of the Justice Party, reserving seats in the state’s medical and engineering colleges as follows. For every fourteen seats that were available it was to be allocated as follows —

Brahmins	2 seats
Non-Brahmin Hindus	6 seats
Backward Hindus	2 seats
Anglo-Indians and Indian Christians	1 seats
Muslims	1 seats
Untouchables	2 seats

The Court held that such a scheme based explicitly on caste and religion offended the equality provisions found in Article 29(2) and 15(1) of the Constitution.³³ Whilst Article 15 generally prohibits state discrimination on the basis of religion, race, caste, sex or place of birth, Article 29 contains similar prohibitions specific to education. Neither Article contained an exception for “backward classes” as did Article 16, which only related to public employment. The Court felt that preferential discrimination on the basis of caste or religion only is contrary to the express provisions of the equality guarantee in the sense of equal treatment.

This judgment of the SC was promptly overruled by Parliament which enacted the first amendment to the Constitution adding a new clause (Clause 4) to Article 15. It expressly provided an exception to the equality guarantees of 29(2) and 15(1) which was similar to Article 16(4), empowering the State to make provision for the advancement of “any socially or educationally backward classes of citizens” or for the SC’s and ST’s. One difference was the modifier “socially and educationally” prior to “backward classes”, which does not appear in Article 16(4). However, given the given the intention of the drafters of the IC and looking at the other language in the constitutional text, the SC has interpreted “backward classes” in Article 16(4) as meaning “socially and educationally backward classes”.

³³ Article 15(1) of the Constitution of India prohibits discrimination on grounds only of religion, caste etc., and Article 29(2) prohibits denial of admission into State funded educational institutions on grounds only of religion, race, etc.

Even though the IC has extended protection to the class of people known as backward classes it does not use only one expression to describe them. It has subsequently added the term of “socially and educationally backward classes” as the backward classes of citizens.³⁴ The problem is that there is no objective criterion for specifying “backward classes”. The conditions differ from State to State and also from region to region. Presently there is no objective criterion used for specifying backward classes and each State has its own criterion for classification. Further, the Constitution of India itself also does not specify or define who the SC’s and ST’s are.

The next case involving the issue of reservations before the SC was the *M R Balaji v State of Mysore*³⁵ case. In this case what was put in issue was an order of the Mysore Government reserving sixty-eight percent of seats in technical institutions for backward classes. The Constitutional Bench of this Court held that the order violated the Constitution as the classification was based solely on consideration of castes. Secondly, the reservation of sixty-eight percent was not consistent with Article 15(4) of the Constitution. The SC held that —

“[I]f admission to professional and technical colleges is unduly liberalised, the quality of our graduates will suffer. That is not to say that reservation should not be adopted; reservation should and must be adopted to advance the prospects of the weaker sections of the society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centers to deserving and qualified candidates of other communities. A special provision contemplated by Article 15(4), like reservation of posts and appointments contemplated by Article 16(4), must be within reasonable limits.”³⁶

The Constitutional Bench held that if under the guise of making special provisions, practically all the seats available were to be reserved by the State that clearly would be subverting the object of Article 15(4). Speaking generally and in broad way, a special provision should be less than fifty percent. How much less than fifty percent or the actual percentage is acceptable would depend upon the relevant prevailing

³⁴ Articles 15(4), 16(4) and 340 of the Constitution of India.

³⁵ *M R Balaji v State of Mysore* (1963) AIR 649 (SC).

³⁶ *Ibid* at 655.

circumstances in each case. It has been argued that the object of Article 15(4) is to advance the interests of society as a whole while looking after the interests of the weaker sections in society. Therefore if a provision under Article 15(4) ignores the interests of society then that is clearly outside the scope of Article 15(4) and has to be struck down.

Gajendragadkar, J made the following pertinent observations with reference to Article 15(4) —

“.....When Article 15(4) refers to the special provisions for the advancement of certain classes or scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorises special provision to be made.....”³⁷

It was also stated by the senior counsel³⁸ in that case that —

“The efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration and that it was undoubtedly the effect of Article 335. Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4).”³⁹

The aforesaid observations were referred to by the Constitutional Bench for two reasons. Firstly, the court took note of this observation while considering the reasonableness of reservation of seats in educational institutions and for highlighting the point that such reservation of seats should not be more than fifty percent. Secondly, that the reservation of sixty-eight percent of seats was not within the permissible limit of special provisions under Article 15(4). The court therefore agreed that the reservation of seats should not amount to more than fifty percent.

³⁷ *M R Balaji v State of Mysore* (1963) Suppl. SCR 439 at 467.

³⁸ Senior counsel Shri Rajendra Sachar.

³⁹ *M R Balaji v State of Mysore* (1963) Suppl. SCR 439 at 474.

Whether or not this percentage is acceptable has to be looked at in the context of the Indian society as a whole.

One has to bear in mind that as one of the aims of affirmative action is to provide crutches to the weaker sections of society so as to enable them not to be crippled forever, the dilution of passing marks at the common entrance test at which such reserved category candidates appear after obtaining their MBBS degree from different universities cannot be totally arbitrary and must have a permissible limit below which it cannot go. That is why it was held by the Constitutional Bench in the *Balaji* case, that it is reasonable to hold that reservation of seats under Article 15(4) in postgraduate medical courses cannot exceed fifty percent.

To sum up, it has been held that the selection of eligible candidates for admission to medical courses can be made by classifying such candidates category-wise keeping in view the services from which they are drawn. Further, the *Balaji* case says that the state is authorised to use caste as an index of social and educational backwardness for making preferences, but this is subject to the proviso that caste, cannot be the sole or dominant test, although it can be used in conjunction with other relevant considerations like poverty, occupation, place of habitation etc.

It is noteworthy that under Article 16(4) reservation in government service can be made not only at the initial stage of recruitment, but even in the matter of promotion from a lower to a higher post or cadre.⁴⁰ Thus selection posts can also be reserved for backward classes. The expression adequately represented in Article 16(4) implies considerations of size as well as values. The court has stated that the adequate representation of backward classes in any service has to be judged by reference to numerical as well as qualitative tests.⁴¹

Looking at Article 16(4) in particular it would seem that it neither confers a right on any one nor imposes a constitutional duty on the government to make a reservation for any one in public services. It is merely an enabling provision and confers a

⁴⁰ *General Manager S Rly. v Rangachari* (1962) AIR 36 (SC).

⁴¹ *Ibid.*

discretionary power on the state to reserve appointments in favour of certain classes of citizens.⁴² An important point about Article 16(4) is that, this provision permits state to classify individuals for favoured treatment.

Further, when the courts have looked at Article 16(4) they have stated that the state is not confined only to the method of reservations for encouraging the backward groups in the area of public employment; it is free to choose any means to achieve equality of opportunity for these backward classes. This Article has however been interpreted to mean that reservation is a constitutional right of the backward classes. This also meant that the quantum of reservations need not necessarily be within the fifty percent limits.⁴³

Moreover, the more important decision relating to equality in the Indian context is to be found in the decision of *Indra Sawhney*.⁴⁴ In this case the SC has dealt with the effect of Article 15(4) and 16(4). It has been held that the “equality” proposed under the IC is not merely a form of legal equality but real equality as well. Article 16(4) was held to be an explanation of Article 16(1). Justice Sawant in this decision has rationalised that equality of opportunity has to be distinguished from equality of results. Various provisions of the IC show that the right to equality is not a formal right or a vacuous declaration. It is a positive right and the state is under an obligation to undertake measures to make it real or effectual. A qualification has however been noted by Justice Sahai, who had emphasised that “reservations, being negative in content to the right of equality guaranteed to every citizen by Article 16(1), has to be tested against the positive right of a citizen and is a direct restriction on state power”. Thus, judicial review instead of being ruled out or restricted is important in maintaining a balance.

The court has been found to have a constitutional obligation to examine if the foundation of the State’s action was within the constitutional paradigm. They have this obligation under Article 16(4), to see if the government “had discharged its duty

⁴² *M R Balaji v State of Mysore* (1963) AIR 649 (SC).

⁴³ *State of Kerala v N M Thomas* (1976) 2 SCC 310.

⁴⁴ *Indra Sawhney v Union of India* (1993) AIR 477 (SC).

of a responsible government by constitutional method so as to put it beyond any scrutiny by the eye and ear of the Constitution”⁴⁵

In the *Devadasen* case, the court held that reservations of more than fifty percent of vacancies *per se* were held to be destructive of the rule of equality of opportunity. The object of the provision under Article 16(4) was to ensure that the backwardness of the backward classes did not unduly handicap their members from securing public employment under the state and when the reservation was so excessive in character as to deny a reasonable opportunity to other classes, it was defeating the ends of the constitution. However this ruling was overturned in the *Thomas* decision and now Article 16(4) must be read to say that such fifty percent can not be the outer limit of the reservations. This view of Article 16(4) has been endorsed in the later case of *Indra Sawhney*.⁴⁶

(11.2.1) Reservations in Admissions

In *A Peeriakaruppan v State of Tamil Nadu and Others*⁴⁷ unit-wise distribution of seats said to have been adopted for administrative convenience was struck down as it obstructed achieving the intended object which was to select the best candidates for being admitted to medical colleges.

In *State of U P v Pradip Tandon*⁴⁸ the SC held that a reservation in favour of candidates from rural areas is unconstitutional. It stated that the Constitution does not enable the State to bring socially and educationally backward areas within the protection of Article 15(4). The backwardness contemplated in that Article is both social and educational. Article 15(4) speaks of backwardness and classes of citizens and therefore socially and educationally backward classes of citizens in Article 15(4) cannot be equated with castes.

⁴⁵ *Ibid* at 485.

⁴⁶ *Ibid* at 477.

⁴⁷ *A Peeriakaruppan v State of Tamil Nadu and Others* (1971) 1 SCC 38.

⁴⁸ *State of U P v Pradip Tandon* (1975) AIR 563 (SC).

In *Kumari Chitra Ghosh and Another v Union of India and Others*⁴⁹ the test laid down for determining the validity of sources of admission are that the sources are properly classified whether on territorial, geographical or other reasonable basis. Further, it must have a rational connection to the object. The object in this case was to impart a particular education and effective selection for the purpose. In laying down the sources of admissions the court stated that there can be no question of any preferential treatment being accorded to any particular category or class of persons desirous of receiving medical education over the other.

In *Pradeep Jain (Dr) v Union of India*⁵⁰ a 3-Judges Bench of this Court had an occasion to examine the validity of reservation based on the residence requirement within the State or on institutional preference. Bhagwati, J during the course of the judgment held that —

“..... so far as admissions to post-graduate courses, such as M.S., M.D. and the like are concerned, it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference. But, having regard to broader considerations of equality of opportunity and Institutional continuity in education which has its own importance and value, we would direct that though residence requirement within the State shall not be a ground for reservation in admissions to post-graduate courses, a certain percentage of seats may in the present circumstance be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the post-graduate course in the same medical college or university but such reservation on the basis of institutional preference should not in any event exceed fifty percent of the total number of open seats available for admission to the post-graduate course. This outer limit which we are fixing will also be subject to revision on the lower side by the Indian Medical Council in the same manner as directed by us in the case of admissions to the MBBS course. But, even in regard to admissions to the post-graduate course, we would direct that so far as super-specialities such as neuro-surgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admission should be granted purely on merit on all India basis.”⁵¹

⁴⁹ *Kumari Chitra Ghosh and another v Union of India and Others* (1969) 2 SCC 228.

⁵⁰ *Pradeep Jain (Dr) v Union of India* (1984) 3 SCC 654.

⁵¹ *Ibid* at 659.

The court went on to say that reservation is guided by the consideration of ensuring the allotment of a privilege or quota to a defined class or category of limited persons, dispensing with the need for competition with another defined class of persons or remaining persons.

With regard to reservation in admissions the various court decisions agree that one must adopt a cautious approach to reservations in admissions. This is because reservations should be kept in check by the demands of competence. One cannot extend the shelter of reservation where minimum qualifications are absent. Similarly, all the best talent cannot be completely excluded by wholesale reservation. The court stated that —

“A fair preference, a reasonable reservation, a just adjustment of the prior needs and real potentials of the weak and the partial recognition of the presence of competitive merit, such is the dynamic of social justice which animates the three egalitarian articles of the Constitution.”⁵²

(11.2.2) Reservation and the Merit Principle

In a similar vein, in *Jagdish Saran v Union of India*⁵³ the Court observed that merit must be the test when choosing the best candidate and is accordance with the rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels of education for postgraduate courses. In the case of Article 15(4) reservations, this Court has made it clear that the claims of national interest demand that these reservations can never exceed fifty percent of the available seats in the concerned educational institutions.

This view was approved by the court in *Indra Sawhney & Others v Union of India & Others*,⁵⁴ where a Bench of nine Judges considered the nature, amplitude and scope of the constitutional provisions relating to reservations in the services of the State. Judge Reddy, speaking for the majority, stated that the very idea of reservation implies the selection of a less commendable person —

⁵² *Ibid* at 660.

⁵³ *Jagdish Saran v Union of India* (1980) AIR 820 (SC).

⁵⁴ *Indra Sawhney & Others v Union of India & Others* (1992) Supp. (3) SCC 217; (1993) 1 SCT 448 (SC).

“.....at the same time, we recognise that this much cost has to be paid if the constitutional promise of social justice is to be redeemed. We also formally believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with — and may in some cases excel — members on open competition.”⁵⁵

Having said this, the Court went on to add that —

“.....We are of the opinion that there are certain services and positions where either on account of nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained herein above alone counts. In such situations it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/ departments/institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical science and mathematics, in defence services and in the establishments connected therewith.....”⁵⁶

In *Municipal Corporation of Greater Bombay and Others v Thukral Anjali*⁵⁷ the impugned rule provided for a college-wise institutional preference for admission in the MD courses. This court agreed with the High Court which had struck down the rule and observed that unless there are strong reasons for exclusion of meritorious candidates, any preference other than in order of merit will not stand the test of Article 14 of the Constitution of India.

In *P K Goel and others v U P Medical Council and Others*⁵⁸ a combined entrance examination for admission for post-graduate medical courses for all the seven medical colleges was held by the University of Lucknow. A merit list was prepared based thereon. However, the University reserved seventy-five percent of the total seats available for post-graduate degree or diploma courses in an institution, after excluding twenty-five percent seats to be filled by the open all-India Entrance Examination, for

⁵⁵ *Ibid* (1992) Supp. (3) SCC 217 at para 836.

⁵⁶ *Ibid* at para 838.

⁵⁷ *Municipal Corporation of Greater Bombay and others v Thukral Anjali* (1989) 2 SCC 249.

⁵⁸ *P K Goel and Others v U P Medical Council and Others* (1992) 3 SCC 232; (1992) 3 SCT 135 (SC).

the Institutional candidates. The term “institutional candidate” was defined as a student who had obtained an MBBS or MDS degree of that University or Institution. This court refused to uphold the rule as it resulted in sacrificing merit and depriving meritorious candidates of getting a speciality of their choice.

In *S Vinood Kumar & Another v Union of India & Others*,⁵⁹ this Court while considering Articles 16(4) and 335 held that for the purpose of promotion lower qualifying marks for the reserved category candidates were not permissible. *Sadhna Devi (Dr) v State of U P*⁶⁰ had rightly prescribed minimum qualifying marks for the common entrance examination for post-graduate medical courses. The Court left open the question of whether there could be any reservation at the post-graduate level and to what extent lesser qualifying marks could be prescribed, assuming the reservations can be made. These are matters essentially of laying down appropriate standards and hence to be decided by the Medical Council of India. However, the disparity in the minimum qualifying marks cannot be substantial.⁶¹

The case of *Preeti Srivastava (Dr) v State of M P*⁶² is a landmark decision of recent times delivered by the Constitution Bench. The principles laid down by the Constitutional Bench and so far as relevant for the purpose of this thesis are briefly stated hereunder —

- (i) At the stage of post-graduate education in medical specialities, the element of public interest in having the most meritorious students at this level of education demands the selection of students of the right caliber. This supervening public interest outweighs the social equity for providing some opportunities to the backward classes that are not able to qualify on the basis of marks obtained by them for post-graduate learning.

⁵⁹ *S Vinood Kumar & Another v Union of India & Others* (1996) 6 SCC 580.

⁶⁰ *Sadhna Devi (Dr) & Others v State of U P & Others* (1997) 3 SCC 90; (1997) 2 SCT 95 (SC).

⁶¹ Also see the case of *State of M P v Nivedita Jain* (1981) 4 SCC 296.

⁶² *Preeti Srivastava (Dr) and Another v State of M P and Others* (1999) 7 SCC 120; (1999) 4 SCT 133 (SC).

- (ii) However, the extent of reservations and the extent of lowering the qualifying marks, consistent with the broader public interest in having the most competent people for specialised training, should be left to be determined by a body of experts (such as the Medical Council of India), whether reservation or lower qualifying marks, at such level have to be minimised. At the same time there cannot be a wide disparity between the minimum qualifying marks for reserved category candidates and the minimum qualifying marks for general category candidates.
- (iii) At the level of super-specialisation there cannot be any reservation because any dilution of merit at this level would adversely affect the national goal of having the best people at the highest levels of professional and educational stream.

It is thus clear that as far back as 1984 the Indian courts have disapproved reservations in post-graduate admissions even though such preferences had taken into account broader considerations of equality of opportunity and institutional continuity in education.⁶³ The preference has to be prescribed without making an excessive or substantial departure from the rule of merit and equality. It has to be kept within limits. The court held that minimum standards cannot be so diluted as to become practically non-existent. Such marginal institutional preference is tolerable at post-graduation level but is rendered intolerable at still higher levels.⁶⁴

(11.2.2.1) The Constitutionality of Concessions for the Backward Classes

The *N M Thomas*⁶⁵ case involved the validity of a scheme showing favour to the SC's and ST's employees by exempting them from the necessity of passing the departmental test for promotion in services. It was brought to the notice of the Government of Kerala that a large number of government servants belonging to the SC's and ST's were unable to get promotions from lower division clerks in the registration department.

⁶³ *Ibid.*

⁶⁴ *D N Chanchala v The State of Mysore and Others* (1971) 2 SCC 293.

⁶⁵ *State of Kerala v N M Thomas* (1976) 2 SCC 310.

In order to give relief to the backward classes of citizens, the government incorporated rule 13AA under the Kerala State and subordinate services Rules 1958, enabling the government to grant exceptions to the SC's and ST's employees for a period of two years from passing the necessary tests. As a result of this rule, thirty four out of fifty one posts were filled up by members of SC's and ST's without passing the test. NM Thomas, a lower division clerk, was not promoted despite his passing the test. He questioned the rule 13AA as violative of Article 16(1) and that it was not saved by Article 16(4).

Justice Krishna Iyer observed that —

“To my mind, this sub Article i.e., Article 16(4) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to True, it may be loosely said that Article 16(4) is an exception but closely examined, it is an illustration of constitutionally sanctified classification. Article 16(4) need not be a savings clause but put in due to the over anxiety of the draftsmen to make matters clear beyond possibility of doubt.”⁶⁶

The Kerala High Court declared the impugned rule invalid under Article 16(1). The impugned scheme resulting in promotion of over sixty percent of the employees permits reasonable classification just as Article 14 does and as such the state could adopt any method under the former Article to ensure adequate representation of the SC's and ST's in public services. The majority further held that equality of opportunity in matters of employment demanded favoured treatment to enable the weakest elements to compete with the advanced.

In the case of *Sadhana Devi (Dr) and Another v State of UP*⁶⁷ the State of Uttar Pradesh had framed rules governing admission to Government Medical Colleges in the State. As far as post-graduate Medical Courses are concerned, the rules prescribe

⁶⁶ In fact Justice Krishna Iyer quoted Justice Subba Rao's dissenting judgment from *Devadasan v Union of India* (1964) 4 SCR 680, without mentioning the fact that this was a dissenting judgment.

⁶⁷ *Sadhana Devi (Dr) and Another v State of U P* (1997) 3 SCC 90.

that only a candidate obtaining at least fifty percent of the marks in the entrance test⁶⁸ shall be eligible for applying for admission to post-graduate medical courses. However, in the case of SC's and ST's the requirement of eligibility was placed at a lesser level, i.e., at thirty-five percent. The situation was that even after prescribing such lower levels of eligibility, a sufficient number of SC's and ST's candidates were not available to fill the seats reserved for them. To meet the situation, the Government amended the rule removing the minimum eligibility criteria altogether in the case of SC's and ST's.

The result of this amendment was that SC's and ST's candidates who have obtained five percent or even one percent of marks in the entrance test, was eligible for applying for admission to post-graduate Medical courses. The aforesaid amendment (removing the floor marks altogether) was questioned before the SC by certain affected students. The SC struck down the said amendment as an impermissible and irrational exercise of power. It was pointed out that if a student who had studied for five to six years in the MBBS is not able to obtain at least forty percent of the marks in the entrance test, he should not be given admission to post-graduate Medical courses, which calls for a high level of efficiency, and where the competition is acute. In such a case open competition students obtaining as much as eighty to eighty-five percent in the entrance test are not able to get admission into these courses.

(11.2.3) Reservation and the Seniority System

The case of *Union of India v Virpal Singh Chauhan*⁶⁹ raises the question of claiming seniority in higher grade by the reserved candidates who obtained promotion by reservation. It was held by the court that it is open to the state to provide that the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular category. The candidate promoted by virtue of the rule of reservation shall not be entitled to seniority over his seniors in the feeder category and that as and when a general candidate in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding the

⁶⁸ The common entrance test held for determining merit for the purposes of admission to such courses.

⁶⁹ *Union of India v Virpal Singh Chauhan* (1996) AIR 448 (SC).

fact that he is promoted subsequent to the reserved candidate. The court held that there is no unconstitutionality involved in such a provision.

The *Ajit Singh Januja v State of Punjab*⁷⁰ case arises out of the question on whether or not a person belonging to a scheduled caste or backward caste can claim seniority in promotion in a general category in the higher grade when he reached the higher grade by virtue of reservation in the lower grade (the roster system).

The court held that the members of the scheduled caste or backward caste class who have been appointed or promoted on the basis of reservation and a system of roster cannot claim promotion against general category posts in the higher grade, on the basis of their seniority being achieved in the lower grade because of accelerated promotion. Further, the equality principle requires exclusion of the factor of extra weight-age of earlier promotion to a reserved category candidate because of reservation alone when he competes for further promotion to a general category with a general category candidate, senior to him in the panel.

The court went on to add that an Article 16(4) reservation gives accelerated promotion but not accelerated consequential seniority. The policy of reservation cannot be implemented in a manner to block the merit channel and care must be taken that the efficiency of the administration is not harmed and that there is no reverse discrimination.

In *Union of India v Rangachary*,⁷¹ the SC had ruled by a majority of 3:2, that Article 16(4) permits reservations in the matter of promotions as well as in addition to reservations at the stage of initial appointment. The correctness of the said holding was challenged in *Indra Sawhney*. Eight out of nine judges held that Article 16(4) read with Article 335 does not permit reservations in the matter of promotions and that the reservations can be provided only at the stage of initial appointment or recruitment.

⁷⁰ *Ajit Singh Januja v State of Punjab* (1996) AIR 1189 (SC).

⁷¹ *Union of India v Rangachary* (1992) AIR 36 (SC).

The remaining Judge did not hold to the contrary; he merely declined to express his opinion on the question. Several reasons were given in the various opinions delivered in the *Indra Sawhney* case, for holding that the reservation in promotions is not permissible under Article 16(4).⁷² The correctness of said reasoning was justified by the facts of a case which came up for hearing before the SC in 1995 though the facts of that case pertain to a period long anterior to the decision in *Indra Sawhney*.

The service conditions in the Indian Railways provided for reservation in favor of SC's and ST's at every stage of promotion. Since the number of employees belonging to SC's and ST's in the higher positions are less than the quota prescribed for them, they obtain quicker promotions. It so happened that all the thirty-three candidates within the range of consideration were scheduled caste candidates though the vacancies were not reserved for them. Since SC's candidates are also entitled to compete for and occupy open competition vacancies (while the converse is not true) they were considered and appointed to those eleven vacancies. While dealing with the facts of the case, the SC pointed out the undesirable consequences arising from the application of the rule of reservation in promotions and its adverse effect upon the efficiency of administration.

It should be noted here that the Parliament has amended Article 16 by introducing Clause (4-A) providing specifically that it shall be permissible for the state to make any provision for reservation in the matter of promotion to any class or classes of posts to the services under the State in favor of SC's and ST's. However, the amendment does not extend to OBC's.

(11.2.4) Extent of Reservation — An Individual's Right to Equality vs Group's Right to Equality

The question of the extent of reservation is closely linked to the issue of whether Article 16(4) is an exception to Article 16(1) or is Article 16(4) an application of Article 16(1). If Article 16(4) is an exception to Article 16(1) then it needs to be given a limited application so as not to overshadow the general rule in Article 16(1). However, if the former is taken as an application of the latter, any amount of

⁷² As discussed above.

reservation could be permissible since it would be furthering the general rule in Article 16(1).

A word of caution against excess reservation was first pointed out in *G M Southern Rly v Rangachari*⁷³ where Gajendragadkar, J giving the majority judgment said that reservation under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. A reasonable balance must be struck between the claims of backward classes and claims of other employees as well as the requirement of efficiency of administration.

However, the *Rangachari* case did not directly concern the question of the extent of reservation. It was the *M R Balaji v State of Mysore* case that dealt with this question with direct reference to Article 15(4). In this case a sixty percent reservation under Article 15(4) was struck down as excessive and unconstitutional. Gajendragadkar, J observed that special provision should be less than fifty percent, but how much less than fifty percent would depend on the relevant prevailing circumstances of each case. Thus, the SC affirmed the rule of fifty percent reservation as laid down in *Balaji v State of Mysore*.⁷⁴

Until the *Thomas*⁷⁵ decision the SC decisions on Article 15(4) had held that generally speaking, this Article was an exception and that reservations should be less than fifty percent. In *Devadasan's* case, the majority held that reservations should be less than fifty percent⁷⁶ However in the *Thomas* decision this long held position was reversed and Articles 15(4) and 16(4) were held to be not an exception but an illustration of Articles 15(1) and 16(1). The effect of which was that since Article 15(4) is just an illustration of Article 15(1), Article 15(4) would not be controlled by Article 15(1) and as such the quantum of reservations could go beyond fifty percent.

⁷³ *G M Southern Rly v Rangachari* (1962) AIR 36 (SC).

⁷⁴ *Balaji v State of Mysore* (1963) AIR 649 (SC).

⁷⁵ *State of Kerala v N M Thomas* (1976) AIR 490 (SC).

⁷⁶ *Devadasan v Union of India* (1964) 4 SCR 680.

This theory has been criticised on a number of counts. Seervai argues that this theory leads to absurd results.⁷⁷ He argues that if one looks at Articles 15(1) and 15(4), these are parts of Article 15 which appears under the group heading of the “right to equality”. He further argues that a plain reading of sub-Articles 15(1) and 15(2) show that they confer fundamental rights. That is, Article 15(1) confers a fundamental right on every citizen by commanding the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. If any action of the state violates a citizen’s fundamental right under Article 15(1), then Article 13 declares such action to be void, and Articles 32 and 226 give him a speedy and effective remedy against the state for the protection of his fundamental rights.

Further, Articles 15(1) and (2) confer legally enforceable fundamental rights. However, if one had to look at Article 15(4), it confers no right much less a fundamental right, on any socially and educationally backward class of citizens or on the SC’s and ST’s, but merely confers a discretionary power on the state to make any special provision for the advancement of the aforesaid classes.⁷⁸ Seervai argues that herein lies the absurdity. He argued that “it would evidently be an absurdity if the part which confers merely a discretionary power is given primacy over the part which confers a fundamental right enforceable directly in the highest court of the land”.⁷⁹

However, in *State of Kerala v N M Thomas*⁸⁰ Krishna Iyer, J expressed his concurrence to the views of Fazal Ali, J who said that although reservation cannot be so excessive as to destroy the principle of equality of opportunity under clause (1) of Article 16, yet it should be noted that the Constitution itself does not put any bar on the power of the Government under Article 16(4). The court stated that if a State has eighty percent population which is backward then it would be meaningless to say that reservation should not cross fifty percent. However, in *Indra Sawhney v Union of*

⁷⁷ Seervai H M Constitutional Law of India (1993) (Seervai).

⁷⁸ Seervai *op cit* 77 at 557.

⁷⁹ Singh Armpal Affirmative Action Programme — A Comparative Study of India and USA (2002-2003) (Singh).

⁸⁰ *State of Kerala v N M Thomas* (1976) 2 SCC 310.

India the majority held that the rule of fifty percent laid down in the *Balaji* case was a binding rule and not a mere rule of prudence.

Giving the judgment of the court Reddy, J⁸¹ stated that Article 16(4) speaks of adequate representation not proportionate representation although the proportion of population of the backward classes to the total population would be relevant.⁸² He further pointed out that Article 16(4) which protects the interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are a restatements of the principle of equality under Article 14.⁸³

The proposed reservation of ten percent of the posts in favor of economically poorer sections who do not fall under any other category of reservation (as provided in the notification) was held to unconstitutional. The Court held that the reservation of ten percent of the vacancies among the open competition candidates on the basis of income or property means the exclusion of others above that ceiling from the ten percent seats. This bar is not permissible and it would mean debarring the person solely on the basis of his income or property. Therefore, it is unconstitutional.

Looking at the above analysis then, fifty percent of reservation is extremely high and it is submitted that as this is the constitutional limit then reservations in India should not exceed fifty percent as it would be unconstitutional. It has been argued that a sub Article which confers no right but a discretionary power cannot be described as occupying a major position over an enforceable fundamental right, and therefore reservations cannot exceed fifty percent.

⁸¹ Speaking on behalf of Kania CJ and Venkatachaliah and Ahmadi JJ.

⁸² *Indra Sawhney and Others v Union of India and Others* (1992) Supp 3 SCC 217 at 734.

⁸³ *Ibid* at 735.

(11.2.5) The Rules of Reservation

In the case of *R K Sabarwal v State of Punjab*⁸⁴ the rules made by the State and Central Governments providing for reservation in favour of backward classes in the matter of appointment and promotion in State services provide very often for a cycle of vacancies. In a cycle of twenty-five or one hundred, as the case may be, certain places are earmarked for one or the other backward class. For example, candidates selected against the quota reserved for SC's are accommodated against the vacancies earmarked for SC's in the cycle. This is done with a view to ensure that the candidates selected under the reserved quota are not placed at the bottom of the seniority list.

A question arose in the *Sabarwal* case of whether the rule of reservation should be applied even after the quota fixed for a particular class of backward classes of citizens is fulfilled in that unit.⁸⁵ The question is whether the rule of reservation is to be followed even after reaching such a stage. The SC said that the rule of reservation need not be followed any further once such a stage is reached. Such a culmination means that the rule of reservation has served its purpose. It was, however, clarified that after reaching such a stage, any vacancy arising in the cycle of vacancies should be filled by a member of the concerned category. In other words, if a vacancy arises in a place earmarked for SC's, a scheduled caste candidate should be appointed.

Similarly, if a vacancy arises in a place meant for an open competition (general) candidate, a candidate from the open competition category should be appointed to that vacancy. It was further clarified, affirming the principle enunciated in *Indra Sawhney*, that members of backward classes who are selected in the open competition category (on the basis of their merit) ought not to be counted against the reserved category. They should be treated as open competition candidates for all purposes.

⁸⁴ *R K Sabarwal v State of Punjab* (1995) 2 SCC 745.

⁸⁵ In other words, take for example, in a given State the reservation in favour of the SC's is fifteen percent and there are 100 vacancies in a given unit. A stage arises when the number of candidates selected under the Rule of Reservation in favour of SC's reaches fifteen.

In the *Awai Chamber Sigh v State of Bihar*⁸⁶ decision the State of Bihar had established and maintained certain medical colleges in the State. The basic course in medicine in India is MBBS. After a student completes this course, he is entitled to pursue post-graduate medical courses, known as MS or MD. The seats for post graduate medical courses are very few and competition is strong amongst candidates. The State of Bihar provided for reservation of seats in post-graduate medical courses in favour of backward classes to the extent of fifty percent. This was contrary to the recommendation of the Medical Council of India, which is established under a Parliamentary statute (the “Medical Council Act”).

The recommendation of the Medical Council was that as far as post graduate medical courses are concerned, the rule of reservation should not be applied and that all admissions thereto should be made only on the basis of merit and merit alone. The rule of reservation made by the State of Bihar was challenged by certain students.

The Court, however, rejected their contention and upheld the rule of reservation with reference to the question of power. The Court held that the State of Bihar, which has established and maintains medical colleges in the State, is entitled to determine the mode of admission to the courses imparted therein, and that so long as such rules are not arbitrary and discriminatory, the court cannot interfere.

The reasoning of the petitioners challenging the rule was that a student who had already obtained admission to MBBS under the rule of reservation and has studied for five to six years should have improved his efficiency to the general level and cannot legitimately claim yet another concession in the matter of admission to Post-graduate Medical courses. Such reservation, it was urged, is not in the public interest besides being opposed to the recommendation of the Medical Council. The Court, however, did not deal with this argument but sustained the rule of reservation on the basis that the State of Bihar does have the power to determine the mode of admission and that such a rule is not prohibited by Clause (4) of Article 15 nor can it be termed as an arbitrary or discriminatory exercise of power.

⁸⁶ *Awai Chamber Sigh v State of Bihar* (1994) 4 SCC 401.

In the case of *Anil Kumr Gupta v State of U P*⁸⁷ the court stated that reservations in India are of two kinds, namely, social reservations and other reservations. Social reservations are reservations in favour of backward classes of citizens within the meaning of Clause (4) of Article 16 and Clause (4) of Article 15.⁸⁸ It was explained in *Indra Sawhney*⁸⁹ that these two types of reservations are not in addition to one another but that they cut across each other. To clarify this idea, the decision called the social reservations “vertical reservations” and the other reservations “horizontal reservations”.

It was directed that a candidate selected under any of the horizontal reservations, for example, under the quota reserved for children of Armed personnel, should be accommodated in the appropriate social category by making the necessary adjustment. It was pointed out that every candidate selected under any of the horizontal reservation categories would necessarily belong to one or the other of the social reservation categories (including open competition).

It was, therefore, directed that if a son of a member of Armed forces is selected under the quota reserved for them and if that person belongs to a SC’s category, he was to be placed in that category by removing, if necessary, the SC’s candidate at the bottom of the SC’s reservation list. In spite of this clear judgment, the Government purported to treat the other reservations also as reservations similar to social reservations, with the result, that a total of sixty-five percent of the seats came to be reserved. Applying the rule in *Indra Sawhney*,⁹⁰ the SC pointed out that the rule must be operated in the manner pointed out in the said decision.

⁸⁷ *Anil Kumr Gupta v State of U P* (1995) 5 SCC 173.

⁸⁸ The other reservations (other than social reservations) are reservations in favor of women, physically handicapped persons, children of armed personnel or ex-armed personnel, in favor of persons who excel in sports and so on.

⁸⁹ *Indra Sawhney and others v Union of India and Others* (1993) AIR 477 (SC).

⁹⁰ *Ibid.*

(11.2.5.1) The Rules of Reservation and Reservation on the Basis of Merit

In the *Balaji* case,⁹¹ it was held that the total number of seats reserved under Clause (4) of Article 15 or under Clause (4) of Article 16 should not exceed fifty percent. However, in a subsequent decision some of the judges observed that the rule of fifty percent is not a hard and fast rule.⁹² Taking advantage of these observations, certain State Governments, in particular, the State Governments of Tamil Nadu and Kerala, increased the reservation to as much as sixty-nine percent, or even beyond on certain occasions. To take the illustration of the State of Tamil Nadu, it reserved fifty percent of the seats in favour of OBC's, eighteen percent in favour of SC's and one percent in favour of ST's, thus making a total of sixty-nine percent.⁹³

However, in the *Indra Sawhney* decision,⁹⁴ the SC reaffirmed the rule of fifty percent and directed that this ceiling should not be exceeded except in certain specified situations. With a view to get over the judgment in *Indra Sawhney*, the legislature of the State of Tamil Nadu enacted a law specifically providing for sixty-nine percent reservation in favor of OBC's, SC's and ST's, both in the matter of appointment to services under the State as well as in the matter of admission to educational institutions. The Government of Tamil Nadu also persuaded the Parliament to include the said enactment in the IX Schedule to the Constitution by amending the Constitution.⁹⁵

It has, however, been held by the SC in *Keshavananda Bharathi v State of Kerala*,⁹⁶ that any constitutional amendment effected thereafter would yet be liable to challenge if it impinges upon the basic features of the Constitution. The question, arose whether the said Act should be given effect to with reference to admissions to medical and engineering courses. It was found that of the thirty-one percent of seats reserved for

⁹¹ *M R Balaji v State of Mysore* (1963) AIR 649 (SC).

⁹² *Thomas v State of Kerala* (1976) AIR 490 (SC).

⁹³ *Voice (Consumer Care) Council v State of Tamil Nadu* (1996) 11 SCC 740.

⁹⁴ *Indra Sawhney and Others v Union of India and Others* (1993) AIR 477 (SC).

⁹⁵ It may be noted that Article 31-B protects the enactments included in the IX Schedule from any challenged based on any of the fundamental rights conferred by Part-III of the Constitution.

⁹⁶ *Keshavananda Bharathi v State of Kerala* (1973) AIR 1461 (SC).

other candidates, as much as twenty-five percent of the seats were being taken away by students belonging to OBC's on the basis of their merit. In other words, the OBC's were obtaining fifty percent of the seats by virtue of the rule of reservation and another twenty-five percent of the seats on the basis of their merit. Nineteen percent of the seats were taken away by SC's and ST's students, with the result that only six percent seats were left for being occupied by all the rest non-reserved-category students.

It was found that this was a recurring situation over a period of two or more years. Such a situation was brought about because a few of the castes which were designated as backward classes in the State of Tamil Nadu many years ago (even prior to the commencement of the Constitution) have advanced socially and educationally to such an extent that they are excelling over the other so-called forward class students. In such a situation, the State is under an obligation⁹⁷ to ascertain which castes or classes have so advanced and remove them from the list of backward classes. However, no State Government actually does this, on account of political and electoral compulsions.⁹⁸

The significance of the directions given in *Indra Sawhney* is to be appreciated keeping in mind the manner in which the several State governments were including some or the other castes in the list of OBC's at the time of each general election.⁹⁹

(11.2.6) Reservations for Persons Falling Outside the Backward Classes

The case of *Valasamma Paul v Cochin University*¹⁰⁰ dealt with the issue of reservations for persons falling outside the backward classes group. The court was faced with the situation of deciding if a person who is born into a forward class but subsequently transplanted into backward class by marriage, adoption or any other

⁹⁷ According to the often repeated principle enunciated by the SC.

⁹⁸ The above result may also be on account of inclusion of certain powerful and electorally significant castes, which are not really backward, among the OBC's. For example, in the State of Karnataka, *Vokkaligas* and *Lingayats* are two powerful and socio-economically dominant castes. Yet they have been included in the list of OBC's.

⁹⁹ *Union of India v Veerpal Singh Chawhan* (1995) 6 SCC 68.

¹⁰⁰ *Valasamma Paul v Cochin University* (1996) AIR 1011 (SC).

voluntary act, whether that person is entitled to claim reservation under Articles 15(4) or 16(4).

The court held that they cannot as it was the SC's and ST's who had suffered social and economic disabilities historically and not him. Therefore it was the SC's and ST's who were entitled to reservations. A candidate who had an advantageous start in life, being born into a forward class but is transplanted into backward class by marriage or adoption does not become eligible to the benefit of reservation. The court stated that the acquisition of the status of scheduled caste by voluntary mobility into these classes would play fraud on the Constitution and frustrate the constitutional policy.

11.3 Equality in Matters of Employment or Appointment under Article 16

Clause (1) of Article 16 lays down a general rule that there shall be equal opportunity for citizens in matters relating to employment or appointment to any office under the State. What is guaranteed is equality of opportunity.¹⁰¹ Clause (2) of Article 16 lays down the specific grounds on the basis of which the citizens are not to be discriminated against. In the case of *B Venkataramana v State of Madras*¹⁰² the reservation of posts in favour of Hindus, Muslims and Christians was held to be violative of Article 16(2). There are however, three exceptions laid down in Clauses (3) to (5) of Article 16 to the general rule laid down in Clauses (1) and (2) explained above.

Under Clause (3), Parliament is competent to regulate the extent to which it would be permissible for a State to depart from the above principle of equality of opportunity in matters of employment. In the exercise of this power conferred by Article 16(3) Parliament had passed the Public Employment Act¹⁰³ and certain states were allowed to depart from the rule of equal opportunity. A period of five years was given, at the first instance and then it was extended for ten years, which period has since expired.

¹⁰¹ *General Manager v Ranga Chari* (1962) AIR 36 (SC).

¹⁰² *B Venkataramana v State of Madras* (1951) AIR 229 (SC).

¹⁰³ Public Employment (Requirement as to Residence) Act of 1957.

Article 16(4) expressly permits the State to make provision for the reservation of appointments or posts in favour of any backward classes of citizens which, in its opinion, are not adequately represented in the services under the State. The power conferred on the State can be exercised only in favour of backward classes. Therefore, in order to apply Article 16(4) two conditions must be satisfied. Firstly, there must be a class of citizens which is backward both socially and educationally. Secondly, the backward classes must not be adequately represented in the services of the State.

While ascertaining whether or not a particular class is a backward class or not, the principles laid down in *MR Balaji v State of Mysore*¹⁰⁴ will apply. In *Triloki Nath Tiku v State of Jammu and Kashmir*¹⁰⁵ the SC observed that the expression “backward class” is not synonymous with “backward caste” or “backward community”.

In *T Devadasan v Union of India*,¹⁰⁶ the Government of India reserved certain posts for SC’s and ST’s. The instructions of a resolution mandating these reservations provided for the carrying forward of vacancies for one year. The rule was amended and it provided that seventeen and a half percent of the total vacancies in a year would be reserved for being filled from amongst candidates belonging to the SC’s and ST’s. If in any year suitable candidates were not available from those classes, the reserved seats could then be filled by candidates from the other classes. A corresponding number was then carried forward to the next year. On the basis of reservation permitted by the carry forward rule, out of forty-five vacancies actually filled in 1961, twenty-nine went to the members of the SC’s and ST’s. That amounted to about sixty-four percent of reservations.

The question before the court was whether or not the carry forward rule was unconstitutional or not. The SC held that the rule was bad and must be struck down. The purpose of Article 16(4) was to ensure that the members of the SC’s and ST’s should not be unduly handicapped in the matter of employment under the State. That provision contemplated the reservation of appointment to such posts in favour of

¹⁰⁴ *M R Balaji v State of Mysore* (1963) AIR 649 (SC).

¹⁰⁵ *Triloki Nath Tiku v State of Jammu and Kashmir* (1969) AIR 1 (SC).

¹⁰⁶ *T Devadasan v Union of India* (1964) AIR 179 (SC).

those backward classes which were not adequately represented in the services under the State. The state is required to provide the members of the backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointment to public services. If the reservation was so excessive that it practically denied a reasonable opportunity for employment to members of other communities, it was open for a member from a more advanced class to complain that he had been denied equality by the State.¹⁰⁷

The guarantee contained in Article 16(1) was for ensuring equality of opportunity for all citizens relating to employment and to appointments to any office under the State. That means that on every occasion for recruitment, the State should see that all citizens are treated equally. The court stated that —

“Article 16(4) is an exception to Article 16(1). An exception cannot be so interpreted as to nullify or destroy the main provision. The court held that to hold that unlimited reservation of appointments can be made under Article 16(4) will, in fact, erase the guarantee contained in Article 16(1) or at best make it illusory.”¹⁰⁸

In *State of Punjab v Hiralal*,¹⁰⁹ the SC held that the Constitution-makers thought it fit — in the interest of the society as a whole — that the backward class of citizens of this country should be afforded certain protection. The court stated that “unaided, many sections in this country cannot compete with the advanced sections of the nation. The interests of the nation will be best served by taking a long-range view and the backward classes are helped to march forward and take their place in line with the advanced sections of the people. The reservation of appointments under Article 16(4) cannot be struck down on hypothetical grounds. To attack a reservation under Article 16(4) the person must first satisfactorily establish that there has been a violation of Article 16(1).”

In *Akhil Bhartiya Soshit Karamchhari (Railway) v Union of India*,¹¹⁰ it was held by the court that the reservation of posts and all other measures designed to promote the

¹⁰⁷ *State of Kerala v N M Thomas* (1976) AIR 490 (SC) at 505.

¹⁰⁸ *Chakradhar Paswan (Dr) v State of Bihar and Others* (1988) 2 SCC 214 at 223.

¹⁰⁹ *State of Punjab v Hiralal* (1971) AIR 1777 (SC).

¹¹⁰ *Akhil Bhartiya Soshit Karamchhari (Railway) v Union of India* (1981) AIR 298 (SC).

participation of the SC's and ST's in the public services were the necessary consequences flowing from the fundamental right guaranteed by Article 16(1). Article 16(4) further emphasises this point. The court further stated that such reservations were not a concession or privilege extended to the backward classes. It is the recognition of their undoubted fundamental right to equality. It is the discharge of a constitutional obligation imposed upon the State to secure to all citizens justice and equality.

It would seem that looking at the decisions of the SC, under Article 16(4) that firstly a basis of classification is backwardness and nothing else. Secondly, the protective discrimination of any such class must be reasonable and must have a rational link to the object to be viewed. Thirdly, the overall administrative efficiency should be kept in view.

It can be argued that Article 16(4) is not in the nature of an exception to Article 16(1). It is a part of Article 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an under privileged and deprived class of citizens. It is illustrative of what the State must do to wipe out such distinction.¹¹¹

As to the *degree* of backwardness it was held in *Janki Prasad Parimoo v State of J&K*¹¹² that it should be comparable to the backwardness of the SC's and the ST's. Similar views were expressed in *K S Jayasree v State of Kerala*¹¹³ and by Chandrachud, J in *K C Vasanth Kumar v State of Karnataka*.¹¹⁴ However, Chinnappa Reddy, J in this case held the opposite view. The same view was expressed earlier in *State of A P v U S V Balram*.¹¹⁵ In *Indra Sawhney v Union of India* the majority held that the backwardness of the other backward classes need not be comparable to the backwardness of the SC's and the ST's. Thommen, J gave the dissenting opinion.

¹¹¹ The opinion of Chinappa Reddy J in the case of *Akhil Bhartiya Soshit Karamchari (Railway) v Union of India* (1981) AIR 298 (SC).

¹¹² *Janki Prasad Parimoo v State of J & K* (1973) 1 SCC 420.

¹¹³ *K S Jayasree v State of Kerala* (1976) 3 SCC 730.

¹¹⁴ *K C Vasanth Kumar v State of Karnataka* (1985) Supp. SCC 714.

¹¹⁵ *State of A P v U S V Balram* (1972) 1 SCC 660.

Although the SC has finally accepted that caste can be the determinant of backwardness, it tried to strike a balance with the secular notion by bringing in the concept of the creamy layer.

11.4 The Constitution and the Creamy Layer

Views have often been voiced for skimming the creamy layer amongst the protected communities while giving them benefit under Article 15(4) or 16(4). Three important cases involving the issue of creamy layer which came before the SC are *K S Jayasree v State of Kerala*, *Indra Sawhney v Union of India* and *Ashoka Kumar Thakur v State of Bihar*.¹¹⁶ In *K S Jayasree v State of Kerala* the SC validated the government order for providing reservation benefits only to those members of the Ezhava community whose aggregate income was below Rs 6000 (Indian Rupees) per annum.¹¹⁷

In the Indian context, it was decided that persons belong to the “creamy layer” are not eligible for OBC’s reservations. This is clearly specified in the Civil services Preliminary Examination notification as follows —

“Candidates belonging to OBC’s but coming in the Creamy Layer and thus not being entitled to OBC reservation should indicate their community as General Category (Others).”¹¹⁸

However the above notification only refers to OBC’s in the course of recruitment to the Indian Administrative Service, Indian Foreign Service, Indian Police Service and certain other Group A and Group B Central Services/Posts. It does not refer to posts held in government or admissions to Universities.

The SC of India made a judgment in November, 1992 in the *Indra Sawhney & Others v Union of India* case which excluded the creamy layer from affirmative action benefits.¹¹⁹ Further, this judgment directed that the Central and State Government(s)

¹¹⁶ *Ashoka Kumar Thakur v State of Bihar* (1995) 5 SCC 403.

¹¹⁷ *K S Jayasree v State of Kerala* (1976) 3 SCC 730.

¹¹⁸ Civil Services Code Preliminary Examination (2004) Note 1 No. 4.

¹¹⁹ *Indra Sawhney v Union of India* (1993) AIR 447 (SC). The Court held that in the reservation for the backward classes the creamy layer should be excluded. The exclusion makes the class a truly backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from others. In a backward class if the connecting link is the social backwardness it should be the same. If some of the members are far too socially advanced then the

must specify a socio-economic criterion to exclude advanced persons/ sections (Creamy Layer) from OBC's (twenty-seven percent reservation). A committee chaired by Justice Ram Nandan Prasad was formed by the Government to set the above mentioned criteria as per the Supreme Court's judgment. Recommendations made by the committee were accepted by the Government.¹²⁰

The commission recommended the following criteria for the exclusion of the creamy layer in the Indian society. The recommendation was that the following persons will be excluded from OBC's and they are considered as the creamy layer in India —

- Son(s)/daughter(s) of persons holding Constitutional positions (i.e., President, Vice-President, Judges of Supreme Court & High Courts, Chairman and Members of the Union and State Public Service Commissions, Chief Election Commissioner, Comptroller and Auditor General of India;
- Persons whose parent(s) is(are) Class I Officer;
- Persons whose parent(s) is(are) in the rank of Colonel and above in the Army and equivalent posts in the Navy and Air Force and the para-military forces;
- Persons whose families own irrigated land, which is equal to or more than eighty-five percent of the ceiling limit in terms of irrigated land as per State land ceiling laws;
- Persons having gross annual income of Rs.2.50 *lakh* (As of February 04, 2004) and above; or
- Persons possessing wealth above the exemption limits prescribed in the wealth Tax Act for a period of three consecutive years (income for salaries or agricultural land shall not be clubbed).¹²¹

connecting link between them snaps .they would be misfits in the class. After excluding them alone would the class be a truly backward class. The SC therefore directs the government to specify the criteria for such exclusion income or extent of holding or otherwise.

¹²⁰ The National Commission for Backward Classes has been asked by the Government to review the income criteria for excluding the Creamy Layer from amongst the OBC's.

¹²¹ Press Information Bureau National Commission For Backward Classes To Review The Income Criteria For Excluding The Creamy Layer From Amongst OBC's (2003) at

However, these recommendations are not helpful in that no specific criteria are set for the exclusion of these persons from preferential treatment.

In *Indra Sawhney v Union of India* all the Judges except Pandian, J held that the means test should be adopted to exclude the better off individuals from the protected group for the purpose of reservation.¹²² Kania, CJ and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ held that the very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness it should broadly be the same in a given class. If some of the members are far too advanced socially (which may mean economically and educationally) the connecting thread between them and the remaining class snaps. Such exclusion benefits the truly backward. They, however, added that the basis of exclusion should not be only economic unless economic advancement is so high that it necessarily means social advancement.

The difference of opinion has been on the question of what should be the criteria for determining the creamy layer. The court stated that economic well-being and social advancement should be taken into account. Sawant, J held that it has to be judged on the basis of the social capacities gained by them to compete with the forward classes. As long as the individuals belonging to the backward classes do not develop sufficient capacities of their own to compete with others they can hardly be classified as forward.¹²³ Thommen, J however, emphasised the economic criteria. According to him it is not sufficient that the person termed as backward is so by reason of illiteracy, ignorance or social backwardness. He argues that if despite these handicaps they have the necessary financial strength to raise themselves the Constitution does not extend the benefit of reservation to them.

<http://pib.nic.in/archieve/lreng/lyr2003/roct2003/08102003/r081020035.html> last visited 31/04/2005.

¹²² *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217.

¹²³ *Ibid.*

In *Ashoka Kumar Thakur v State of Bihar* the constitutional validity of the criteria for determining the “creamy layer” for the purpose of exclusion from backward class laid down by the State of Bihar and State of Uttar Pradesh was struck down because of over-inclusion.¹²⁴

11.5 Criteria for Defining the Backward Classes

The question of defining “backward classes” has been considered by the SC in a number of cases.¹²⁵ The SC of India in the beginning tried to define backwardness in a secular tone.¹²⁶ On the whole the courts’ approach has been that state resources are limited. Further, the courts have stated that the protection of one group affects the constitutional rights of other citizens in public services and admissions to universities because it is implicit in the very idea of reservation that one person is being preferred above another because of his or her status regarding caste. Further, the courts have also stated that the very idea of reservation would imply that a less meritorious person is being preferred to a more meritorious person.¹²⁷ The court also seeks to guard against the perpetuation of the caste system in India and the inclusion of the advanced classes or the “creamy layer” within the term of “backward classes”.

From several judicial pronouncements concerning the definition of backward classes, several propositions emerge. First the backwardness envisaged by Article 15(4) is social and educational and not either social or educational. This means that for a class to be identified as backward they should be both socially and educationally backward. Secondly, poverty alone cannot be the test of backwardness in India because by and large people are poor and therefore, large sections of the population would fall under the backward category and thus the whole object of reservation would be frustrated.¹²⁸ Thirdly backwardness should be comparable, though not exactly similar to SC’s and

¹²⁴ It was laid down that on the face of it the criteria was arbitrary and violative of Articles 16(4) and 14 and the law laid down in the *Indra Sawhney* case. It had included sections of population which should have been excluded if the law laid down in *Indra Sawhney* case had been followed.

¹²⁵ See *D N Chanchala v State of Mysore* (1971) AIR 839 (SC).

¹²⁶ *M R Balaji v State of Mysore* (1963) AIR 649 (SC).

¹²⁷ See *D N Chanchala v State of Mysore* (1971) AIR 839 (SC).

¹²⁸ *Pradip Tondon v State of U P* (1982) AIR 1258 (SC).

ST's. Fourthly, castes may be a relevant factor to define backwardness, but it cannot be the sole or even the dominant criterion.¹²⁹

It is submitted that if classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society. Likewise if affirmative action programmes in SA was to be based solely on the basis of someone's race then that would perpetuate racism. Also this test would break down in relation to those sections of society which do not recognise caste in the conventional sense as known to the Hindu society. Fifthly, poverty, occupations place of habitation, all contributes to backwardness and such factors cannot be ignored. Sixthly, backwardness may be defined without any reference to caste.

As the SC has emphasised¹³⁰ Article 15(4) does not speak of castes, but only speaks of classes, and that caste and class are not synonymous. Therefore the exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests. The second most contentious issue, as has been noted above, is the quantum of reservations. According to the reservation system in India, any reservation is discriminatory if reservation means that as between two candidates of equal merits, the candidate belonging to the reserved quota is preferred to the one having no reserved quota if this preference is based solely on that persons' caste. Many deserving candidates thus feel frustrated because of reservations for the less deserving persons and they seek to challenge the scheme of reservations as unconstitutional. In SA, appointing someone merely on the basis that they belong to a designated group would amount to unfair discrimination and such affirmative action programme would not be constitutionally valid.

11.6 The Problem with the Carry-Forward Rules

The "carry forward" rules have created a situation where the number of posts reserved for the backward classes has become excessive.¹³¹

¹²⁹ *D N Chanchala v State of Mysore* (1971) AIR 839 (SC).

¹³⁰ *Indra Sawhney v Union of India* (1993) AIR 477 (SC).

¹³¹ Anand C L Equality Justice and Reverse Discrimination (1987) at 256.

In the case of *Jogendra Sehti v Rabindranath Behura & Others*¹³² this Court considered the provisions with regard to reservation of posts for SC's and ST's in Orissa made in the Orissa Reservation of Vacancies.¹³³ It considered the provision for the carry-forward of vacancy for three years of recruitment and held that the first recruitment year would be the year in which the vacancy arose and it was required to be carried forward for three subsequent calendar years looking to the definition of "recruitment year" in the said Act. The Brochure on "Reservation for Scheduled Castes and Scheduled Tribes in Services"¹³⁴ defines "recruitment year" to mean "a calendar year and for purposes of the three years limit for carry-forward of reserved vacancies it shall mean the year in which recruitment is actually made". The vacancy, therefore, was required to be carried forward for three calendar years starting with 1991.¹³⁵

In the case of *Rajendra v Union of India*,¹³⁶ a single vacancy for the post of Deputy Superintendent against a roster point which was reserved for a scheduled caste candidate arose in the year 1978. This was the initial recruitment year. In that year since no scheduled caste candidate was available it was treated as "unreserved" and the reservation was carried forward to the next recruitment year which was in 1983 when a single vacancy arose. This vacancy was treated as a "reserved" vacancy.

However, since a scheduled caste candidate was not available for this vacancy an application was made for de-reserving this vacancy, which was granted. It was thereupon filled by a general category candidate and the reservation was carried forward or transferred to the next recruitment year. This would now be the initial recruitment year for the reserved vacancy since the earlier point was de-reserved. The

¹³² *Sehti v Rabindranath Behura & Others* (1995) Supp. (3) SCC 693.

¹³³ These reservations were made in The Posts and Services (For Scheduled Castes and Scheduled Tribes) Act 1971.

¹³⁴ Also see Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services (1985, June 24) at para 11.1.

¹³⁵ See also in this connection *Malkhan Singh v Union of India & Others* (1997) 2 SCC 33; (1997) 1 (SCT) 777.

¹³⁶ *Rajendra v Union of India* (1998) SOL Case No. 183 at <http://www.supremecourtonline.com/cases/1613.html> last visited 03/05/04.

next recruitment year was 1990 when the next vacancy arose. This is how the vacancy which arose on July 23, 1990 was reserved for a scheduled caste candidate.

Since no scheduled caste candidate was available in 1990 and since the application of the department for de-reservation was rejected, this vacancy was required to be carried forward for three recruitment years. The vacancy was accordingly carried forward for the next three recruitment years being the years 1991 to 1993. In 1994 the reservation would have lapsed if no suitable scheduled caste candidate was available. The issue was whether or not the reservation could lapse.

The court stated that in cases where only one vacancy occurs in the initial recruitment year and the corresponding roster point happens to be for a scheduled caste or a scheduled tribe, it should be treated as unreserved and filled accordingly and the reservation carried forward to subsequent three recruitment years as hitherto. In the subsequent years, even if there is only one vacancy it should be treated as “reserved”. This meant that it would be reserved against the carried forward reservation from the initial recruitment year and a SC’s or ST’s candidate, if available, should be appointed in that vacancy. This situation prevailed even though it may happen to be the only vacancy in that recruitment year.¹³⁷

The court stated that —

“In the first subsequent year, i.e., 1976, if again, a single vacancy occurs then it should be treated as “reserved” against the reservation carried forward from 1975 and a scheduled caste or scheduled tribe candidate should be appointed against that vacancy. In the event of a scheduled caste or scheduled tribe candidate not being available to fill the reserved vacancy in 1976, the reservation would be further carried forward to 1977 and 1978, when also a single vacancy, if any, arising in those years should be treated as “reserved” against the carried forward reservation, where after, the reservation will lapse.”

The problem with this decision is that employers may deliberately not appoint a person for the backward classes on various reasons and will be allowed to carry

¹³⁷ For instance, if a single vacancy arises in the initial recruitment year 1975, and it falls at a reserved point in the roster, it will be treated as ‘unreserved’ and filled accordingly in that year but the reservation would be carried forward to subsequent recruitment years.

forward that vacant reserved position until such time as it lapses. Another problem arises when in a particular year due to carry forward rule more than fifty percent of vacancies are reserved. This issue was dealt with in the case of *T Devadasan v Union of India*.¹³⁸ The Union Public Service Commission had provided for 17-1/2 percent reservation for SC's and ST's. In case of non-availability of reserved category candidates in a particular year the posts had to be filled by general category candidates and the number of such vacancies were to be carried forward to be filled by the reserved category candidate next year. Due to this rule of carry forward, reservation in a particular year amounted to sixty-five percent of the total vacancies. The petitioner contended that reservation was excessive which destroyed his right under Article 16(1) and Article 14.

The court on the basis of the decision in the *Balaji* case held the reservation was excessive and, therefore, unconstitutional. It further stated that the guarantee of equality under Article 16(1) is to each individual citizen and to appointments to any office under the State. It means that on every occasion for recruitment the State should see that all citizens are treated equally. In order to effectuate the guarantee each year of recruitment will have to be considered by itself.

11.7 Analysing the Supreme Courts Decisions

Looking at all the SC decisions the following can be said for the basis of a valid classification under Article 14 —

- The basis for a valid classification may be different in different cases.
- The classification must be reasonable and not arbitrary.¹³⁹
- What Article 14 prohibits is hostile discrimination and not reasonable classification for the purpose of legislation.¹⁴⁰
- It must be founded on “intelligible differentia”. This intelligible differentia must have a rational relation with the object of the statute sought to be achieved.¹⁴¹

¹³⁸ *T Devadasan v Union of India* (1964) AIR 179 (SC).

¹³⁹ *Chandrakant Saha v Union of India* (1979) AIR 314 (SC).

¹⁴⁰ *State (Delhi Administration) v V C Shukla* (1980) AIR 1382 (SC).

¹⁴¹ *V J Ferreira v Bombay Municipality* (1972) AIR 845 (SC).

- Like SA, classifications may validly be made on geographical and historical considerations.¹⁴²
- A valid classification may be made on historical consideration.¹⁴³

These criteria are similar to the ones that have been adopted by the CC of SA. The cases show that in adopting a substantive approach to equality, the Indian courts have warned against arbitrary and haphazard classifications. Further, it can be said that although Article 14 has been worded in absolute terms the judiciary has read a limitation of protective discrimination in it.¹⁴⁴

The cases have further shown that the criteria for specifying who the SC's, ST's and OBC's are, are not clearly defined, thereby leaving the responsibility of the determination of backward classes on the State and to the populous to prove that they belong to any one of the designated groups. This situation has posed many problems. First and foremost it has led to the ever increasing expansion of the lists of these SC's, ST's and OBC's. At this rate, the entire population of India would find it necessary to be classified into one of these groups to get employment. Further, this increasing list makes it virtually impossible for persons falling outside these lists to get jobs. The carry-forward rules are barring employment opportunities to persons from outside these groups and this is a minefield for unfair discrimination claims in India.

The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism, in the nature of a Commission, for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of OBC's and to advise the Government on this issue. It has been made clear though, that the reservation to the backward classes should be provided on the one ground of socially and educationally backward and on the second ground, if they are not adequately represented.

¹⁴² *Gopi Nath v Delhi Administration* (1959) AIR 609 (SC).

¹⁴³ *Lachmandas v State of Punjab* (1963) AIR 222 (SC).

¹⁴⁴ *Md. Shujat Ali v Union of India* (1974) AIR 1631 (SC) at 1653.

Any reservation, apart from being sustainable on the constitutional level, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence and equality enabling the nation to rise to higher levels.

Further, mediocrity over meritocracy negatively impacts on the right to equality. Protective discrimination by way of reservation or classification must withstand the test of Article 14. Any over-generous approach to a section of the beneficiaries if it has the effect of destroying another's right to education by, for example, choosing a mediocre over a meritorious candidate contradicts the intention of the drafter of the IC so must be declared unconstitutional.

Further, the courts have continuously held that caste is not and cannot be a sole consideration for reservations or preferences. In SA, a persons designated status cannot be the sole criteria for his or her benefiting under an affirmative action programme. If a persons designation is the sole criteria then this will amount to tokenism and which in turn equals unfair discrimination.

Although the SC has accepted that caste can be the criteria for giving reservations, it still maintains that the provision is for backward sections of the population who for the time being need support. It has been argued that although backwardness can be identified on the basis of caste, it is not the caste as such which is given proportionate representation. It is the individuals comprising a class who are suffering because they are members of a socially, economically and educationally depressed class who need support. Hence the concept of creamy layer tries to exclude the advanced sections of the population from getting the benefits of protective measures. According to the courts this also explains the validation of the ten percent reservation for poor sections among the forward castes.

It seems as though the contemporary discrimination policies of India have been strongly followed in post independent India and that they have produced a substantial redistributive effect as well. Reservations of seats alone provide a substantial legislative presence and increase the flow of support, attention and favourable policies

for the SC's and ST's. The reservation in jobs and educational institutions has also given rise to a considerable section of the beneficiary group benefiting in terms of earnings, security and prestige that goes with obtaining a government job in India.

However this has not gone without its costs. In fact in the Indian context, the costs have been enormous. There is much frustration amongst those who have been deprived off jobs which they would have got in the absence of preferential policies. Further, the reservation system seems to have undermined the efficiency of administration. This has led to a country being divided as the reservation policies underline the differences of the people of India. The system of reservation has led to invidious discriminations, which in turn has the effect of making the beneficiary groups dependent and stunted their development and initiative. These are some of the costs of these preferential policies in the form of reservation.

Further, even though the courts have stated that reservations alone do not lead to the achievement of equality, reservations in India seem to be the sole focus of affirmative action measures. Looking at the problems experienced by this very narrow focus, SA would do well to learn from this experience. Reservations must be kept in check by the demands of competence and various other factors.

Further, even though the courts have stated in the *M R Balaji* case that that if under the guise of making special provisions, practically all the seats available were to be reserved by the State that clearly would be subverting the object of Article 15(4). This has still led to so-called "carry-forward" rules. These carry forward rules have effectively blocked admissions to universities and jobs to persons belonging outside of the backward classes and has led to reverse discrimination in India.

Armpal Singh says that —

“the criticism that these policies have evoked and the debates that take place in India today, represent the vivacity of the Indian civilisation, wherein the advantages and disadvantages, hopes and frustrations are bound to one another, and connects the past with the future with an unbreakable continuity of the present.”¹⁴⁵

¹⁴⁵ Singh *op cit* 79.

The Indian approach to affirmative action has developed criteria for identifying beneficiary groups that are, as compared to US doctrine, both more abstract and complex. The IC by its explicit terms¹⁴⁶ creates criteria of general applicability (“socially and educationally backward”) to expand affirmative action from the most readily identifiable disadvantaged group, the untouchables, to other “classes of citizens” that occupy disadvantaged positions in the social structure of the country. This is so even though their disadvantage may differ in both cause and degree from the untouchables.

Justice Reddy in his *Sawhney* opinion concluded that the term “classes of citizens” is not distinct from castes but rather that castes are prototypical examples of the kind of classes intended by the drafters of the First Amendment. The application of the criteria used in the Mandal report to identify a particular caste as a socially and educationally backward class looks at the needs of the group before deciding if they qualify for preferential treatment. However, whether this so-called needs analysis involves both economic and social criteria is not certain.

As regards the scope of reservation of seats in educational institutions affiliated and recognised by State Universities, the constitutional prescription of reservation of fifty percent of the available seats has to be respected and enforced. Further, the institutional preference should be limited to fifty percent and the rest being left for open competition based purely on merits on an All India basis.¹⁴⁷

The beneficiaries of reservations are identified as being a minor or smaller group of persons which deservedly stands in need of protection or push up because of historical, geographical, economic, social, physical or similar such other handicaps. Persons belonging to the reserved category are found to be an underprivileged class who cannot be treated on par with a larger and more privileged class of persons and will be denied social justice and equality unless protected and encouraged.¹⁴⁸

¹⁴⁶ In Article 15(4) of the Constitution of India.

¹⁴⁷ *Saurabh Chaudri & Others v Union of India & Others* (2003) 4 LRI 532.

¹⁴⁸ *Pradeep Jain (Dr) v Union of India* (1984) 3 SCC 654.

In the USA there is no constitutional provision providing for set asides or reservations. These are included under the reasonable classification principle under the concept of equality guaranteed to every citizen in the US. In India they have Article 16(4) which provides that the State can provide for reservations in services to the backward classes who are in the opinion of the State not adequately represented in the services. In effect it would seem that the set aside programmes in the US are the same as the reservation system in India. This has led to the establishment of a quota system in both India and the US. The problem that people and the courts have with affirmative action programmes seems to stem from their feelings about the quota system. Rightly so, quotas and reservations have been met with a great deal of resistance.

Further, a majority of the SC justices in the *D N Chanchala* case approved the following basic principles regarding reservations —

- (1) Reservation of government positions for OBC's should not be interpreted as a narrow exception to the constitutional guarantee of equality but rather as a way of achieving true, substantive equality.
- (2) Traditional caste categories can be used as a starting point for identifying OBC's but selection criteria must include empirical factors beyond conventional assumptions that certain castes are "backward".
- (3) Identification of a group as an OBC can not be based on economic criteria alone.
- (4) Because the Mandal Commission used objective, empirical criteria to create these new group categories, distribution of government benefits based on OBC membership does not perpetuate the stigma of traditional caste categories.
- (5) OBC membership only creates a refutable presumption that a person needs preferential treatment; therefore, the state must also use an individualised economic means test to eliminate persons from affluent or professional families (termed "the creamy layer test").¹⁴⁹

¹⁴⁹

Indra Sawhney and Others v Union of India and Others (1993) AIR 477 (SC).

According to Singh Armpal and the various court decisions the provisions regulating affirmative action show that —

- preferential policies provide a direct flow of valuable resources to the historically deprived ones in larger measure than they would otherwise enjoy;
- that compensatory policies provide for participation in decision making by those who effectively represent the interest of that section of the population which would otherwise be unrepresented or neglected;¹⁵⁰
- that, by affording opportunities for participation and well being, preferences promote feelings of a sense of belonging and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups into society;
- that preferences permit personal efficacy that enable the beneficiaries to contribute to national development as willing partners;
- that by broadening opportunities, preferences stimulate the acquisition of skill and resources needed to compete successfully in open competition, that by cultivating talents, providing opportunities and incentives and promoting their awareness and self consciousness, preferences enhance the capacity of the beneficiary groups to undertake organised collective action;
- that by increasing the visibility of the beneficiary groups, promoting their placement in employment and admissions and emphasising the national commitment to remedy their conditions, that preferences compensate for and help to offset the accumulated disablement resulting from past deprivations of advantages and opportunities;
- that by reducing tangible disparities among groups and directing attention to mundane rather than ritual development of a secular society and that, preferences contribute to national development by providing incentives, opportunities and resources to utilise neglected talent.¹⁵¹

¹⁵⁰ Galanter Marc Pursuing Equality in the land of Hierarchy — An assessment of India's Policies of Compensatory Discrimination for Historically Disadvantaged Groups in Law and Society *op cit* 2.

¹⁵¹ Law and Society *op cit* 2 at 12.

The Constitution of India clearly recognises that there are castes and classes which are in need of special support and protection and the dream of an equal nation will remain unfulfilled unless these classes are brought in the mainstream of the society through various measures. However, the primary focus for bringing about this equality is based on the system of reservation, which has developed its own problems and is not as effective as it ought to be.

The next part of this thesis will focus on how SA can learn from the experiences of India to implement effective affirmative action programmes.