

## **Part I - Few things about Mandal Commission**

The Mandal Commission was setup in 1977 by Janata Party Government to study affirmative action policies for the scheduled castes, scheduled tribes and backward classes.

Earlier, in the case of State of Madras v Champakam Dorairajan AIR 1951 SC 226 [1951] SCR 217, Supreme Court had held that, making a person ineligible for seats in engineering and medical college on the basis of caste who is otherwise eligible is un-constitutional. This led to amendment in Constitution and amendment to articles 15, 16 etc.

It submitted its report on December 31, 1980.

Rajiv Gandhi and Indira Gandhi chose not to implement the report and left it to the choice of respective states. State of Tamil nadu had reservations even before independence. Some states chose to implement the recommendations of the Mandal Commission.

Modus operandi.

The commission issued a questionnaire comprising of 11 questions which may be divided into 3 groups namely social, educational and economic. The questions were completely based on CASTE.

The Mandal Commission itself had admitted that, it has relied upon highly in-adequate data. It admitted that, surveys were conducted only in 0.06% of the total villages.

- Identified 3743 castes as backward class based ONLY on basis of CASTE which constitution prohibits
- the mandate given to the Mandal commission was to determine desirability of making reservations in public service and the original mandate did not include it on caste basis.
- Survey sample was 0.06% of total villages in India.
- Out of 3743 caste only 10.85% were subject to socio-educational field survey.
- No survey was undertaken on the touch stone of BACKWARD CLASS vis-a-vis 3743 caste
- It accepted the list from some states without any inquiry at all.
- There were many states which never prepared any list at all.
- 1961 census was used when 1971 was available.
- Relied upon data of 1931 census and assumed that the growth in population would be in same proportion.
- It ignored the fact that, 1931 census included population of Pakistan, Bangladesh and Burma as well.

Justice Sinha [ dissenting] judge observed – A collection of so-called backward caste by a clerical act based on drawing room investigation can not be the backward classes as envisaged in article 16(4).

## **Part II - Relevant articles from Constitution of India**

Following is the text of articles as it stands today. This was not the position considered by Supreme Court in the case of Indira Sawhney.

### **13. Laws inconsistent with or in derogation of the fundamental rights.-**

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

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

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

### **14. Equality before law**

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

### **15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) 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

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause ( 2 ) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

### **16. Equality of opportunity in matters of public employment**

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination

#### 29. Protection of interests of minorities.-

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

#### 30. Right of minorities to establish and administer educational institutions.-

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of any educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

#### 46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation

#### 338. Special Officer for Scheduled Castes, Scheduled Tribes etc

(1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament

(3) In this article references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause ( 1 ) of Article 340, by order specify and also to the Anglo Indian community

#### 340. Appointment of a Commission to investigate the conditions of backward classes

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

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

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

#### 355. Duty of the Union to protect States against external aggression and internal disturbance

It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution

**Part III - Indra Sawhney Etc. Etc vs Union Of India And Others, Etc. ... on 16 November, 1992**  
**Equivalent citations: AIR 1993 SC 477, 1992 Supp 2 SCR 454**

Judges taking a majority view – (5)

M Kania,  
M Venkatachaliah,  
S R Pandian  
P Sawant,  
B J Reddy

Judges taking a minority view – (3)

Thommen  
Kuldip Singh  
R. M. Sahai

PART - II Before we proceed to answer the questions aforementioned, it would be helpful to notice (a) the debates in the Constituent Assembly on Article 16 (draft Article 10); (b) the decisions of this Court on Articles 16 and 15; and (c) a few decisions of the U.S. Supreme Court considering the validity of race-conscious programmes.

The Framing of Article 16: Debates in the Constituent Assembly

25. Draft Article 10 corresponds to Article 16. The debate in the Constituent Assembly on draft Article 10 and particularly Clause (3), thereof [corresponding to Clause (4) of Article 16] helps us to appreciate the background and understand the objective underlying Article 16, and in particular, Clause (4) thereof. The original intent comes out clear and loud from these debates. Omitting draft Clause (4) [which corresponds to Clause (5) of Article 16] the three clauses in draft Article 10, as introduced in the Constituent Assembly, read as follows:

10(1). There shall be equality of opportunity for all citizens in matters of employment under the State.  
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them be ineligible for any office under the State.  
(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any class of citizens who in the opinion of the State are not adequately represented in the services under the State.

It was the Drafting Committee under the Chairmanship of Dr. B.R. Ambedkar that inserted the word "backward" in between the words "in favour of any" and 'class of citizens'. The discussion on draft Article 10 took place on November 30, 1948. Several members including S/Sri Damodar Swarup Seth, Pt. Hirdya Nath Kunzru and R.M. Nalavade complained that the expressions 'backward' and 'backward classes' are quite vague and are likely to lead to complications in future. They suggested that appointments to public services should be made purely on the basis of merit. Some others suggested that such reservations should be available only for a period of first ten years of the Constitution. To this criticism the Vice-President of the Assembly (Dr. H.C. Mookherjee) replied in the following words: Before we start the general discussion, I would like to place a particular matter before the Honourable Members. The clause which has so long been under discussion affects particularly certain sections of our population sections which have in the past been treated very cruelly and although we are today prepared to make reparation for the evil deeds of our ancestors, still the old story continues, at least

here and there, and capital is made out of it outside India.... I would therefore very much appreciate the permission of the House so that I might give full discussion on this particular matter to our brethren of the backward classes. Do I have that permission?

26. In the ensuing discussion Sri Chandrika Ram (Bihar-General) supported draft Clause (3) with great passion. He pleaded for reservations in favour of Backward Classes both in services as well as in the legislature, just as in the case of Harijans.

Sri Chandrika Ram was supported by another Member Sri P.Kakkan (Madras-General) and Sri T.Channah (Mysore), Sri Channah, in particular, commented upon the Members coming from Northern India being puzzled about the meaning of the expression 'backward class' and proceeded to clarify the same in the following words:-

The backward classes of people as understood in South India, are those classes of people who are educationally backward, it is those classes that require adequate representation in the services. There are other classes of people who are socially backward; they also require adequate representation in the service.

27. After the discussion proceeded for some more time, Sri K.M.Munshi, who was a Member of the Drafting Committee rose to explain the content of the word 'backward'. He said:-

What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State-highest efficiency which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward classes, classes who are really backward, should be given scope in the State services; for it is realised that State services give a status and an opportunity to serve the country, and this opportunity should be extended to every community, even among the backward people. That being so, we have to find out some generic term and the word "backward class" was the best possible term.

Sri Munshi proceeded to state:

I may point out that in the province of Bombay for several years now, there has been a definition of backward classes, which includes not only Scheduled Castes and Scheduled Tribes but also other backward classes who are economically, educationally and socially backward. We need not, therefore, define or restrict the scope of the word "backward" to a particular community. Whoever is backward will be covered by it and I think the apprehensions of the Honourable Members are not justified. Ultimately Dr. B.R.Ambedkar, the Chairman of the Drafting Committee, got up to clarify the matter. His speech, which put an end to all discussion and led to adopting of draft Article 10(3), is worth quoting in extenso, since it throws light on several questions relevant herein:

...there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality or opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative-and it ought to be operative in their judgment to its fullest extent-there ought to be no reservations of any sort for any class or community at all, that all citizens, if they

are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration.

If honourable Members will bear these facts in mind-the-three principles we had to reconcile,-they will see that no better formula could be produced than the one that is embodied in Sub-clause (3) of Article 10 of the Constitution. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now-for historical reasons-been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10, must be confined to a minority of seats.

It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly...

Somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government.

659. Reason for backwardness or inadequate representation in services of backward Hindus prior to 1950 were caste division, lack of education, poverty, feudalistic frame of society, and occupational helplessness. All these barriers are disappearing. Industrialisation has taken over. Education, through State effort and due to awareness of its importance, both, statistically and actually has improved. Feudalism died in fifties itself. Even the Mandal Commission accepts, this reality. Any identification of backward class for purposes of reservation, therefore, has to be tested keeping in view these factors as the exercise of power is in presenti. Importance of word 'is' in Article 16(4) should not be lost of.

Backwardness and inadequacy should exist on the date the reservation is made. Reservation for a group which was educationally, economically and socially backward before 1950 shall not be valid unless the group continues to be backward today. The group should not have suffered only but it should be found to be suffering with such disabilities. If a class or community ceases to be economically and socially backward or even if it is so but is adequately represented then no reservation can be made as it no more continues to be backward even though it may not be adequately represented in service or it may be backward but adequately represented.

660. Ethical justification for reverse discrimination or protective benefits or ameliorative measures emanates from the moral of compensating such class or group for the past injustices inflicted on it and for promoting social values. Both these aspects are fully borne out from the Constitutional Assembly Debates. Anxiety was to uplift the backward classes by enabling them to participate in administration as they had been excluded by few who had monopolised the services. Objective was to change the social face as it shall advance public welfare, by demolishing rigidity of caste, promoting representation of those who till now were kept away thus providing status to them, restoring balance in the society, reducing poverty and increasing distribution of benefits and advantages to one and all. The compensatory principle implies that like an individual a group or class that has remained backward for whatever reason, should be provided every help to overcome the shortcomings but once disadvantage disappears the basis itself must go. For instance there may be four groups of different nature deserving such protection. Some of it may improve and come up in the social stream within short time. Can it be said that since they were kept excluded for hundred years the compensation by way of protective benefits should continue for hundred years. That would be mockery of protective discrimination. The compensation principle, 'makes little sense unless it is involved in connection with assertion that the malignant effects of prior deprivation are still continuing'. The social utility of preferential treatment extended to the disadvantage and weaker too should not be pushed too far on what happened in the past without looking to the present. Such construction of Article 16(4) arises not because of what has been said by some of the American judges but on plain and simple reading of the word, 'is' in the Article.

661. An egalitarian society or welfare state wedded to secularism does not and cannot mean a social order in which religion or caste ceases to exist. 'India is a secular but not an anti-religious state. Article 25 is pride of our democracy. But that cannot be basis of state activities. May be caste is being exploited for political ends. Chinnappa Reddy, J. has very graphically described it in Karnataka Third Backward Class Commission Report (1990). And, we have political parties and politicians who, if anything, are realists, fully aware of the deep roots of caste in Indian society and who, far from ignoring it, feed the fire as it were and give caste great importance in the choice of their candidates for election and flaunt the caste of the candidates before the electorate. They preach against caste in public and thrive on it in private.

662. Even Mandal Commission observed that what, 'caste lost on ritual front it gained on political front'. In politics caste may or may not play an important role but politics and constitutional exercise are not the same. A candidate may secure a ticket on caste considerations but if he or his agent or any person with his consent or his agent's consent appeals to vote or refrain from voting on ground of religion, race or caste then he is guilty of corrupt practice under Section 123(3) of the Representation of People Act and his election is liable to be set aside. Thus caste, race or religion are prohibited even in political process. What cannot furnish basis for exercise of electoral right and is constitutionally prohibited from being exercised by the State cannot furnish valid basis for constitutional functioning

under Article 16(4). Utilization of caste as the basis for purpose of determination of backward class of citizens is thus constitutionally invalid and even ethically and morally not permissible. Existence of caste in the past and present, its continuance in future cannot be denied but insistence that since it is being practised or observed for political purpose even though unfortunately it should be the basis for identification of backwardness in services is not only robbing the Constitution of the fresh look it promised and guaranteed but would result in perpetuating a system under ugly weight of which the society had bent earlier.

Thus, (i) backwardness and inadequacy of representation in service must exist on the date the reservation is being made.

(ii) Any past injustice which entitles a group for protective discrimination must on principle of compensation or social justice be continuing on the date when reservation is being made.

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663. 'It is easier to give power but difficult to give wisdom'. Dr. Ambedkar quoted this Burke's thought in the Constituent Assembly Debate and exhorted 'let us prove by our conduct that we have not only the power but also the wisdom to carry with us all sectors of the country which is bound to lead us to unity'. How to effectuate this wisdom? For Article 16(4) how to determine who can be legally considered to be backward class of citizens? The answer is simple. By adopting, constitutionally permissible methodology of identification irrespective of their race, religion or caste. The difficulty, however, arises in finding out the criteria. Although the work should normally be left to be undertaken by the State as the courts are ill equipped for such exercise due to lack of data, necessary expertise and relevant material but with development of role of courts from mere, 'superintend and supervise' to legitimate constitutional affirmative decision, this Court is not only duty bound but constitutionally obliged to lay down principles for guidance for those who are entrusted with this responsibility, with a sense of duty towards the country as the occasion demands never more than now, but with remotest intention to interfere with legislative, or executive process. What the Nation should remember is that the basic values of constitutionalism guaranting judicial independence is to enable the courts to discharge their duty without being guided by any philosophy as judicial interpretation, gives better protection than the political branches to the weak and outnumbered, to minorities and unpopular individuals, to the inadequately represented in the political process.

664. Before doing so it is necessary to be stated, at the outset, that identification of backward classes for purposes of different States may not furnish safe and sound basis for including all such groups or collectivities for reservation in services under the Union. Reason is that local conditions play major part in such exercise. For instance habitation in hills of U.P. was upheld as valid basis for identifying backwardness. Same may not be true of residents of hills in other States. Otherwise entire population of Kashmir may have to be treated as backward. In Kerala State most of the Muslims are identified as backward. Can this be valid basis for other States. Even the Mandal Commission noticed that some castes backward in one State are forward in others. If State list of every State is adopted as valid for central services it is bound to create confusion. One of the apparent abuse inherent in such inclusion is that it is apt to encourage paper mobility of citizens from a State where such class or caste is not backward to the State where it is so identified. This apart such inclusion may suffer from constitutional infirmity. Many groups or collectivities in different States are continuing or have been included in the State list due to various considerations political or otherwise. State of Karnataka is its best example. Commission after commission beginning from Gowda Commission, Venkataswamy Commission and Havanur Commission despite having found that some of the castes ceased to be

backward they continue in the list due to their political pressure and economic power. Ghanshyam Shah 'Economic and Political Weekly' Vol. 26 (1991) p. 601 in 'Social Backwardness and Politics of Reservations', has pointed out, 'Among the sudras there are peasant castes, artisan castes and nomadic castes. Subjective perception of one's position in the 'varna' system varies and changes from time to time, place to place and context to context. For instance, the Patidars of Gujarat were considered sudras a few decades ago, but not they call themselves vaishyas, and are acknowledged as such by others. It is significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar.' Yet these castes or group have been identified as backward class in their State. Whether such inclusion on political, economic and social condition is justified in State list or not but inclusion of a group or collectivity in list of socially and educationally backward classes, which is a term narrower and different than backward class for services under the Union without proper identification only on State list may not be valid. For services under the Union, therefore, some principle may have to be evolved which may be of universal application to members of every community and which may be adopted by State, as well, after adjusting it with prevalent local conditions.

665. Ours is a country comprising of various communities. Each community follows different religion. Centuries of historical togetherness has influenced each other. Caste system which is peculiar to Hindus infiltrated even amongst Muslims, Christians, Sikhs or others although it has no place in their religion. The Encyclopedia Americana International Edition describes the development thus, All important communities, including the Muslims, Christians, and Sikhs, have some sort of caste scheme. These schemes are patterned after the Hindu system, since most of these people originally came from Hindu stock. The large-scale conversions that have been going on for centuries have modified Indian caste society. Thus traditional Hindu communal and connubial rituals and emphasis on inherited social status or rank though generally rejected in the Islamic or Christian religious ethic, nevertheless operate on social plain in these societies in India. In India social rites and customs vary from region to region rather than from religion to religion. Among the Muslims, the Sayids, Sheikh, Pathan, and Momin, among others, function as exclusive endogamous caste groups. The Christians are divided into a number of groups, including the Chaldean Syrians, Jacobite Syrians, Latin Catholics, Marthom Syrians, Syrian Catholics, and Protestants. Each of these groups practices endogamy. Among the Catholics, the Syrian Romans and the Latin Romans generally do not intermarry. The Christians have not wholly discarded the idea of food restrictions and pollution by lower caste members. When lower caste Hindus were converted to Christianity a generation or two ago, they were not allowed to sit with high caste Christians in Church, and separate churches were erected for them.

666. On the social plain therefore there has been lack of mobility from one group to other. Amongst Hindus it has been more marked. Inter-se discrimination has been worse. Untouchables prior to 1950 have been victims of social persecutions not only by the twice born but even the so-called intermediate backward classes. But what appears to be common in each community is that the caste divide is more or less occupational based. A washerman or a barber, a milkman or an agriculturist, are all known among Hindus by castes and amongst others by occupation. In fact they are all occupational. Very genesis of Chatur Varna was occupational.

According to Kroeber, castes are special form of social classes, 'which in tendency at least are present in every society. Castes differ from social classes, however, in that they have emerged into social consciousness to the point that custom and law attempt their rigid and permanent separation from

one another'.... 'The jatis which developed later and which continued to grow in number have their economic significance; they are for the most part occupational groups and, in the traditional village economy, the caste system largely provides the machinery for the exchange of goods and services. But these rigid stratifications are breaking today. The social inter-se barriers are rapidly disappearing. Values are fast changing. In fact many of the backward classes as observed by Sri Naik in his separate note to the Mandal Commission Report 'co-existed since times immemorial with upper castes and had therefore some scope to imbibe better association and what all its connotes'. Take for instance the list of the 'Intermediate Backward Class' where traditional occupation, according to Sri Naik has been, 'agriculture, market gardening, betal leaves, grovers, pastoral activities, village industries like artisans, tailors, dyers and weavers, petty business-cum-agricultural activities, heralding, temple service, toddy selling, oil mongering, combating, astrology etc. etc.'. Their backwardness has been primarily economic or educational. Mobility, too, occupational or professional has not been very rigid. An agriculturist or an artisan, a dyer or weaver had the occupational freedom of moving in any direction. Consideration for marriage or social customs may be different. But that prevails in every strata of society. One sect of a caste or community Hindu or Muslim, or even Christian, forward or backward does not prefer marrying in another sect what to say of caste. But these considerations are not relevant for identifying backward class for public employment. Lack of education, at least among so-called intermediate backward classes, was more due to personal volition than social ostracisation.

Historical social backwardness has already been taken care of by providing reservation to SC/ST and empowering President to include any group or collectivity found to be suffering from such disability. Same yardstick cannot be applied for socially and educationally backward class for whom the President has been empowered to appoint a Commission and who only after identification are to be deemed to be included as SC and ST by virtue of Article 338(10). From the preceding discussion it is clear that identification of such class cannot be caste based. Nor it can be founded, only, on economic considerations as 'Mere poverty' cannot be the test of backwardness. With these two negative considerations stemming out of constitutional constraints two positive considerations, equally important and basic in nature flow from principle of constitutional construction one that the effort should, primarily, be directed towards finding out a criteria which must apply uniformly to citizens of every community, second that the benefit should reach the needy. Various combinations excluding and including caste as relevant consideration have been discussed in different decisions which need not be mentioned as occasion to examine social and educational backwardness in public services and that also in union services never arose.

667. In sub-paragraph (ii) of paragraph 12.8 extracted earlier the Mandal Commission recommended occupational identification for non-Hindus if the community was traditionally known to carry on the hereditary occupation of their counterpart amongst Hindus and included in the test of OBC. The Commission thus recognised occupational divide among Hindus. If occupation amongst Hindus can be basis for identification of backwardness among non-Hindus then why cannot it furnish basis for identification amongst Hindus itself.

668. Ideal and wise method, therefore, would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be the caste itself. Find out their social acceptability and educational standard. Weight them in the balance of economic conditions. Result would be backward class of citizens needing genuine protective umbrella. Group or collectivity which may thus emerge may be members of one or the other community. Advantage of occupational based identification would be that it shall apply uniformly irrespective of race, religion and caste. Reason for accepting

occupation based identification is that prior to 1950 Sudras amongst Hindus were all those who were not twice born. Amongst them there was vertical and occupational divisions. No similar to hierarchy existed amongst Muslims. Same is true of other communities. Sri Naik narrated a list of, 'intermediate backward classes' and 'depressed backward classes'. It may not be exhaustive. But it is indicative that different categories of persons are, normally, known by occupation they carry. 'Castes, therefore, are special form of classes which in tendency are present in every society'. It was said by Lord Bryce long back for America that classes way not be divided, for political purposes into upper and lower and richer and poorer, 'but according to their respective occupation they follow'. Class according to Tawny may get formed due to various reasons, 'war, the institution of private property, biological characteristic, the division of labour'. And, 'Even today, indeed though less regularly than in the past class tends to determine occupation rather than occupational class. So is the case in our society. It is immaterial if caste has given rise to occupation or vice versa. In either case occupation can be the best starting point constitutionally permissible and legally valid for determination of backwardness.

669. For instance, priests either in Hindus or Mullahs in Muslims or Bishops or Padris amongst Christians or Granthi in Sikhs are considered to be at the top of hierarchal system. They cannot be considered to be backward in any community not because of their religion but the nature of occupation. Similarly the untouchables became outcaste due to nature of the job they performed. On lower level whether it is barber or tailor, washerman or milkman, agricultural class or artisan they are a group or class who can be identified in any community. Identifying them by caste may mean that a Muslim or Christian who for generations has been carrying on same occupation as his counterpart amongst Hindus cannot be identified as backward class. And if it is done then for Hindus it would be caste based whereas for others occupational. How far that would be legal and constitutional is one matter but if the yardstick of occupation is applied to every community the identification would be uniform without exclusion of any. For instance weavers or washerman. They may be both Hindus and Muslims. It would be unfair to include Hindu washerman and exclude Muslim washerman.

670. Having adopted occupation as the starting point next step should be to ascertain the social acceptability. A lawyer, a teaching and a doctor of any community whether he is a teacher of primary school or University, a Vaid or Hakim practising in the village or a professor in Medical college always commands social respect. Similarly social status amongst those who perform lower job depends on the nature of occupation. A person carrying on scavenging became an untouchable whereas others who were as lower as untouchable in the order became depressed. For instance coboler. Same did not apply to those who carried on better occupation. A person having landed property and carrying on agricultural occupation did not in social hierarchy command lesser respect than the one carrying on same occupation belonging to higher caste. But backwardness should be traditional. For instance only those washerman or tailor should be considered backward who have been carrying on this occupation for generations and not the modern dry cleaner or fashion tailors. If the collectivity satisfies both the tests then apply the test of education.

What standard of education should be adopted should be concern of the State. Existence of, both, that is social and educational backwardness for a group or collectivity is indicated by Article 15(4) itself. Use of such expression was purposive. Mere educational or social backwardness would not have been sufficient as it would have enlarged the field thus frustrating the very purpose of the amendment. That is why it was observed in Balaji that the concept of backwardness was intended, 'to be relative in the sense that any class who is backward in relation to the most advanced classes should be included in it. And the purpose of amendment could be achieved if backwardness under Article 15(4) was

understood as comprising of social and educational backwardness. It is not either social or educational, but it is both social and educational'. Reading the expression disjunctively and permitting inclusion of either socially or educationally backward class of citizens would defeat the very purpose. For instance some of the so-called higher castes who by nature of their occupation or caste have been accepted by society to be socially advanced may enter because of the group or collectivity having been educationally backward. Many agricultural occupationists both in South and North have chosen to remain educationally backward even though by virtue of their landed property they have always been compared to any higher class. Can such persons be permitted to take benefit of such benign measures. Not on the language, purpose and objective of these provisions.

671. After applying these tests the economic criteria or the means test should be applied. Poverty is the prime cause of all backwardness. It generates social and educational backwardness. But wealth or economic affluence cuts across all. A wealthy man irrespective of caste or community needs no crutches. Not in 1990 when money more than social status and education have become the index. Therefore, even if a group or collectivity is not educated or even socially backward but otherwise rich and affluent then it cannot be considered backward. There is no dearth of class or group who by the nature of the occupation they have been pursuing are economically well off. Including such groups would be doing injustice to others. Thus occupation should furnish the starting point of determination of backward class. And if in ultimate analysis any Hindu caste is found to be occupationally, socially, educationally and economically backward it should be regarded as eligible for benefit under Article 16(4) because it would be within constitutional sanction.

672. Identification alone does not entitle a group or class to be entitled for protective benefits. Such group or collectivity should be inadequately represented. Use of such words as a equate or inadequate are no doubt wide and vague and their meaning has to be gathered, 'largely on the point of view from which the facts may be proved are reconsidered'. But from the purpose and objective of Article 16(4) a collectivity or group which is found to be backward cannot qualify for being included if it is adequately represented. Word 'any' has great significance. In wider sense it extends to and includes all group or collectivity, which is as much 'any' backward class as any singularity. In the larger sense comprising of entire plurality it continues and may continue but in the limited sense the group may keep on getting in and out depending on continuance of those conditions which entitled it to be determined as backward.

A government of a State or the Central Government may on evaluation after five or ten years direct a group or collectivity to be excluded from the list of backward classes if it finds it adequately represented. What is adequate representation is of course the primary concern of the government. But the exercise should be objective. For instance in some States it was found by Commissions appointed by their governments that certain castes were adequately represented. Yet because of extraneous reasons the government had to bow and include them in the list of backward classes. Such inclusion is a fraud of constitutional power. Any citizen has a right to challenge and court has obligation to strike it down by directing exclusion of such group from the backward class. Inadequacy provides jurisdiction not only for exercise of power but its continuance as well. If that itself ceases to exist the power cannot be continued to be exercised. Where power is coupled with duty the condition precedent must exist for valid exercise of power. Mere identification of collectivity or group by a Commission cannot clothe the government to exercise the power unless it further undertakes the exercise of determining if such group or collectivity is adequately or inadequately represented. The exercise is mandatory not in the larger sense alone but in the narrower sense as well.

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673. More important that determination of backward class is the proportion in which reservation can be done as it is not only a social or economic problem or the question of empowering but a constitutional and legal issue which calls for serious deliberation. Although political statesmanship of the framers of the Constitution intended to confine it to 'minority of seats' the judicial pragmatism raised it 'broadly and generally' to less than 50% in Balaji and not beyond that in T. Devadason v. Union of India . Effect of these two decisions was that the reserved and non-reserved seats both for purposes of admission in educational institution under Article 15(4) and for appointment and posts in Article 16(4) were divided in half and half. But once the reservation climate spread in the country's environment it took over the political set up of different States to provide for reservation for different groups for different reasons. And legal justification for such reservation was provided for by the courts, either on the touchstone of Article 14 being a reasonable classification or under Article 16(1) as preferential treatment for disadvantaged groups. If in Chitra Ghosh and Anr. v. Union of India, , the provision for government nominees in medical colleges was upheld, 'as the government which bears the financial burden of running medical colleges' could not be, 'denied the right to decide from what sources the admission will be made' then D.N. Chanchala v. State of Mysore, , did not find it unreasonable to extend the principle of preferential treatment, of socially and educationally backward in Article 15(4), to children of political sufferers as 'it would not in any way be improper if that principle were to be applied to those who are handicapped but do not fall under Article 15(4)'.

The reservation in favour of wards of defence personnel was upheld as a reasonable classification in Subhashini v. State of Mysore, AIR 1966 Mysore 40 as the reservation was in national interest. Result of such extensions and justification was multiplication of categories and withdrawal of more and more seats and posts from open competition. And when observations were made in Thomas that 50% was, 'a rule of caution' and, 'percentage of reservation in proportion to population did not violate Article 16(4)', a virtual go by was given by various states to the balancing equality created by courts and reservations were made much beyond 50% and the High Courts had no option but to uphold them. Thus the combined effect of these principles, developed by Balaji and Davadason, on the one hand and Chitra Ghosh, Chanchala and Thomas on the other was that reservation up to 50% under Articles 15(4) and 16(4) and up to, 'reasonable extent' under Article 16(1). Under one it became SC/ST and BC and under the other wards of Military and Defence personnel, Jagdish Rai v. State of Haryana , Political, sufferers, sportsman, Children of MISA, State of Karnataka v. Jacob Maltew ILR (1964) 2 Kerala p. 53 and DSIR, Chhotey Lal v. State of U.P. , detenue etc. Is this sound either constitutionally or legally or socially?

674. Article 16(1), (2) and (4) is extracted below:

16. Equality of opportunity in matters of public employment-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.'

675. Originally this Article as introduced in the Constituent Assembly was Article 10 and its Sub-article (3) identical to Sub-article (4) of Article 16 provided for reservation, 'in favour of any class of citizens'. It was the Drafting Committee which qualified the expression, 'class of citizens' by adding the word 'backward' before it. Effect of this addition was that clause got narrowed and the reservation could be made only for those class of citizens who could be grouped as backward. Putting it the other way the framers of the Constitution decided against expansive reservation which under original proposal could have extended to any class of citizens. What was thus consciously and deliberately given up by exercising the option in favour of only those class of citizens who could be identified as backward then reservation in favour of any other class of citizens cannot legitimately and legally be accepted as valid. Extending it to other class of citizens under cover of reasonable classification would be constitutional distortion. What should be deemed to be prohibited in the light of historical background cannot be brought back from the backdoor on principle developed by the American courts under Equal Protection Clause as they had to rise to the occasion due to absence of a provision like Article 16(4), and the fractured interpretation put in the Slaughter house cases, which eroded the very foundation of Equal Protective clause 'mainly intended for the benefit of Negro freedom'.

676. Reservation co-related with population was not accepted even by the Constituent Assembly. On plain construction inadequacy of representation cannot be the measure of reservation. That is creative of jurisdiction only. In fact Dr. Ambedkar's illustration while persuading all sections to accept the drafting committee proposal is very instructive.

Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.

Even otherwise if the framers would have intended to provide for reservation to extent of backwardness of the population it would have been simpler to use the expression, 'in proportion to it' after the word 'backward class of citizens' and before 'is not' adequately represented. Article 16(4) then would have read as under:-

Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens in proportion to it is not adequately represented in the services under the State.

No rule of interpretation in absence of express or implied indication permits such substituted reading.

677. In Thomas, (supra 46) Mathew J., introduced concept of proportional equality from two American decisions Griffin v. Illinois 351 US (12) and Harper v. Virginia Board of Educations 383 US 663 [1966]. None of the decisions were concerned with affirmative action. The one related to payment of charges for translation of manuscript in appeal and other with levy of poll tax at uniform rate indiscriminately. In view of clear phraseology and the background of enactment of Article 16(4) any interpretation of it on ratio of American decisions cannot be of any help. Our Constitution does not approve of proportional representation either in services or even in Parliament as is illustrated by Article 331 of the Constitution which empowers the President to nominate not more than two

members of the Anglo-Indian community to the House of People, irrespective of their population, if they are not adequately represented. Same is the theme of Dr. Ambedkar's speech, in Constituent Assembly, extracted earlier. For the same reasons the observation of Fazal Ali, J. in Thomas (supra), ...Decided cases 01 this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16. The answer must necessarily be in the negative. cannot be accepted as correct construction of Article 16(4).

True as observed by Krishna Iyer, J., in Soshit Karamchari (Supra) and Chinnappa Reddy, J., in Vasantha Kumar (supra) that there is no constitutional provision restricting reservation to 50% but with profound respect, the debates in the Constituent Assembly, the provisions in the Constitution do not support the construction of Article 16(4) as empowering government to reserve posts for backward class of citizens in proportion to their population. Any construction of Article 16(4) cannot be divorced without taking into account Article 16(1). Equality in services has been balanced by providing equal opportunity to every citizen at the same time empowering the State to take protective measure for the backward class of citizens who are not adequately represented. This balancing of equality cannot be lost sight of while interpreting these provisions. Since there is no clear indication either way the role of the courts become both important and responsible, by interpreting the provision reasonably and with common sense so as to carry out the objective of its enactment. And the purpose was to enable the backward class of citizens to share the power if they were not adequately represented but not to grant proportional representation, a typical British concept rejected by our Bounding Fathers.

678. Equality has various shades. Its understanding and application have been shaped by social, economic and political conditions prevailing in the society. The reigning philosophy since 18th century has been the State's responsibility to reduce disparities amongst various sections of the population and promoting a just and social order in which benefits and advantages are evenly distributed. To achieve this basic objective various theories have been advanced from time to time. The formal equality advanced by Aristotle that equals should be treated equally and unequals unequally was as much result of social and economic conditions as the Rawls theory of justice or the Dworkin's concepts of right of all to treatment as equals. Liberty and right to equality taken individually may appear to pull in different directions. But viewed as part of justice and fairness the two are the primary tenets of modern egalitarian society. The real difficulty is translating them into practical working. The American concept of 'equal but separate' doctrine is the best illustration of distance between theory and practice of equal protection. The recognition and realisation that neither all men are equal nor are the circumstances in which they are born or grow are same gave rise to classification and grouping of persons similarly situated and extending them equal or same treatment. But the classification has to be reasonable and rational bearing a just relation with the legislative purpose and should not be invidious or arbitrary. In our constitutional scheme the classification in matters of employment or appointment in the services has been done constitutionally. From the entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alike for purposes of employment except those who fall under Article 16(4) any further classification of grouping for reservation would be constitutionally invalid. No legislative exercise can transcend

the constitutional barrier. For valid classification legislature or executive measures must be co-related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only, any further reservation being beyond constitutional purpose would be impermissible and per se invalid.

679. Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective. Atoning for the past injustices on backward classes through Constitutional mechanism was morality raised to legal plain. Admonition to State not to deny equality before law or equal protection of laws found on sound public policy, is in reality the measure of fundamental right which every person enjoys. But, principle of the equal protection of law does not mean that, 'every law must have universal application to all persons who are not by nature, attainment or circumstance, in the same position', *Dhirendra Kumar Mandal v. The Supdt. & Remembrancer of Legal Affairs to the Govt. of West Bengal and Anr.* and the varying needs of different classes of persons require special treatment. Principle of reasonable classification was developed by theorists and courts to enable State to function effectively by classifying reasonably. But the theory developed by Tussman and Breck that equal Protection clause really dealt with the problem with the relation of two classes to each other one of individuals possessing the definite trait and the other of individuals tainted by the mischief at which the law aims said to be, 'the first comprehensive analysis of the Equal Protection Clause' may be applicable while considering the scope of Article 14 but once the Constitution makers treated employment in services separately by creating fundamental right in favour of all citizens in pursuance of the ideal of Preamble to secure to all its citizens equality in opportunity and status then it has to be understood in its own perspective. Various sub-articles of Article 16 specially Clause 4 indicates constitutional classification and creation of two classes one dealt with in Article 16(1) and the other in Article 16(4). Principle of reasonable classification for purposes of creating another class or planting one class in another would be constitutionally infirm.

680. All the same the legislative anxiety of affirmative action by preferential treatment to disadvantaged group lagging behind may not be doubted. Difference between reservation and preferential treatment is that in one a group or class or collectivity is separately provided for and the competition is amongst them only. Whereas in preferential treatment the collectivity is part of the same group but it is permitted some weightage due to social, economic or any justifiable reason. For purposes of achieving equality by result Article 16 creates two compartments, one general and the other reserved and then both are paired together. But preference is available in the same compartment. Validity of one depends on constitutional sanction whereas the second has to stand on test of reasonableness. For instance the reservation of backward class cannot be assailed as being violative of constitutional guarantee whereas preferential treatment can be upheld only if it is reasonable with the nexus it seeks to achieve. Article 16 unlike Article 14 is a positive right of equal opportunity. Therefore, any preferential treatment shall have to be tested in the light of the constitutional objective the Article seeks to achieve. That is what is its natural, operation and effect. Reservation made for backward class of citizens achieves the constitutional goal of achieving equality of opportunity of all. Same cannot be said for others. Any reservation for any other class would be, as already explained, contrary to constitutional objective thus invalid. Wards of military personnel or political sufferers or any other class cannot be extended the benefit of benign discrimination as that would be violative of equality of opportunity. In absence of any objective or purpose discernible from the Constitution the State action would be liable to be struck down for absence of necessary co-relation between constitutional purpose and its means. Nexus such as national purpose or principle contained in Article 15(4) would not justify such action. Even preferential treatment by way of

weightage may be permissible in very limited cases and any such measure would be liable to strict judicial scrutiny. Principle of Article 14 of reasonable classification may be relevant only to limited extent as to whether it is backed by reason and is justified but since it has to be tested further on touchstone on Article 16(1) the reasonable classification must be so tailored as not to contravene the right to equal opportunity.

681. No provision of reservation or preference can be so vigorously pursued as to destroy the very concept of equality. Benign discrimination or protection cannot under any constitutional system itself become principle clause. Equality is the rule. Protection is the exception. Exception cannot exhaust the rule itself. True no restriction was placed on size of reservation. But reason was the consensus understanding that it was for minority of seats. That apart the reservation under Article 16(4) cannot be taken in isolation. Article 16(1) and Article 16(4) being part of same objective and goal, any policy of reservation must constitutionally withstand the test of inter action between the two. In this perspective reservation cannot be except for, 'minority of seats'. Our founding fathers were aware that such policies were bound to have political overtones. Various considerations may result in influencing the political decision. That is why their validity in the constitutional framework was left to the courts. Observations by Dr. Ambedkar in Constituent Assembly Debates are quite pertinent, If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

Since this Court has consistently held that the reservation under Articles 15(4) and 16(4) should not exceed 50% and the States and the Union have by and large accepted this as correct it should be held as constitutional prohibition and any reservation beyond 50% would liable to be struck down.

Therefore,

- (i) Reservation under Article 16(4) should in no case exceed 50%;
- (ii) No reservation can be made for any class other than backward class either under Article 16(1) or 16(4).
- (iii) Preferential treatment in shape of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive.

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682. Promotion is the most sensitive branch of service jurisprudence. Although its purpose is manifold but the principle objective is, 'to secure the best possible incumbents for the higher positions while maintaining the morale of the whole organisation' as it not only, 'serves the public interest' but is founded on the inherent principle that the higher one moves the greater is the responsibility he assumes.

683. Manner and method of promotion is usually linked with the nature of posts, if it is selection or non-selection. Reservation, for SC/ST, has been extended, to both, by this Court in Rangachari and Soshit Karamchari respectively reiterated in State of Punjab v. Hira Lal, and Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan and Anr. . In Rangachari it was held, 'The condition precedent may refer either to numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation'. In the context the expression, 'adequately represented imports consideration of size as well as values, numbers as well as the nature of appointments'.

684. But, inadequacy of representation is creative of jurisdiction only. It is not measure of backwardness. That is why less rigorous test or lesser marks and competition amongst the class of unequals at the point of entry has been approved both by this Court and American courts. But a student admitted to a medical or engineering college is further not granted relaxation in passing the examinations. In fact this has been explained as valid basis in American decisions furnishing justification for racial admissions on lower percentage. Rationale appears to be that every-one irrespective of the source of entry being subjected to same test neither efficiency is effected nor the equality is disturbed. After entry in service the class is one that of employees. If the social scar of backwardness is carried even, thereafter the entire object of equalisation stands frustrated. No further classification amongst employees would be justified as is not done amongst students.

685. Constitutional, legal or moral basis for protective discrimination is redressing identifiable backward class for historical injustice. That is they are today, what they would not have been but for the victimisation. Remedying this and to balance the unfair advantage gained by others is the constitutional responsibility. But once the advantaged and disadvantaged the so-called forward and backward, enter into the same stream then the past injustice stands removed. And the length of service, the seniority in cadre of one group to be specific the forward group is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimisation.

686. Equality either as propagated by theorists or as applied by courts seeks to remove inequality by, 'parity of treatment under parity of condition'. But once in 'order to treat some persons equally, we must treat them differently' has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

687. Constitutional sanction is to reserve for backward class of persons. That is class or group interest has been preferred over individual. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against other. No forward class v. backward class or majority against minority. It would, thus, be contrary to the Constitution. Brother Kuldeep Singh, for good and sound reasons has rightly opined, that, Rangachari cannot be held to be laying down good law.

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688. Reservation, for, 'economically backward sections of the people who are not covered by any of the existing schemes of reservation', again, raises an important issue. De facto difficulties in determining such backwardness stands established by failure of the government to evolve any workable criteria even after lapse of one year since, 25th September, 1991, the date on which the order dated 23rd August 1990 directing reservation for backward class was amended and it was announced that, 'the criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.' But the de jure hurdles appear, even, greater. Any reservation resulting in curtailing right of equal opportunity is to withstand the test of equal protection or benign discrimination. Latter has been permitted for a class which had suffered

injustices in the past and is suffering even now. It is an atonement of past segregation and discrimination such as Negroes in America and SC/ST of our country. And is being extended even to those who could legitimately be considered to be backward class. Since Article 16(4) has a constitutional purpose and is to operate only so long the goal is not achieved economic backwardness does not qualify for such protective measure. As even if such a class or collectivity is held to fall in the broader concept of the expression backward class of citizens it would not be eligible for the benefit as it would be incapable of satisfying the other mandatory requirement of being inadequately represented in services without which the State cannot have any jurisdiction to exercise the power. Article 16(4) thus by its nature, and purpose cannot be applicable to economically backwards, except probably when a proper methodology is worked out to determine inadequacy of representation of such class.

689. Is it possible to reserve under Article 16(1)? Detailed reasons have been given, earlier, against any reservation under cover of doctrine of reasonable classification. Eradication of poverty which, 'is not to be exalted or praised, but is an evil thing which must be fought and stamped out' is one of the ideals set out in the Preamble of the Constitution as it postulates to achieve economic justice and exhorts the State under Article 38(2) to, 'minimise the inequality of income'. All the same can the State for this purpose reserve posts for the economically backwards in service. Right to equal protection of laws or equality before law in, 'benefits, and burdens' by operation of law, equally, amongst equals and unequally amongst unequals is firmly rooted in concept of equality developed by courts in this country and in America. But any reservation or affirmative action on economic criteria or wealth discrimination cannot be upheld under doctrine of reasonable classification. Reservation for backward class seeks to achieve the social purpose of sharing in services which had been monopolised by few of the forward classes. To bridge the gap, thus, created the affirmative actions have been upheld as the social and educational difference between the two classes furnished reasonable basis for classification. Same cannot be said for rich and poor. Indigence cannot be rational basis for classification for public employment. Any legislative measure or executive action operating unequally between rich and poor has been held to be suspect. A provision requiring a person to pay for trial manuscript before filing criminal appeal was struck down in *Griffin v. Illinois* 351 US 12 (195) as it amounted to denial of right of appeal to poor persons. In *Harper v. Virginia Board of Elections* 383 US 663 [1966] Poll tax for voting was invalidated as, 'wealth, like race, creed or colour, is not germane to one's ability to participate intelligently in the electoral process'. Protection was given to the appellants in effect or consequence of equal protection clause. Duty of State to protect against deprivation due to poverty should not be confused with States obligation to treat everyone uniformly and equally without discrimination. Protection against application of law due to difference in economic condition, cannot be equated with classification based on disproportion in wealth. Former is in realm of justice and fairplay whereas latter is equal protection to which every one is entitled. In the former unjust application of law may be cured by removing the offending part and thus apply the law uniformly to rich and poor. Whereas in latter the classification has to be justified on the nexus test. Poverty may have relevance and may furnish valid justification while dealing with social and economic measure. Any legislation or executive measure undertaken to remove disparity in wealth cannot be suspect but a classification based on economic conditions for purposes of Article 16(1) would be violative of equality doctrine.

690. More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle

them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class. Therefore, (1) No reservation can be made on economic criteria.

(2) It may be under Article 16(4) if such class satisfies the test of inadequate representation.

(3) Exclusion of creamy layer is a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

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691. Various infirmities were highlighted in the report of the Second Backward Class Commission and the consequent invalidity of the government order issued on it. Attack on the report varied from the reference being beyond Article 340 to manner and method of ascertaining backwardness by issuing questionnaire to hardly one per cent of the population, interviewing interested and biased persons only, relying on obsolete material such as caste census of 1931, importing personal knowlege, rewriting Hindu Varna by adding intermediate or middle caste between twice born and sudra, working out backward population erroneously as in 1931 only 67% of the population was Hindu and if 22% were SC and 43% backward then the remaining were 20% inflating backward classes by conjectures and assumptions as First Commission identified 2399 whereas the Second determined it at 3743 and the Anthropological Survey of India published a project report identifying only 1057 backward classes, and adopting caste as the sole and the only criteria for identifying backwardness etc. Action of the Govt. in accepting the report and issuing the Government Order was challenged for exhibition of sudden alacrity not on objective consideration but for extraneous reasons, acceptance of the report without any discussion or debate in the Parliament which was the least considering the far-reaching consequences of such report, acting by executive order instead of legislative measure, when reservation for backward class was being made in Union services for the first time, propriety of basing the action on a report rendered 10 years earlier without any regard to social and economic changes in the meantime when such period is normally considered sufficient for review and re-assessment of continuance of such actions, etc.

692. Many of these challenges appear to be well founded but any discussion on it is unnecessary for two reasons, one failure of any objective consideration of the report by the Government before issuing the orders and others some of the basic infirmities have been dealt with while dealing with the issue of identification of backward classes. Above all what is not provided in the Constitution, what was not accepted by the Government in 1956 what has not been approved by this Court even for backward classes in Article 16(4) was adopted by the Commission as the basis in its report submitted in 1978 for 'socially and educationally backward classes', an expression narrower and different than 'backward classes' and implemented in 1990 by the Government without even placing it before the Parliament or any objective consideration by it. An order reserving posts can no doubt be made even by the executive but the decision being of utmost importance as reservation was being made in services under the Union for the first time the propriety demanded that it should have been placed before the Parliament. For growth and development of healthy conventions and traditions no

provision in the Constitution or statute is needed. It may, however, not be out of place to mention that where rules framed under Rule 309 exist no executive order in violation of it can be passed.

693. Vital issues, by agreement of both sides, relating to reservation and preferential treatment in services have been discussed. On many of these this Court, to use the words of the Constitution Bench, has not spoken with, 'one voice'. Therefore, these public interest petitions, filed in unfortunate circumstances which are not necessary to be narrated, were referred to be heard by a larger bench of nine judges, 'to finally settle the legal positions relating to reservations'.

694. Finality, is necessary not only for courts or tribunal but for the guidance of the affirmative action ameliorative or preferential by the Legislature or the Executive. What should not be lost sight of is if history of discrimination and segregations of the SC/ST and the socially, educationally and economically backward in the darkest chapter of our social history, with no parallel any where in the world, then constitutional therapy to eradicate it root and branch too is unparalleled and even most developed and democratically advanced democracies, cannot match the socially oriented effort to achieve an egalitarian society. Practical equality or equality by result is the approach. Effort is to usher in a progressive society by bridging the gap between the forward and backward by demolishing the social barriers and enabling the lowest to share the power to remove inferiority and infuse feeling of equality. But without sacrificing efficiency and disturbing the equality equilibrium by confining it to minority of posts and treating them preferentially for such length of time, as a self operating mechanism, coming to an end once the constitutional objective of enabling them to stand on their own is fulfilled. Why reservation policy in services or the benefits of welfare measures pursued by different States for the weaker sections of the society have not percolated to the needy and deserving at the rock bottom is more a political issue than constitutional or legal. But no effort can succeed unless the policy makers eschew extraneous considerations and tackle the problem sincerely and with understanding. So long the identification of the backward class is not made properly and practically it would serve the vested interest only. And the 'halves' among Sudra or the intermediate backward classes shall not permit it to reach the have-nots the real and genuine backward classes.

695. No exception can be taken to the recommendations of the Mandal Commission for reservation for backward class of citizens in services by the Union. But commissions are only fact finding bodies. The constitutional responsibility of reserving posts rests with the government. Unfortunately neither in 1990 nor in 1991 this duty was discharged constitutionally or even legally. Whether the report was within the term of reference and if the Commission in identifying socially and educationally backward class repeated the same mistake as was done by the first Commission and if the Commission could adopt two different yardsticks for determining backwardness among Hindus and non-Hindus were aspects which were required to be gone into by the Government before issuing any order. The exercise of power to reserve is coupled with duty to determine backward class of citizens and if they were adequately represented. If the Government failed to discharge its duty then the exercise of power stands vitiated. No further need be said except to extract following words of William O. Douglas-

Judicial Review gives time for the sober second thought \* \* \* \* \*

## CONCLUSIONS

696. Both the impugned orders issued by the respective governments in 1990 and 1991 reserving appointments and posts for socially and educationally backward classes of citizens, without

discharging their constitutional obligation of examining if the identification of backward class by the Commission was in consonance with constitutional principle and philosophy of the basic feature of the Constitution and if the group or collectivity so identified was adequately represented or not which is the sine qua non for the exercise of the power under Article 16(4), are declared to be unenforceable.

(1) Reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher courts in the country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions.

(2) (a) Constitutional bar under Article 16(2) against state for not discriminating on race, religion or caste is as much applicable to Article 16(4) as to Article 16(1) as they are part of the same scheme and serve same constitutional purpose of ensuring equality. Identification of backward class by caste is against the Constitutional.

(b) The prohibition is not mitigated by using the word, 'only' in Article 16(2) as a cover and evolving certain socio-economic indicators and then applying it to caste as the identification then suffers from the same vice. Such identification is apt to become arbitrary as well as the indicators evolved and applied to one community may be equally applicable to other community which is excluded and the backward class of which is denied similar benefit.

697. Identification of a group or collectivity by any criteria other than caste, such as, occupation cum social cum educational cum economic criteria ending in caste may not be invalid.

(c) Social and educational backward class under Article 340 being narrower in import than backward class in Article 16(4) it has to be construed in restricted manner. And the words educationally backward in this Article cannot be disregarded while determining backwardness.

(3) Reservation under Article 16(4) being for any class of citizens and citizen having been defined in Chapter II of the Constitution includes not only Hindus but Muslims, Christians, Sikhs, Buddhists Jains etc. the principle of identification has to be of universal application so as to extend to every community and not only to those who are either converts from Hinduism or some of who carry on the same occupation as some of the Hindus.

(4) Reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50%.

(5) Article 16(4) being part of the scheme of equality doctrine it is exhaustive of reservation, therefore, no reservation can be made under Article 16(1).

(6) Reservation in promotion is constitutionally impermissible as, once the advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

(7) Economic backwardness may give jurisdiction to state to reserve provided it can find out mechanism to ascertain inadequacy of representation of such class. But such group or collectivity does not fall under Article 16(1).

(8) Creamy layer amongst backward class of citizens must be excluded by fixation of proper income, property or status criteria.

698. Reservation by executive order may not be invalid but since it was being made for the first time in services under the Union propriety demanded that it should have been laid before Parliament not only to lay down healthy convention but also to consider the change in social, economic and political conditions of the country as nearly ten years had elapsed from the date of submissions of the report, a period considered sufficient for evaluation if the reservation may be continued or not.

699. Valuable assistance was rendered by Shri K.K. Venugopal and Shri N.A. Palkhiwala the learned senior counsel, who led the arguments and placed one view. They were ably supported by Shri P.P. Rao and Smt. Shyamala Pappu, senior advocates. Arguments were also advanced by Smt. Hingorani, Mr. Mehta, Mr. K.L. Sharma, Mr. S.M. Ashri, Mr. Vishal Jeet. Shri K.N. Rao and Col. Dr. D.M. Khanna appeared in person as interveners and were of assistance.

700. Shri Ram Jethmalani, the learned senior advocate appearing for the State of Bihar was equally helpful in projecting the other view. Shri K. Parasaran, the learned senior counsel for the Union of India while supporting. Shri Jethmalani placed a very dispassionate view of the entire matter. Shri Rajiv Dhawan was also very helpful. Shri R.K. Garg, Shri Shiv Pujan Singh, Shri J. Siva Subramaniam, Shri Poti, Smt. Rani Jethmalani also made submissions. Shri Ram Avadhesh Singh argued in person.

#### **Part IV – other citations**

Jawaharlal Nehru in his famous letter dated June 27, 1961 sent to all the chief ministers observed as follows

*....help should be given on economic considerations and not on caste...I dislike any kind of reservation, more particularly in service. I react strongly against anything which leads to inefficiency and second rate standards.....the only real way to help a group of backwards is to give opportunities of good education....but if we go in for reservations in communal and caste basis, we swamp the bright and able people and remain second rate or third rate. I am grieved to learn of how far this business of reservation has gone based on communal consideration. It has amazed me to learn that even sometimes promotions are based on communal / caste considerations. This way lies not only folly, but disaster. Let's help the backward group by all means, but never at the cost of efficiency. How are we going to build our public sector or indeed any sector with second rate people?*

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Mumbai: The Bombay high court on Friday held that a woman belonging to the SC/ST category by birth would retain her caste even after marrying a man who was from an upper caste. The bench of Justices B H Marlapalle, Abhay Oka and R Y Ganoo said that a woman would not lose her caste by marriage and it did not change to that of her husband's. In fact, as ruled by a Constitution bench of the SC,

"Caste is acquired by birth and does not undergo a change by virtue of marriage or even adoption." The apex court had also laid down that a woman from a general category married to a SC/ST man would also not automatically gain voluntary mobility into the backward caste.