Supreme Court of India 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 Author: B J Reddy Bench: M Kania, M Venkatachaliah, S R Pandian, . T Ahmadi, K Singh, P Sawant, R Sahai, B J Reddy ORDER 1. Judgment of The Chief Justice, M.N. Venkatachallah, A.M. Ahmadi and B.P. Jeevan Reddy, JJ. Delivered by B.P. Jeevan Reddy, J. B.P. Jeevan Reddy, J. Forty and three years ago was founded this republic with the fourfold objective of securing to its citizens justice, liberty, equality and fraternity. Statesmen of the highest order the like of which this country has not seen since - belonging to the fields of law, politics and public life came together to fashion the instrument of change - the Constitution of India. They did not rest content with evolving the framework of the State; they also pointed out the goal-and the methodology for reaching that goal. In the preamble, they spelt out the goal and in parts III and IV, they elaborated the methodology to be followed for reaching that goal. 2. The Constituent Assembly, though elected on the basis of a limited franchise, was yet representative of all sections of society. Above all, it was composed of men of vision, conscious of the historic but difficult task of carving an egalitarian society from out of a bewildering mass of religions, communities, castes, races, languages, beliefs and practices. They knew their country well. They understood their society perfectly. They were aware of the historic injustices and inequities afflicting the society. They realised the imperative of redressing them by constitutional means, as early as possible - for the alternative was frightening. Ignorance, illiteracy and above all, mass poverty, they took note of. They were conscious of the fact that the Hindu religion - the religion of the overwhelming majority - as it was being practiced, was not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this fourtier system (chaturvarnya) were the outcastes (Panchamas), the lowliest. They did not even believed all the caste system - ugly as its face was. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, unconnected with their deeds. There was to be no deliverance for them from this social stigma, except perhaps death. They were condemned to be inferior. All lowly, menial and unsavoury occupations were assigned to them. In the rural life, they had no alternative but to follow these occupations, generation after generation, century after century. It was their 'karma', they were told, the penalty for the sins they allegedly committed in their previous birth. Pity is, they believed all this. They were conditioned to believe it. This mental blindfold had to be removed first. This was a phenomenon peculiar to this country. Poverty there has been - and there is - in every country. But none had the misfortune of having this social division - or as some call it, degradation - super-imposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted - and do still constitute - a vicious circle. The founding fathers were aware of all this - and more. 3. 'Liberty, equality and fraternity' was the battle cry of the French Revolution. It is also the motto of our Constitution, with the concept of 'Justice-Social Economic and Poilitical' - the sum-total of modern political

thought - super-added to it. Equality has been and is the single greatest craving of all human beings at all points of time. It has inspired many a great thinker and philosopher. All religious and political schools of thought swear by it, including the Hindu religious thought, if one looks to it ignoring the later crudities and distortions. Liberty of thought, expression, belief, faith and worship has equally been an abiding faith with all human beings, and at all times in this country in particular. Fraternity assuring the dignity of the individual has a special relevance in the Indian context, as this Judgment will illustrate in due course. 4. The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets, relevant to Indian Society, have been referred to in the preamble and the articles under the sub-heading "Right to equality"- (Articles 14 to 18). In short, the goal is "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several articles in Part IV (Directive Principles of State Policy). "Justice, Social, Economic and Political", is the sum total of the aspirations incorporated in part IV. 5. Article 14 enjoins upon the state not to deny to any person "equality before the law" or "the equal protection of the laws" within the territory of India. Most constitutions speak of either "equality before the law" or "the equal protection of the laws", but very few of both. Section 1 of the XIV. Amendment to the U.S. Constitution uses only the latter expression while the Austrian Constitution (1920), the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equal before the law". (Article 7 of the Universal Declaration of Human Rights, 1948, of course, declares that "all are equal before the law and are entitled without any discrimination to equal protection of the law".) The content and sweep of these two concepts is not the same though there may be much in common. The content of the expression "equality before the law" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39A, 41 and 46. Among others, the concept of equality before the law contemplates minimising the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation. Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality - either equality before law or equality in any other respect. 6. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18. Through Article 15 they declared in positive terms that the state shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. With a view to eradicate certain prevalent undesirable practices it was declared in Clause (2) of Article 15 that no citizen

shall on the 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 shops, public restaurants, hotels and place of public entertainment or to the use of well, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of state funds or dedicated to the use of general public. At the same time, with a view to ameliorate the conditions of women and children a provision was made in Clause (3) that nothing in the said Article shall prevent the state from making any special provision for women and children. 7. In as much as public employment always gave a certain status and power - it has always been the repository of State power - besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1) expressly declares that in the matter of public employment or appointment to any office under the state, citizens of this country shall have equal opportunity while Clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to declare in Clause (4) that nothing in the said Article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizen which in the opinion of the state is not adequately represented in the services under the state. Article 17 abolishes the untouchability while Article 18 prohibits conferring of any titles (not representing military or academic distinction). It also prohibits the citizens of this country from accepting any title from a foreign state. 8. Article 16 has remained unamended, except for a minor amendment in Clause (3) whereas Article 15 had Clause (4) inserted in it by the First Amendment Act, 1951. As amended, they read as follows: 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 places 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 of, 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 of 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 apointments 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. (5) Noting 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. The other provisions of the Constitution having a bearing on Article 16 are Articles 38, 46 and the set of articles in Part XVI. Clause (1) of Article 38 obligates the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." Clause (2) of Article 38, added by the 44th Amendment Act says, "the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations." Article 46 contains a very significant directive to the State. It says: 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. It is evident that "the weaker sections of the people" do include the "backward class of citizens" contemplated by Article 16(4). Part XVI of the Constitution contains "special provisions relating to certain classes". The "classes" for which special provisions are made are, Scheduled Castes, Scheduled Tribes and the Anglo-Indian Community. It also provides for appointment of a Commission to investigate the conditions of and the difficulties faced by the socially and educationally backward classes and to make appropriate recommendations. Article 340 reads as follows: 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 tit 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 of 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 and 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 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. Article 338, which has been extensively amended by the Sixty-fifth Amendment Act, provides for establishment of a Commission for the Scheduled Castes and Scheduled Tribes to be known as 'the National Commission for the Scheduled Castes and Scheduled Tribes'. Clause (5) prescribes the duties of the Commission. They are: (5) It shall be duty of the Commission- (a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards; (b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled castes and Scheduled Tribes; (c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State; (d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards; (e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socioeconomic development of the Scheduled Castes and Scheduled Tribes; and (f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify. Clause (6) provides that "the President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations." Clause (7) being relevant may also be read here. It reads, "where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations." Clause (10) [Clause (3) prior to 65th Amendment Act] brings in socially and educationally backward classes identified by the Government on the basis of the report of the Commission appointed under Article 340 and Anglo-Indians within the purview of the expressions "Scheduled Castes and Scheduled Tribes". It reads as follows: 10. 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. Article 335 provides that "the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State." It is obvious that if the claims of even Scheduled Castes and Scheduled Tribes are to be taken into consideration

consistently with the maintenance of efficiency of administration, the said admonition has to be respected equally while taking into consideration the claims of other backward classes and other weaker sections. THE FIRST BACKWARD CLASSES COMMISSION (KALELKAR COMMISSION): 9. The proceedings of the Constituent Assembly on draft Article (10) disclose a persistent and strident demand from certain sections of the society for providing reservations in their favour in the matter of public employment. While speaking on the draft Article 10(3) [corresponding to Article 16(4)] Dr. Ambedkar had stated, "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." It was this demand which was mainly responsible for the incorporation of Clause (4) in Article 16. As matter of fact, in some of the southern States, reservations in favour of O.B.Cs. were in vogue since quite a number of years prior to the Constitution. There was a demand for similar reservations at the center. In response to this demand and also in realisation of its obligation to provide for such reservations in favour of backward sections of the society, the Central Government appointed a Backward Class Commission under Article 340 of the Constitution on January 29, 1953. The Commission, popularly known as Kaka Kalelkar Commission, was required "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 difficulties and to improve their conditions". The Commission submitted its report on March 30, 1955. According to it, the relevant factors to consider while classifying backward classes would be their traditional occupation and profession, the percentage of literacy or the general educational advancement made by them; the estimated population of the community and the distribution of the various communities throughout the state or their concentration in certain areas. The Commission was also of the opinion that the social position which a community occupies in the caste hierarchy would also have to be considered as well as its representation in Government service or in the Industrial sphere. According to the Commission, the causes of educational backwardness amongst the educationally and backward communities were (i) traditional apathy for education on account of social and environmental conditions or occupational handicaps: (ii) poverty and lack of educational institutions in rural areas and (iii) living in inaccessible areas. The Chairman of the commission, Kaka Kalelkar, however, had second thoughts after signing the report. In the enclosing letter addressed to the President he virtually pleaded for the rejection of the report on the ground that the reservations and other remedies recommended on the basis of caste would not be in the interest of society and country. He opined that the principle of caste should be eschewed altogether. Then alone, he said, would it be possible to help the extremely poor and deserving members of all the communities. At the same time, he added, preference ought to be given to those who come from traditionally neglected social classes. 10. The report made by the Commission was considered by

the Central Government, which apparently was not satisfied with the approach adopted by the Commission in determining the criteria for identifying the backward classes under Article 15(4). The Memorandum of action appended to the Report of the Commission while placing it on the table of the Parliament [as required by Clause (3) of Article 340] on September 3, 1956, pointed out that the caste system is the greatest hindrance in the way of our progress to egalitarian society and that in such a situation recognition of certain specified castes as backward may serve to maintain and perpetuate the existing distinctions on the basis of caste. The Memorandum also found fault with certain tests adopted by the Commission for identifying the backward classes. It expressed the opinion that a more systematic and elaborate basis has to be evolved for identifying backward classes. Be that as it may, the Report was never discussed by the Parliament. 11. No meaningful action was taken after 1956 either for constituting another Commission or for evolving a better criteria. Ultimately, on August 14, 1961, the Central Government wrote to ail the State Governments stating inter alia that "while the State Governments have the discretion to choose their own criteria for defining backwardness, in the view of the Government of India it would be better to apply economic tests than to go by caste." The letter stated further, rather inexplicably, that "even if the Central Government were to specify under Article 338(3) certain groups of people as belonging to 'other backward classes', it will still be open to every State Government to draw up its own lists for the purposes of Articles 15 and 16. As, therefore, the State Governments may adhere to their own lists, any All-India list drawn up by the Central Government would have no practical utility." Various State Governments thereupon appointed Commissions for identifying backward classes and issued orders identifying the socially and educationally backward classes and reserving certain percentage of posts in their favour. So far as the Central services are concerned, no reservations were ever made in favour of other backward classes though made in favour of Scheduled Castes and Scheduled Tribes. THE SECOND BACKWARD CLASSES COMMISSION (COMMISSION): 12. By an Order made by the President of India, in the year 1979, under Article 340 of the Constitution, a Backward Class Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India, which Commission is popularly known as Mandal Commission. The terms of reference of the Commission were: The terms of reference of the Commission were:- (i) to determine the criteria for defining the socially and educationally backward classes; (ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified; (iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and (iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper. The Commission was empowered to:- (a) obtain such information as they may consider necessary or relevant for their purpose in such form and such manner as they may think appropriate, from

the Central Government, the State Government, the Union Territory Administrations and such other authorities, organisations or individuals as may in the opinion of the Commission, be of assistance to them: and (b) hold their sittings or the sittings of such sub-committees as they may appoint from amongst their own members of such times and such places as may be determined by, or under the authority of the Chairman. 13. The report of the Commission was required to be submitted not later than 31st December, 1979, which date was later extended upto December 31, 1980. It was so submitted. Chapter-I of the Report deals with the Constitution of First Backward Classes Commission (Kaka Kalelkar Commission), its report, the letter of Kaka Kalelkar to the President, the lack of follow-up action and the letter of the Central Government referred to hereinbefore to State Governments to draw up their own lists. It also points out certain "internal contradictions" in the Report. Chapter-II deals with the "Status of other backward classes in some States". It sets out the several provisions relating to reservation in favour of O.B.Cs. obtaining in several States and the history of such reservations. Chapter-III is entitled 'methodology and data base'. It sets out the procedure followed by the Commission and the material gathered by them. Paras 3.1 and 3.2 read thus: 3.1. One important reason as to why the Central Government could not accept the recommendations of Kaka Kalelkar Commission was that it had not worked out objective tests and criteria for the proper classification of socially and educationally backward classes. In several petitions filed against reservation orders issued by some State Governments, the Supreme Court and various High Courts have also emphasised the imperative need for an empirical approach to the defining of socially and educationally backwardness or identification of Other Backward Classes. 3.2 The Commission has constantly kept the above requirements in view in planning the scope of its activities. It was to serve this very purpose that the Commission made special efforts to associate the leading Sociologists, Research Organisations and Specialised Agencies of the country with every important facet of its activity. Instead of relying on one or two established techniques of enquiry, we tried to caste our net far and wide so as to collect facts and get feed-back from as large an area as possible. A brief account of this activity is given below. It then refers to the Seminar held by Department of Anthropology of Delhi University in March 1979, to the questionnaire issued to all departments of Central Government and to the State Governments (the proforma are compiled in Vol. II of the Report) the country-wide touring undertaken by the Commission, the evidence recorded by it, the socio-educational field survey conducted by it and other studies and Reports involved in its work. In Chapter-IV the Commission deals with the interrelationship between social backwardness and caste. It describes how the fourth caste, Shudras, were kept in a state of intellectual and physical subjugation and the historical injustices perpetrated on them. In para 4.5 the Commission states: "The real triumph of the caste system lies not in upholding the supremacy of the Brahmin, but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as a part of the natural order of things.... It was through an elaborate, complex and subtle scheme of scripture, mythology and ritual that Brahminism succeeded in

investing the caste system with a moral authority that has been seldom effectively challenged even by the most ardent social reformers." 14. Chapter-V deals with 'social dynamics of caste'. In this chapter, the Commission emphasises the fact that notwithstanding public declarations condemning the caste, it has remained a significant basis of action in politics and public life. Reference is made to several caste associations, which have come into being after the Constitution. The concluding part in this Chapter, para 5.17, reads: The above account should serve as a warning against any hasty conclusion about the weakening of caste as the basis of social organisation of the Hindu society. The pace of social mobility is no doubt increasing and some traditional features of the caste system have inevitably weakened. But what caste has lost on the ritual front, it has more than gained on the political front. This has also led to some adjustments in the power equation between the high and low castes and thereby accentuated social tensions. Whether these tensions rent the social fabric or the country is able to resolve them by internal adjustments will depend on how understandingly the ruling high castes handle the legitimate aspirations and demands of the historically suppressed and backward classes. Chapter-VI deals with 'Social Justice, Merit and Privilege'. It attempts to establish, that merit in a elitist society is not something inherent but is the consequence of environmental privileges enjoyed by the members of higher castes. This is sought to be illustrated by giving an example of two boys - Lallu and Mohan. Lallu is a village boy belonging to a backward class occupying a low social position in the village caste hierarchy. He comes from a poor illiterate family and studies at a village school, where the level of instruction is woeful. On the other hand, Mohan comes from a fairly well-off middle class and educated family, attends one of the good public schools in the city, has assistance at home besides the means of acquiring knowledge through television, radio, magazines and so on. Even though both Lallu and Mohan possess the same level of intelligence, Lallu can never compete with Mohan in any open competition because of the several environmental disadvantages suffered by him. 15. Chapter-VII deals with 'Social justice. Constitution and the law'. It refers to the relevant provisions of the Constitution, to the decision in M.R. Balaji and Ors. v. State of Mysore [1963] Suppl. 1 S.C.R. 439 and various subsequent decisions of this Court and discusses the principles flowing from the said decisions. It notes that the subsequent decisions of this Court in C.A. Rajendran v. Union of India ; State of Andhra Pradesh and Ors. v. P. Sugar and State of Andhra Pradesh and Ors. v. U.S.V. Balram etc. show a marked shift from the original position taken in Balaji on several important points. In particular, it refers to the observations in Rajendran to the effect that "caste is also a class of citizens and if the class as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it was socially and educationally backward class of citizens within the meaning of Article 15(4)". It refers to the statement in A. Peeriakaruppan etc. v. State of Tamil Nadu , to the effect that "a caste has always been recognised as a class." It also commends the dissenting view of Subba Rao, J. in T. Devadasan v. Union of India , (wrongly referred to as Rangachari) - General Manager, Southern Railway v. Rangahari . Chapter-VIII

deals with 'North-South Comparison of other Backward Classes Welfare'. It is a case study of provisions in force in two Southern States namely Tamil Nadu and Karnataka and the two Northern States, Bihar and Uttar Pradesh. The conclusions drawn from the discussion are stated in para 8.45 in the following words: "In view of the foregoing account, the reasons for much stronger reaction in the North than South to reservations, etc. for other Backward Classes may be summarised as below:- (1) Tamil Nadu and Karnataka had a long history of Backward Classes movements and various measures for their welfare were taken in a phased manner. In Uttar Pradesh and Bihar such measures did not mark the culmination of a mass movement. (2) In the South"the forward communities have been divided either by the classification schemes or politically or both.... In Bihar and U.P. the G.Os. have not divided the forward castes. (3) In the South, clashes between Scheduled Castes and Backward peasant castes have been rather mild. In the North these cleavages have been much sharper, often resulting in acts of violence. This has further weakened the backward classes solidarity in the North. (4) in the non-Sanskritic South, the basic Varna cleavage was between Brahmins and non-Brahmins and Brahmins constituted only about 3 per cent of the population. In the Sanskritic North, there was no sharp cleavage between the forward castes and together they constituted nearly 20 per cent of the population. In view of this the higher castes in U.P. and Bihar were in a stronger position to mobilise opposition to backward class movement. (5) Owing to the longer history and better organisation of Other Backward castes in the South, they were able to acquire considerable political clout. Despite the lead given by the Yadavas and other peasant castes, a unified and strong OBC movement has not emerged in the North so far. (6) The traditions of semi-feudalism in Uttar Pradesh and Bihar have enabled the forward castes to keep tight control over smaller backward castes and prevent them from joining the mainstream of backward classes movement. This is not so in the south. (7) "The economies of Tamil Nadu and Karnataka have been expanding relatively faster. The private tertiary sector appears to be growing. It can shelter many forward caste youths. Also, they are prepared to migrate outside the State. The private tertiary sectors in Bihar and U.P. are stagnant. The forward caste youths in these two States have to depend heavily on Government jobs. Driven to desperation, they have reacted violently." 16. Chapter-IX sets out the evidence tendered by Central and State Governments while Chapter-X deals with the evidence tendered by the Public. Chapter-XI is quite important inasmuch as it deals with the "Socio-Educational Field Survey and Criteria of Backwardness". In this Chapter, the Commission says that it decided to tap a of number of sources for the collection of data, keeping in mind the criticism against the Kaka Kalelkar Commission as also the several Judgments of this Court. It says that Socio-Educational Field Survey was the most comprehensive inquiry made by the Commission in this behalf. Right from the beginning, this Survey was designed with the help of top social scientists and specialists in the country. Experts from a number of disciplines were associated with different phases of its progress. It refers to the work of Research Planning Team of Sociologists and the work done by a panel of experts led by Prof. M.N. Srinivas. It

refers to the fact that both of them concurred that "in the Indian context such collectivities can be castes or other hereditary groups traditionally associated with specific occupations which are considered to be low and impure and with which educational backwardness and low income are found to be associated." The Commission says further that with a view to providing continuous guidance at the operational level, a Technical Advisory Committee was set up under Dr. K.C. Seal. Director General, Central Statistical Organisation with the Chief Executive, National Sample Survey Organisation and representatives of Directors of State Bureau of Economics and Statistics as Members. The Commission sets out the Methodology evolved by the Experts' panel and states that survey operations were entrusted to the State Statistical Organisations of the concerned States/Union Territories. It refers to the training imparted to the survey staff and to the fact that the entire data so collected was fed into a computer for electronic processing of such data. Out of the 406 districts in the country, the survey covered 405 districts. In every district, two villages and one urban block was selected and in each of these villages and urban blocks, every single household was surveyed. The entire data collected was tabulated with the aid and National Informatics center of Electronics Commission of India. The Technical Committee constituted a Sub-Committee of Experts to help the Commission prepare "Indicators of Backwardness" for analysing the data contained in the computerised tables. In para 11.23 (page 52) the Commission sets out the eleven Indicators/Criteria evolved by it for determining social and educational backwardness. Paras 11.23, 11.24 and 11.25 are relevant and may be set out in full:- 11.23. As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are:- A. Social: (i) Castes/Classes considered as socially backward by others. (ii) Castes/Classes which mainly depend on manual labour for their livelihood. (iii) Castes/Classes where at least 25% females and 10% males above the state average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas. (iv) Castes/Classes where participation of females in work is at least 25% above the State average. B. Educational: (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average. (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average. (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average. C. Economic: (viii) Castes/Classes where the average value of family assets is at least 25% below the State average. (ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average. (x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households. (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average. 11.24. As the above three groups are not of equal importance for our purpose, separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each. Educational 'Indica-

tors' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also. 11.25. It will be seen that from the values given to each Indicators, the total score adds upto 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 percent (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference. It will also be useful to set out the observations of the Commission in para 11.27:- 11.27. In the end it may be emphasised that this survey has no pretentions to being a piece of academic research. It has been conducted by the administrative machinery of the Government and used as a rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time. All these factors obviously militate against the requirements of a technically sophisticated and academically satisfying operation. 17. Chapter-XII deals with 'Identification of OBCs'. In the first instance, the Commission deals with OBCs among Hindu Communities. It says that it applied several tests for determining the SEBCs like stigmas of low-occupation, criminality, nomadism, beggary and untouchability besides inadequate representation in public services. The multiple approach adopted by the Commission is set out in para 12.7 which reads:- 12.7. Thus, the Commission has adopted a multiple approach for the preparation of comprehensive lists of Other Backward Classes for all the States and Union Territories. The main sources examined for the preparation of these lists are:- (i) Socio-educational field survey; (ii) Census Report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes); (iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described in Chapter X of this Report; and (iv) Lists of OBCs notified by various State Governments. The Commission next deals with OBCs among Non-Hindu Communities. In paragraphs 12.11 to 12.16 the Commission refers to the fact that even among Christian, Muslim and Sikh religions, which do not recognise caste, the caste system is prevailing though without religious sanction. After giving a good deal of thought to several difficulties in the way of identifying OBCs among Non-Hindus, the Commission says, it has evolved a rough and ready criteria viz., (1) all untouchables converted to any Non-Hindu religion and (2) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counter-parts have been included in the list of Hindu OBCs - ought to be treated as SEBCs. The Commission then sought

to work out the estimated population of the OBCs in the country and arrived at the figure of 52 per cent. Paras 12.19, 12.22 may be set out in full in view of their relevancy: 12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of castewise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes communities and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country. 12.22. From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, Other Backward Classes constitute nearly 52% of the Indian population. Percentage Distribution of Indian Population by Caste and Religious Groups S.No. Group Name Percentage of total population I. Scheduled Castes and Scheduled Tribes A–1 Scheduled Castes 15.05 A–2 Scheduled Tribes 7.51 Total of 'A' 02.56 II. Non-Hindu Communities, Religious Groups, etc. B–1 Muslims (other than STs) 11.19 (0.02)* B–2 Christians (other than STs) 2.16 (0.44)* B–3 Sikhs (other than SCs & STs) 1.67 (0.22)* B–4 Buddhists (other than STs) 0.67 (0.03)* B–5 Jains 0.47 Total of 'B' 16.16 III. Forward Hindu Castes & Communities C–1 Brahmins (including Bhumidars) 5.52 C–2 Rajputs 3.90 C–3 Marathas 2.21 C–4 Jats 1.00 C–5 Vaishyas-Bania, etc. 1.88 C–6 Kayasthas 1.07 C–7 Other forward Hindu castes groups 2.00 Total of 'C' TOTAL OF 'A', 'B' & 'C' 56.30 IV. Backward Hindu Castes & Communities D. Remaining Hindu castes/ groups which come in the category of "Other Backward Classes" 43.70@ V. Backward Non-Hindu Communities E. 52% of religious groups under Section B may also be treated as OBCs. 8.40 F. The approximate derived population of Other Backward Classes including non-Hindu Communities 52% (Aggregate of D& E, rounded) @ This is a derived figure. * Figures in brackets give the population of S.C. & S.T. among these non-Hindu Communities." 1993 S.C./33 III G–9 18. Chapter-XIII contains various recommendations including reservations in services. In view of the decisions of the Supreme Court limiting the total reservation to 50 per cent, the Commission recommended 27 per cent reservation in favour of OBCs (in addition to 22.5 per cent already existing in favour of SCs and STs). It recommended several measures for improving the condition of these backward classes. Chapter-XIV contains a summary of the report. 19. Volumes 2 to 9 of the Report contain and set out the material and the data on the basis of which the Commission made its recommendations. Vol. II contains the State-wise lists of Backward Classes, as identified by the Commission. (It may be remembered that both the Scheduled Castes order and Scheduled Tribes order notified by the President contain State-wise lists of Scheduled Castes and Scheduled Tribes). Volume II inter alia contains the questionnaire issued to the State Governments/Union Territories, the questionnaire issued to the Central Government Ministries/Departments, the questionnaire issued to the general public, the list of M.Ps. and other experts who appeared and gave evidence before the Commission, the criteria furnished to Central Government offices for identifying OBC employees for both Hindu and non-Hindu Communities, report of the Research Planning Team of the Sociologists and the proformas

employed in conducting the Socio-Education Survey. 20. The Report of the Mandal Commission was laid before each House of Parliament and discussed on two occasions - once in 1982 and again in the year 1983. The proceedings of the Lok Sabha placed before us contain the statement of Sri R. Venkataraman, the then Minister for Defence and Home Affairs. He expressed the view that "the debate has cut across party lines and a number of people on this side have supported the recommendations of the Mandal Commission. A large number of people on the other side have also supported it. If one goes through the entire debate one will be impressed with a fairly unanimous desire on the part of all sections of the House to find a satisfactory solution to this social evil of backwardness of Scheduled Castes/Scheduled Tribes etc. which is a festering sore in our body politic," The Hon'ble Minister then proceeded to state," the Members generally said that the recommendations should be accepted. Some Members said that it should be accepted in toto. Some Members have said that it should be accepted with certain reservations. Some Members said, there should be other criteria than only social and educational backwardness. But all these are ideas which Government will take into account. The problem that confronts Government today is to arrive at a satisfactory definition of backward classes and bring about an acceptance of the same by all the state concerned." The Hon'ble Minister referred to certain difficulties the Government was facing in implementing the recommendations of the Commission on account of the large number of castes identified and on account of the variance in the State lists and the Mandal Commission lists and stated that consultation with various departments and State Governments was in progress in this behalf. He stated that a meeting of the Chief Ministers would be convened shortly to take decisions in the matter. The Report was again discussed in the year 1983. The then Hon'ble Minister for Home Sri P.C. Sethi, while replying to the debate stated: "While referring to the Commission whose report has been discussed today, I would like to remind the House that although this Commission had been appointed by our predecessor Government, we now desire to continue with this Commission and implement its recommendations." The Office Memorandum dated 13th August, 1090: 21. No action was, however, taken on the basis of the Mandal Commission Report until the issuance of the Office Memorandum on 25th September, 1991. On that day, the then Prime Minister Sri V.P. Singh made a statement in the Parliament in which he stated inter alia as follows: After all, if you take the strength of the whole of the Government employees as a proportion of the population, it will be 1% or 1-1/2. I do not know exactly, it may be less than 1%. We are under no illusion that this 1% of the population, or a fraction of it will resolve the economic problems of the whole section of 52%. No. We consciously want to give them a position in the decision-making of the country, a share in the power structure. We talk about merit. What is the merit of the system itself? That the section which has 52% of the population gets 12.55% in Government employment. What is the merit of the system? That in Class I employees of the Government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power structure it hardly 4.69. I want to challenge first the

merit of the system itself before we come and question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consiciously, with open eyes. And I know when changing the structures comes, there will be resistance.... What I want to convey is that treating unequals as equals is the greatest injustice. And, correction of this injustice is very important and that is what I want to convey. Here, the National Front Government's Commitment for not only change of Government, but also change of the social order, is something of great significance to all of us; it is a matter of great significance. Merely making programmes of economic benefit to various sections of the society will not do.... There is a very big force in the argument to involve the poorest in the power structure. For a lot of time we have acted on behalf of the poor. We represent the poor.... Let us forget that the poor are begging for some crumbs. They have suffered it for thousands of years. Now they are fighting for their honour as a human being.... A point was made by Mahajan ji that if there are different lists in different States how will the Union List harmonise? It is so today in the case of the Scheduled Castes and the Scheduled Tribes, That has not caused a problem. On the same pattern, this will be there and there will be no problem. 22. The Office Memorandum dated 13th August, 1990 reads as follows: OFFICE MEMORANDUM Subject : Recommendations of the Second backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in services under the Government of India. In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The Second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12.1980. 2. Government have carefully considered the report and the recommendations of the Commission in the present context regarding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:- (i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC. (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation will be issued separately. (iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%. (iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Governments' lists, a list of such castes/communities is being issued separately. (v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders. 3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and

Ministry of Finance respectively. sd/- (Smt. Krishna Singh) Joint Secretary to the Govt. of India 23. Soon after the issuance of the said Memorandum there was wide-spread protest in certain Northern States against it. There occurred serious disturbance to law and order involving damage to private and public property. Some young people lost their lives by self-immolation. Writ Petitions were filed in this Court questioning the said Memorandum along with applications for staying the operation of the Memorandum. It was stayed by this Court. The Office Memorandum dated 25th September, 1991: 24. After the change of the Government at the center following the general election held in the first half of 1991, another Office Memorandum was issued on 25th September, 1991 modifying the earlier Memorandum dated 13th August, 1990. The later Momorandum reads as follows: OFFICE MEMORANDUM Subject : Recommendations of the Second Backward Classes Commission (Mandal Report) - Reservation for socially and Educationally Backward Classes in service under the Government of India. The undersigned is directed to invite the attention to O.M. of even number dated the 13th August, 1990, on the above mentioned subject and to say that in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said Memorandum with immediate effect as follows:- (i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates. (ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation. (iii) 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. The O.M. of even number dated the 13th August, 1990, shall be deemed to have been amended to the extent specified above. sd/- (A.K. Harit) DY. SECRETARY TO THE GOVERNMENT OF INDIA 25. Till now, the Central Government has not evolved the economic criteria as contemplated by the later Memorandum, though the hearing of these writ petitions was adjourned on more than one occasion for the purpose. Some of the writ petitions have meanwhile been amended challenging the later Memorandum as well. Let us notice at this stage what do the two memorandums say, read together. The first provision made is: 27% of vacancies to be filled up by direct recruitment in civil posts and services under the Government of India are reserved for backward classes. Among the members of the backward classes preference has to be given to candidates belonging to the poorer sections. Only in case, sufficient number of such candidates are not available, will the unfilled vacancies be filled by other backward class candidates. The second provision made is: backward class candidates recruited on the basis of merit in open competition along with general candidates shall not be adjusted against the quota of

27% reserved for them. Thirdly, it is provided that backward classes shall mean those castes and communities which are common to the list in the report of the Mandal Commission and the respective State Government's list. It may be remembered that Mandal Commission has prepared the list of backward classes State-wise, Lastly, it is provided that 10% of the vacancies shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations. As stated above, the criteria for determining the poorer sections among the backward classes or for determining other economically backward sections among the non-reserved category has so far not been evolved. Though the first Memorandum stated that the orders made therein shall take effect from 7.8.1990, they were not in fact acted upon on account of the orders made by this Court. Issues for consideration: 26. These writ petitions were heard in the first instance by a Constitution Bench presided over by the then Chief Justice Sri Ranganath Misra. After hearing them for some them, the Constitution Bench referred them to a Special Bench of Nine Judges, "to finally settle the legal position relating to reservations." The reason for the reference being, "that the several Judgments of this Court have, not spoken in the same voice on this issue and a final look by a larger Bench in our opinion should settle the law in an authoritative way. We have, accordingly, heard all the parties and interveners who wished to be heard in the matter. Written submissions have been filed by almost all the parties and intervenOrs. Together, they run into several hundreds of pages. At the inception of arguments, counsel for both sides put their heads together and framed eight questions arising for our discussion. They read as follows: (1) Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation to posts in services under the State? (II) What would be the content of the phrase Backward Class in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether backward Classes in Article 16(4) would include the Article 46 as well? (III) If economic criterion by itself could not constitute a Backward Classes under Article 16(4) whether reservation of posts in services under the State based exclusively on economic criteria would be covered by Article 16(1) of the Constitution? (IV) Can the extent of reservation to posts in the services under the State under Article 16(4) or, if permitted under Articles 16(1) and 16(4) together, exceed 50% of the posts in a cadre or Service under the State or exceed 50% of the appointment in a cadre or Service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of Services under the State? (V) Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes or permit Classification among them based on economic or other considerations? (VI) Would making"any provision" under Article 16(4) for reservation "by the State" necessarily have to be by law made by the Legislatures of the State or by law made by Parliament? Or could such provisions be made by an executive order? (VII) Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made

for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage? (VIII) Would reservation of appointments or posts "in favour of any Backward Class" be restricted to the initial appointment to the post or would it extend to promotions as well? For the sake of convenient discussion and in the interest of clarity, we found it necessary to elaborate them. Accordingly, we have re-framed the questions. We shall proceed to answer them in the same order. The reframed questions are: 1(a) Whether the 'provision' contemplated by Article 16(4) must necessarily be made by the legislative wing of the State? (b) If the answer to Clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Article 309? 2(a) Whether Clause (4) of Article 16 is an exception to Clause (1) of Article 16? (b) Whether Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of 'backward class of citizens'? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes or groups? (c) Whether reservations can be made under Clause (1) of Article 16 or whether it permits only extending of preferences/concessions? 3(a) What does the expression 'backward class of citizens' in Article 16(4) means? (b) Whether backward classes can be identified on the basis and with reference to caste alone? (c) Whether a class, to be designated as a backward class, should be situated similarly to the S.Cs./S.Ts.? (d) Whether the 'means' test can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory? 4(a). Whether the backward classes can be identified only and exclusively with reference to economic criteria? (b) Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes? 5. Whether the backward classes can be further categorised into backward and more backward categories? 6. To what extent can the reservation be made? (a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence? (b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16? (c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to? (d) Whether Devadasan was correctly decided? 7. Whether Article 16 permits reservations being provided in the matter of promotions? 8. Whether reservations are anti-meritian? To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16? 9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage? 10. Whether the distinction made in the Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16? 11. Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Article 16? 26A. Before we proceed to deal with the question,

we may be permitted to make a few observations: The questions arising herein are not only of great moment and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian Society, wrapped and presented to us as constitutional and legal questions. On some of these questions, the decisions of this Court have not been uniform. They speak with more than one voice. Several opposing points of view have been pressed upon us with equal force and passion and quite often with great emotion. We recognize that these view-points are held genuinely by the respective exponents. Each of them feels his own point of view is the only right one. We cannot, however, agree with all of them. We have to find and we have tried our best to find - answers which according to us are the right ones constitutionally and legally. Though, we are sitting in a larger Bench, we have kept in mind the relevance and significance of the principle of Stare, decisis. We are conscious of the fact that in law certainty, consistency and continuity are highly desirable features. Where a decision has stood the test of time and has never been doubted, we have respected it unless, of course, there are compelling and strong reasons to depart from it. Where, however, such uniformity is not found, we have tried to answer the question on principle keeping in mind the scheme and goal of our Constitution and the material placed before us. There are occasions when the obvious needs to be stated and, we think, this is one such occasion. We are dealing with complex social, constitutional and legal questions upon which there has been a sharp division of opinion in the Society, which could have been settled more satisfactorily through political processes. But that was not to be. The issues have been relegated to the judiciary - Which shows both the disinclination of the executive to grapple with these sensitive issues as also the confidence reposed in this organ of the State. We are reminded of what Sir Anthony Mason, Chief Justice of Australia once said: Society exhibits more signs of conflict and disagreement today than it did before.... Governments have always had the option of leaving questions to be determined by the courts according to law.... There are other reasons, of course - that cause governments to leave decisions to be made by Courts. They are of expedient political character. The community may be so divided on a particular issue that a government feels that the safe course for it to pursue is to leave the issue to be resolved by the Courts, thereby diminishing the risk it will alienate significant sections of the Community. But then answering a question as to the legitimacy of the Court to decide such crucial issues, the learned Chief Justice says: ....my own feeling is that the people accept the Courts as the appropriate means of resolving disputes when governments decide not to attempt to solve the disputes by the political process. (Judging the World: Law and Politics in the Worlds Leading Courts - page 343) We hope and trust that our people too are mature enough to appreciate our endeavour in the same spirit. They may well remember that "the law is not an abstract concept removed from the society it serves, and that Judges, as safe-guarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality." 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 by 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 Coustitution. 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.Channiah (Mysore), Sri Channiah, 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 embodies 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 communites, 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. The above material makes it amply clear that the objective behind Clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted there into and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16(4) is empowerment of the deprived backward communities - to give them a share in the administrative apparatus and in the governance of the community. Decisions of this Court on Articles 16 and 15: 28. Soon after the enforcement of the Constitution two cases reached this Court from the State of Madras - one under Article 15 and the other under Article 16. Both the cases were decided on the same date and by the same Bench. The one arising under Article 15 is State of Madras v. Champakam Dorairajan [1951]

S.C.R. 525, and the other arising under Article 16 is Venkataraman v. State of Madras A.I.R. 1951 S.C. 229. By virtue of certain orders issued prior to coming into force of the Constitution,-popularly known as 'Communal G.O.' - seats in the Medical and Engineering Colleges in the State of Madras were apportioned in the following manner: Non-Brahmin (Hindus)-6, Backward Hindus-2, Brahmin-2, Harijan-2, Anglo Indians and Indian Christians-1, Muslims-1. Even after the advent of the Constitution, the G.O. was being acted upon which was challenged by Smt. Champakam as violative of the fundamental rights guranteed to her by Articles 15(1) and 29(2) of the Constitution of India. A Full Bench of Madras High Court declared the said G.O. as void and un-enforceable with the advent of the Constitution. The State of Madras brought the matter in appeal to this Court. A Special Bench of Seven Judges heard the matter and came to the unanimous conclusion that the allocation of seats in the manner aforesaid is violative of Articles 15(1) and 29(2) inasmuch as the refusal to admit the respondent (writ petitioner) notwithstanding her higher marks, was based only on the ground of caste. The State of Madras sought to sustain the G.O. with reference to Article 46 of the Constitution. Indeed the argument was that Article 46 over-rides Article 29(2). This argument was rejected. The Court pointed out that while in the case of employment under the State, Clause (4) of Article 16 provides for reservations in favour of backward class of citizens, no such provision was made in Article 15. 29. In the matter of appointment to public services too, a similar communal G.O. was in force in the State of Madras since prior to the Constitution. In December, 1949, the Madras Public Service Commission invited applications for 83 posts of District Munsifs, specifying at the same time that the selection of the candidates would be made from the various castes, religions and communities as specified in the communal G.C. The 83 vacancies were distributed in the following manner: Harijans-19, Muslims-5, Christians-6, Backward Hindus-10, Non-Brahmin (Hindus)-32 and Brahmins-11. The petitioner Venkataraman (it was a petition under Article 32 of the Constitution) applied for and appeared at the interview and the admitted position was that if the provisions of the communal G.O. were to be disregarded, he would have been selected. Because of the CO., he was not selected (he belonged to Brahmin community). Whereupon he approached this Court. S.R.Das, J. speaking for the Special Bench referred to Article 16 and in particular to Clause (4) thereof and observed: "Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional". He proceeded to hold: The Communal G.O. itself makes an express reservation of seats for Harijans & Backward Hindus. The other categories, namely, Muslims, Christians, Non-Brahmin Hindus & Brahmins must be taken to have been treated as other than Harijans & Backward Hindus. Our attention was drawn to a schedule of Backward Classes set out in Schedule III to Part I of the Madras Provincial & Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. It is, in the circumstances, impossible to say that classes of people other than Harijans & Backward Hindus can be called Backward Classes. As regards the posts reserved for Harijans & Backward Hindus it may be said that the petitioner who

does not belong to those two classes is regarded as ineligible for those reserved posts not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such posts in favour of a backward class of citizens, but the ineligibility of the petitioner for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. For instance, the petitioner may be far better qualified than a Muslim or a Christian or a Non-Brahmin candidate & if all the posts reserved for those communities were open to him he would be eligible for appointment, as is conceded by the learned Advocate General of Madras, but, nevertheless, he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the posts reserved for the other communities, although he may have far better qualifications than those possessed by members falling within those categories, is brought about only because he is a Brahmin & does not belong to any of those categories. This ineligibility created by the Communal G.O. does not appear to us to be sanctioned by Clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petnr. as an individual citizen under Article 16(1) & (2). The Communal G.O., in our opinion, is repugnant to the provisions of Article 16 & is as such void and illegal. 30. Sri Ram Jethmalani, the learned Counsel appearing for the Respondent-State of Bihar placed strong reliance on the above passage. He placed before us an extract of the Schedule of the backward classes appended to the Madras Provincial and Subordinate Service Rules, 1942. He pointed out that Clause (3)(a) in Rule 2 defined the expression backward classes to mean "the communities mentioned in Schedule III to this part", and that Schedule III is exclusively based upon caste. The Schedule describes the communities mentioned therein under the heading 'Race, Tribe or Caste'. It is pointed out that when the said Schedule was substituted in 1947, the basis of classification still remained the caste, though the heading "Races, Tribes and Castes" was removed. Mr. Jethmalani points out that the Special Bench took note of the fact that Schedule III was nothing but a collection of certain 'communities', notified as backward classes and yet upheld the reservation in their favour. According to him, the decision in Venkataraman clearly supports the identification of backward classes on the basis of caste. The Communal G.O. was struck down, he submits, only in so far as it apportioned the remaining vacancies between sections other than Harijans and backward classes. It is rather curious, says the counsel, that the decision in Venkataraman has not attracted the importance it deserves all these years; All the subsequent decisions of this Court refer to Champakam. Hardly any decision refers to Venkataraman notwithstanding the fact that Venkataraman was a decision rendered with reference to Article 16. 31. Soon after the said two decisions were rendered the Parliament intervened and in exercise of its constituent power, amended Article 15 by inserting Clause (4), which reads: 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. It is worthy of notice that the Parliament, which enacted

the first Amendment to the Constitution, was in fact the very same Constituent Assembly which had framed the Constitution. The speech of Dr. Ambedkar on the occasion is again instructive. He said:- Then with regard to Article 16, Clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in Mulla's edition on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste-he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu-that is the fundamental proposition-who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste. After the enactment of the First Amendment the first case that came up before this Court is Balaji v. The State of Mysore. (In the year 1961, this Court decided the General Manager, Southern Railway v. Rasngachari, but that related to reservations in favour of the Scheduled Castes and Scheduled Tribes in the matter of promotion in the Railways. Rangachari will be referred to at an appropriate stage later.) In the State of Karnataka, reservations were in force since a few decades prior to the advent of the Constitution and were being continued even thereafter. On July 26, 1958 the State of Mysore issued an order under Article 15(4) of the Constitution declaring all the communities excepting the Brahmin community as socially and educationally backward and reserving a total of 75 per cent seats in Educational Institutions in favour of SEBCs and SCs/STs. Such orders were being issued every year, with minor variation in the percentage of reservations. On 13th of July, 1972, a similar order was issued wherein 68 per cent of the seats in all Engineering and Medical Colleges and Technical Institutions in the State were reserved in the favour of the SEBCs, SCs and STs. SEBCs were again divided into two categories-backward classes and more backward classes. The validity of this order was questioned under Article 32 of the Constitution. While striking down the said order this Court enunciated the following principles:- (1) Clause (4) of Article 15 is a proviso or an exception to Clause (1) of Article 15 and to Clause (2) of Article 29; (2) For the purpose of Article 15(4), backwardness must be both social and educational. Though caste in relation to Hindus may be a relevant factor to consider, in determining the social backwardness of a class of citizens, it cannot be made the sole and dominant test. Christians, Jains and Muslims do not believe in caste system; the test of caste cannot be applied to them. Inasmuch as identification of all backward classes under the impugned order has been made solely on the basis of caste, it is bad. (3) The reservation made under Clause (4) of Article 15 should be reasonable. It should not be such as to defeat or nullify the main Rule of equality contained in Clause (1). While it is not possible to predicate the exact permissible percentage of reservations, it can be stated in a general and broad way that they should be less than 50 per cent. (4) A provision under Article 15(4) need not be in the form of legislation; it can be made by an executive or-

der. (5) The further categorisation of backward classes into backward and more backward is not warranted by Article 15(4). It must be remembered that Balaji was a decision rendered under and with reference to Article 15 though it contains certain observations with respect to Article 16 as well. 33. Soon after the decision in Balaji this Court was confronted with a case arising under Article 16 - Devadasan v. Union of India. This was also a petition under Article 32 of the Constitution. It related to the validity of the 'carry-forward' rule obtaining in Central Secretariat Service. The reservation in favour of Scheduled Castes was twelve and half per cent while the reservation in favour of Scheduled Tribes was five per cent. The 'carry-forward' rule considered in the said decision was in the following terms: "If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies, thus, treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quotas, a corresponding addition should be made to the number of reserved vacancies in the second following year." Because sufficient number of SC/ST candidates were not available during the earlier years the unfilled vacancies meant for them were carried forward as contemplated by the said rule and filled up in the third year - that is in the year 1961. Out of 45 appointments made, 29 went to Scheduled Castes and Scheduled Tribes. In other words, the extent of reservation in the third year came to 65 per cent. The rule was declared unconstitutional by the Constitution Bench, with Subba Rao, J. dissenting. The majority held that the carry forward rule which resulted in more than 50 per cent of the vacancies being reserved in a particular year, is bad. The principle enunciated in Balaji regarding 50 percent was followed. Subba Rao, J. in his dissenting opinion, however, upheld the said rule. The learned Judge observed: "The expression,"nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article." The learned Judge opined that once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the State and is not a matter for this Court to prescribe. We must, at this stage, clarify that a 'carry-forward' rule may be in a form different than the one considered in Devadasan. The Rule may provide that the vacancies reserved for Scheduled Castes or Scheduled Tribes shall not be filled up by general (open competition) candidates in case of non-availability of SC/ST candidates and that such vacancies shall be carried forward. 34. In the year 1964 another case from Mysore arose, again under Article 15 - Chitralekha v. State of Mysore. The Mysore Government had by an order defined backward classes on the basis of occupation and income, unrelated to caste. Thirty per cent of seats in professional and technical institutions were reserved for them in addition to eighteen per cent in favour of SCs and STs. One of

the arguments urged was that the identification done without taking the caste into consideration is impermissible. The majority speaking through Subba Rao, J., held the identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad and does not offend Article 15(4). 35. During the years 1968 to 1971, this Court had to consider the validity of identification of backward classes made by Madras and Andhra Pradesh Governments. Minor P.Rajendran v. State of Madras related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, CJ., speaking for the Constitution Bench dealt with the contention in the following words: The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 nothing but a list of certain castes. Therefrore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that person belonging to these castes are also not a class of socially and educationally backward citizens.... As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4) In view however of the explanation given by the State of Madras, which has not been controverted by and rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail. 36. The shift in approach and emphasis is obvious. The Court now held that a caste is a class of citizens and that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). More over the burden of proving that the specification/identification was bad, was placed upon the petitioners. In case of failure to discharge that burden, the identification made by the State was upheld. The identification made on the basis of caste was upheld inasmuch as the petitioner failed to prove that any caste mentioned in the list was not socially and educationally backward. 37. Another Constitution Bench took a

similar view in Triloki Nath [1969] 1 S.C.R. 103. Rajendran was expressly referred to and followed in Peeriakaruppun v. State of Tamil Nadu, a decision rendered by a Bench of three Judges (J.C.Shah, K.S.Hegde and A.N.Grover, JJ.). This was a Petition under Article 32 of the Constitution and one arising under Article 15. The argument was that identification of SEBCs having been done on the basis of caste alone is bad. Repelling the argument, Hegde, J. held:- There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence, we are unable to uphold the contention that impugned reservation is not in accordance with Article 15(4). 38. Again, in State of Andhra Pradesh v. Balram, a case arising from Andhra Pradesh, a Division Bench (Vaidyalingam and Mathew,JJ.) adopted the same approach and upheld the identification made by Andhra Pradesh Government on the basis of caste. Answering the criticism that the Backward Classes Commission appointed by the State Government did not do a scientific and thorough job, the Bench observed: In our opinion, the Commission has taken considerable pains to collect as much relevant material as possible to judge the social and educational backwardness of the persons concerned. When, for instance, it had called for information regarding the student population in classes X and XI from nearly 2224 institutions, if only 50% of the institutions sent replies, it is not the fault of the Commission for they could not get more particulars. If the commission has only to go on doing the work of collecting particulars and materials, it will be a never ending matter. In spite of best efforts that any commission may make in collecting materials and datas, its conclusions cannot be always scientifically accurate in such matters. Therefore, the proper approach, in our opinion should be to see whether the relevant data and materials referred to in the report of the Commission justify its conclusions. In our opinon, there was sufficient material to enable the Commission to be satisfied that the persons included in the list are really socially and educationally bakcward. No doubt there are few instances where the educational average is slightly above the State average, but that circumstances by itself is not enough to strike down the entire list. Even assuming there are few categories which are little above the State average, in literacy, that is a matter for the State to take note of and review the position of such categories of persons and take a suitable decision. We respectfully agree with these observations. Answering the main criticism that the list of SEBCs was wholly based upon caste, the Bench observed:- To conclude, though prima facie the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of Backward Classes is warranted by Article 15(4). The groups mentioned therein have been included in the list of Backward classes as they satisfy the various tests, which have been laid down by this Court for ascertaining the social and educational

backwardness of a class. 39. In certain cases including Janaki Prasad Parimoo v. State of Jammu & Kashmir and State of Uttar Pardesh v. Pradip Tandon , it was held that poverty alone cannot be the basis for determining or identifying the social and educational backwardness. It was emphasised that Article 15(4) - or for that matter Article 16(4) - is not an instance of poverty alleviation programme. They were directed mainly towards removal of social and educational bachwardness, it was pointed out. In Pradip Tandon, a decision under Article 15(4), Ray,C.J. speaking for the Division Bench of three Judges opined: Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste but when a classification taken recourse to caste as one of the criteria in determining socially and educationally backward classes the expression "classes" in that case violates the rule of expressio unions est exclusio alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste. This statement was made without referring to the dicta in Rajendran, a decision of a larger Bench. Though Balaji was referred to, we must point out with respect that Balaji does not support the above statement. Balaji indeed said that "though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf." 40. Thomas marks the beginning of a new thinking on Article 16, though the seed of this thought is to be found in the dissenting opinion of Subba Rao,J. in Devadasan. The Kerala Government had, by amending Kerala State and Subordinate Service Rules empowered the Government to exempt, by order, for a specified period, any member or members belonging to Scheduled Castes or Scheduled Tribes and already in service, from passing the test which an employee had to pass as a precondition for promotion to next higher post. Exercising the said power, the Government of Kerala issued a notification granting "temporary exemption to members already in service belonging to any of the Scheduled Castes or Scheduled Tribes from passing all tests (unified, special or departmental test) for a period of two years". On the basis of the said exemption, a large number of employees belonging to Scheduled Castes and Scheduled Tribes, who had been stagnating in their respective posts for want of passing the departmental tests, were promoted. They were now required to pass the tests within the period of exemption. Out of 51 vacancies which arose in the category of Upper Division Clerks in the year 1972, 34 were filled up by members of Scheduled Castes leaving only 17 for others. This was questioned by Thomas, a member belonging to non-reserved category. His grievance was: but for the said concession/exemption given to members of Scheduled Castes/Scheduled Tribes he would have been promoted to one of those posts in view of his passing the relevant tests. He contended that Article 16(4) permits

only reservations in favour of backward classes but not such an exemption. This argument was accepted by the Kerala High Court. It also upheld the further contention that inasmuch as more than 50% vacancies in the year had gone to the members of Scheduled Castes as a result of the said exemption, it is bed for violating the 50% rule in Balaji. The Stats of Kerala carried the matter in appeal to this Court which was allowed by a majority of 5:2. All the Seven Judges wrote separate opinions. The head-note to the decision in Supreme Court Reports succinctly sets out the principles enunciated in each of the judgments. We do not wish to burden this judgment by reproducing them here. We would rest content with delineating the broad features emerging from these opinions. Ray, CJ. held that Article 16(1), being a facet of Article 14, permits reasonable classification. Article 16(4) clarifies and explains that classification on the basis of backwardness. Classification of Scheduled Castes does not fall within the mischief of Article 16(2) since Scheduled Castes historically oppressed and backward, are not castes. The concession granted to them is permissible under and legitimate for the purposes of Article 16(1). The rule giving preference to an un-represented or under-represented backward community does not contravene Articles 14, 16(1) or 16(2). Any doubt on this score is removed by Article 16(4). He opined further that for determining whether a reservation is excessive or not one must have to look to the total number of posts in a given unit or department, as the case may be. Mathew, J. agreed that Article 16(4) is not an exception to Article 16(1), that. Article 16(1) permits reasonable classification and that Scheduled Castes are not 'castes' within the meaning of Article 16(2). He espoused the theory of 'proportional equality' evolved in certain American decisions. He does not refer to the decisions in Balaji or Devadasan in his opinion nor does he express any opinion the extent of permissible reservation. Beg, J. adopted a different reasoning. According to him, the rule and the orders issued thereunder was "a kind of reservation" falling under Article 16(4) itself. Krishna Iyer,J. was also of the opinion that Article 16(1) being a facet of Article 16 permits reasonable classification, that Article 16(4) is not an exception but an emphatic statement of what is inherent in Article 16(1) and further that Scheduled Castes are not 'castes' within the meaning of Article 16(2) but a collection of castes, races and groups. Article 16(4) is one made of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to, held the learned Judge. He approved the dissenting opinion of Subba Rao,J. in Devadasan. Fazal Ali, J. too adopted a similar approach. The learned Judge pointed out "if we read Article 16(4) as an exception to Article 16(1) then the inescapable conclusion would be that Article 16(1) does not permit any classification at all because an express provision has been made for this in Clause (4). This, however, is contrary to the basic concept of equality contained in Article 14 which implicitly permits classification in any form provided certain conditions are fulfilled. Furthermore, if no classification can be made under Article 16(1) except reservation contained in Clause (4) then the mandate contained in Article 335 would be defeated." He held that the Rule and the orders impugned are referable to and sustainable under Article 16. The learned Judge went further and held that the rule of 50%

evolved in Balaji is a mere rule of caution and was not meant to be exhaustive of all categories. He expressed the opinion that the extent of reservation depends upon the proportion of the backward classes to the total population and their representation in public services. He expressed a doubt as to the correctness of the majority view in Devadasan. Among the minority Khanna, J. preferred the view taken in Balaji and other cases to the effect that Article 16(4) is an exception to Article 16(1). He opined that no preference can be provided in favour of backward classes outside Clause (4). A.C.Gupta, J. concurred with this view. 41. The last decision of this Court on this subject is in K.C.Vasant Kumar and Anr. v. State of Karnataka [1985] Suppl. 1 S.C.R. 352. The Five Judges constituting the Bench wrote separate opinions, each treading a path of his own. Chandrachud, C.J. opined that the present reservations should continue for a further period of 15 years making a total of 50 years from the date of commencement of the Constitution. He added that the means test must be applied to ensure that the benefit of reservations actually reaches the deserving sections. Desai, J. was of the opinion that the only basis upon which backward classes should be identified is the economic one and that a time has come to discard all other bases. Chinnappa Raddy, J. was of the; view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class. Caste, the learned Judge said, is the primary index of social backwardness, so that social backwardness is often readily identificable with reference to a person's caste. It it is found in the case of a given caste that a few members have progressed far enough so as to compare favourably with the forward classes in social, economic and educational fields, an upper income ceiling can perhaps be prescribed to ensure that the benefit of reservation reaches the really deserving. He opined that identification of SEBCs in the Indian milieu is a difficult and complex exercise, which does not admit of any rigid or universal tests. It is not a matter for the courts. The "backward class of citizens", he held, are the very same SEBCs referred to in Article 15(4). The learned Judge condemned the argument that reservations are likely to lead to deterioration in efficiency or that they are anti-merit. He disagreed with the view that for being identified as SEBCs, the relevant groups should be comparable to SCs/STs in social and educational backwardness. The learned Judge agreed with the opinion of Fazal Ali, J. in Thomas that the rule of 50% in Balaji is a rule of caution and not an inflexible rule. At any rate, he said, it is not for the court to lay down any such hard and fast rule. A.P.Sen, J. was of the opinion that the predominant and only factor for making special provision under Article 15(4) or 16(4) should be poverty and that caste should be used only for the purpose of identification of groups comparable to Scheduled Castes/Scheduled Tribes. The reservation should continue only till such time as the backward classes attain a state of enlightenment. Venkataramiah, J. agreed with Chinnappa Reddy,J. that identification of backward classes can be made on the basis of caste. He cited the Constituent Assembly and Parliamentary debates in support of this view. According to the learned Judge, equality of opportunity revolves around two dominant principles viz., (i) the traditional value of equality of opportunity and (ii) the newly appreciated - though not

newly conceived idea of equality of results. He too did not agree with the argument of 'merit'. Application of the principle of individual merit, un-mitigated by other consideration, may quite often lead to inhuman results, he pointed out. He supported the imposition of the 'means' test but disagreed with the view that the extent of reservations can exceed 50%. Periodic review of this list of SEBCs and extention of other facilities to them is stressed. Decisions of U.S. Supreme Court 42. At this stage, it would be interesting to notice the development of law on the subject in the U.S.A. The problem of blacks (Negroes) - holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in U.S.A. the problem is just about 200 years' old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters [Dred Scott v. Sanford [1857] 15 L.E. 691]. In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. World War II and its aftermath, however, brought about a radical change in this situation, the culmination of which was the celebrated decisions in Brown v. Board of Education [1954] 98 L.E. 591 and Boiling v. Shrarpe [1954] 98 L.E. 583 over-ruling the 'separate but equal' doctrine evolved in Plessey v. Ferguson [1986] 41 L.E. 256. In quick succession followed several decisions which effectively out-lowed all discrimination against blacks in all walks of life. But the ground-realities remained. Socially, educationally and economically, blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their mark. They were still unable to compete with their white counterparts. Similar was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of 'persisting effects of past-descrimination'. The Congress, the State Universities and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally, these measures were challenged in Courts-with varying results. The four decisions examined hereinafter, rendered during the period 1974-1990 mirror the conflict and disclose the judicial thinking in that country. 43. The first decision is in Defunis v. Charles Odeqaard [1974] 40 L.Ed. 2nd. 164. The University of Washington Law School - a school operated by the State - evolved, in December 1973, an admissions policy whereunder certain percentage of seats in the Law School were reserved for minority racial groups. Para 6 of the programme stated, "because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under-representation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognises a special obligation in its admissions policy to contribute to the solution of the problem." (emphasis added) Procedure for admission for the minority students was different and of a lesser standard than the one adopted for all others. Defunis, a non-minority student was denied admission while granting it to minority

applicants with lower evaluation. He commenced an action challenging the validity of the programme. According to him, the special admissions programme was violative of the Equal Protection Clause in the Fourteenth Amendment. The Trial Court granted the requested relief including admission to the plaintiff. On Appeal, the Supreme Court of Washington reversed the Trial Court's Judgment. It upheld the constitutionality of the Admissions Policy. The matter was brought by Defunis to United States Supreme Court by way of certiorari. The Judgment of the Washington Supreme Court was stayed pending the decision. By the time the matter reached the stage of final hearing, Defunis had arrived in the final quarter of the last term. In view of this circumstance, five Members of the Court held that the Constitutional question raised has become 'moot' (academic) and, therefore, it is unnecessary to go into the same. Four of the Judges Brennan, Douglas, White and Marshall, JJ., however, did not agree with that view. Of them, only Douglas, J. recorded his reasons for upholding the Special Admissions' Programme. The learned Judge was of the opinion that the Equal Protection Clause did not require that law schools employ an admissions formula based solely upon testing results and under-graduate grades nor does it prohibit Law Schools from evaluating an applicant's prior achievements in the light of the barriers that he had to overcome. It would be appropriate to quote certain observations of the learned Judge to the above affect which inter alia emphasise the importance of looking to the promise and potential of a candidate rather than to mere scores obtained in the relevant tests. He said: the Equal Protection Clause did not enact a requirement that Law Schools employ as the sole criterion for admissions a formula based upon the LSAT (Law School Admission Test) and under-graduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that would lead a fair-minded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered to him. Because of the weight of the prior handicaps, the black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career, his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. The learned Judge while agreeing that any programme employing racial classification to favour certain minority groups would be subject to strict scrutiny under Equal Protection Clause, yet concluded that the material placed before the Court did not establish that Defunis was invidiously discriminated against because of his race. Accordingly, he opined that the matter should be remanded for fresh trial to consider whether the plaintiff has been individually discriminated against because of his race. 44. The next case is in Regents of the University of California v. Allan Bakke [1978] 57 L.Ed. 2nd 750. The Medical School of the University of California at Davis had been

following two admissions programmes, one in respect of the 84 seats (general) and the other, a special admissions programme under which only disadvantaged members of certain minority races were considered for the remaining 16 seats - the total seats available being 100 a year. For these 16 seats, none except the members of the minority races were considered and evaluated. The respondent, Bakke, a white, could not obtain admission for two consecutive years, in view of his evaluation scores, while admission was given to members of minority races who had obtained lesser scores than him. He questioned the validity of special admissions programme on the ground that it violated the equal protection clause in the Fourteenth Amendment to the Constitution and also Title VI of the Civil Rights Act. 1964. The Trial Court upheld the plea on the ground that the programme excluded members of non-minority races from the 16 reserved seats only on the basis of race and thus operated as a racial quota. It, however, refused to direct the plaintiff to be admitted inasmuch as he failed to establish that he would have been admitted but for the existence of the special admissions programme. The matter was carried in direct appeal to Supreme Court of California, which not only affirmed the Trial Court's Judgment in so far as it held the special admission programme to be invalid but also granted admission to the plaintiff-respondent into the Medical School. It was of the view that the University had failed to prove that in the absence of special admissions programme the respondent would not have been admitted. The matter was then carried to the United States Supreme Court, where three distinct view-points emerged. Brennan, White, Marshall and Blackmun, JJ. were of the opinion that the special admissions programme was a valid one and is not violative of the Federal or State Constitutions or of Title VI of the Civil Rights Act, 1964. They were of the opinion that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University's remedial use of race. Since the Judgment of the Supreme Court of California prohibited the use of race as a factor in University admissions, they reversed that Judgment. Chief Justice Warren Burger, Stevens, Stewart and Rehnquist, JJ. took the other view. They affirmed the judgment of the California Supreme Court. They based their judgment mainly on Title VI of Civile Rights Act, 1964, which provided that "no person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any programme or activity receiving Federal Financial assistance." They opined that Bakke was the victim of, what may be called, reverse discrimination and that his exclusion from consideration in respect of the 16 seats being solely based on race, is impermissible. Powell, J. took the third view in his separate opinion, partly agreeing and partly disagreeing with the other view-points. He based his decision on Fourteenth Amendment alone. He did not take into consideration the 1964 Act. The learned Judge held that though racial and ethnic classifications of any kind are inherently suspect and call for the most exacting judicial scrutiny, the goal of achieving a racially balanced student body is sufficiently compelling to justify consideration of race in admissions decisions under certain circumstances. He was of the opinion that while preference can

be provided in favour of minority races in the matter of admission, setting up of quotas (which have the effect of foreclosing consideration of all others in respect thereof) is not necessary for achieving the said compelling goal. He was of the opinion that impugned programme is bad since it set apart a quota for minority races. He sustained the admission granted to Bakke on the ground that the University failed to establish that even without the quota, he would not have been admitted. 45. It would be useful to notice the three points of view in a little more detail. Brennan, J. (with whom Marshall, White and Blackmun, JJ. agreed) observed that though the U.S. Constitution was founded on the principle that "all men are created equal", the truth is that it is not so in fact. Racial discrimination still persists in the society. In such a situation the claim that the law must be "colour-blind" is more an aspiration rather than a description of reality. The context and the reasons for which Title VI of the Civil Rights Act, 1964 was enacted leads to the conclusion that the prohibition contained in Title VI was intended to be consistent with the commands of the Constitution and no more. Therefore, "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." On the contrary, said the learned Judge, prior decisions of the court strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. Dealing with the equal protection clause in the Fourteenth Amendment, the learned Judge observed: The assertion of human equality is closely associated with the proposition that differences in colour or creed, birth or status, are neither significant nor relevant to the way in which person should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance" summed up by the shorthand phrase "our Constitution is colour-blind" has never been adopted by this Court as the proper meaning of the Equal Protection clause. We conclude, therefore, that racial classifications are not per se invalid under the Fourtheenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race. (emphasis added) After examining a large number of decided cases, the learned Judge held: The conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Indeed, held the learned Judge, failure to take race into account to remedy unequal access to University programs caused by their own or by past societal discrimination would not be consistent with the mandate of the Fourteenth Amendment. The special admissions programme whereunder whites are excluded from the 16 reserved seats is not bad for the reason that "its purpose is to overcome the effects of segregation by bringing races together." The learned Judge then pointed out the relevance of race and the lesser impact of economic disadvantage, with reference to certain facts and figures, and concluded: While race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically

advantaged whites while economically advantaged blacks score less well than do disadvantaged whites. 46. Warren Burger,CJ., with whom Stevens, Stewart and Rehnquist, JJ. agreed opined that since in respect of 16 seats reserved for racial minorities, whites are totally excluded only on the basis of their race, it is a clear case of discrimination on the basis of race and, therefore, violative of the Fourteenth Amendment to the Constitution as well as Title VI of the Civil Rights Act, 1964. 47. Powell, J. took different line agreeing in part with both the points of view. His approach is this: (1) It is not necessary to consider the impact or the scope of Title VI of the Civil Rights Act inasmuch as the said question was not raised or considered in the courts below. The matter had to be examined only with reference to the Fourteenth Amendment; (2) Any distinction based on race is inherently suspect in the light of the equal protection clause and calls for more exacting judicial examination. It is for the State in such a case to establish that the distinction was precisely tailored to serve a compelling governmental interest. (3) Since the special admissions program of the University totally excluded some individual (non-minorities) from enjoying the State provided benefit of admission to the medical school solely because of their race, the classification must be regarded as suspect and it will be sustained only if it is supported by substantial state purpose or interest and only where it is established that the classification is necessary to the accomplishment of such purpose or for safeguarding such interest. The University has failed to discharge this burden, though the State interest in removing "identified discrimination" and attainment of a "diverse student body" were certainly compelling interests. In other words, the University has failed to establish that for attaining the said abjectives, creation of quotas was necessary. (4) While preferences can be provided in favour of disadvantaged sections, reservation of seats which had the effect of excluding members of a race or races from those seats altogether, is not permissible. For this reason too, the special admissions program of the University must be held to violate the Fourteenth Amendment. In the course of his opinion, the learned Judge observed: A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element - to be weighed fairly against other elements - in the selection process.... In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class. In this manner, the learned Judge agreed with Brennan, J. that race-conscious admissions programmes are permissible under the Fourteenth Amendment, but qualified the meaning of the race-conscious programmes. At the same time, he agreed with the learned Chief Justice that the special admissions programme of

Davis was unconstitutional. He commended the Harvard admissions programme which provided for certain preferences in favour of racially disadvantaged sections, without reserving any seats as such for them. 48. We may next notice the decision in Fullilove v. Phillip M. Klutznick [1980] 65 Lawyers Ed. 2nd 90. The Public Works Employment Act, 1977 contained a provision to the effect that atleast 10% of federal funds granted for local public works projects must be used by the State or the local grantee to procure services or supplies from businesses owned by minority group members, defined as United State citizens "who are negroes, spanish-speaking, Orientals, Indians, Eskimos and Aleuts". Regulations were framed under the Act and guidelines issued requiring the grantees and private contractors to seek out all available qualified bona fide minority business enterprises (MBEs), to the extent feasible, for fulfilling the 10% MBE requirement. The guidelines provided that contracts shall be awarded to bona fide MBEs, even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. This requirement could, however, be waived in individual cases if the grantee established the infeasibility of the requirement. Several associations of construction contractors and Sub-contractors filed a suit in the Federal District Court for a declaration that the said provision of the Public Works Employment Act and the regulations made thereunder are void and enforceable being violative of the equal protection clause of the Fourteenth Amendment and equal protection component of the due process clause of the Fifth Amendment. The challenge failed in the District Court as well as in the Court of Appeals. The matter was then carried to the United State Supreme Court. By a majority of 6:3 (Stewart, Rehnquist and Stevens, JJ. dissenting) the Supreme Court repelled the challenge. Chief Justice Burger speaking for himself. White and Powell, JJ. stated the object of the impugned provision in the following words: The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation, otherwise it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting. The learned Chief Justice then proceeded to examine" the question whether as a means to accomplish these plainly constitutional objectives, congress can use racial and ethnic criteria in this limited way as a condition attached to a federal grant." Indeed, he posed the same question in this form: "Whether the limited use of racial and ethnic criteria is a constitutionally permissible means for achieving the congressional objectives", and proceeded to answer the same - after referring exhaustively to the earlier decisions of the court relating to school admissions - in the following words: We held that "just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." (emphasis added) ... In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. 49. Marshall, J. speaking for himself, Brennan and Blackmun, JJ. in his con-

curring opinion, pointed out the approach to be adopted in judging the validity of the race-conscious programmes and concluded with these resounding words: In my separate opinion in Bakke, I recounted the ingenious and pervasive forms of discrimination against the Negro" long condoned under the Constitution and concluded that "the position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment" I there stated: It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doOrs. 50. We may now examine the decision in Metro Broadcasting, Inc. v. Federal Communications Commission, rendered on June 27, 1990 (Copies of the decision have been made available to us by Sri K. Parasaran, counsel for Union of India). Under the Communications Act, 1934, the Federal Communications Commission was vested with the exclusive authority to grant licences to persons wishing to construct and operate Radio and Television Broadcasting Station in United States. The grant of licences was to be based on 'public convenience, interest or necessity'. The commission found that over the last two decades relatively fewer members of minority groups have held broadcasting licences, indeed less than one percent. Even as late as in 1986, they owned just 2.1%. The Commission proposed to remedy this underrepresentation and accordingly evolved a policy whereunder minorities were to be granted certain preferences in the matter of grant of these licences. The policy had two prominent features. The first was to provide for a preference in the matter of evaluation of applicants and the second was, what may be called, 'distress sale policy'. The second feature meant that where the qualifications of a licencee to hold a broadcast licence comes into question he was entitled to transfer the said licence to save the disqualification provided such transfer is made in favour of a member of a minority. The said two features were questioned by Metro Broadcasting Inc., which matter was ultimately brought to the Supreme Court. The decision of the majority (Brennan, White, Marshall, Blackmun and Stevens, JJ.) rendered by Brennan, J. is note-worthy for the shift of approach from the earlier decisions. It is now held that a classification based on race (benign race conscious measures) is constitutionally permissible even if it is not designed to compensate victims of past governmental or societal discrimination so long as it serves important governmental objectives and is substantially related to achievement of those objectives. In other words, it is held that it is not necessary that the court apply a strict standard of scrutiny to evaluate racial classification to ascertain whether it is necessary for achieving the relevant objective and further whether it is narrowly tailored to achieve a compelling state interest. Brennan, J. relied upon the opinion of Chief Justice Burger in Fullilove for this liberal approach. It would be appropriate to quote certain observations from his opinion: We hold that benign race-conscious measures mandated by Congress - even if those manures are not "remedial" in the sense of being de-

signed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.... Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies... we must pay close attention to the expertise of the Commission and the fact finding of the Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this "complex" empirical question, ibid., we are required to give "great weight to the decisions of Congress and the experience of the Commission. 51. On the other hand, the minority (O'connor, J. speaking for herself, Rehnquist, C.J., Scalia and Kennedy, JJ.) protested against the abandonment of what they thought was a well established standard of scrutiny in such cases in the following words: Strict scrutiny" requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. This Court's precedents in no way justify the Court's marked departure from our traditional treatment or race classifications and its conclusion that different equal protection principles apply to these federal actions. 52. We have examined the decisions of U.S. Supreme Court at some length only with a view to notice how another democracy is grappling with a problem similiar in certain respects to the problem facing this country. The minorities (including blacks) in United States are just about 16 to 18% of the total population, whereas the backward classes (including the Scheduled Castes and Scheduled Tribes) in this country - by whichever yardstick they are measured - do certainly constitute a majority of the population. The minorites there comprise 5 to 7 groups - Blacks, spanish-speaking people, Indians, Purto Ricano, Aleuts and so on - whereas the castes and communities comprising backward classes in this country run into thousands. Untouchability - and 'unapproachability', as it was being practised in Kerala - is something which no other country in the world had the misfortune to have - nor the blessed caste system. There have been equally old civilisations on earth like ours, if not older, but none had evolved these pernicious practices, much less did they stamp them with scriptural sanction. Now coming to Constitutional provisions, Section 1 of the Fourteenth Amendment (insofar as it guarantees equal protection of the laws) corresponds to Article 14 but they do not have provisions corresponding to Article 16(4) or 15(4). Title VI of the Civil Rights Act enacted in 1964 roughly corresponds to Clause (2) of Articles 15 and 16. 53. At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as

the case may be. In other words, under Clause (1) of Article 16, apointments and/or posts can be reserved in favour of a class. But an argument is now being advanced - evidently inspired by the opinion of Powell, J. in Bakke that Article 16(1) permits only preferences but not reservations. The reasoning in support of the said argument is the same as was put forward by Powell, J. This argument, in our opinion, disregards the fact that that is not the unanimous view of the court in Bakke. Four Judges including Brennan, J. took the view that such a reservation was not barred by the Fourteenth Amendment while the other four (including Warren Burger, C.J.) took the view that the Fourteenth Amendment and Title VI of the Civil Right Acts, 1964 bars all race-conscious progammes. At the same time, there are a series of decisions relating to school desegregation - from Brown to Board of Education v. Swann (28 L.Ed. 2nd 586) - where the court has been consistently taking the view that if race be the basis of discrimination, race can equally form the basis of remedial action. The shift in approach indicated by Metro Broadcasting Inc. is equally significant. The 'lingering effects' (of past discrimination) theory as well as the standard of strictest scrutiny of race-conscious programmes have both been abandoned. Suffice it to note that no single uniform pattern of thought can be discerned from these decisions. Ideas appear to be still in the process of evolution. PART - III (QUESTIONS 1 AND 2) We may now proceed to deal with the questions aforementioned. Question. 1(a): Whether the 'provision' in Article 16(4) must necessarily be made by the Parliament/Legislature? 54. Sri K.K.Venugopal, learned Counsel for the petitioner in Writ Petition No. 930 of 1990 submits that the "provision" contemplated by Clause (4) of Article 16 can be made only by and should necessarily be made by the legislative wing of the State and not by the executive or any other authority. He disputes the correctness of the holding in Balaji negativing an identical contention. He submits that since the provision made under Article 16(4) affects the fundamental rights of other citizens, such a provision can be made only by the Parliament/Legislature. He submits that if the power of making the "provision" is given to the executive, it well give room for any amount of abuse. According to the learned Counsel, the political executive, owing to the degeneration of the electoral process, normally acts out of political and electoral compulsions, for which reason it may not act fairly and indepenently. If, on the other hand, the provision is to be made by the legislative wing of the State, it will not only provide an opportunity for debate and discussion in the Legislature where several shades of opinion are represented but a balanced and unbiased decision free from the allurements of electoral gains is more likely to emerge from such a deliberating body. Sri Venugopal cites the example of Tamil Nadu where, according to him, before every general election a few communities are added to the list of backward classes, only with a view to winning them over to the ruling party. We are not concerned with the aspect of what is ideal or desirable but with what is the proper meaning to be ascribed to the expression 'provision' in Article 16(4) having regard to the context. The use of the expression 'provision' in Clause (4) of Article 16 appears to us to be not without design. According to the definition of 'State' in Article 12, it includes not merely the government and Parliament of India and Government

and Legislature of each of the States but all local authorities and other authorities within the territory of India or under the control of the Government of India which means that such a measure of reservation can be provided not only in the matter of services under the Central and State Governments but also in the services of local and other authorities referred to in Article 12. The expression 'Local Authority' is defined in Section 3(31) of the General Clauses Act. It takes in all municipalites, Panchayats and other similar bodies. The expression 'other authorities' has received extensive attention from the court. It includes all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Now, would it be reasonable, possible or practicable to say that the Parliament or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides providing for in respect of services under the Central/State Government? This aspect would become clearer if we notice the definition of "Law" in Article 13(3)(a). It reads: 13(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;... The words "order", "bye-law", "rule" and "regulation" in this definition are significant. Reading the definition of "State" in Article 12 and of "Law" in Article 13(3)(a), it becomes clear that a measure of the nature contemplated by Article 16(4) can be provided not only by the Parliament/Legislature but also by the executive in respect of Central/State services and by the local bodies and "other authorities" contemplated by Article 12, in respect of their respective services. Some of the local bodies and and some of the statutory corporations like Universities may have thier own legislative wings. In such a situation, it would be unreasonable and inappropriate to insist that reservation in all these services should be provided by Parliament/Legislature. The situation and circumstances of each of these bodies may vary. The rule regarding reservation has to be framed to suit the particular situations. All this cannot reasonably be done by Parliament/Legislature. Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Article 16(4) is significant. Whereas Clauses (3) and (5) of Article 16 - and Clauses (2) to (6) of Article 19 - use the word "Law", Article 16(4) uses the word "provision". Regulation of service conditions by orders and Rules made by the Executive was a well known feature at the time of the framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of Clause (4). Accordingly, we hold, agreeing with Balaji, that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case. Bajaji has been followed recently in Comptroller and Auditor General of India v. Mohan Lal Mehrotra . With respect to the argument of abuse of power by the political executive, we may say that there is adequate safeguard against misuse by the political executive of the power under Article 16(4) in the provision itself. Any determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. As held herein - as also by earlier judgments - the exercise is an objective one. Certain objective social and other criteria has to be satisfied

before any group or class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power. Question 1(b): Whether an executive order making a 'provision' under Article 16(4) is enforceable forthwith? 55. A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate Legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate Legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the Executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Sri Jethmalani. Once we hold that a provision under Article 16(4) can be made by the executive, it must necessarily follow that such a provision is effective the moment it is made. A Constitution Bench of this Court in B.S. Yadav (1981 S.C. 561), (Y.V. Chandrachud, C.J., speaking for the Bench) has observed: Article 235 does not confer upon the High Court the power to make rules relating to conditions of service of judicial officers attached to district courts and the courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See, for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1) and (2), 148(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2). Be that as it may, there is yet another reason, why we cannot agree that the impugned Memorandums are not effective and enforceable the moment they are issued. It is well settled by the decisions of this Court that the appropriate government is empowered to prescribe the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. It is further held by this Court that even where Rules under the proviso to Article 309 are made, the government can issue orders/instructions with respect to matters upon which the Rules are silent. [see Sant Ram Sharma v. State of Rajasthan]. This view has been reiterated in a recent decision of this Court in Comptroller and Auditor General v. Mohanlal Mehrotra wherein it is held: The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact it is silent on the subject of reservation. The Government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but it could be issued to supplement the statutory rules [See the observations in Santram Sharma v. State of Rajasthan . In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and

Scheduled Tribes in the Railway Services both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in Akhil Bhartiya Soshit Karamchari Sangh (Railways) v. Union of India . It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect to reservation in favour of backward classes, it would always be open to the Executive (Government) to provide for reservation of appointments/posts in favour of Backward Classes by an executive order. We cannot also agree with Sri Jethmalani that the impugned Memorandums should be treated as Rules made under the proviso to Article 309. There is nothing in them suggesting even distantly that they were issued under the proviso to Article 309. They were never intended to be so, nor is that the stand of the Union Government before us. They are executive orders issued under Article 73 of the Constitution read with Clause (4) of Article 16. The mere omission of a recital "in the name and by order of the President of India" does not affect the validity or enforceability of the orders, as held by this Court repeatedly. Question 2(a). Whether Clause (4) of Article 16 is an exception to Clause (1)? 56. In Balaji it was held - "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in Champakam, with a view to remove the defect pointed out by this Court namely, the absence of a provision in Article 15 corresponding to Clause (4) of Article 16. Following Balaji it was held by another Constitution Bench (by majority) in Devadasan - "further this Court has already held that Clause (4) of Article 16 is by way of a proviso or an exception to Clause (1)". Subbarao, J., however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in Devadasan, it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe set-back from the majority decision in State of Kerala and Ors. v. N.M. Thomas . Though the minority (H.R. Khanna and A.C. Gupta, JJ.) stuck to the view that Article 16(4) is an exception, the majority (Ray, C.J., Mathew, Krishna Iyer and Fazal Ali, JJ.) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg. J. took a slightly different view which it is not necessary to mention here). The said four learned Judges - whose views have been referred to in para 41 - held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in Thomas is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special

treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that Clause (4) of Article 16 is not exception to Clause (1) of Article 16. It is an instance of classification implicit in and permitted by Clause (1). The speech of Dr. Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly - referred to in para 28 - shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft Clause (3) was put in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with Clause (1). Indeed, even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms. Regarding the view expressed in Balaji and Devadasan, it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of Clause (4) being an exception to Clause (1) became untenable. It had to be accepted that Clause (4) is an instance of classification inherent in Clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, Clause (2) of Article 16 is also an elaboration of a facet of Clause (1). If Clause (4) is an exception to Clause (1) then it is equally an exception to Clause (2). Question then arises, in what respect is Clause (4) an exception to Clause (2), if 'class' does not means 'caste'. Neither Clause (1) nor Clause (2) speak of class. Does the contention mean that Clause (1) does not permit classification and therefore Clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit. Question 2(b): Whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes? 57. The question than arises whether Clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts." The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancilliary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in Karamchari Sangh are instances of supplementay, incidental and ancilliary provisions made with a view to make the main provision of reservation effective i.e., to ensure that

the members of the reserved class fully avail of the provision for reservation in their favour. The other type of measure is the one in Thomas. There was no provision for reservation in favour of Scheduled Castes/Scheduled Tribes in the matter of promotion to the category of Upper Division Clerks. Certain tests were required to be passed before a Lower Division Clerk could be promoted as Upper Division Clerk. A large number of Lower Division Clerks belonging to S.C./S.T. were not able to pass those tests, with the result they were stagnating in the category of L.D.Cs. Rule 13AA was accordingly made empowering the government to grant exemption to members of S.C./S.T. from passing those tests and the Government did exempt them, not absolutely, but only for a limited period. This provision for exemption was a lesser form of special treatment than reservation. There is no reason why such a special provision should not be held to be included within the larger concept of reservation. It is in this context that the words "any provision for the reservation of appointments and posts" assume significance. The word "any" and the associated words must be given their due meaning. They are not a mere surplusage. It is true that in Thomas it was assumed by the majority that Clause (4) permits only one form of provision namely reservation of appointments/posts and that if any concessions or exemptions are to be extended to backward classes it can be done only under Clause (1) of Article 16. In fact the argument of the writ petitioners (who succeeded before the Kerala High Court) was that the only type of provision that the State can make in favour of the backward classes is reservation of appointments/posts provided by Clause (4) and that the said clause does not contemplate or permit granting of any exemptions or concessions to the backward classes. This argument was accepted by Kerala High Court. This Court, however, by a majority (Ray,C.J., Mathew, Krishna Iyer and Fazal Ali, JJ.) reversed the view taken by Kerala High Court, holding that such exemptions/concessions can be extended under Clause (1) of Article 16. Beg, J. who joined the majority in exemption provided by impugned notification was indeed a kind of reservation and was warranted by and relatable to Clause (4) of Article 16 itself. This was because - according to the learned Judge - Clause (4) was exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. We are inclined to agree with the view taken by Beg, J. for the reasons given hereinabove. In our opinion, therefore, where the State finds it necessary - for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under Clause (4) itself. In other words, all supplemental and ancilliary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under Clause (4) itself. In this sense, Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution

having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Clause (4) of Article 16. Question 2(c): Whether Article 16(4) is exhaustive of the very concept of reservations? 58. The aspect next to be considered is whether Clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside Clause (4) i.e., under Clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that Clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely bacause, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, and not for all and sundry reasons - that any further reservations, of whatever kind, should be provided under Clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of Clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simply. If reservations are made both under Clause (4) as well as under Clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do. Whether Clause (1) of Article 16 does not permit any reservations? 59. For the reasons given in the preceding paragraphs we must reject the argument that Clause (1) of Article 16 permits only extending of preferences, concessions and exemptions, but does not permit reservation of appointments/posts. As pointed out in para (54) the argument that no reservations can be made under Article 16(1) is really inspired by the opinion of Powell, J. in Bakke. But in the very same paragraph we had pointed out that it is not the unanimous opinion of the Court. In principle, we see no basis for acceding to the said contention. What kind of special provision should be made in favour of a particular class is a matter for the State to decide, having regard to the facts and circumstances of a given situation - subject, of course, to the observations in the preceding paragraph. PART - IV (QUESTIONS 3, 4 AND 5) Question 3(a): Meaning of the expression "Backward Class of citizens" in Article 16(4). 60. What does the expression "Backward Class of Citizens" in Article 16(4) signify and how should they be identified? This has been the single most difficult question tormenting this nation. The expression is not defined in the Constitution. What does it mean then? The arguments before us mainly revolved round this question. Several shades of opinion have been presented to us ranging from one extreme to the other. Indeed, it may be difficult to set out in full the reasoning presented before us orally and in several written propositions submitted by various counsel. We can mention only the substance of and the broad features emerging from those submissions. At one end of the spectrum stands Sri N.A. Palkhiwala (supported by several other counsel) whose submissions may briefly be summarised in the following

words: a secular, unified and caste-less society is a basic feature of the Constitution. Caste is a prohibited ground of distinction under the Constitution. It ought be erased altogether from the Indian Society. It can never be the basis for determining backward classes referred to in Article 16(4). The Report of the Mandal Commission, which is the basis of the impugned Memorandums, has treated the expression "backward classes" as synonymous with backward castes and has proceed to identify backward classes solely and exclusively on the basis of caste, ignoring all other considerations including poverty. It has indeed invented castes for Non-Hindus where none exists. The Report has divided the nation into two sections, backward and forward, placing 52% of the population in the former section. Acceptance of Report would spell disaster to the unity and integrity of the nation. If half of the posts are reserved for backward classes, it would seriously jeopardise the efficiency of the administration, educational system, and all other services resulting in backwardness of the entire nation. Merit will disappear by deifying backwardness. Article 16(4) is broader than Article 15(4). The expression "backward class of citizens" in Article 16(4) is not limited to "socially and educationally backward classes" in Article 15(4). The impugned Memorandums, based on the said report must necessarily fall to the ground along with the Report. In fact the main thrust of Sri Palkhiwala's argument has been against the Mandal Commission Report.
61. Sri K.K.Venugopal appearing for the petitioner in Writ Petition No. 930 of 1990 adopted a slightly different approach while reiterating that the expression "backward classes of citizens" in Article 16(4) cannot be construed as backward castes. According to him, backwardness may be social and educational and may also be economic. The authority appointed to identify backward classes must first settle the criteria or the indicators for determining backward classes and then it must apply the said criteria to each and every group in the country. In the course of such identification, it may well happen that certain castes answer and satisfy the criteria of backwardness and may as a whole qualify for being termed as a backward class. But it is not permissible to start with castes to determine whether a caste is a backward class. He relied upon the provision in Clause (2) of Article 38 and Article 46 to say that the objective is to minimize the inequalities in income not only among individuals but also among groups of persons and to help the weaker sections of the society. The economic criterion is an important one and must be applied in determining backward classes and also for excluding those sections or identified groups who may for the sake of convenience be referred to as the 'creamy layer'. Since castes do not exist among Muslims, Christians and Sikhs, caste can never be the basis of identification. The learned Counsel too pointed out the alleged basic errors in the approach adopted by and conclusions arrived at by the Mandal Commission.
62. Smt. Shyamala Pappu also took the stand that caste can never be the basis for identification. According to her, survey to identify backward classes should be from individual to individual; it cannot be caste-wise. To the same effect are the submissions of Sri P.P. Rao appearing for the Supreme Court Bar Association. According to him, the only basis for identifying backward classes should be occupation-cum-means as was done in the State of Karnataka at a

particular stage which aspect is dealt with and approved by this Court in Chitralekha and Ors. v. State of Mysore . A secular socialist society, he submitted, can never countenance identification of backward classes on the basis of caste which would only perpetuate and accentuate caste differences and generate antagonism and antipathy between castes. 63. At the other end of the spectrum stands Sri Ram Jethmalani, counsel appearing for the State of Bihar supported by several other counsel. According to him, backward castes in Article 16(4) meant and means only the members of Shudra casts which is located between the three upper castes (Brahmins, Kshatriyas and Vaishyas) and the out-castes (Panchamas) referred to as Scheduled Castes. According to him, Article 16(4) was conceived only for these "middle castes" i.e., castes categorised as shudras in the caste system and for none else. These backward castes have suffered centuries of discrimination and disadvantage, leading to their backwardness. The expression "backward classes" does not refer to any current characteristic of a backward caste save and except paucity or inadequacies of representation in the apparatus of the Government. Poverty is not a necessary criterion of backwardness; in is in fact irrelevant. The provision for reservation is really a programme of historical compensation. It is neither a measure of economic reform nor a poverty alleviation programme. The learned Counsel further submitted that it is for the State to determine who are the backward classes; it is not a matter for the court. The decision of the Government is not judicially reviewable. Even if reviewable, the scope of judicial review is extremely limited - to the only question whether the exercise of power is a fraud on the Constitution. The learned Counsel referred to certain American decisions to show that even in that country several programmes of affirmative action and compensatory discrimination have been evolved and upheld by courts. 64. Dr. Rajiv Dhawan, learned Counsel appearing for Srinarayana Dharama Paripalana Yogam (an association of Ezhavas in Kerala) submitted that Article 16(4) and 15(4) occupy different fields and serve different purposes. Whereas Article 15(4) contemplates positive action programmes, Article 16(4) enables the State to undertake schemes of positive discrimination. For this reason, the class of intended beneficiaries under both the clauses is different. The social and educational backwardness which is the basis of identifying backwardness under Article 15(4) is only partly true in the case of 'backward class of citizens' in Article 16(4). The expression "any backward class of citizens" occurring in Article 16(4) must be understood in the light of the purpose of the said clause namely, empowerment of those groups and classes which have been kept out of the administration - classes which have suffered historic disabilities arising from discrimination or disadvantage or both and who must now be provided entry into the administrative apparatus. In the light of the fact that the Scheduled Castes and Scheduled Tribes were also intended to be beneficiaries of Article 16(4) there is no reason why caste cannot be an exclusive criteria for determining beneficiaries under Article 16(4). Counsel emphasised the fact that Article 16(4) speaks of group protection and not individual protection. Sri R.K. Garg appearing for the Communist Party of India, an Intervenor, submitted that caste plus poverty plus location plus residence should be the basis of identification and not mere caste. According

to the learned Counsel, a national concensus is essential to introduce reservations for 'orther backward classes' under Article 16(4) and that efforts must be made to achieve such a concensus. 65. Sri Siva Subramanium appearing for the State of Tamil Nadu supported the Mandal Commission Report in its entirety. According to him, backward classes must be identified only on the basis of caste and that no economic criteria should be adopted for the said purpose. He submitted that economic criteria may be employed as one of the indicators for identification of backward classes but once a backward class is identified as such, there is no question of excluding any one from that class on the basis of income or means or on any other economic criterion. He referred to the history of reservations in the province of Madras prior to independence and now it has been working there successfully and peacefully over the last several decades. Sri P.S. Poti appearing for the State of Kerala supported the identification of backward classes solely and exclusively on the basis of caste. He submitted that the caste system is scientifically organised and practiced in Kerala and, therefore, furnishes a perfectly scientific basis for identification of backward classes. He submitted that besides the vice of untouchability, another greater vice of 'unapproachability' was also being practiced in that State. Sri Ram Awadesh Singh, M.P., President of Lok Dal and President of All India Federation of Backward Classes, Scheduled Castes, Scheduled Tribes and Religious minorites submitted that caste should be the sole criteria for determining backwardness. He referred to centuries of injustice meted out by upper castes to shudras and panchamas and submitted that these castes must now be given a share in the governance of the country which alone will assure their dignity besides instilling in them a sense of confidence and a spirit of competition. 66. Sri K.Parasaran, learned Counsel appearing for the Union of India urged the following submissions: (1) The reservation provided for by Clause (4) of Article 16 is not in favour of backward citizens, but in favour of backward class of citizens. What is to be identified is backward class of citizens and not citizens who can be classified as backward. The homogeneous groups based on religion, race, caste, place of birth etc. can form a class of citizens and if that class is backward there can be a reservation in favour of that class of citizens. (2) Caste is a relevant consideration. It can even be the dominant consideration. Indeed, most of the lists prepared by the States are prepared with reference to and on the basis of castes. They have been upheld by this Court. (3) Article 16(2) prohibits discrimination only on any or all of the grounds mentioned therein. A provision for protective discrimination on any of the said grounds coupled with other relevant grounds would not fall within the prohibition of Clause (2). In other words, if reservation is made in favour of backward class of citizens the bar contained in Clause (2) is not attracted, even if the backward classes are identified with reference to castes. The reason is that the reservation is not being made in favour of castes simplicitor but on the ground that they are backward castes/classes which are not adequately represented in the services of the State. (4) The criteria of backwardness evolved by Mandal Commission is perfectly proper and unobjectionable. It has made an extensive investigation and has prepared a list of backward classes. Even if there are instances of under-inclusion or over-inclusion, such errors do

not vitiate the entire exercise. Moreover, whether a particular caste or class is backward or not and whether it is adequately represented in the services of the State or not are questions of fact and are within the domain of the executive decision. 67. In paragraphs 33 to 42, we have noticed how this Court has been grappling with the problem over the years. In Venkataraman's case, a Seven-Judge Bench of this Court noticed the list of backward classes mentioned in Schedule III to the Madras Provincial and Subordinate Service Rules, 1942, as also the fact that backward classes were enumerated on the basis of caste/race. It found no objection thereto though in Champakam, rendered by the same Bench and on the same day it found such a classification bad under Article 15 on the ground that Article 15 did not contain a clause corresponding to Clause (4) of Article 16. In Venkataraman's case this Court observed that in respect of the vacancies reserved for backward classes of Hindus, the petitioner (a Brahmin) cannot have any claim inasmuch as "those reserved posts (were reserved) not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such post in favour of a backward class of citizens." The writ petition was allowed on the ground that the allocation of vacancies to and among communities other than Harijans and backward classes of Hindus cannot be sustained in view of Clauses (1) and (2) of Article 16. 68. Though Balaji was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulations enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4). It is, therefore, necessary to notice precisely the formulations in Balaji relevant in this behalf. Gajendragadkar,J. speaking for the Constitution Bench found, on an examination of the Nagangowda Committee Report, "that the Committee virtually equated the class with the castes." The learned Judge then examined the scheme of Article 15, the meaning of the expression 'class', the importance of caste in the Hindu social structure and observed, while dealing with social backwardness: Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens.... Though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves. The learned Judge further proceeded to hold: Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, the test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains or even Linguists are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in to to from the operation of Article 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the

social backwardness of groups or class of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is in the ultimate analysis the result of poverty to a very large extent.... It is true that social backwardness which results form poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens. The learned Judge stressed the part played by the occupation, conventional beliefs and place of habitation in determining the social backwardness. Inasmuch as the identification of backward classes of Nagangowda Committee was based almost solely on the basis of caste, it was held to be bad. The criticism of the Respondents' counsel against the Judgment runs thus: While it recognises the relevance and significance of the caste and the integral connection between caste, poverty and social backwardness, it yet refuses to accept caste as the sole basis of identifying socially backward classes, partly for the reason that castes do not exist among non-Hindus. The Judgment does not examine whether caste can or cannot form the starting- point of process of identification of socially backward classes. Nor does it consider the aspect - how does the non-existence of castes among non-Hindus (assuming that the said premise is factually true) makes it irrelevant in the case of Hindus, who constitute the bulk of the country's population. There is no rule of law that a test of basis adopted must be uniformly applicable to the entire population in the country as such. Before proceeding further it may be noticed that Balaji was dealing with Article 15(4), which clause contains the qualifying words "socially and educationally" preceding the expression "backward classes". Accordingly, it was held that the backwardness contemplated by Article 15(4) is both social and educational. Though, Clause (4) of Article 16 did not contain any such qualifying words, yet they came to be read into it. In Janaki Prasad Parimoo, Palekar, J. speaking for a Constitution Bench, took it as "well-settled that the expression 'backward classes' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4)". More of this later. 69. In Minor P.Rajendran, the caste vis-a-vis class debate took a sharp turn. The ratio in this case marks a definite and clear shift in emphasis. (We have dealt with it at some length in para 36). Suffice it to mention here that in this decision, it was held that "a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).... It is true that in the present case the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was a sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens." This principle was reiterated in Peeriakaruppan. Balram and Trilokinath-II. We have referred to these decisions at some length in paras 38 and 39. In Peeriakaruppan, Hegde,J. concluded, "a caste has always been recognised as a class." 70. This issue was gone into in some detail in Vasant Kumar, where all the five Judges constituting the Constitution Bench expressed different opinions. Chandrachud,CJ. did not express himself on this

aspect but other four learned Judges did. Desai, J. recognised that "in the early stages of the functioning of the Constitution, it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Article 15(4)." He also recognised that "there has been some vacillation on the part of the judiciary on the question whether the caste should be the basis for recognising the backwardness." After examining the significance of caste in the Indian social structure, the learned Judge observed: Social hierarchy and economic position exhibit an indisputable mutuality. The lower the caste, the poorer its member. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. The learned Judge also recognised that caste system has even penetrated other religions to whom the practice of caste should be anathema. He observed: So sadly and oppressively deep-rooted is caste in our country that it has cut across even the barriers of religion. The caste system has penetrated other religious and dissentient Hindu sects to whom the practice of caste should be anathema and today we find that practitioners of other religious faiths and Hindu dissentients are some times as rigid adherents to the system of caste as the conservative Hindus. We find Christians Harijans, Christian Madars, Christian Reddys, Christian Kammas, Mujbi Sikhs, etc. etc. In Andhra Pradesh there is a community known as Pinjars or Dudekulas (known in the North as 'Rui Pinjane Wala'): (professional cottonbeaters) who are really Muslims but are treated in rural society, for all practical purposes, as a Hindu caste. Several other instances may be given. Having thus noticed the pernicious effects of the caste system, the learned Judge opined that the only remedy in such a situation is to devise a method for determining social and educational backward classes without reference to caste. He stressed the significance of economic criterion and of poverty and concluded that a time has come when the economic criterion alone should be the basis for identifying the backward classes. Such an identification has the merit of advancing the secular character of the nation and will tend towards nullifying caste influence, said the learned Judge. 71. Chinnappa Reddy,J. dealt with the question at quite some length. The learned Judge quoted Max Weber, according to whom the three dimensions of social inequality are class, status and power - and stressed the importance of poverty in this matter. Learned Judge opined that caste system is closely entwined with economic power. In the words of the learned Judge: Social status and economic power are so woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. The learned Judge too recognised the percolation of caste system into other religions and concluded his opinion in

the following words: Poverty, caste, occupation and habitation are the principal factors which contribute to brand a class as socially backward.... But mere poverty it seems is not enough to invite the Constitutional branding, because of the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backward.... True, a few members of those caste or social groups may have progressed far enough and forged ahead so as to compare favourably with the leading forward classes economically, socially and educationally. In such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it.... Class poverty, not individual poverty, is therefore the primary test.... Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined, it will not be for the court to interfere in the matter. But, lest there be any misunderstanding, judicial review will not stand excluded. 72. A.P.Sen,J. dealt with this question in a short opinion. According to him: ....The predominant and only factor for making special provisions under Article 15(4) or for reservation of posts and appointments under Article 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable' to Scheduled Castes or Scheduled Tribes, till such members of backward classes attain a state of enlightenment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life. 73. "E.S.Venkataramiah,J. too dealt with this aspect at some length. After examining the origins of the caste and the ugly practices associated with it, the learned Judge opined: An examination of the question in the background of the Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward. The learned Judge then referred to the debates in the Constituent Assembly on draft Article 10 and other allied articles, including the speech of Dr. Ambedkar and observed thus: The whole tenor of discussion in the Constituent Assembly pointed to making reservation for a minority of the population including Scheduled Castes and Scheduled Tribes which were socially backward. During the discussion, the Constitution (First Amendment) Bill by which Article 15(4) was introduced, Dr. Ambedkar referred to Article 16(4) and said that backward classes are 'nothing else but a collection of certain castes. This statement leads to a reasonable inference that this was the meaning which the Constituent Assembly assigned to classes' at any rate so far as Hindus were concerned. The learned Judge also supported the imposition of a means test as was done by the Kerala Government in K.S.Jayasree and Anr. v. State of Kerala and Anr. . The above opinions emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognise that in the Indian context, lower castes are and ought to be treated as backward classes. Rajendran and Vasant Kumar (opinions of Chinnappa Reddy and Venkataramiah, JJ.) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Article 16(4) and Article 15(4). 74. At this stage, it would be fruitful to examine, how he words"caste"

and "class" were understood in pre Constitution India. We shall first refer to various Rules in force in several parts of India, where these expressions were used and notice how were these expressions defined and understood. In the Madras Provincial and Subordinate Service Rules, 1942, framed by the Governor of Madras under Section 241(2)(b) read with 255 and 275 of the Government of India Act. 1935, the expression "backward classes" was defined in Clause 3(A) of Rule 2. (The provinces of Madras at that time covered not only the present State of Tamil Nadu but also a major portion of the present State of Andhra Pradesh and parts of present States of Kerala and Karnataka.) The definition read as follows: 3(A)."Backward classes" means the communities mentioned in Schedule III of this part. Schedule III bore the heading "backward classes". It was a collection of castes and tribes under the sub-heading "race, tribe or caste." The backward classes in the Schedule not only included the backward castes and tribes in Hindu religion but also certain sections of Muslims in the nature of castes. For example, item (23) in Schedule III referred to 'Dudekula' who, as is well known, is a socially disadvantaged section of Muslims - in effect, a caste - pursuing the occupation of ginning and cleaning of cotton and preparing pillows and mattresses. In this connection, reference may be had to Chapter III - 'History of the Backward Classes Movement in Tamil Nadu' - of the Report of the Tamil Nadu Second Backward Classes Commission (1985), which inter alia refers to formation of 'The Madras Provincial Backward Classes League, an association representing the various backward Hindu communities' in 1934 and its demand for separate representation for them in services. The former State of Mysore was one of the earliest States, where certain provisions were made in favour of Backward Classes. The opinion of E.S.Venkataramiah, J. in Vasant Kumar, (at pages 442-443) traces briefly the history of reservations in the State of Mysore from 1918-21 upto the re-organisation of State. The learned Judge points out how the expression 'backward classes' and 'backward communities' were used interchangeably. All the castes/communities' except Brahmins in the State were notified as backward communities/castes. As far back as 1921, preferential recruitment was provided in favour of "backward communities", in Government services. In Bombay province, the Government of Bombay, Finance Department Resolution No. 2610 dated 5.2.1925 defined "Backward Classes" as all except Brahmins, Prabhus, Marwaris, Parsis, Banyas and Christians. Certain reservations in Government service were provided for these classes. In 1930, the State Committee noticed the over-lapping meanings attached to the expressions "depressed classes" and "backward classes" and recommended that "Depressed Classes" should be used in the sense of untouchables, a usage which "will coincide with existing common practice." They proposed that the wider group should be called "Backward Classes", which should be subdivided into Depressed Classes (i.e., untouchables); Aboriginals and Hill Tribes; Other Backward Classes (including wandering tribes). They opined that the groups then currently called Backward Classes should be renamed "intermediate classes". In addition to 36 Depressed classes (approximate 1921 population 1.475 millions) and 24 Aboriginal and Hill Tribes (approximate 1921 population 1.323 millions), they listed 95 Other Backward Classes (approximate 1921 population

1.041 millions)“. 75. In the former princely State of Travancore, the expression used was”Communities“, as would be evident from the Proceedings of the Government of His Highness the Maharaja of Travancore, contained in Order R. Dis. N. 893/general dated Trivandrum, 25th June, 1935. It refers to earlier orders on the subject as well. What is significant is that the expression”communities" was used as taking in Muslims and certain sections of Christians as well; it was not understood as confined to castes in Hindu social system alone. The operative portion of the order reads as follows: ....Accordingly, Government have decided that all communities whose population is approximately 2 per cent of the total population of the State or about one lakh, be recognised as separate communities for the purpose of recruitment to the public service. The only exception from the above rule will be the Brahmin community who, though forming only 1.8 per cent of the total population, will be dealt with as a separate community. On the above basis the classification of communities will be as follows:- A. HINDU 1. Brahmin. 2. Nayar. 3. Other Caste Hindu. 4. Kummula. 5. Nudar. 6. Ezlmva. 7. Cheramar (Pulaya) 8. Other Hindu. B. MUSLIM. C. CHRISTIAN. 1. Jacobite. 2. Marthomite. 3. Syriac Catholic. 4. Latin Catholic. 5. South India United Church. 6. Other Christian. In the then United Provinces, the term “Backward Classes” was understood as covering both the untouchable classes as well other “Hindu Backward” classes. Marc Galanter says: The United Provinces Hindu Backward Classes League (founded in 1929) submitted a memorandum which suggested that the term “Depressed” carried a connotation “of untouchability, in the sense of causing pollution by touch as in the case of Madras and Bombay” and that many communities were reluctant to identify themselves as depressed. The League suggested the term “ ‘Hindu’ Backward”’ as a more suitable nomenclature. The list of 115 castes submitted included all candidates from the untouchable category as well as a stratum above. “All of the listed communities belong to non-Dwijas or degenerate or Sudra classes of the Hindus.” They were described as low socially, educationally and economically and were said to number over 60% of the population. The expression “depressed and other backward classes” occurs in the Objectives Resolution of the Constituent Assembly moved by Jawaharlal Nehru on December 13, 1946. 76. We may also refer to a speech delivered by Dr. Ambedkar on May 9, 1916 at the Columbia university of New York, U.S.A. on the subject “castes in India: their mechanism, genesis and development” (the speech was published in Indian Antiquary-May 1917-Vol.XLI), which shows that as early as 1916, “class” and “caste” were used inter-changeably. In the course of the speech, he said: ....society is always composed of classes. It may be an exaggeration to assert the theory of class-conflict, but the existence of definite classes in a society is a fact. Their basis may differ. They may be economic or intellectual or social, but an individual in a society is always a member of a class. This is a universal fact and early Hindu society could not have been an exception to this rule, and, as a matter of fact, we know it was not. If we bear this generalization in mind, our study of the genesis of caste would be very much facilitated, for we have only to determine what was the class that first made itself into a caste, for class and caste, so to say, are next door neighbours, and it is only a span that

separates the two. A Caste is an Enclosed Class. A little later he stated: We shall be well advised to recall at the outset that the Hindu society, in common with other societies, was composed of classes and the earliest known are the (1) Brahmins or the priestly class; (2) the Kshatriya, or the military class; (3) the Vaishya, or the merchant class and (4) the Shudra or the artisan and menial class. Particular attention has to be paid to the fact that this was essentially a class system, in which individuals, when qualified, could change their class, and therefore classes did change their personnel. At some time in the history of the Hindus, the priestly class socially detached itself from the rest of the body of people and through a closed-door policy became a caste by itself. The other classes being subject to the law of social division of labour underwent differentiation, some into large, others into very minute groups. 77. In Encyclopaedia Britannica Vol. 16, the following statement occurs under the heading "Slavery, Serfdom and Forced labour" under the sub-heading "servitude in Ancient India and China." - "castes in India." More abundant than slavery were serfdom. Within the rigid classification of social classes in ancient India, the Sudra caste was obliged to serve the Ksatriya, or warrior caste, the Brahmins, or priests, and the Vaisyas, or farmers, cattle raisers and merchants. There is an unbreakable barrier, however, separating these castes from the inferior Sudra caste, the descendants of the primitive indigenous people who lived in serfdom. In those times it was not a person's economic wealth that gave him his social rank but rather his social and racial level; and thus one of the Manu's laws says" Although able, a Sudra must not acquire excess riches, since when a Sudra acquires a fortune, he vexes the Brahmans with his insolence." The barrier separating the servile castes took on extreme cruelty in some laws: The legal condition of the Sudra left him only death as a means of improving his condition. In Legal Thesaurus (Regular Edition) the following meanings are given to the word "class": Assortment, bracket, branch, brand, breed, caste, category, classification, classes, denomination, designation, division...; gradation, grade, group, grouping hierarchy.... sect, social rank, social status.... The following meanings are given to the word "caste" in Webster's English Dictionary: (1) a race, stock, or breed of men or animals (2): one of the hereditary classes into which the society of India is divided in accordance with a system fundamental to Hinduism, reaching back into distant antiquity, and dictating to every orthodox Hindu the rules and restrictions of all social intercourse and of which each has a name of its own and special customs that restrict that occupation of its members and their intercourse with the members of the other classes (3)(a): a division or class of society comprised of persons within a separate and exclusive order based variously upon differences of wealth, inherited rank or privilege, profession, occupation... (b) the position conferred by caste standing. (4) a system of social stratification more rigid than a class and characterized by hereditary status, endogamy and social barriers rigidly sanctioned by custom law or religion. All the above material does go to show that in pre-Independence India, the expressions 'class' and 'caste' were used interchangeably and that caste was understood as an enclosed class. 78. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the

use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr. Ambedkar as conclusive on the meaning of the expression "backward classes." We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in Clause (4). We are aware that what is said during these debates is not conclusive or binding upon the court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr. Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft Clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. See Madhu Limaye A.I.R. 1969 S.C. 1014 at 1018; Golaknath v. State of Punjab (Subba Rao, CJ.); opinion of Sikri, CJ., in Dhillon v. Union of India and the several opinions in Keshavananda Bharati where the relevance of these debates is pointed out, emphasising at the same time, the extent to which and the purpose for which they can be referred to). Since the expression "backward" or "backward class of citizens" is not defined in the Act, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable. 79. According to Dr. Ambedkar (his speech is referred in para 28 and need not be reproduced here), the Drafting Committee was of the opinion that such a qualifying expression was necessary to indicate that the classes of citizens for whom reservations were to be made are those "communities which have not had so far representation in the State." It was also of the opinion that without such a qualifying expression (like 'backward') the "exemption made in favour of reservation will ultimately eat up the rule altogether". This was also the opinion of Sri K.M.Munshi, who too was a member of the Drafting Committee. In his speech (referred to in para 27) he explains why the said qualifying expression "backward" was inserted by the Drafting Committee in draft Article 10(3). His speech, in so far as it is relevant on this aspect, has been quoted in extenso in para 28 and need not be repeated here. In our opinion too, the words "class of citizens - not adequately represented in the services under the State" would have been a vague and uncertain description. By adding the word "backward" and by the speeches of Dr. Ambedkar and Sri K.M.Munshi, it was made clear that the "class of citizens... not adequately represented in the services under the State" meant only those classes of citizens who were not so represented on account of their social backwardness. Reference can also be made in this context to the speech of Dr. Ambedkar in the Parliament at the time the First Amendment to the Constitution was being enacted. It must be remembered that the

Parliament which enacted the First Amendment was the very same Constituent Assembly which framed the Constitution and Dr. Ambedkar as the Minister of Law was piloting the Bill. He said that backward classes "are nothing else but a collection of certain castes". (the relevant portion of his speech is referred to in papa 32) and that it was for those backward classes that Article 15(4) was being enacted. 80. Pausing here, we may be permitted to make a few observations. The speeches of Dr. Ambedkar may have to be understood in the context of the then obtaining ground realities viz., (a) Hindus constituted 84% of the total population of India. And among Hindus, caste discrimination was unfortunately an unpleasant reality; (b) caste system had percolated even the Non-Hindu religions - no doubt to varying extents. Particularly among Christians in Southern India, who were converts from Hinduism, it was being practised with as much rabidity as it was among Hindus. (This aspect has been stressed by the Mandal Commission (Chapter 12 paras 11 to 16) and has also been judicially recognised. (See, for instance, the opinions of Desai and Chinnappa Reddy, JJ. in Vasant Kumar). Encyclopaedia Britannica-II-Micropaedia refers to existence of castes among Muslims and Christians at pages 618 and 61.9. Among Muslims, it is pointed out, a distinction is made between 'Ashrats' (supposed to be descendants ascendants of Arab immigrants) and non-Ashrafs (native converts). Both are divided into subgroups. Particularly, the non-Ashrafs, who are converts from Hinduism, it is pointed out, practice caste system (including endogamy)" in a manner close to that of their Hindu counter-parts." All this could not have been unknown to Dr. Ambedkar, the keen social scientist that he was. (c) It is significant to notice that throughout his speech in the Constituent Assembly, Dr. Ambedkar was using the word "communities" (and not 'castes') which expression includes not only the castes among the Hindus but several other groups. For example, Muslims as a whole were treated as a backward community in the princely State of Travancore besides several sections/denominations among the Christians. The word "community" is clearly wider than "caste" - and "backward communities" meant not only the castes - wherever they may be found - but also other groups, classes and sections among the populace. 81. Indeed, there are very good reasons why the Constitution could not have used the expression "castes" or "caste" in Article 16(4) and why the word "class" was the natural choice in the context. The Constitution was meant for the entire country and for all time to come. Non-Hindu religions like Islam, Christianity and Sikh did not recognise caste as such though, as pointed out hereinabove, castes did exist even among these religions to a varying degree. Further, a Constitution is supposed to be a permanent document expected to last several centuries. It must surely have been envisaged that in future many classes may spring-up answering the test of backwardness, requiring the protection of Article 16(4). It, therefore, follows that from the use of the word "class" in Article 16(4), it cannot be concluded either that "class" is antithetical to "caste" or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens. The word "class" in Article 16(4), in our opinion, is used in the sense of social class - and not in the sense it is understood in Marxist jargon. In Rajendran, Trilokinath-II, Balram and Peerikarupan, this

reality was recognised and given effect to, notwithstanding the fact that they had to respect and operate within the rather qualified formulation of Balaji. For the sake of completeness, we may refer to a few passages from Vasant Kumar to show what does the concept of 'caste' signify? D.A. Deasi, J. defines and describes "caste" in the following terms: What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it. Homo Hierarchicus is expected to be the central and substantive element of the caste/system which differentiate it from other social systems. The concept of purity and impurity conceptualises the caste system.... There are four essential features of the caste system which maintained its homo hierarchicus character: (1) hierarchy (2) commensality: (3) restrictions on marriage; and (4) hereditary occupation. Most of the caste are endogamous groups. Intermarriage between two groups is impermissible. But 'Pratilom' marriages are not wholly known. Venkataramiah,J. also defined "caste" in practically the same terms. He said: A caste is an association of families which practice the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste.... A caste is based on various factOrs. Sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth, in a family. Certain ideas of ceremonial purity are peculiar to each caste.... Even the choice of occupation of members of castes was predetermined in many cases, and the members of particular caste were prohibited from engaging themselves in other types of callings, profession or occupations. Certain occupations were considered to be degrading or impure. 82. The above material makes it amply clear that a caste is nothing but a social class - a socially homogeneous class. It is also an occupational grouping, with this difference that its membership is hereditary. One is born into it. Its membership is involuntary. Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogenous class. Endogamy is its main charateristic. Its social status and standing depends upon the nature of the occupation followed by it. Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. A few members may have gone to cities or even abroad but when they return - they do, barring a few exceptions they go into the same fold again. It doesn't matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions, it is his social class - the caste - that is relevant. It is a matter of common knowledge that an overwhelming majority of doctors, engineers and other highly qualified people who go abroad for higher studies or employment, return to India and marry a girl from their own caste. Even those who are settled abroad come to India in search of brides and bridegrooms for their sons and daughters from among their own caste or community. As observed by Dr. Ambedkar, a caste is an enclosed class and it was mainly

these classes the Constituent Assembly had in mind though not exclusively - while enacting Article 16(4). Urbanisation has to some extent broken this caste-occupation nexus but not wholly. If one sees around himself, even in towns and cities, a barber by caste continues to do the same job - may be, in a shop (hair dressing saloon). A washerman ordinarily carries on the same job though he may have a laundry of his own. May be some others too carry on the profession of barber or washerman but that does not detract from the fact that in the case of an over-whelming majority, the caste-occupation nexus subsists. In a rural context, of course, a member of barber caste carrying on the occupation of a washerman or vice versa would indeed be a rarity - it is simply not done. There, one is supposed to follow his caste occupation, ordained for him by his birth. There may be exceptions here and there, but we are concerned with generality of the scene and not with exceptions or aberrations. Lowly occupation results not only in low social position but also in poverty; it generates poverty. 'Caste-occupation-poverty' cycle is thus an ever present reality. In rural India, it is strikingly apparent; in urban centers, there may be some dilution. But since rural India and rural population is still the overwhelmingly predominant fact of life in india, the reality remains. All the decisions since Balaji speak of this 'caste-occupation-poverty' nexus. The language and emphasis may very but the theme remains the same. This is the stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon. We are not saying it ought to be encouraged. It should not be. It must be eradicated. That is the ideal - the goal. But any programme towards betterment of these sections-classes of society and any programme designed to eradicate this evil must recognise this ground reality and attune its programme accordingly. Merely burying our heads in the sand - Ostrich-like - wouldn't help. One cannot fight his enemy without recognizing him. The U.S.Supreme Court has said repeatedly, if race be the basis of discrimination - past and present - race must also form the basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far. Without a doubt, an extensive restructuring of socio-economic system is the answer. That is indeed the goal, as would be evident from the preamble and Part IV (Directive Principles). But we are concerned here with a limited aspect of equality emphasised in Article 16(4) - equality of opportunity in public employment and a special provision in favour of backward class of citizens to enable them to achieve it. (b). Identification of "backward class of citizens". 83. Now, we may turn to the identification of "backward class of citizens". How do you go about it? Where do you begin? Is the method to very from State to State, region to region and from rural to urban? What do you do in the case of religions where caste system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to cease-fire line (in Jammu and Kashmir) or hilly or inaccessible regions to be surveyed and identified as backward classes for the purpose of Article 16(4)? And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or

region. Each and every situation cannot be visualised and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes - for it cannot be denied that Scheduled Castes include quite a few castes. Coming back to the question of identification, the fact remains that one has to begin somewhere - with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely inter-twined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and soon and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of Clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (After excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread

over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by Justice O.Chinnappa Reddy Commission in this respect. We do not mean to suggest - we may reiterate - that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward. 83A. The only basis for saying that caste should be excluded from consideration altogether while identifying the Backward Class of Citizens for the purpose of Article 16(4) is Clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of Clause (2). It prohibits discrimination on any or all of the grounds mentioned therein. The significance of the word "any" cannot be minimised. Reservation is not being made under Clause (4) in favour of a 'caste' but a 'backward class'. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State. In such a situation, the bar of Clause (2) of Article 16 has no application whatsoever. Similarly, the argument based upon secular nature of the Constitution is too vague to be accepted. It has been repeatedly held by the U.S. Supreme Court in School desegregation cases that if race be the basis of discrimination, race can equally form the basis of redressal. In any event, in the present context, it is not necessary to go to that extent. It is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born Heathen, by baptism, it becomes a Christian - to use a similie. Baptism here means passing the test of backwardness. 84. Another contention urged is that only that group or section of people, who are suffering the lingering effects of past discrimination, can alone be designated as a backward class and not others. This argument, inspired by certain American decisions, cannot be accepted for more than one reason. Firstly, when the caste discrimination is still prevalent, more particularly in rural India (which comprises the bulk of the total population), the theory of lingering effects has no relevance. Where the discrimination has ended, does that aspect become relevant and not when the discrimination itself is continuing. Secondly, as we have noticed hereinabove,

the said theory has practically been given up by the U.S. Supreme Court in Metro Broadcasting. In this case, it is held sufficient for introducing and implementing a race-conscious programme that such programme serves important State objectives. In other words, according to this test, it is no longer necessary to prove that such programme is designed to compensate victims of past societal or governmental discrimination. Thirdly, the basic premise of the theory of lingering effects is not accepted by all the learned Judges of U.S. Supreme Court. If one sees the opinion of Douglas, J. in Defunis and of Marshall, J. in Bakke and Fullilove. It would become evident. They also say that discriminatory practices against blacks and other minorities have not come to an end but are still persisting. In this country too, none can deny - in the face of the material collected by the various Commissions including Mandal Commission - that discrimination persists even today in India. The representation of the socially backward classes in the Government apparatus is quite inadequate and that conversely the upper classes have a disproportionately large representation therein. This is the lingering effect, if one wants to see it. Whether the backwardness in Article 16(4) should be both social and educational? 85. The other aspect to be considered is whether the backwardness contemplated in Article 16(4) is social backwardness or educational backwardness or whether it is both social and educational backwardness. Since the decision in Balaji, it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4). Though Article 15(4) came into existence later in 1951 and Article 16(4) does not contain the qualifying words 'socially and educationally' preceding the words "backward class of citizens" the same meaning came to be attached to them. Indeed, it was stated in Janaki Prasad Parimoo (Palekar,J. speaking for the Constitution Bench) that: Article 15(4) speaks about socially and educationally backward classes of citizens." However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a 'backward class citizens' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Article 15(4) and 16(4). It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does Clause (4) of Article 15. It may be remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: "backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens

for the purposes of Article 16(4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. Thus, S.E.B.Cs, referred to in Article 340 is only one of the categories for whom Article 16(4) was enacted; Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services - which may mean, at any level whatsoever - insisting upon educational backwardness may not be quite appropriate. Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle. It is a well known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr. Rajiv Dhawan may be right when he says that the object of Article 16(4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social and educational. The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness. It is necessary to state at this stage that the Mandal Commission appointed under Article 340 was concerned only with the socially and educationally backward classes contemplated by the said Article. Even so, it is evident that social backwardness has been given precedence over others by the Mandal Commission - 12 out of 22 total points. Social backwardness - it may be reiterated - leads to educational and economic backwardness. No objection can be, nor is taken, to the validity and relevancy of the criteria adopted by the Mandal Commission. For a proper a appreciation of the criteria adopted by the Mandal Commission and the difficulties in the way of evolving the criteria of backwardness, one must read closely Chapters III and XI of Volume I along with Appendixes 12 and 21 in Volume II. Appendix XII is the Report of the Research Planning Team of the Sociologists while Appendix 21 is the 'Final List of Tables' adopted in the course of socio-educational survey. In particular, one may read paras 11.18 to 11.22 in

Chapter XI, which are quoted hereunder for ready reference: 11.18. Technical Committee constituted a Sub-Committee of Experts (Appendix-20, Volume II) to help the Commission prepare 'Indicators of Backwardness' for analysing data contained in computerised tables. After a series of meetings and a lot of testing of proposed indicators against the tabulated data, the number of tables actually required for the Commission's work was reduced to 31 (Appendix-21 Volume II). The formulation and refinement of indicators involved testing and validation checks at every stage. 11.19. In this connection, it may be useful to point out that in social sciences no mathematical formulae or precise bench-marks are available for determining various social traits. A survey of the above type has to read warily on unfamiliar ground and evolve its own norms and bench-marks. This exercise was full of hidden pitfalls and two simple examples are given below to illustrate this point. 11.20. In Balaji's case the Supreme Court held that if a particular community is to be treated as educationally backward, the divergence between its educational level and that of the State average should not be marginal but substantial. The Court considered 50% divergence to be satisfactory. Now, 80% of the population of Bihar (1971 Census) is illiterate. To beat this percentage figure by a margin of 50% will mean that 120% members of a caste/class should be illiterates. In fact it will be seen that in this case even 25% divergence will stretch us to the maximum saturation point of 100%. 11.21. In the Indian situation where vast majority of the people are illiterate, poor or backward, one has to be very careful in setting deviations from the norms as, in our conditions, norms themselves are very low. For example, Per Capita Consumer Expenditure for 1977-78 at current prices was Rs. 991 per annum. For the same period, the poverty line for urban areas was at Rs. 900 per annum and for rural areas at Rs. 780. It will be seen that this poverty line is quite close to the Per Capita Consumer Expenditure of an average Indian. Now following the dictum of Balaji case, if 50% deviation from this average Per Capital Consumer Expenditure was to be accepted to identify 'economically backward' classes, their income level will have to be 50% below the Per Capital Consumer Expenditure i.e. less than Rs. 495.5 per year. This figure is so much below the poverty line both in urban and rural areas that most of the people may die of starvation before they qualify for such a distinction. 11.22. In view of the above, 'Indicators for Backwardness' were tested against various cut-off points. For doing so, about a dozen castes well-known for their social and educational backwardness were selected from amongst the castes covered by our survey in a particular State. These were treated as 'Control' and validation checks were carried out by testing them against 'Indicators' at various cut-off points. For instance, one of the 'Indicators' for social backwardness is the rate of student dropouts in the age group 5-15 years as compared to the State average. As a result of the above tests, it was seen that in educationally backward castes this rate is at least 25 per cent above the State average. Further, it was also noticed that this deviation of 25% from the State average in the case of most of the 'Indicators' gave satisfactory results. In view of this, wherever an 'Indicator' was based on deviation from the State average, it was fixed at 25%, because a deviation of 50% was seen to give wholly unsatisfactory results and,

at times, to create anomalous situations. It is after these paragraphs that the Report sets out the indicators (criteria) evolved by it, set out in Paras 11.23 and 11.24 of the Report. 102. The S.E.B.Cs. referred to by the impugned Memorandums are undoubtedly 'backward class of citizens' within the meaning of Article 16(4). (d) 'Means' test and 'creamy layer': 86. 'Means test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as "the creamy layer" argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class - as forward as any other forward class member - and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since Jayasree, almost every decision has accepted the validity of this submission. On the other hand, the learned Counsel for the State of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representation received. In this behalf, the learned Counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar, to the following effect: ... One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad? In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class - a backward class. 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 in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line - how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become - say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs. 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of I.A.S. or I.P.S. or any other All India Service, his status in society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the Respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that Clause (4) or Article 16 aims at group backwardness and not individual backwardness. While we agree that Clause (4)

aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of Clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes). Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion - whether on the basis of income, extent of holding or otherwise - of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated 13th August, 1990 and 25th September, 1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise. (c) Whether a class should be situated similarly to the Scheduled Caste/Scheduled Tribe for being qualified as a Backward Class? 87. In Balaji it was held "that the backward classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes." The correctness of this observation is questioned by the counsel for the respondents. Reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar (at page 406) where, dealing with the above observations in Balaji, the learned Judge said: We do not think that these observations were meant to lay down any proposition that the socially Backward Classes were those classes of people, whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes. . . .There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes. 88. We see no reason to qualify or restrict the meaning of the expression "backward class of citizens" by saying that it means those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes. As pointed out in para 85, the relevant language employed in both the clauses is different. Article 16(4) does not expressly refer to Scheduled Castes or Scheduled Tribes; if so, there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection. As a matter of fact, neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated. If any group or class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such a priori notions into the con-

cept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say. How difficult is the process of ascertainment of backwardness would be known if one peruses Chapters III and XI of Volume I of the Mandal Commission Report along with Appendixes 12 and 21 in Volume II. It must be left to the Commission/Authority appointed to identify the backward classes to evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria. If, in any case, a particular caste or class is wrongly designated or not designated a backward class, it can always be questioned before a court of law as well. We may add that relevancy of the criteria evolved by Mandal Commission (Chapter XI) has not been questioned by any of the counsel before us. Actual identification is a different matter, which we shall deal with elsewhere. 88A. We may now summarise our discussion under Question No. 3.(a) a caste can be an quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (b) Neither the Constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. If can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be down with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes, (d) 'Creamy layer' can be, and must be, excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens." The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined

in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4). Adequacy of Representation in the services under the State: 89. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. The language of Clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in Barium Chemicals v. Company Law Board , which need not be repeated here. Sufficed it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive. Question 4: (a) Whether backward classes can be identified only and exclusively with reference to the economic criterion: 90. It follow from the discussion under Question No. 3 that a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis alongwith and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same. (b). Whether a backward class can be identified on the basis of occupation-cum-income without reference to caste? 91. In Chitralekha, this Court held that such an identification is permissible. We see no reason to differ with the said view inasmuch as this is but another method to find socially backward classes. Indeed, this test in the Indian context is broadly the same as the one adopted by the Mandal Commission. While answering Question 3(b), we said that identification of backward classes can be done with reference to castes alongwith other occupational groups, communities and classes. We did not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, Rickshawpullers/drivers, street-hawkers etc. may well qualify for being designated as Backward Classes. Question No. 5: Whether Backward Classes can be further divided into backward and more backward categories? 92. In Balaji it was held "that the sub-classification made by the order between Backward Classes and more backward classes does not appear to be justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of backward classes,

what the impugned order, in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced compared to the more advanced classes in the State and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of backward and more backward. The classification of the two categories, therefore, is not warranted by Article 15(4)." The correctness of this holding is questioned before us by the counsel for the respondents. It is submitted that in principle there is no justification for the said holding. It is submitted that even among backward classes there are some who are more backward than the others and that the backwardness is not and cannot be uniform throughout the country nor even within a State. In support of this contention, the Respondents rely upon the observations of Chinnappa Reddy, J. in Vasant Kumar, where the learned judge said: We do not see why on principle there cannot be a classification into Backward Classes and More Backward Classes, if both classes are not merely a little behind, but far far behind the most advanced classes. In fact such a classification would be necessary to help the More Backward Classes; otherwise those of the Backward Classes who might be a little more advanced than the More Backward Classes might walk away with all the seats. 92A. We are of the opinion that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that gold-smiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitably result would be that gold-smiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State - and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group-A comprises of "Aboriginal tribes. Vimukta jatis. Nomadic and semi-nomadic tribes etc.". Group-B comprises professional group like tappers, weavers, carpenters, iron-

smiths, goldsmiths, kamsalins etc. Group-C pertains to "Scheduled Castes converts to Christianity and their progency", while Group-D comprises of all other classes/communities/groups, which are not included in groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [1972] 3 S.C.R. 247 AT 286. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, O.B.Cs. will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law. PART - V (QUESTION NOS. 6, 7 AND 8) Question 6: To what extent can the reservation be made? (a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence? (b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16? (c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to ? 93. In Balaji, a Constitution Bench of this Court rejected the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the court on the extent of reservation. It observed that a provision under Article 15(4) being a "special provision" must be within reasonable limits. It may be appropriate to quote the relevant holding from the judgment: When Article 15(4) refers to the special provision 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 exhaustive 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. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored. . . .A Special provision contemplated by Article 15(4) like reservation for posts and appoint-

ments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the State and the center have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be adverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case. In Devadasan this rule of 50% was applied to a case arising under Article 16(4) and on that basis the carry-forward rule was struck down. In Thomas, however the correctness of this principle was questioned. Fazal Ali, J. observed: This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time Clause (4) of Article 16 does not fix any limit on the power of the government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. 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 class 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. The dominant object to this provision is to take steps to make inadequate representation adequate. Krishna Iyer, J. agreed with the view taken by Fazal Ali, J. in the following words: I agree with my learned brother Fazal Ali, J. in the view that the arithmatical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the carry forward' rule. Mathew, J. did not specifically deal with this aspect but from the principles of 'proportional equality' and 'equality of results' espoused by the learned Judge, it is argued that he did not accept the 50% rule. Beg, J. also did not refer to this rule but the following sentence occurs in his judgment at pages 962 and 963: If a reservation of posts under Article 16(4) for employees of backward classes could include complete reservation of higher posts to which they could be promoted, about which there could be no doubt now, I fail to see why it cannot be partial or for a part of the duration of service and hedged round with the condition that a temporary

promotion would operate as a complete and confirmed promotion only if the temporary promotee satisfies some tests within a given time. Ray, C.J., did not dispute the correctness of the 50% rule but at the same time he pointed out that this percentage should be applied to the entire service as a whole. After the decision in Thomas, controversy arose whether the 50% rule enunciated in Balaji stands overruled by Thomas or does it continue to be valid. In Vasant Kumar, two learned judges came to precisely opposite conclusions on this question. Chinnappa Reddy, J. held that Thomas has the effect of undoing the 50% rule in Balaji whereas Venkataramiah, J. held that it does not. 94. It is argued before us that the observations on the said question in Thomas were obiter and do not constitute a decision so as to have the effect of overruling Balaji. Reliance is also placed upon the speech of Dr. Ambedkar in the Constituent Assembly, where he said that reservation must be confined to a minority of seats (See para 28). It is also pointed out that Krishna Iyer, J. who agreed with Fazal Ali, J. in Thomas on this aspect, came back to, and affirmed, the 50% rule in Karamchari Sangh (at pp. 241 and 242). On the other hand, it is argued for the respondents that when the population of the other backward classes is more than 50% of the total population, the reservation in their favour (excluding Scheduled Castes and Scheduled Tribes) can also be 50%. 94A. We must, however, point out that Clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State Legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonably limits - and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in Narayan Rao v. State 1987 A.P. 53, striking down the enhancement of reservation from 25% to 44% for O.B.Cs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%. It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4)

- conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates. 95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations that is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure. It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be - applicable to exemptions, concessions or relaxations, if any provided to 'Backward Class of Citizens' under Article 16(4). 96. The next aspect of this

question is whether an year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. Balaji does not deal with this aspect but Devadasan (majority opinion) does. Mudholkar, J. speaking for the majority says: We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities. On the other hand is the approach adopted by Ray, C.J. in Thomas. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, C.J. would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go, i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e., 270 by other backward classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% an year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be. (d) Was Devadasan correctly decided? 97. The rule (providing for carry forward of unfilled reserved vacancies as modified in 1955) struck down in Devadasan read as follows: 3(a) If a sufficient number of candidate considered suitable by the recruiting authorities, are not available

from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year. The facts of the case relevant for our purpose are the following: (i) Reservation in favour of Scheduled Castes and Scheduled Tribes was 12 1/2% and 5% respectively; (ii) In 1960, U.P.S.C. issued a notification proposing to hold a limited competitive examination for promotion to the category of Assistant Superintendents in Central Secretariat Services. 48 vacancies were to be filled, out of which 16 were unreserved while 32 were reserved for Scheduled Castes/Scheduled Tribes, because of the operation of the carry forward Rule: 28 vacancies were actually carried forward; (iii) U.P.S.C. recommended 16 for unreserved and 30 for reserved vacancies - a total of 46; (iv) the Government however appointed in all 45 persons, out of whom 29 belonged to Scheduled Castes/Scheduled Tribes. The said Rule and the appointments made on that basis were questioned mainly on the ground that they violated the 50% rule enunciated in Balaji. It was submitted that by virtue of the carry forward Rule, 65% of the vacancies for the year in question came to be reserved for Scheduled Castes/Scheduled Tribes. The majority, speaking through Mudholkar,J. upheld the contention of the petitioners and struck down the Rule purporting to apply the principle of Balaji. The vice of the Rule was pointed out in the following wards: In order to appreciate better the import of this rule on recruitment, let us take an illustration. Supposing in two successive years no candidate from amongst the Scheduled Castes and Tribes is found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved vacancies for each of those years would, according to the Government resolution, be 18 for each year. Now, since these vacancies were not filled in those years a total of 36 vacancies will be carried forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Tribes. By operation of the carry forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%. 98. We are of the respectful opinion that on its own reasoning, the decision in so far as it strikes down the Rule is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said Rule. But it would not be correct to presume that that is the necessary and the only consequence of that rule. Let us take the very illustration given at pp. 691-2, - namely 100 vacancies arising in three successive years and 18% being the reservation quota - and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are

filled up and 9 are carried forward. Similarly, in the second year again, 9 are filled up and another 9 are carried forward. Result would be that in the third year, 9 + 9 + 18 = 36 (out of a total of 100) would be reserved which would be far less than 50%; the rule in Balaji is not violated. But by striking down the Rule itself, carrying forward of vacancies even in such a situation has become impermissible, which appears to us indefensible in principle. We may also point out that the premise made in Balaji and reiterated in Devadasan, to the effect that Clause (4) is an exception to Clause (1) is no longer acceptable, having been given up in Thomas. It is for this reason that in Karamchari Sangh, Krishna Iyer, J. explained Devadasan in the following words: In Devadasan's case the court went into the actuals, not into the hypotheticals. This is most important. The Court actually verified the degree of deprivation of the 'equal opportunity' right.... .... What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right....Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC&ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical precision is different in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule shall not result, in any given year, in the selection of appointments of SC&ST candidates considerably in excess of 50% we uphold Annexure I. We are in respectful agreement with the above statement of law. Accordingly, we over-rule the decision in Devadasan. We have already discussed and explained the 50% rule in paras 93 to 96. The same position would apply in the case of carry forward rule as well. We, however, agree that an year should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength. 99. We may reiterate that a carry forward rule need not necessarily be in the same terms as the one found in Devadasan. A given rule may say that the unfilled reserved vacancies shall not be filled by unreserved category candidates but shall be carried forward as such for a period of three years. In such a case, a contention may be raised that reserved posts remain a separate category altogether. In our opinion, however, the result of application of carry forward rule, in whatever manner it is operated, should not result in breach of 50% rule. Question No, 7: Whether Clause (4) of Article 16 provides reservation only in the matter of initial appointments/direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well? 100. The petitioner's submission is that the reservation of appointments or posts contemplated by Clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to frog-leap over his compatriots,

which was bound to generate acute heart - burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are given how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of dis-heartening which kills the spirit of competition and develops a sense of dis-interestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon in-efficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in Clause (J) of Article 51A (Fundamental Duties). 101. Sri K.Parasaran, learned Counsel appearing for the Union of India raised a preliminary objection to the consideration of this question at all. According to him, this question does not arise at present inasmuch as the impugned Memorandums do not provide for reservation in the matter of promotion. They confine the reservation only to direct recruitment. Learned counsel reiterated the well-established principle of Constitutional Law that Constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case and where it is found necessary to decide them for a proper decision of the case. A large number of decisions of this Court and English courts are relied upon in support of this proposition. If for any reason this Court decides to answer the said question, says the counsel, the answer can only be one - which is already given by this Court in a number of decisions namely, Rangachari, Hiralal and Karamchari Sangh. He submits that an appointment to a post is made either by direct recruitment or by promotion or by transfer. In all these cases it is but an appointment. If so, Article 16(4) does undoubtedly take in and warrant making a provision for reservation in the matter of promotion as well. Learned counsel commended to us the further reasoning in Rangachari that adequate representation means not merely quantitative representation but also qualitative representation. He says further that adequacy in representation does not mean representation at the lowest level alone but at all levels in the

administration. Regarding the Constituent Assembly debates, his submission is that those debates do not indicate that the said provision was not supposed to apply to promotions. In such a situation, it is argued, plain words of the Constitution should be given their due meaning and that there is no warrant for cutting down their ambit on the basis of certain suppositions with respect to interpretation of Clauses (1), (2) and (4). This is also the contention of the other counsel for respondents. 102. With respect to the preliminary objection of Sri Parasaran, there can hardly be any dispute about the proposition espoused by him. But it must be remembered that reference to this larger Bench was made with a view to "finally settle the legal position relating to reservations". The idea was to have a final look at the said question by a larger Bench to settle the law in an authoritative way. It is for this reason that we have been persuaded to express ourselves on this question. But before we proceed to express ourselves on the question, a few clarifications would be in order. 103. Reservation in the case of promotion is normally provided only where the promotion is by selection, i.e., on the basis of merit. For, if the promotion is on the basis of seniority, such a rule may not be called for; in such a case the position obtaining in the lower category gets reflected in the higher category (promotion category) also. Where, however, promotion is based on merit, it may happen that members of backward classes may not get selected in the same proportion as is obtaining in the lower category. With a view to ensure similar representation in the higher category also, reservation is thought of even in the matter of promotion based on selection. This is, of course, in addition to the provision for reservation at the entry (direct recruitment) level. This was the position in Rangachari. Secondly, there may be a service/class/category, to which appointment is made partly by direct recruitment and partly by promotion (i.e., promotion on the basis of merit). If no provision is made for reservation in promotions, the backward class members may not be represented in this category to the extent prescribed. We may give an illustration to explain what we are saying. Take the category of Assistant Engineers in a particular service where 50% of the vacancies arising in a year are filled up by direct recruitment and 50% by promotion (by selection i.e., on merit basis) from among Junior Engineers. If provision for reservation is made only in the matter of direct recruitment but not in promotions, the result may be that members of backward classes (where quota, let us say, is 25%) would get in to that extent only in the 50% direct recruitment quota but may not get in to that extent in the balance 50% promotion quota. It is for this reason that reservation is thought of even in the matter of promotions, particularly where promotions are on the basis of merit. The question for our consideration, however, is whether Article 16(4) contemplates and permits reservation only in the matter of direct recruitment or whether it also warrants provision being made for reservation in the matter of promotions as well. For answering this question, it would be appropriate, in the first instance, to examine the facts of and dicta in Rangachari, Hiralal and Karamchari Sangh. 104. In Rangachari, validity of the circulars issued by the Railway administration providing for reservation in favour of Scheduled Castes/Scheduled Tribes in promotions (by selection) was questioned. The contention was that Article 16(4) does not take in or compre-

hend reservation in the matter of promotions as well and that it is confined to direct recruitment only. The Madras High Court agreed with this contention. It held that the word "appointments" in Clause (4) did not denote promotion and further that the word "posts" in the said clause referred to posts outside the cadre concerned. On appeal, this Court reversed by a majority of 3:2, Gajendragadkar, J. speaking for the majority enunciated certain propositions, of which the following are relevant for our discussion: (a) matters relating to employment [in Clause (1)] must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment. (b) in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service. (c) The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. (b) in providing for the reservation of appointments or posts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments of posts. 105. In State of Punjab v. Hiralal, validity of an order made by the Government of Punjab providing for reservation in promotion (in addition to initial recruitment) was questioned. Though the High Court upheld the challenge, this Court (Shah, Hegde and Grover, JJ.) reversed and upheld the validity of the Government order following Rangachari. 106. Validity of a number of circulars issued by the Railway Administration was questioned in Karamchari Sangh, a petition under Article 32. The experience gained over the years disclosed that reservation of appointments/posts in favour of SC/STs, though made both at the stage of initial recruitment and promotion was not achieving the intended results, inasmuch as several posts meant for them remained unfilled by them. Accordingly, the Administration issued several circulars from

time to time tending further concessions and other measures to ensure that members of these categories avail of the posts reserved for them fully. (The original circular is referred to in the judgment as Ann.-F, whose validity was upheld in Rangachari itself. The other circulars are referred to as Annexures I, H, J and K). These circulars contemplated (i) giving one grade higher to SC/ST candidates than is assignable to an employee (ii) carrying forward vacancies for a period of three years and (iii) provision for in-service training and coaching (after promotion) to raise the level of efficiency of SC/ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petitioners was that these circulars, being inconsistent with the mandate of Article 335, are bad. Rangachari was sought to be reopened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The Division Bench (Krishna Iyer, Pathak and Chinnappa Reddy, JJ.) not only refused to re-open Rangachari but also repelled the attack upon the circulars. It was held that no dilution of efficiency in administration resulted from the implementation of the circulars inasmuch as they preserved the criteria of eligibility and minimum efficiency required and also provided for in-service training and coaching to correct the deficiencies, if any. The carry forward rule was also upheld subject to the condition that the operation of the rule shall not result, in any given year, selection/appointment of Scheduled Caste/Scheduled Tribe candidates in excess of 50%. In Comptroller and Auditor General v. K.S. Jagannathan , it was held: It is now well settled by decisions of this Court that the reservation in favour of backward classes of citizens including the members of the Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made. [See for instance: and Akhil Bhartiya Soshit Karamchari Sangh v. U.O.I. [1981] 1 S.C. 246.] 107. We find it difficult to agree with the view in Rangachari that Article 16(4) contemplates or permits reservation in promotions as well. It is true that the expression "appointment" takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizens. But this question has not to be answered on a reading of Article 16(4) alone but on a combined reading of Article 16(4) and Article 335. In Rangachari this fact was acknowledged but explained away on a basis which, with great respect to the learned Judges who constituted the majority - does not appear to be acceptable. The propositions emerging from the majority opinion in Rangachari have been set out in Para 104. Under proposition (d) (as set out in para 104), the majority does say that "in providing for the reservation of appointments or posts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically

and conceivably means some impairment of efficiency;" but then it explains it away by saying "but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments of posts." We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream - a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-fogging and the deleterious effects of "leap-fogging" need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class-IV and Class-Ill. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation. It is true that Rangachari has been the law for more than 30 years and that attempts to re-open the issue were repelled in Karamchari Sangh. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in Rangachari, to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State

Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12-such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise modify or reissue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. A purist or a legal theoretician may find this direction a little illogical. We can only answer them in the words of Lord Roskill. In his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject "Law Lords, Reactionaries or Reformers?", the learned Law Lord said: Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves "this case requires a policy decision - what is the right policy decision?" The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it, is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply. We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. The relaxation concerned in Thomas and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in Karamchari Sangh are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the O.B.Cs., S.Cs. and S.Ts. consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove. Question No. 8: Whether Reservations are anti-meritarian? 108. In Balaji and other cases, it was assumed that reservations are necessarily anti-meritarian. For example, in Janaki Prasad Parimoo it was observed, "it is implicit in the idea of reservation that a less meritorious person be preferred to another who is more meritorious." To the same effect is the opinion of Khanna, J. in Thomas, though it is a minority opinion. Even Subba Rao, J. who did not agree with this view did recognize some force in it. In his dissenting opinion in

Devadasan, While holding that there is no conflict between Article 16(4) and Article 335, he did say, "it is inevitable in the nature of reservation that there will be a lowering of standards to some extent", but, he said, on that account the provision cannot be said to be bad, inasmuch as in that case, the State had, as a matter of fact, prescribed minimum qualifications, and only those possessing such minimum qualifications were appointed. This view was, however, not accepted by Krishna Iyer, J. in Thomas. He said "efficiency means, in terms of good government, not marks in examinations only, but responsible and responsive service to the people. A chaotic genius is a grave danger to public administration. The inputs of efficiency rule include a sense of belonging and of accountability (not pejoratively used) if its composition takes in also the weaker segments of"We, the people of India". No other understanding can reconcile the claim of a radical present and the hangover of the unjust past." A similar view was expressed in Vasant Kumer by Chinnappa Reddy, J. The learned judge said "the mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after Independence, the position of the Scheduled Castes etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the district administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it." 109. It is submitted by the learned Counsel for petitioners that reservation necessarily means appointment of less meritorious persons, which in turn leads to lowering of efficiency of administration. The submission, therefore, is that reservation should be confined to a small minority of appointments/posts, - in any event, to not more than 30%, the figure referred to in the speech of Dr. Ambedkar in the Constituent Assembly. The mandate of Article 335, it is argued, implies that reservations should be so operated as not to affect the efficiency of administration. Even Article 16 and the directive of Article 46, it is said, should be read subject to the aforesaid mandate of Article 335. 110. The respondents, on the other hand, contend that the marks obtained at the examination/test/interview at the stage of entry into service is not an indicia of the inherent merit of a candidate. They rely upon the opinion of Douglas,J. in Defunis where the learned Judge illustrates the said aspect by giving example of a candidate coming from disadvantaged sections of society and yet obtaining reasonably good scores - thus manifesting his "promise and potential" - vis-a-vis a candidate from a higher strata obtaining higher scores. (His opinion is referred to in para 44). On account of the disadvantages suffered by them and the lack of opportunities, - the Respondents say - members of backward classes

of citizens may not score equally with the members of socially advanced classes at the inception but in course of time, they would. It would be fallacious to presume that nature has endowed intelligence only to the members of the forward classes. It is to be found everywhere. It only requires an opportunity to prove itself. The directive in Article 46 must be understood and implemented keeping in view these aspects, say the Respondents. 111. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate - if it can be called that - of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of Article to say that the mandate is maintenance of efficiency of administration.) May be, efficiency, competence and merit are not synonymous concepts; May be, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. 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 firmly 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 of open competitor candidates. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are anti meritian. Merit there is even among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency alongwith others. Having said this, we must append a note of clarification. In some cases arising under Article 15, this Court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in State of M.P. v. Nivedita Jain admission to medical course was regulated by an entrance test (called Pre-Medical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that Scheduled Cast/Schedule Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard altogether. The Government's action was challenged in this Court but was upheld. Since it was a case under Article 15, Article 335 had no relevance and was not applied. But in the case of Article 16, Article 335 would be relevant and any order on the lines of the order of the Government of M.P. (in Nivedita Jain) would not be permissible, being inconsistent with the efficiency of administration. To wit, in the matter of appointment of Medical Officers, the Government or the Public Service Commission cannot say that there shall be no minimum qualifying

marks for Scheduled Castes/Scheduled Tribes candidates, while prescribing a minimum for others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes - consistent with the requirements of efficiency of administration - it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind. 112. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, 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-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable. As a matter of fact, the impugned Memorandum dated 13th August, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may, we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment; (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August, 1990 cannot be stayed or withheld. We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, shill and excellence, some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335. We may add that we see no particular relevance of Article 38(2) in this context. Article 16(4) is also a measure to ensure equality of status besides equality of opportunity. PART - VI (QUESTIONS 9, 10 & 11 AND OTHER MISCELLANEOUS QUESTIONS). Question No. 9: Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made

for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage? 113. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive - a co-equal wing - in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed. Question No. 10: Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16? 114. While dealing with Question No. 3(d), we held that that exclusion of 'creamy layer' must be no the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No. 5, we held that it is not impermissible for the State to categories backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the gold-smiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backward classes may indeed serve to help the more backward among them to get their due. But the question now is whether Clause (i) of the Office Memorandum dated 25th September, 1991 is sustainable in law. The said clause provides for a preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with the context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as a measure of social back-

wardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e., 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is: what is the meaning and context of the expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally - if the 'more backward' take away all the available vacancies/posts reserved for O.B.Cs., none would remain for 'backward' among the O.B.Cs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression preference in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true insertion behind the clause. It shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the apportionment of reserved vacancies/posts among 'backward' and "more backward". On such notification the clause will become operational. Question No. 11: Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Article 16? 115. This clause provides for a 10% reservation (in appointments/posts) in favour of economically backward sections among the open competition (non-reserved) category. Though the criteria is not yet evolved by the Government of India, it is obvious that the basis is either the income of a person and/or the extent of property held by him. The impugned Memorandum does not say whether this classification is made under Clause (4) or Clause (1) of Article 16. Evidently, this classification among a category outside Clause (4) of Article 16 is not and cannot be related to Clause (4) of Article 16. If at all, it is relatable to Clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of Livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated 25.5.1991 fails and is accordingly declared as such. THE CONCEPT OF POSITIVE ACTION AND POSITIVE DISCRIMINATION 116. Dr. Rajiv Dhawan describes Article 15(4) as a provi-

sion envisaging programmes of positive action and Article 16(4) as a provision warranting programmes of positive discrimination. We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs., Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts. But it may not be entirely right to say that Article 15(4) is a provision envisaging programmes of positive action. Indeed, even programmes of positive action may sometimes involve a degree of discrimination. For example, if a special residential school is established for Scheduled Tribes or Scheduled Castes at State expense, it is a discrimination against other students, upon whose education a far lesser amount is being spent by the State. Or for that matter, take the very American cases - Fullilove or Metro Broadcasting Can it be said that they do not involve any discrimination? They do. It is another matter that such discrimination is not unconstitutional for the reason that it is designed to achieve an important governmental objective. DESIRABILITY OF A PERMANENT STATUTORY BODY TO EXAMINE COMPLAINTS OF OVER INCLUSION/UNDER INCLUSION. 117. We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even it any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquirey. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under Clause (4) of Article 16 itself - or under Article 16(4) read with Article 340 - as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created

can also be consulted in the matter of periodic revision of lists of O.B.Cs. As suggested by Chandrachud, CJ. in Vasant Kumar, there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be. SHOULD THE MATTER GO BACK TO Constitution BENCH TO GO INTO THE DEFECTS OF THE MANDAL COMMISSION REPORT. 118. Now that we have answered all the questions raised for our consideration, question new arises, whether in view of the answers given and directions being given by us, is it necessary to send back the matter to the Five-Judge Bench to consider whether the investigation and survey done, and conclusions arrived at, by the Mandal Commission are contrary to law and if so, whether the impugned Office Memorandums, based as they are on the report of the said Commission, can be sustained? We think not. This is not a case where the Five-Judge Bench framed certain questions and referred them to this Bench. All the matters as such were placed before this Bench for disposal. During the course of hearing, however, when some counsel wanted to take us into details of castes/groups/classes which, according to them, have been wrongly included or excluded, as the case may be, we refused to go into those details saying that those details can be gone into before the Five-Judge Bench later. Otherwise, we heard the counsel fully on the alleged illegalities in the approach and methodology adopted by the Commission. The written arguments bear them out. We shall notice the criticism first and then answer the question posed at the inception of this para. 118A. The first and foremost criticism levelled against the approach and the procedure adopted by Mandal Commission in that the Mandal Commission has adopted caste and caste alone as the basis of its approach throughout. On this count alone, it is argued, the entire report of the Commission is vitiated. It is pointed out that in its very first letter dated 25th April, 1979 (Appendix VII at page 91-Vol. 2) addressed to all the Ministries and Departments of the Central Government, the Commission has prescribed the following test for determining the socially and educationally backward classes: (a) In respect of employees belonging to the Hindu communities (i) an employee will be deemed to be socially backward if he does not belong to any of the three twice-born (Dvij) 'Varnas' i.e., he is neither a Brahmin, nor a Kshatriya/nor a Vaishya; and (ii) he will be deemed to be educationally backward if neither his father nor his grant father has studied beyond the primary level. (b) Regarding the non-Hindu Communities (i) an employee will be deemed to be socially backward if either (1) he is a convert from those Hindu communities which have been defined as socially backward as per para 4(a)(i) above, or (2) in case he is not such a convert, his parental income is below the prevalent poverty line, i.e., Rs. 71 per head per month. (ii) he will be deemed to be educationally backward if neither his father nor his grand father had studied beyond the primary level. Serious objection is taken to the above criteria. Treating all the Hindus not belonging to three upper castes as socially and educationally backward classes, it is submitted, is faulty to the core. In the case of non-Hindus, the prescription of income limit is said to be arbitrary. The criteria for identifying backward classes must be uniform for the entire population; it cannot vary from religion to religion. This shows, says the

counsel, the impropriety and impermissibility of adopting the caste as the basis of identification, since castes exist only in the Hindu religion and not in others. On the basis of the statements made in Chapters IV and V, it is submitted that the Commission was obsessed by caste and was blind to all other determinants. It is also pointed out that the Survey done by the Commission is cursory, totally inadequate and faulty. According to the petitioners, the survey must be an exhaustive one like the one done by Venkataswamy Commission in Karnataka, which also forms the basis of Justice Chinnappa Reddy Commission Report. Carrying out the Survey to cover merely two villages and one urban block in each District is not likely to disclose a true picture since it does not represent survey of even one percent of the population. Objection is also taken to use of personal knowledge and also to reliance upon lists of backward classes prepared by State Governments. It is repeatedly urged that the survey done by the Commission cannot be called a scientific one, which has led to discovery of as many as 3,743 castes and their identification as socially and educationally backward classes. This is a steep increase over Kaka Kalelkar Commission, according to which, the number of S.E.B.Cs. was only 2,733. It is pointed out further that certain castes which obtained less than 11 points on being tested against the criteria evolved by the Commission are included among the backward classes. Conversely, certain castes which obtained 11 or more points are yet excluded from the list of backward classes. It is urged that the caste based approach adopted by the Commission has practically divided the nation into a forward section and a backward section. If Scheduled Castes and Scheduled Tribes are also added to the Other Backward Classes, more than 81 per cent of the population gets designated as backward. But for the decision in Balaji, it is submitted, the Commission would certainly have recommended reservation of 52 per cent of the appointments/posts in favour of the backward classes. The Commission was actuated by malice towards upper castes and has submitted an unbalanced, unjust and unconstitutional report, it is argued. Respondent's counsel, on the other hand, have refuted each and every contention of the petitioners. According to them, the criteria evolved, the methodology adopted, identification made and lists prepared are all perfectly valid and legal. The Union of India, while justifying the Report, has taken the stand that even if there are any errors or inadequacies in the work and report of the Commission, it is no ground for throwing out the report altogether, more particularly when the Government of India has taken care by 'marrying' the Mandal lists with the State lists. If any errors are brought to the notice of the Government, Sri Parasaran says, the Government will certainly look into them and rectify them, if satisfied about the error. 119. Before we decide to answer the question, it is necessary to point out that each and every defect, if any, in the working and Report of the Mandal Commission does not automatically vitiate the impugned Office Memorandums. It has to be shown further that that particular defect has crept into the Office Memorandum as well. In addition to the above, the following factors must also be kept in mind: (a) The Mandal Commission Report has not been accepted by the Government of India in its fullness, nor has the Government accepted the list of Other Backward Classes Prepared by it in its entirety. What is now

in issue is not the validity of the Report but the validity of the impugned Office Memorandums issued on the basis of the Report. The First Memorandum expressly directs that only those classes will be treated as backward classes for the purposes of Article 16(4) as are common to both the Mandal List and the respective State List. (It may be remembered that the Mandal Commission has prepared the lists of Other Backward Classes State-wise). Almost every caste, community and occupational group found in the State lists is also found in the concerned State list prepared by Mandal Commission; Mandal lists contain many more castes/occupational groups than the respective State lists. (It should indeed be rare that a particular caste/group/class is included in the State list and is not included in the Mandal list relating to that State. In such a case, of course, such caste/group/class would not be treated as an O.B.C. under the Office Memorandum dated 13th August, 1990). In such a situtation, what the Office Memorandum dated 13th August, 1990 does in effect is to enforce the respective state lists. In other words, the Government of India has, for all practical purposes, adopted the respective State lists, as they obtained on 13th August, 1990. In this sense, the lists prepared by Mandal have no real significance at present. The State lists were prepared both for the purposes of Article 16(4) as well as Article 15(4). The following particulars furnished by the Union of India do establish that these State lists have been prepared after due enquiry and investigation and have stood the test of time and judicial scrutiny: Basis of identification of SEBCs/OBCs in the States covered by O.M. of 13.8.1990. S.No. Name of States Whether State's list is based on report of Commission/ Committee Status 1. 2. 3. 4. 1. Andhra Pradesh Reports of the Commission headed by Shri K. M. Anantharaman and Shri Muralidhara Rao (June, 1970 and August, 1982 respectively). State's G.O. based on the report of the Anantharam Commission was upheld by the Supreme Court in Balaram case (AIR 1972 SC 1375). The modified list of OBCs based on the report of Muralidhara Rao Commission was upheld by the A.P. High Court but the increased quantum of reservation from 25% to 44% was struck down (Judgment of 5-9-1986). 2. Bihar Commission set up in 1971 under the Chairmanship of Sri Mungeri Lal. Not challenged. 3. Gujarat Commission headed by Shri A. R. Bakshi, Retd. High Court Judge (Report of Feb., 1976). 4. Goa No Commission/ Committee State Government have notified 4 communities as OBC on their own. The list was challenged in the High Court in 1986 for quashing the G.O. and instead declare all the 19 communities recommended by the Mandal Commission as OBCs. The High Court rejected the petitioner's claim on 10-3-88. The matter is now before the Supreme Court through SLP No. 9813 of 1988. 5. Haryana Committees of 1951 and 1965. (In 1990 Gurnam Singh Commission was also set up and its report accepted by State Government). 6. Himachal Pradesh Based on the list of OBCs declared by the erstwhile State of Punjab for the areas merged in the State of Himachal Pradesh in November, 1966. The list is now extended to the entire State. Not challenged 7. Karnataka Commission headed by Shri L. G. Havanuri (Report ofNov. 75) The Karnataka High Court struck down the inclusion of certain communities in the list of SEBCs. The matter was then taken to the Supreme Court in the Vasanth Kumar's case. (High Court judgment was

prior to Mandal report.) 8. Kerala (i) Commission headed by Shri G. Kumara Pillai set up in 1964. (ii) Commission headed by Shri N. P. Damodaran set up in 1967. The Kerala Govt. vide communication dt. 8-2-91 has intimated that the list of OBCs has not been challenged. 9. Madhya Pradesh Mahajan Commission (report of Dec. 1983) (when Mandal was working, no State list) List stayed by M.P. High Court. 10. Maharashtra Committee headed by Shri B. D. Deshmukh (report of Jan. 1964) Not challenged 11. Punjab Committees set up in 1951 and 1965. The latter Committee was headed by Shri Brish Bhan. Not challenged 12. Tamil Nadu (i) Commission headed by ShriA. N. Sattanathan set up in 1969. (ii) Commission headed by Shri J. A. Ambasankar (report of Feb. 1985) The revised list prepared by the Ambasankar Commission has been challenged in the 13. Uttar Pradesh Commission headed by Shri Chhedi Lal Sathi (Report of 1977). Supreme Court vide WP No. 1 of 1987 which is pending Status report not received from State Government. Even if in one or two cases (e.g., Goa), the list is prepared without appointing a Commission, it cannot be said to be bad on that account. The Government, which drew up the list, must be presumed to be aware of the conditions obtaining in their State/area. Unless so held by any competent court - or the permanent mechanism (in the nature of a Commission) directed to be created herewith holds otherwise - the lists must be deemed to be valid and enforceable. At the same time, we think it necessary to make the following clarification: It is true that the Government of India has adopted the State lists obtaining as on 13th August, 1990 for its own purposes but that does not mean that those lists are meant to be sacrosanct and unalterable. There may be cases where commissions appointees by the State Government may have, in their reports, recommended modification of such lists by deletion or addition of certain castes, communities and classes. Wherever such commission reports are available, the State Government is bound to look into them and take action on that basis with reasonable promptitude. If the State Government effects any modification or alteration by way of deletions or additions, the same shall be intimated to the Government of India forthwith which shall take appropriate action on that basis and make necessary changes in its own list relating to that State. Further, it shall be equally open to, indeed the duty of, the Government of India - since it has adopted the existing State lists - to look into the reports of such commission, if any, and pass its own orders, independent of any action by the State Government, thereon with reasonable promptitude by way of modification or alteration. It shall be open to the Government of India to make such modification/alteration in the lists adopted by way of additions or deletions, as it thinks appropriate on the basis of the Reports of the Commission(s). This direction, in our opinion, safe guards against perpetuation of any errors in the State lists and ensures rectification of those lists with reasonable promptitude on the basis of the reports of the Commission already submitted, if any. This course may be adopted de hors the reference to or advice of the permanent mechanism (by way of Commission) which we have directed to be created at both central and state level and with respect to which we have made appropriate directions elsewhere. (b) Strictly speaking, appointment of a Commission under Article 340 is not necessary to identify the other backward

classes. Article 340 does not say so. According to it, the Commission is to be constituted "to investigate the conditions of socially and educationally backward classes... and the difficulties under which they labour and to make recommendations as to the steps that should be taken of the Union or any State to remove such difficulties...." The Government could have, even without appointing a Commission, specified the O.B.Cs., on the basis of such material as it may have had before it (e.g., the lists prepared by various State Governments) and than appointed the Commission to investigate their conditions and to make appropriate recommendations. It is true that Mandal Commission was constituted "to determine the criteria for defining the socially and educationaly backward classes" and the Commission did determine the same. Even so, it is necessary to keep the above constitutional position in mind, - more particularly in view of the veto given to State lists over the Mandal lists as explained in the preceding sub-para. The criteria evolved by Mandal Commission for defining/identifying the Other Backward Classes cannot be said to be irrelevant. May be there are certain errors in actual exercise of identification, in the nature of over-inclusion or under- inclusion, as the case may be. But in an exercise of such magnitude and complexity, such errors are not uncommon. These errors cannot be made a basis for rejecting either the relevance of the criteria evolved by the Commission or the entire exercise of identification, It is one thing to say that these errors must be rectified by the Government of India by evolving an appropriate mechanism and an altogether different thing to say that on that account, the entire exercise becomes futile. There can never be a perfect report. In human affairs, such as this, perfection is only an ideal - not an attainable goal. More than forty years have passed by. So far, no reservations could be made in favour of O.B.Cs. for one or the other reason in Central services though in many States, such reservations are in force. Reservations in favour of O.B.Cs. are in force in the States of Kerala, Tamil Nadu, Karnataka, Andhra Pradesh, Maharashtra, Orissa, Bihar, Gujarat, Goa, Uttar Pradesh, Punjab, Haryana and Himachal Pradesh among others. In Madhya Pradesh, a list of O.B.Cs. was prepared on the basis of Mahajan Commission Report but it appears to have been stayed by the High Court. (c) The direction made herein for Constitution of a permanent Commission to examine complaints of over-inclusion or under-inclusion obviates the need of any such scrutiny by this Court. We have directed Constitution of such Commission both at Central and State level. Persons aggrieved can always approach them for appropriate redress. Such Commission, which will have the power to receive evidence and enquire into disputed questions of fact, can more appropriately decide such complaints than this Court under Article 32. 120. In this view of the matter, it is unnecessary for us to express any opinion on the correctness or adequacy of the exercise done by the Mandal Commission. (If and when the Government of India notifies any caste/community/group/class from out of the Mandal list, which caste etc., is not included in the appropriate State list, would the said question fall for consideration. It is then that it would be necessary to deal with the criticism against the Mandal Commission). For the same reason, it is unnecessary to refer or deal with the arguments of the counsel for Union of India and the Respondents in justification of the Mandal

Commission Report. Before parting with this aspect, we must say that identifying the impugned Office Memorandums with the Mandal Commission report is basically erroneous. Such an identification is bound to lead one into confusion. He would be missing the wood for the trees. Instead of concentrating on the real issues, he would deviate into irrelevance and imbalance. Mandal Commission report may have led to the passing of the impugned Office Memorandum dated 13th August, 1990; it may have acted as the catalytic agent in bringing into existence the reservation in favour of O.B.Cs. (loosely referred to as SEBCs. in the O.M.) but the Office Memorandum dated 13th August, 1990 doesn't incorporate the Mandal lists of O.B.Cs. as such. It incorporates, in truth and effect, the State lists as explained hereinabove. In a social measure like the impugned one, the court must give due regard to the judgment of the Executive, a co-equal wing of the State and approach the measure in the spirit in which it is conceived. This very idea is put forcefully by Joseph Raz (Fellow of Balliol College, Oxford) in his article "The Rule of Law and its virtue" (1977) 93 Law Quarterly Review 195 at 211 in the following words: ... one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty. A note of clarification may be appended at this stage. We are told that in the State of Madhya Pradesh a list of Other Backward Classes has been prepared but it has been stayed by the High Court. The said stay, in our opinion, does not affect the operation of the Office Memorandum dated 13th August, 1992 even with respect to the other backward classes in Madhya Pradesh. What the said Office Memorandum does is to import and adopt the said list for its own purposes i.e., for the purpose of making reservations in central services in favour of other backward classes. In such a situation, the stay of the operation of the said list by the State of Madhya Pradesh does have no relevance to the importation and adoption of the said list into Office Memorandum dated 13th August, 1990. PART - VII 121. We may summarise our answers to the various questions dealt with and answered hereinabove: (1)(a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Para 55) (b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Para 56) (2)(a) Clause (4) of Article 16 is not an exception to Clause (1). It is an instance and an illustration of the classification inherent in Clause (1). (Para 57) (b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 58) (c) Reservations can also be provided under Clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under Clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens'

- as explained in this Judgment. (Para 60) (3)(a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (Paras 61 to 82) (b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with the occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 83 and 84) (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (Paras 87 and 88) (d) 'Creamy layer' can be, and must be excluded. (Para 86) (e) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. (Para 85) (f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority. (Para 89) (4)(a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. (Para 90) (b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised. (Para 91). (5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. (Para 92) (6)(a)&(b) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of

the main-stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out. (c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be. (Para 96) (d) Devadasan was wrongly decided and is accordingly over-ruled to the extent it is inconsistent with this judgment. (Paras 97 to 99) (7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. If is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of backward class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. (Ahmadi, J. expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extent concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. (Paras 100 to 107). (8) While the rule of reservation cannot be called anti-meritarion, there are certain services and posts to which it may not be advisable to apply the rule of reservation. (Paras 108 to 112) (9) The distinction made in the impugned Office Memorandum dated 25th September, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as other Backward classes, as explained in para 114 of this Judgment (Para 114). (11) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned office memorandum dated 25.9.1991 is constitutionally invalid and is accordingly struck down. (Para 115) (12) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4). (Para 113) (13) 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 O.B.Cs. and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor. (Para 117) (14) In view of the answers given by us herein and the directions issued herewith,

it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of Five Judges. (Paras 118 to 119) 122. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 26. Our answers question-wise are: (1) Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under Clause (1) of Article 16. (2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', S.Cs., S.Ts. and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are inter-twined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to Article 46 do include S.E.B.Cs. referred to in Article 340 and covered by Article 16(4). (3) Even under Article 16(1), reservations cannot bo made on the basis of economic criteria alone. (4) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main-stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out. For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate. To the extent, Devadasan is inconsistent herewith, it is over-ruled. (5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay, necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry. For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement. (6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature. (7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4). It is not possible or necessary to say more than this under this question. (8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only

and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. (As pointed out at the end of the paragraph 101 of this judgment, Ahmadi, J. having upheld the preliminary objection raised by Sri Parasaran and others has not associated himself with the discussion on the question whether reservation in promotion is permissible. Therefore, the views expressed in this judgment on the said point are not the views of Ahmadi. J.) THE FOLLOWING DIRECTIONS ARE GIVEN TO THE GOVERNMENT OF INDIA. THE STATE GOVTS. AND THE ADMINISTRATION OF UNION TERRITORIES. 123. (A). The Government of India, each of the State Governments and the Administrations of Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government. (B) Within four months from today the Government of India shall specify the bases, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections ('creamy layer') from 'Other Backward Classes'. The implementation of the impugned O.M. dated 13th September, 1990 shall be subject to exclusion of such socially advanced persons ('creamy layer'). This direction shall not however apply to States where the reservations in favour of backward classes are already in operation. They can continue to operate them. Such States shall however evolve the said criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated 'Other Backward Classes. (C) It is clarified and directed that any and all objections to the criteria that may be evolved by the Government of India and the State Governments in pursuance of the direction contained in Clause (B) of Para 123 as well as to the classification among backward classes and equitable distribution of the benefits of reservations among them that may be made in terms of and as contemplated by Clause (1) of the Office Memorandum dated 25th September 1991, as explained herein, shall be preferred only before this Court and not before or in any other High Court or other Court or Tribunal. Similarly, and petition or proceeding questioning the validity, operation or implementation of the two impugned Office Memorandums, on any grounds whatsoever, shall be be filed or instituted only before this Court and not before any High Court or other Court

or Tribunal. 124. The Office Memoranda dated August 13, 1990 impugned in these writ petitions is accordingly held valid and enforceable subject to the exclusion of the socially advanced members/sections from the notified 'Other Backward Classes', as explained in para 123(B). Clause (i) of the Office Memorandum dated September 25, 1991 requires - to uphold its validity - to be read, interpreted and understood as intending a distinction between backward and more backward classes on the basis of degrees of social backwardness and a rational and equitable distribution of the benefits of the reservations amongst them. To be valid, the said clause will have to be read, understood and implemented accordingly. Clause (ii) of the Office Memorandum dated September 25, 1991 is held invalid and inoperative. The writ Petitions and Transferred Cases are disposed of in the light of the principles, directions, clarifications and orders contained in this Judgment. No costs. S. Ratnavel Pandian, J. 125. Equality of status and of opportunity... 'the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1971 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' (in Part HI) through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres. 126. Though forty-five years from the commencement of the Indian independence after the end of British paramountcy and forty-two years from the advent of our Constitution have marched on, the tormenting enigma that often nags the people of India is whether the principle of 'equality of status and of opportunity' to be equally provided to all the citizens of our country from cradle to grave is satisfactorily consummated and whether the clarion of 'equality of opportunity in matters of public employment' enshrined in Article 16(4) of the Constitution of India has been called into action? With a broken heart one has to answer these questions in the negative. 127. The founding fathers of our Constitution have designedly couched Articles 14, 15 and 16 in comprehensive phraseology so that the frail and emaciated section of the people living in proverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression should not be denied of equality before the law and equal protection of the laws and equal opportunity in the matters of public employment or subjected to any prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. 128. To achieve the above objectives, the Government have enacted innumerable social welfare legislations and geared up social reformative measures for uplifting the social and economic development of the disadvantaged section of people. True,

a rapid societal transformation and profusion of other progressive changes are taking place, yet a major section of the people living below the poverty line and suffering from social ostracism still stand far behind and lack in every respect to keep pace with the advanced section of the people. The undignified social status and sub-human living conditions leave an indelible impression that their forlorn hopes for equality in every sphere of life are only a myth rather than a reality. It is verily believed - rightly too - that the one and only peerless way and indeed a most important and promising way to achieve the equal status and equal opportunity is only by means of constitutional justice so that all the citizens of this country irrespective of their religion, race, caste, sex, place of birth or any of them may achieve the goal of an egalitarian society. 129. This Court has laid down a series of landmark judgments in relation to social justice by interpreting the constitutional provisions upholding the cherished values of the Constitution and thereby often has shaped the course of our national life. Notwithstanding a catena of expository decisions with interpretive semantics, the naked truth is that no streak of light or no ray of hope of attaining the equality of status and equality of opportunity is visible. 130. Confining to the issue involved in this case as regards the equal opportunity in the matters of public employment, I venture to articulate without any reservation, even on the possibility of any refutation that it is highly deplorable and heart-rending to note that the constitutional provision, namely, namely, Clause (4) of Article 16 proclaiming a "Fundamental Right" enacted about 42 years ago for providing equality of opportunity in matters of public employment to people belonging to any backward class has still not been given effect to in services under the Union of India and many more States. A number of Backward Classes Commission have been appointed in some of the States, the recommendations of which have been repeatedly subjected to judicial scrutiny. Though the President of India appointed the second Backward Classes Commission under the chairmanship of Shri B.P. Mandal as far back as 1at January, 1979 and the Report was submitted in December, 1980, no effective steps were taken for its implementation till the issuance of the two impugned OMs. Having regard to this appalling situation and the pathetic condition of the backward classes, for the first time the Union of India has issued the Office Memorandum (hereinafter called the 'O.M.') in August 1991 and thereafter an amended O.M. in September 1991 on the basis of the recommendations of the Mandal Commission. 131. Immediately after the announcement of the acceptance of the Report of the Mandal Commission, as pointed out in Writ Petition No. 930/90 and the Annexures I & II enclosed thereto, there were unabated pro as well as anti reservation agitations and violent societal disturbances virtually paralysing the normal life. It was unfortunate and painful to note that some youths who are intransigent to recognise the doctrine of equality in matters of public employment and who under the mistaken impression that 'wrinkles and gray hairs' could not do any thing in this matter, actively participated in the agitation. Similarly, another section of people suffering from a fear psychosis that the Mandal recommendations may not at all be implemented entered the fray of the agitation. Thus, both the pro and anti-reservationists or being detonated and inflamed by the

ruffled feelings that their future in public employment is bleak raised a number of gnawing doubts which in turn sensationalised the issue. Their pent up fury led to an orgy of violence resulting in loss of innocent life and damaged the public properties. It is heart-rending that some youths - particularly students - in their prime of life went to the extent of even self-immolating themselves. No denying the fact that the horrible, spine - chilling and jarring piece of information that some youths whose feelings ran high had put an an end to their lives in tragic and pathetic manner had really caused a tremor in Indian society. My heart bleeds for them. 132. In fact, a three-Judges Bench of this Court comprised of Ranganath Misra, CJ and K.N. Singh and M.H. Kania, JJ (as the learned Chief Justices then were) taking note of the widespread violence, by their order dated 21st September 1990 made the following appeal to the general public and particularly the student community: After we made order on 11th September, 1990, we had appealed to counsel and those who were in the Court room to take note of the fact that the dispute has now come to the apex court and it is necessary that parties and the people who were agitated over this question should maintain a disciplined posture and create an atmosphere where the question can be dispassionately decided by this Court.... There is no justification to be panicky over any situation and if any one's rights are prejudiced in any manner, certainly relief would be available at the appropriate stage and nothing can happen in between which would deter this Court from exercising its power in an effective manner. 133. Be that as it may, sitting as a Judge one cannot be swayed either way while interpreting the Constitutional provisions pertaining to the issues under controversy by the mere reflexes of the opinion of any section of the people or by the turbulence created in the society or by the emotions of the day. Because nothing inflicts a deeper wound on our Constitution than in interpreting it running berserk regardless of human rights and dignity. 134. We are very much alive to the fact that the issues with which we are now facing are hypersensitive, highly explosive and extremely delicate. Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner. 135. Part-III dealing with 'Fundamental Rights' and Part-IV dealing with 'Directive Principles of State Policy' which represent the core of the Indian Constitutional philosophy envisage the methodology for removal of historic injustice and inequalities - either inherited or artificially created - and social and economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble. 136. Though all men and women created by the Almighty, whether orthodox or heterodox; whether theist or atheist; whether born in the highest class or lowest class; whether belong to 'A' religion or 'B' religion are biologically same, having same purity of blood. In a Hindu Society they are divided into a number of distinct sections and sub-sections known as castes and sub-castes. The moment a child comes out of the mother's womb in a Hindu family and takes its first breath and even before its umbilical cord is cut off, the innocent child

is branded, stigmatized and put in a separate slot according to the caste of its parents despite the fact that the birth of the child in the particular slot is not by choice but by chance. 137. The concept of inequality is unknown in the Kingdom of God who creates all beings equal, but the "created" of the creator has created the artificial inequality in the name of casteism with selfish motive and vested interest. 138. Swami Vivekananda in one of his letters addressed to his disciples in Madras dated 24.1.1894 has stated thus: Caste or no caste, creed or no creed,... or class, or caste, or nation, or institution which bars the power of free thought and action of an individual - even so long as that power does not injure others - is devilish and must go down. (Vide 'The Complete Works of Swami Vivekananda, Vol. V. page 29') 139. A Biblical verse in New Testament says "He denied none that come unto Han, black and white". 140. Sura 10 Verse No. 44 of Holy Quran reads: Verily God will not deal unjustly with man in aught; it is man that wrongs his own soul. 141. The Hindus who form the majority, in our country, are divided into 4 Varnas - namely, Brahmins, Kshatriyas, Vaishyas (who are all twice born) and lastly Shudras which Varnas are having a four tier demarcated hierarchical caste system based on religious tenets, believed to be of divine origin or divinely ordained, otherwise called the Hindu Varnasharma Dharma. Beyond the 4 Varnas Hinduism recognises a community, by name Panchma (untouchables) though Shudras are recognised as being the lowest rung of the hierarchical race. This system not only creates extreme forms of caste and gender prejudices, injustices, inequalities but also divides the society into privileged and disabled, revered and despised and so on. The perpetuation of casteism, in the words of Swami Vivekananda "continues social tyranny of ages". The caste system has been religiously preserved in many ways including by the judicial verdicts, pronounced according to the traditional Hindu Law. 142. On account of the caste system and the consequent inequalities prevailing in Hinduism between person to person on the basis of Varnasharma Dharma new religions such as Buddhism and Jainism came into existence on the soil of this land. Many humanistic thinkers and farseeing revolutionary leaders who stood foursquare by the down - trodden section of the Backward Classes aroused the consciousness of the backward class to fight for justice and join the wider struggle for social equality and propagated various reforms. It was their campaign of waging an unending war against social injustice which created a new awareness. The sustained and strenuous efforts of those leaders in that pursuit have been responsible for bringing many new social reforms. 143. Recognizing and recalling the self-less and dedicated social service carried on by those great leaders from their birth to the last breath; the then Prime Minister while making his clarificatory statement regarding the implementation of the Mandal Commission's Report in the Rajya Sabha on the 9th August 1990 paid the tributes in the following words: In fact this is the realisation of the dream of BHARAT RATNA Dr. B.R. AMBEDKAR, of the great PERIYAR RAMASWAMY and Dr. RAM MANOHAR LOHIA. 144. Harkingback, it is for the first time that the controversial issue as regards the equality of opportunity in matters of public employment as contemplated under Article 16(4) has come up for deliberation before a nine-Judges Bench, on being referred to by a five-

Judges Bench. 145. There are various Constitutional provisions such as Articles 14, 15, 16, 17, 38, 46, 332, 335, 338 and 340 which are designed to redress the centuries old grievances of the scheduled castes and scheduled tribes as well as the backward classes and which have come for judicial interpretation on and off. It is not merely a part of the Constitution but also a national commitment. 146. This Court which stands as a sentinel on the quiver over the rights of people of this country has to interpret the Constitution in its true spirit with insight into social values and suppleness of the adoption to the changing social needs upholding the basic structure of the Constitution for securing social justice, economic justice and political justice as well as equality of status and equality of opportunity. 147. The very blood and soul of our Constitutional scheme are to achieve the objectives of our Constitution as contained in the preamble which is part of our Constitution as declared by this Court in Kesvananda Bharti v. Kerala, 1993 (Suppl.) SCR 1. So it is incumbent to lift the veil and see the notable aspirations of the Constitution. 148. No one can be permitted to invoke the Constitution either as a sword for an offence or as a shield for anticipatory defence, in the sence that no one under the guise of interpreting the Constitution can cause irreversible injustice and irredeemable inequalities to any section of the people or can protect those unethically claiming unquestionable dynastic monopoly over the Constitutional benefits. 149. Therefore, the Judges who are entrusted with the task of fostering an advanced social policy in terms of the Constitutional mandates cannot afford to sit in ivory towers keeping Olympian silence unnoticed and uncaring of the storms and stresses that affect the society. 150. This Summit Court has not only to interpret the Constitution but also sometimes to articulate the Constitutional norms, serving as a publicist for reforms in the areas of the most pressing needs and directing the executive to take the needed actions. Mere verbal gymnastics or empty slogans and sermons honoured more often in rhetoric than practice are of no use. 151. It may be a journey of thousand miles in achieving the equality of status and of opportunity, yet it must begin with a single step. So let the socially backward people take their first step in that endeavour and march on and on. 152. When new societal conditions and factual situations demand the Judges to speak they, without professing the tradition of judicial lock-jaw, must speak out. So I speak. 153. For providing reservations for backward class of citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions and for providing equal opportunity in the matters of public employment, some States have appointed Commissions on Backward Classes. The Central Government has also appointed two Commissions under Article 340(1) of the Constitution of India for identifying the backward class of citizens as contemplated under Article 16(4) for the purpose of making reservation of appointments or posts in the Services under Union of India. The list of Commissions appointed by the various States and the Central Government is given as under: COMMISSIONS ON BACKWARD CLASSES 1918-1990 Andhra Pradesh Manohar Pershad Committee (1968-69) Ananta Raman Commission (1970) Muralidhara Rao Commission (1982) Bihar Mungeri Lal Commission (1971-76) Gujarat A.R. Bakshi Commission (1972-76) Justice C.V. Rane Commission (1981-83) Justice

R.C. Mankad Commission (1987) Haryana Gurnam Singh Commission (1990) Jammu and Justice Ganjendragadkar Commission (1967-68) Kashmir Justice J.N. Wazir Commission (1969) Justice Adarsh Anand Commission (1976-77) Karnataka Justice L.C. Miller Committee (1918-1920; Mysore) Naganna Gowda Commission (1960-61) L.G. Havnur Commission (1972-75) T. Venkataswamy Commission (1983-86) Justice Chinnappa Reddy Commission (1989-90) Kerala Justice CD. Nokes Committee (1935; Travancore-Cochin) V.K. Vishvanatham Commission (1961-63) G. Kumar Pillai Commission (1964-66) N.P. Damodaran Commission (1967-70) Maharashtra O.H.B. State Committee (1928-30; Bombay Presidency) B.D. Deshmukh Committee (1961-64) Punjab Brish Ban Committee (1965-66) Tamil Nadu A.N. Sattanathan Commission (1969-70) J.M. Ambasankar Commission (1982-86) Uttar Pradesh Chhedi Lal Sathi Commission (1975-77) All India Kaka Kalelkar Commission (1953-55) B.P. Mandal Commission (1979-80) Note : 1. Where two dates are mentioned they refer to year of appointment and year of submission. Where only one is mentioned it refers to year of submission which is also the year of appointment in some cases. 2. The three commissions of the colonial period mentioned here had an ambit wider than those groups that later came to be known as Backward Classes. 154. Second Backward Classes Commission (popularly known as Mandal Commission) 155. By a Presidential Order under Article 340 of the Constitution of India, the first Backward Class Commission known as Kaka Kalelkar's Commission was set up on January 29, 1953 and it submitted its report on March 30, 1955 listing out 2399 castes as socially and educationally backward on the basis of criteria evolved by it, but the Central Government did not accept that report and shelved it in the cold storage. 156. It was about twenty-four years after the First Backward Classes Commission submitted its Report in 1955 that the President of India pursuant to the resolution of the Parliament appointed the second Backward Classes Commission on 1st January 1979 under the Chairmanship of Shri B.P. Mandal to investigate the conditions of Socially and Educationally Backward Classes (for short 'SEBCs') within the territory of India. One of the terms of reference of the Commission was to determine the criteria for defining the SEBCs. The Commission commenced its functioning on 21st March, 1979 and completed its work on 12th December 1980, during the course of which it made an extensive tour throughout the length and breadth of India in order to collect the requisite data for its final report. The Commission submitted its report with a minute of dissent of one of its members, Shri L.R. Naik on 31st December 1980. The Commission appears to have identified as many as 3743 castes as SEBCs and made its recommendations under Chapter XIII of Volume I of its report (vide paras 13. 1 to 13.39) and finally suggested "regarding the period of operation of Commission's recommendations, the entire scheme should be reviewed after twenty years. (Vide para 13.40) 157. The entire Report comprises of fourteen Chapters of which Chapter IV deals with 'Social Backwardness and Caste', Chapter XI deals with 'Socio-Educational Field Survey and Criteria of Backwardness', Chapter XII deals with 'Identification of OBCs' and Chapter XIII gives the 'Recommendations'. After a thorough survey of the population, the Commission has arrived at the percentage of OBCs as follows: 12.22 From

the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, other Backward Classes constitute nearly 52% of the Indian population. Percentage of Distribution of India Population by Caste and Religious Groups S.No. Group Name Percentage of the total population I. Scheduled Castes and Scheduled Tribes A-1 Scheduled Castes 15.05 A-2 Scheduled Tribes 7.51 Total of 'A' 22.56 II. Non-Hindu Communities, Religious Groups, etc. B-1 Muslims (other than STs) 11.19 (0.2)* B-2 Christians (other than STs) 2.16 (0.44)* B-3 Sikhs (other than SCs & STs) 1.67 (0.22)* B-4 Budhists (Other than STs) 0.67 (0.03)* B-5 Jains 0.47 Total of 'B' 16.16 III. Forward Hindu Castes & Communities C-1 Brahmins (including Bhumihars) 5.52 C-2 Rajputs 3.90 C-3 Marathas 2.21 C-4 Jats 1.00 C-5 Vaishyas-Bania etc. 1.88 C-6 Kayasthas 1.07 C-7 Other forward Hindu castes/groups 2.00 Total of 'C' 17.58 Total of 'A', 'B' & 'C 56.30 IV. Backward Hindu Castes & Communities D. Remaining Hindu castes/groups which come in the category of 'Other Backward Classes' 43.70@ V. Backward Non-Hindu Communities E. 52% of religious groups under Section B may also be treated as OBCs 8.40 F. The approximate derived population of Other Backward Classes including non-Hindu Communities 52% (Aggregate of D & E, rounded) @ This is a derived figure * Figures in brackets give the population of S.C. & S.T. among these non-Hindu Communities. 158. On the basis of the Commission's Report - popularly known as Mandal Commission's Report - (for short 'the Report'), two office Memoranda - one dated 13.8.1990 and the other amended one dated 25.9.1991 were issued by the Government of India. We are reproducing those Memoranda hereunder for proper understanding and appreciation of the significance of these two OMs and the distinctions appearing between them: No. 36012/31/90-Estt (SCT) Government of India Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OFFICE MEMORANDUM New Delhi, the 13th August, 1990 Subject : Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in services under the Government of India. In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12.1980. 2. Government have carefully considered the report and the recommendations of the Commission in the present context responding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows: (i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC. (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately. (iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately. (v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively. sd/- (Smt. Krishna Singh) Joint Secretary to the Govt. of India Amended Memorandum: No. 36012/31/90-Estt. (SCT) Government of India Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OFFICE MEMORANDUM New Delhi, the 25th September, 1991. Subject : Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in service under the Government of India. The undersigned is directed to invite the attention to O.M. of even number dated the 13th August, 1990, on the above sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservations, Government have decided to amend the said Memorandum with immediate effect as follows:- 2. (1) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates. (ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation. (iii) 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. 3. The O.M. of even number dated the 13th August, 1990, shall be deemed to have been amended to the extent specified above. sd/- (A.K. HARIT) DEPUTY SECRETARY TO THE GOVT. OF INDIA 159. The expression deployed in both the OMs,"Socially and Educationally Backward Classes" is on the strength of the Report of the Commission, though no such expression is used in Article 16(4) whereunder the reservation of appointments or posts in favour of any backward class of citizens is to be made. This expression is used as an explanatory one to the words 'backward class' occurring in Article 16(4). Articles 16(4) and 340(1) were embodied in the Constitution even at the initial stage; but Article 15(4) containing the same expression as in Article 340(1) was subsequently added by the Constitution (First Amendment) Act of 1951 to over-ride the decision of this Court in State of Madras v. Smt. Champakam Dorairajan, 1951 SCR 525. 160. Legislative History of Article 15(4) of the Constitution 161. A legislative historical event that warranted the introduction of Clause 4 to Article 15 may be briefly retraced. 162. The Government of Tamil Nadu issued a Communal G.O. in 1927 making compartmental reservation of posts for various communities.

Subsequently the G.O. was revised. In 1950 one Smt. Champakam Dorairajan who intended to join the Medical College, on enquiries came to know that in respect of admissions into the Government Medical College the authorities were enforcing and observing an order of the Government, namely, notification G.O.No. 1254 Education dated 17.5.1948 commonly known as Communal G.O. which restricted the number of seats in Government Colleges for certain castes. It appeared that the proportion fixed in the old Communal G.O. had been adhered to even after commencement of the Constitution on January 26, 1950. She filed a Writ Petition on 7th June 1950 under Article 226 of the Constitution for issuance of a writ of mandamus restraining the State of Madras from enforcing the said Communal G.O. on the ground that the G.O. was sought or purported to be regulated in such a manner as to infringe the violation of the fundamental rights guaranteed under Articles 15(1) and 29(2). Similarly one Srinivasan who had applied for admission into the Government Engineering College at Guindy also filed a Writ Petition praying for a writ of mandamus for the same relief as in Champakam Dorairajan. A Full Bench of the Madras High Court heard both the Writ Petitions and allowed them (vide Smt. Champakam Dorairajan and Anr. v. State of Madras, this connection it may be mentioned that while the Writ Petition was pending before the High Court, another revised G.O. No. 2208 dated June 16. 1950 substantially reproducing the communal proportion fixed in the old Communal G.O. came into being. The State on being aggrieved by the judgment of the Madras High Court preferred an appeal before this Court in State of Madras v. Smt. Champakam Dorairajan [1951] SCR 525. A seven-Judges Bench dismissed the appeal holding that "the Communal G.O. being inconsistent with the provisions of Article 29(2) in Part III of the Constitution is void under Article 13." This judgment necessitated the introduction of a Bill called Constitution (First Amendment) Bill for overriding the decision of this Court in Champakam's case (supra). 163. During the Parliament Debates held on 29th May 1951 Pt. Jawahar Lal Nehru, the then Prime Minister while moving the Bill to amend the Constitution stated as follows: We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has the responsibility, there are groups, classes, individuals, communities, if you like, who are backward. They are backward in many ways - economically, socially, educationally - sometimes they are not backward in one of these respects and yet backward in another. The fact is therefore that if we wish to encourage them in regard to these matters, we have to do something special for them.... Therefore one has to keep a balance between the existing fact as we find it and the objective and ideal that we aim at. 164. Thereafter, the Bill was passed and Clause (4) to Article 15 was added by the Constitution (First Amendment) Act. The object of the newly introduced Clause (4) to Article 15 was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 and to make it constitutionally valid for the State to reserve seats for backward class of citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions as well as to make other special provisions as may be necessary for their advancement. 165. Scope of Article 16(4) of the Constitution 166. Article 16(4) expressly permits the State

to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State are not adequately represented in the services under the State. As the power conferred on the State under this Clause 4 is to be exercised only if 'in the opinion of the State' that there is no adequate representation in the services under the State, a vital question arose for consideration whether the issue of determination by the State as to whether a particular class of citizens is backward or not is a justiciable one? This question was answered by the Constitution Bench of this Court in Trilok Nath Tiku and Anr. v. State of Jammu & Kashmir and Ors. holding thus: While the State has necessarily to ascertain whether a particular class of citizens are backward or not, having regard to acceptable criteria, it is not the final word on the question; it is a justiciable issue. While ordinarily a Court may accept the decision of the State in that regard, it is open to be canvassed if that decision is based on irrelevant considerations. The power under Clause (4) is also conditioned by the fact that in regard to any backward classes of citizens there is no adequate representation in the services under the State. The opinion of the State in this regard may ordinarily be accepted as final, except when it is established that there is an abuse of power. 167. The words "backward class of citizens" occurring in Article 16(4) are neither defined nor explained in the Constitution though the same words occurring in Article 15(4) are followed by a qualifying phrase. "Socially and Educationally". 168. Though initially, Article 10(3) of the draft Constitution did not contain the qualifying word 'backward' preceding the words 'class of citizens' the said qualifying word was subsequently inserted on the suggestion of the Drafting Committee. Strong objection was taken for insertion of the word 'backward' and more so for the introduction of Article 10(3) of the draft Constitution. Amendments were moved by one section of the members of the Constituent Assembly for complete deletion of Clause (3) and by another section for the omission of the word 'backward'. The discussion and debate took place at length for and against the introduction of Clause (3) as well as for the insertion of the word 'backward'. Before the motions for amendments were put on vote, Dr. B.R. Ambedkar in answering the scathing criticism made in the course of the debate and explaining the significance of Clause (3) of Article 10 with the qualifying word 'backward' and insisting the sustenance of the said clause emphatically expressed his views as follows: I am not prepared to say that this Constitution will not give rise to questions which will involve legal interpretation or judicial interpretation. In fact, I would like to ask Mr. Krishanamachari if he can point out to me any instance of any Constitution in the world which has not been a paradise for lawyers. I would particularly ask him to refer to the vast storehouse of law reports with regard to the Constitution of the United States, Canada and other countries. I am therefore not ashamed at all if this Constitution hereafter for purposes of interpretation is required to be taken to the Federal Court. That is the fate of every Constitution and every Drafting Committee. I shall therefore not labour that point at all. 169. While winding up the debate he said: ... the Drafting Committee had to produce a formula which would reconcile these three point 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.... that no better formula could be produced than the one that is embodied in Clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity has been embodied in Sub-clause (1) of Article 10. It is a generic principle....Supposing for instance, we are to concede in full the demand of those communities who have not been so far employed in the public services 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....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. My honourable Friend Mr. T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. 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. (emphasis supplied) (Constituent Assemble Debates, Volume VII Pages 700-703) 170. After the debate, two motions were put to vote but they were negatived. The unexpurgated draft Article 10(3) corresponds to the present Article 16(4) of the Constitution. It has now become necessary for this Court to interpret and explain the words 'backward class'. 171. There is a galaxy of decisions of this Court, explaining the words 'backward class' as occurring under Article 16(4) in relation to Articles 16(1) and 16 (2) which I shall recapitulate in my endeavour to meet the arguments advanced by the learned Counsel appearing for various parties in interpreting the words 'backward class'. 172. The Government both in the earlier O.M. and the subsequent amended O.M. has used the expression 'socially and educationally backward classes' thereby qualifying the word 'backward' as 'socially and educationally backward' though in the second amended O.M., the 'economic backwardness' is alone taken as a ground for providing reservation for the economically backward section of the people not covered by the same kind of reservation meant for 'socially and educationally backward classes'. 173. The word 'backward' is very wide bringing within its fold the social backwardness, educational backwardness, economic backwardness, political backward and even physical backwardness. 174. To assimilate the expression

'class' in its legal sense, the said expression should be strictly construed and tested on the principles of agreed criteria which throw a flood light on its true meaning. In interpreting the words 'backward class', I am sorry to say there is no uniform and consistent view expressed by the Court by laying down a rigid formula exhaustively listing out the specific criteria. The battery of tests that are recognised by the Courts in determining 'socially and educationally backward classes' are caste, nature of traditional occupation or trade, poverty, place of residence, lack of education and also the sub-standard education of the candidates for the post in comparison to the average standard of candidates from general category. These factors are not exhaustive. 175. As to the questions (1) whether 'caste' can be taken as a criterion in determining and identifying a 'backward class' in Hindu society and (2) whether it could be a pre-dominant factor or one of the factors in identifying the backward class, there is a cleavage of opinion. 176. Ray, C.J. in State of Uttar Pradesh v. Pradeep Tandon and Ors. has gone to the extent of saying that "when Article 15(1) forbids discrimination on grounds only of religion, race, caste - caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1)". The effect of this judgment is that caste can never be a criterion. This decision has also ruled that the place of habitation and the environment are also the determining factors in judging the social and educational backwardness. 177. A good deal of arguments was advanced on the question whether caste can be the sole if not the dominant factor or at the least one of the factors or not at all. Whilst anti-reservationists contend that the Report should be thrown overboard on the ground that the reservation is made on the caste criterion, the pro-reservationists would forcibly refute that contention making counter submissions stating, inter-alia, that caste can justifiably be taken as an important and dominant factor if not the sole factor in determining the social and educational backwardness for various reasons as pointed out in the Report. Since backwardness is a direct consequence of caste status and the discrimination perpetuated against the socially backward people is based on the caste system, the caste criterion can never be divested while interpreting the word 'class'. Mr. K.K. Venugopal, the learned senior counsel while concluding his arguments has stated that caste if it is to be taken as one of the criteria, it must be at the end point and not the starting point. Therefore, even at the threshold, it has become obligatory to decide the question whether 'caste' should be completely excluded from being considered as one of the criteria, if not to what extent caste would become relevant in the determination and ascertainment of 'socially and educationally backward class'. There is a galaxy of decisions of this Court in explaining the words 'backward class' and 'caste' which I shall refer to at the appropriate place. 178. Meaning of 'Class' and 'Caste' 179. To identify the diversity of meanings of the words 'class' and caste' that constitute their inner complexity; to formulate the questions about them that are disputed and to examine as well as to assess the opposed voices in controversies that have ensued and to understand their semiology, I shall first of all reproduce the meanings of those words as lexically defined. 180. The

Oxford English Dictionary (Volume II): Class : (2) a division or order of society according to status; a rank or grade of society;... (6) a number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division. Caste (2) one of the several hereditary classes into which society in India has from time immemorial been divided; the members of each caste being socially equal, having the same religious rites, and generally following the same occupation or profession; those of one caste have no social intercourse with those of another; (3) the system or basis of this division among the Hindoos. 181. In Webster Comprehensive Dictionary (International Edition), the meaning of the words is given as follows: Class : (1) A number or body of persons with common characteristics: the educated class; (2) social rank, caste Caste : (1) one of the hereditary classes into which Hindu society is divided in India (2) the principle of practice of such division or the position it confers; (3) the division of society on artificial grounds; a social class 182. According to Webster's Encyclopedic Unabridged Dictionary of the English Language, meaning of the words 'class' and 'caste' is as follows: Class : (1) a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits, kind, sort (2) any division of persons or things according to rank or grade.... (9) Social, a social stratum sharing basic, economic, political or cultural characteristics and having the same social position.... (10) the system of dividing society; caste.... Caste : (1) Social, an endogamous and hereditary social group limited to persons of the same rank, occupation, economic position etc. and having mores distinguishing it from other such groups, (2) any rigid wealth, hereditary rank or privileges, or by profession or employment, having special significance when applied to the artificial divisions or social classes into which the Hindus are rigidly separated. 183. Black Law Dictionary (Sixth Edition) Centennial Edition (1891-1991) gives the meaning of 'class' thus: Class : A group of persons, things, qualities, or activities having common characteristics or attributes. 184. The word 'caste' is defined in Encyclopedia Americana (5) thus: Caste : Caste is a largely, exclusive social class, membership in which is determined by birth and involves particular customary restrictions and privilegs. The word derives from the Portugues casta, meaning 'breed', 'race', or 'kind' and was first used to denote the Hindu social system of social distinctions (2) Hinduism, any of the four social divisions, the Brahman, Kshatriya, Vaisya and Sudra, into which Hindu society is rigidly divided, each caste having its own privileges and limitations, transferred by inheritance from one generation to the next (3) any class or group of society sharing common cultural features.... (6) pertaining to characterised by caste; a caste society; a caste system; a caste structure. 185. In Corpus Juris Secundum (14), the meaning of words 'class' and 'caste' is given thus: Class A number of objects distinguished by common characters from all others, and regarded as a collective unit or group, a collection capable of general division, a number of persons or things ranked together for some common purpose or possessing some attribute in common; the order of rank according to which persons or things are arranged or assorted;.... Caste A class or grade, or division of society separated from others by differences of classification on the Indian subcontinent. While

this remains the basic connotation, the word 'caste' is also used to describe in whole or in part social system that emerged at various times in other parts of the world.... 186. The meaning of the word 'backward' is defined in lexicons as 'retarded in physical, material or intellectual development' or 'slow in growth or development; retarded. 187. A careful examination of the meaning of the words 'class' and 'caste' as defined above by the various dictionaries, perceivably shows that these two words are not synonymous with each other and they do not convey the same meaning. 189. See R. Chitralekha and Anr. v. State of Mysore and Ors. ; Triloki Nath v. J. & K. State [1969] 1 SCR 103 at 105 and K.C. Vasanth Kumar v. Karnataka [1985] Supp. 1 SCR 352. 190. The quintessence of the above definitions is that a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense not having so much of intellect and ability will fall within the ambit of 'any backward class of citizens' under Article 16(4) of the Constitution. 191. In the course of debate in the Parliament on the intendment of Article 16(4), Dr. B.R. Ambedkar, the then Minister for Law expressed his views that "backward classes which are nothing else but a collection of certain castes." 192. The next important, but central point at issue is whether caste by the name of which a group of persons are identified, can be taken as a criterion in determining that caste as 'socially and educationally backward class' and if so, will it be the sole or dominant or one of the factors in the determination of "social and educational backwardness". 193. Before embarking upon a discussion relating to this aspect, it is pertinent to note the views of certain States as regards the caste criterion and economic criterion for identifying the 'backwardness'. 194. In reply to a questionnaire issued by the Second Backward Classes Commission, the State of Assam, Andhra Pradesh, Bihar, Gujarat, Karnataka, Kerala, Maharastra, Punjab, Rajasthan and Uttar Pradesh stated that caste should be used as one of the criterion for identifying backwardness. Delhi, Dadra and Nagar Haveli, Haryana, Himachal Pradesh and Madhya Pradesh stated that caste should not be made a criterion of backwardness. Bihar, Gujarat, Himachal Pradesh, Kerala, Punjab, Rajasthan and Uttar Pradesh suggested low economic status as one of the significant tests, while Delhi, Dadra and Nagar Haveli and Haryana desired the economic factor to be the sole determinant of backwardness. 195. Articles 15(4), 16(4) and 340(1) do not speak of 'caste' but only 'class'. The learned Counsel particularly those appearing for anti-reservationists have stressed that if the makers of the Constitution had really intended to take 'caste or castes' as conveying the meaning of socially and educationally backward class, they would have incorporated the said word, 'caste or castes' in Articles 15(4) and 340(1) as 'socially and educationally backward caste or castes' instead of 'class or classes' as they have adopted the expression in the case of 'Scheduled Castes and Scheduled Tribes'. Similarly in Article 16(4) also, they would have used the words as 'backward caste or castes' instead of 'backward class'. It has been further urged that the very fact that the framers of the Constitution in their wisdom thought of using a wider expression 'classes' in Article 15(4) and 340(1) and 'class' in Article 16(4) alludes that they did not have the intention of equating classes with the castes. 196. The word

'caste' is not used the Constitution as indicative of any section of people or community expect in relation to 'Scheduled Castes' which is defined in Article 366(24). However, the word 'caste' in Articles 15(2), 16(2) and 29(2) does not include 'scheduled caste' but it refers to a caste within the ordinary meaning of caste. The word 'Scheduled Caste' came into being only by the notification of President under Article 341. It would be appropriate, in this connection, to recall the observation of Fazal Ali, J. in his separate but concurring judgment in State of Kerala and Ors. v. N.M. Thomas and Ors. wherein at page 996, he has said that "the word 'caste' appearing after 'scheduled' is really a misnomer and has been used only for the purpose of identifying this particular class of citizens which has a special history of several hundred years behind it.". 197. Mathew, J. in his separate judgment in the same case (Thomas) has expressed that "it is by virtue of the notification of the President that the 'Scheduled Castes' came into being". 198. Reference also may be made to the observation of Krishna Iyer, J. in Akhil Bhartiya Soshit Karamchari Sangh v. Union of India and Ors. where he has said: Terminological similarities are an illusory guide and we cannot go by verbal verisimilitude. It is very doubtful whether the expression caste will apply to Scheduled Castes. At any rate, Scheduled Tribes are identified by their tribal denomination. A tribe cannot be equated with a caste. As stated earlier, there are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. 199. There is a long line of decisions dealing with the significance of the word 'caste' in relation to Hindus as being one of the relevant criteria, if not the sole criterion for ascertaining whether a particular person or group of persons will fall within the wider connotation of 'class'. 200. In M.R. Balaji v. State of Mysore [1963] Suppl. 1 SCR 439, Gajendragadkar, J. observed, "Though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be the sole or the dominant test in that behalf." 201. Subba Rao, J. speaking for the majority of the Constitution Bench in R. Chitralekha v. State of Mysore has stated: ... what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individual may be considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests. 202. Mudholkar, J. in his dissenting judgment in considering the caste in determination of the backward class, has expressed his view thus: ... it would not be in accordance either with Clause (1) of Article 15 or Clause (2) of Article 29 to require the consideration of the castes of persons to be borne in mind for determining what are socially and educationally backward classes. It is true that Clause (4) of Article 15 contains a non-obstante clause with the result that power conferred by that clause can be exercised despite the provisions of Clause (1) of Article 15 and Clause (2) of Article 29. But that does not justify the inference that castes have any relevance in determining what are socially and educationally backward communities. 203. Wanchoo, C.J. speaking for the Constitution Bench in Minor P.

Rajendran v. State of Madras and Ors., pointed out that "if the reservation in question has been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)". (emphasis supplied). 204. The learned Chief Justice in support of his above observation has placed reliance on Balaji. 205. In State of Andhra Pradesh v. P. Sagar , it has been observed: ... the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted. 206. In Triloki Nath v. J & K State II [1969] 1 SCR 103 Shah, J. speaking for the Constitution Bench has reiterated the meaning of the word 'class' as defined in the case of Sagar and added that "for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community race religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution." 207. Further, this judgment reaffirms that view in Minor P. Rajendran's case to the effect that if the members of an entire caste or community at a given time are socially, economically and educationally backward that caste on that account be treated as a backward class. This is not because they are members of that caste or community but because they form a class. 208. Hegde, J. in A. Peerikaruppan, etc. v. State of Tamil Nadu has observed: A caste has always been recongnised as class. 209. Vaidialingam, J. in State Andhra Pradesh and Ors. v. U.S.V. Balram etc. [1972] 3 SCR 447 in his conclusion upheld the list of Backward Class in that case as they satisfied the various tests, which have been laid down by this Court for ascertaining the social and educational of a backwardness of a class even though the said list was exclusively based on caste. (emphasis our) 210. Chief Justice Ray in Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr. was of the view that "In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test...." 211. Speaking for the Bench in U.P. State v. Pradip Tandon Ray, the learned Chief Justice after stating that neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4) when Article 15(1) forbids discrimination on grounds only of religion, race caste - observed that caste cannot be made one of the criteria for determining social and educational backwardness and that if the caste or religion is recognised as a criterion of social and educational backwardness, Article 15(4) still stultify Article 15(1). Further, he observed that "It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste but when a classification taken re-

course to caste as one of the criteria in determining socially and educationally backward classes, the expression 'classes' in that case violates the rule of expressio unius est exclusio alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste." 212. The learned Chief Justice also recognised the meaning of the expression "classes of citizens" in line with the observation made in Triloki Nath (II)and Sagar (supra) and explained the traits of social backwardness, economic backwardness and educational backwardness. 213. See also Akhil Bhartia Soshit Karamchari Sangh (supra) and K.C. Vasanth Kumar (supra). 214. Though there is tremendous ambivalence in a host of judgments rendered by this Court, not even a single judgment has held that class has no relevance to caste at all wherever caste system is prevalent. 215. Collating the above said views expressed by this Court in a catena of decisions as regards the relevance and significance of the caste criterion in the field of identification of 'socially and educationally backward classes' it may be stated that caste neither can be the sole criterion nor can it be equated with 'class' for the purpose of Article 16(4) for ascertaining the social and educational backwardness of any section or group of people so as to bring them within the wider connotation of 'backward class'. Nevertheless 'caste' in Hindu society becomes a dominant factor or primary criterion in determining the backwardness of a class of citizens. Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established and accepted criteria to identify the 'backward class' a caste per se without satisfying the agreed formulae generally cannot fall within the meaning of 'backward class of citizens' under Article 16(4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of the lower strata - indicating the social backwardness. 216. True, the caste system is predominantly known in Hindu society and runs through the entire fabric of the social structure. Therefore, the caste criterion cannot be divested from the other established and agreed criteria in identifying and ascertaining the backward classes. 217. It is said that the caste system is unknown to other communities such as Muslims, Christians, Sikhs, Jews, Parsis, Jains etc. in whose respective religion, the caste system is not recognised and permitted. But in practice, it cannot be irrefutably asserted that Islam, Christianity, Sikhism are all completely immune from casteism. 218. There are marked distinctions in one form or another among various sections of the Muslim community especially among converts to Islam though Islam does not recognise such kind of divisions among Muslims and professes only common brotherhood. 219. There are various sects or separate group of people in Muslim communities being identified by their occupation such as Pinjara in Gugarat, Dudekula (cotton beaters) in Andhra Pradesh, Labbais, Rowthar and Marakayar in Tamil Nadu. 220. Though Christianity does not acknowledge caste system, the evils of caste system in some States are as prevalent as in Hindu society especially among the converts. In Andhra Pradesh, there are Harijan Christians, Reddy Christians, Kamma Christians etc. Similarly, in Tamil Nadu, there are Pillai Christians, Marvar Christians, Nadar Christians and Harijan Christians etc. That is to say all the converts to Christianity have

not divested or set off themselves from their caste labels and crossed the caste barrier but carry with them the banners of their caste labels. Like Hindus, they interact and have their familiar relationship and marital alliances only within the converted caste groups. 221. In Tamil Nadu, after persistent effort and agitations some of the sections of people belonging to some castes or communities converted either to Islam or Christianity have become successful in having them included in the list of 'backward classes' on par with their corresponding Hindu caste people. 222. The Government of Tamil Nadu on the basis of the report of the Second Backward Classes Commission issued a revised list of 'backward classes' by G.O. Ms. No. 1564 (Social Welfare Department) dated 30th July 1985 wherein the following castes and communities converted to Islam and Christianity' are included for the purpose of reservation under Articles 15(4) and 16(4) of the Constitution. Serial No. 26 Converts to Christianity from Scheduled Castes irrespective of the generation of conversion for the purpose of reservation of seats in Educational Institutional and for seats in Public Services. 98* Labbais including Rowthar and Marakayar (whether their spoken language is Tamil or Urdu.) 100 Latin Catholics. . . : in Kanyakumari district and Shenkottah taluk of Tirunelveli district. 110 Meenavar, Parvatharajakulam, Pattanavar, Sembadavar (including converts to Christianity). 115 Mukkuvar or Mukayar (including converts to Christianity). 118 Nadar, Shanar and Gramani, including Christian Nadar, Christian Shanar and Christian Gramani. 136 Paravar including converts to Christianity (except in Kanyakumari district and Shenkottah taluk of Tirunelveli district where the community is a Scheduled Caste.) * Item No. 98 denotes Muslim community. 223. By another G.O. Ms. No. 1565 dated 30th July 1985, the Government of Tamil Nadu directed the reservation of seats at 50% for Backward Classes and 18% for Scheduled Castes and Scheduled Tribes in respect of all courses in all kinds of educational institutions as well as in all Services in the Government of Tamil Nadu. Thereafter, another G.O. Ms. No. 558 dated 24th February, 1986 on the representation of Christian converts was issued, the relevant paragraphs of which read as follows: (5) Accordingly, the Government declare that, in addition to the Christian Converts mentioned in paragraph one above, the persons belonging to the other Christian communities who are converts from any Hindu community included in the list of Backward Classes also will be considered as socially and educationally backward for the purposes of Article 15(4) of the Constitution. (6) The Government also declare that, in addition to the Christian converts mentioned in paragraph one above, the persons belonging to the other Christian communities who are converts from any Hindu community included in the list of Backward Classes also will be considered as Backward Classes of citizens and that they are not adequately represented in the services under the State with reference to Article 16(4) of the Constitution. 224. The Christian converts mentioned in the above G.O. relates to the list of Christian converts mentioned in G.O. Ms. No. 1564 dated 30th July 1985. 225. As per the statistics given in the Report of the Second Backward Classes Commission, in Tamil Nadu out of 27,05,960 people belonging to Muslim minorities 25,60,195 are included in the backward list which works out to 94.61% of the total Muslim population of the

State. Similarly, among Christians, out of 31, 91, 988 of the total population, 25, 48, 148 are included in the backward list which works out to 79.83%. 226. The Nav. Budhists, and Neo Budhists the majority of whom are converts from Scheduled Castes enjoy the reservation on the ground that their low status in that community have not become advanced equal to the status of others and their social backwardness is not changed in spite of change of their religion. 227. Sikhism, no doubt, strictly believes in social equality and justice, denounces all sorts of social discrimination between man and man, strongly advocates the equality and parity in all humanity and propagates that caste, birth or colour cannot make one superior or inferior. All the Gurus of Sikhism have advocated and articulated the concept of equality of man as the basis of egalitarian society. Notwithstanding Sikhism is violently against casteism, some converts to Sikhism from the Scheduled Castes still retain their caste label. 228. Thus even among non-Hindus, there are occupational organisations or social groups or sects which are having historical backward/evolution. They too constitute social collectives and form separate classes for the purposes of Article 16(4). 229. Though in India, caste evil originated from Hindu religion that evil has taken its root so deep in the social structure of all the Indian communities and spread its tentacles far and wide thereby leaving no community from being influenced by the caste factor. In other words, it cannot be authoritatively said the some of the communities belonging to any particular religion are absolutely free from casteism or at least from its shadow. The only difference being that the rigour of caste varies from religion to religion and from region to region. Of course, in some of the communities, the influence of the caste factor may be minimal. So far as the Hindu society is concerned, it is most distressing to note that it receives sanction from the Hindu religion itself and perpetuated all through. 230. Reference may be made to paragraphs 12.11 to 12.16 of Chapter XII of the Report. 231. After identifying in paragraph 12.18, the Commission has laid down the following tests for identifying non-Hindu OBCs: 12.18 After giving a good deal of thought to these difficulties, the Commission has evolved the following rough and ready criteria for identifying non-Hindu OBCs:- (i) All untouchables converted to any non-Hindu religion; and (ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples: Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.) 232. Even assuming that the caste factor would not furnish a reliable yardstick to identify 'socially and educationally backward groups' in the communities other than Hindu community as there is no commonness since all sections of people among Budhists, Muslims, Sikhs and Christians etc. and as the respective religion of those communities do not recognise the caste system, yet on the principle of the other agreed criteria such as traditional occupation, trade, place of residence, poverty lack of education or economic backwardness etc. the social and economic backwardness of those communities could be identified independently of the caste criterion. Once these 'casteless societies' are tested on the anvil of the established relevant criteria de hors the caste criterion, there may not be any difficulty in identifying the social and educational

backwardness of the section of the people of that community and classifying them as 'backward class of citizens' within the meaning of Article 16(4). 233. In this connection, reference may be made to the observation of this Court in Chitralekha (supra) that "... if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests." 234. More often than not, a question that is put forth is should the caste label be accepted as a criterion in ascertaining the social and educational backwardness of a group of persons or community. No doubt, it is felt that in identifying and classifying a group of persons or community as 'socially and educationally backward class', it should be done de hors the caste label. But all those who address such a question turn a blind eye to the existing stark reality that in the Hindu society ever since the caste system was introduced, till today, the social status of Hindu is so woven or inextricably intertwined and fused with the caste system to such an extent that no one in such a situation can say that the caste is not a primary indicator of social backwardness and that social backwardness is not identifiable with reference to the caste of an individual or group of persons or community. However, painful and distasteful, it may be, we have to face the reality that under the hydraulic pressure of caste system in Hindu society, a major section of the Hindus under multiple caste labels are made to suffer socially, educationally and economically. There appears no symptoms of early demise of this dangerous disease of caste system or getting away from the caste factor in spite of the fact that many reformative measures have been taken by the Government. Unless this caste system, unknown to other parts of the world is completely eradicated and all the socially and educationally backward classes to whichever religion they belong inclusive of Scheduled Castes and Scheduled Tribes are brought up and placed on par with the advanced section of the people, the caste label among Hindus will continue to serve as a primary indicator of its social backwardness. 235. Though I am not inclined to exhaustively elaborate the untold agony and immeasurable sufferings undergone by the people in the lower strata under the label of their respective caste, I cannot avoid but citing a jarring piece of information appearing in the Report. The noted and renowned Sociologist Shri J.R. Kamble in Rise & Awakening of Depressed Classes in India published by National Publishing House, New Delhi has quoted a passage from the issue of 'Hindu' dated 24.12.1932 as an example of visual pollution existing in Tinnevelli (Tamil Nadu) which the Mandal Commission has extracted in Chapter IV vide para 4.13 of its report: 4.13. ... In this (Tinnevelly) district there is a class of unseeables called purada vannans. They are not allowed to come out during day time because their sight is considered to be pollution. Some of these people who wash the clothes of other exterior castes working between midnight and day-break, were with difficulty persuaded to leave their houses to interview. 236. Does not the very mention of the caste named 'purada vannans' indicate that the people belonging to that community were so backward, both socially, economically as well as educationally beyond comprehension? Would the children of those people who were not allowed to come out during day time have gone to any school? Does not the very fact that those people were treated

with contempt and disgrace as if they were vermin in the human form freeze our blood? Alas! What a terrible and traumatic experience it was for them living in their hide-outs having occasional pot-luck under pangs of misery, all through mourning over their perilous predicament on account of this social ostracism. When people placed at the base level in the hierarchical caste system are living like mutes, licking their wounds - caused by the deadening weight of social customs and mourning their fate for having been born in lower castes - can it be said by any stretch of imagination that caste can never be the primary criterion in identifying the social, economic and educational backwardness? Are not the social and economic activities of Shudras and Panchamas (untouchables) severely influenced by their low caste status? 237. There is no denying that many of the castes are identified even by their traditional occupation. This is so because numerous castes arranged in a hierarchical order in the Hindu social structure are tied up with their respective particular traditional occupation consequent upon the creation of four Varnas on the concept of divine origin of caste system based on the Vedic principles. Can it be said that the propagation and practice on the caste - based discrimination; the marked dividing line between upper caste Hindus and Shudras, and the practice of untouchability in spite of the Constitutional declaration of abolition of untouchability under Article 17 are completely eradicated and erased? Can it be said that the social backwardness has no relation to caste status? The unchallengeable answer for the first question would be in the negative and for the second question, the answer would be that social backwardness does have a relation with the caste status. 238. It is not germane for my purpose to enter into a lengthy deliberation as to how religion and mythology were used for founding the social institution in Hindu society containing so much of inequalities and discrimination among the people professing the same Hinduism. 239. The Mandal Commission in Chapter IV of its report under the heading "Social Backwardness and Caste" has concluded its view, with a query under paragraph 4.33 of its Report (Volume I) thus: In view of the foregoing will it be too much to say that in the traditional Indian society social backwardness was a direct consequence of caste status.... 240. Though the Government both on the Central and State level have taken and are taking positive steps through law and other reformative measures to eradicate this social evil, it is heart- rending to note that in many circumstances, the caste system is being perpetuated instead of being banished for the reasons best known to those perpetratOrs. 241. It is common knowledge that in Hindu society, if a person merely mentions the name of a traditional occupation, another by his empirical knowledge can immediately identify the caste by the said traditional occupation. To illustrate, the traditional occupation of washing clothes is identified with washerman (Dhobi), caste, traditional occupation of haircutting is identified with Barber (Nai) - caste, traditional occupation of pottery is identified with Potter (Kumhar's caste), and so on. Of course in modern times, persons belonging to any particular caste might have shifted over to other occupation leaving their traditional occupation but generally speaking, the occupation is identified with the caste and vice-versa. Many backward castes have taken 'agricultrure' as their profession. In such an unquestionable situation, in

my opinion, there can be no justification in saying that caste in Hindu society cannot serve as a primary criterion even at the starting point in ascertaining its social, economic and educational backwardness. To say that in the effort of ascertaining social backwardness, caste should be considered only at the end point, is a misnomer and fallacious. Because after identifying and classifying a group of persons belonging to a particular caste by testing with the application of the relevant criteria other than the caste criterian, the identification of the caste of that class of persons is no more required as in the case of identification of casteless society as a backward class. In fact, this Court in a number of decisions has held that a caste may become a 'backward class' provided that caste satisfies the test of backwardness. 242. It is apposite, in this context, to make reference of the views expressed by the Mandal Commission stating that there is "a close linkage between caste ranking of a person and his social educational and economic status. . . .In India, therefore, the low ritual caste status of a person has a direct bearing on his social backwardness". 243. Chinnappa Reddy, J. In Vasant Kumar points out that the social investigator ". . . may freely perceive those pursuing certain 'lowly' occupation as socially and educationally backward classes." 244. In passing, I would like to make reference to the pith and substance of the report of Kaka Kalelkar, according to which the relevant factors to cosider in classifying 'backward class' would be their traditional occupation or profession, the percentage of literary or the general educational advancement made by them; the estimated population of the conmmunity, and the distribution of the various communities throughout the State or their concentration in certain areas. 245. What the Expression "Backward Class" means? 246. In Minor P. Rajendran (supra), Wanchoo, C.J. speaking for the Constitution Bench has stated that" a caste is also a 'class of citizens' and that reservation can be made in such a case provided if that caste as a whole is socially and educationally backward within the meaning of Article 15(4)". 247. Reference may also be made to Triloki Nath (11) (supra) and Balaram. 248. The facts in Balaram (cited above) disclose that for the admission to the integrated M.B.B.S. Course in the government medical colleges in Andhra Pradesh, the Government issued a G.O. making a reservation of 25% of seats in favour of 'backward classes' as recommended by the Andhra Pradesh Backward Classes Commission besides other reservations inclusive of reservation for Scheduled Castes and Scheduled Tribes. The reservation for the 'backward classes' was challenged on the ground that the Government Order violated Article 15(1) read with Article 29 and that the reservation was not saved by Article 15(4). The High Court held that the Commission had merely enumerated the various persons belonging to a particular caste as 'backward classes' which was contrary to the decision of this Court and violative of the constitutional provisions and consequently struck down the G.O. The Government preferred an appeal before this Court. Vaidialingam, J. speaking for the Bench has observed: In the determination of a class to be grouped as backward, a test solely based upon caste or community cannot be valid. But, in our opinion, though Directive Principles contained in Article 46 cannot be enforced by Courts, Article 15(4) will have to be given effect to in order to assist the weaker sections of the citizens, as the State has been charged

with such a duty. No doubt, we are aware that any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not also be missed that a caste is also a class of citizens and that a caste as such may be socially and educationally backward. If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, in our opinion, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. There is no gainsaying the fact that there are numerous castes in the country, which are socially and educationally backward and, therefore, a suitable provision will have to be made by the State as charged in Article 15(4) to safeguard their interest. (emphasis supplied) 249. The decisions which we have referred to above support the view that a caste is also a class of citizens and that if that caste satisfies the requisite tests of backwardness, then the classification of that caste as a backward class is not opposed to Article 16(4) notwithstanding that a few individuals of that caste are socially and educationally above the general average. I am in full agreement with the above view. 250. The composition and terms of reference of the Second Backward Classes Commission show that the Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India but not the socially, economically and educationally backward classes. The earlier O.M. issued on 13.8.90 reads that with a view to providing certain weightage to socially and educationally backward classes in the services of the Union and their Public Undertakings, as recommended by the Commission, the orders are issued in the terms mentioned therein. The said O.M. also explains that"the SEBC would comprise in the first phase the castes and communities which are common to both the lists, in the report of the Commission and the State Government' list". In addition it is said that list of such castes/communities is being issued seperately. The subsequent amended O.M. dated 25.9.91 states that in order to enable the 'poorer sections' of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, the Government have decided to amend the earlier Memorandum. Thus this amended O.M. firstly speaks of the 'poorer sections' of the SEBCs and secondly about the economically backward sections of the people not covered by any of the existing schemes of reservation. However, both the O.M.s while referring to the SEBCs, do not include the 'economic backwardness' of that class along with 'social and educational backwardness'. By the amended O.M., the Government while providing reservation for the backward sections of the people not covered by the existing schemes of reservation meant for SEBCs, classifies that section of the people as 'economically backward', that is to say that those backward sections of the people are to be identified only by their economic backwardness and not by the test of social and educational backwardness, evidently for the reason that they are all socially and educationally well advanced. 251. Coming to Article 16(4) the words 'backward class' are used with a wider connotation and without any qualification or explanation. Therefore, it must be construed

in the wider perspective. Though the OMs speak of social and educational backwardness of a class, the primary consideration in identifying a class and in ascertaining the inadequate representation of that class in the services under the State under Article 16(4) is the social backwardness which results in educational backwardness, both of which culminate in economic backwardness. The degree of importance to be attached to social backwardness is much more than the importance to be given to the educational backwardness and the economic backwardness, because in identifying and classifying a section of people as a backward class within the meaning of Article 16(4) for the reservation of appointments or posts, the 'social backwardness' plays a predominant role. 252. Ray, C.J. in Jayashree is of the view that"Social backwardness can contribute to educational backwardness and educational backwardness may perpetuate social backwardness. Both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition." 253. The very fact that the Commission itself has given a weightage of 12 points to 'social backwardness' and 6 points to 'educational backwardness' and 4 points to 'economic backwardness' (vide paragraph 11.24 of Chapter XI) shows in very clear terms that 'social backwardness' is taken as a predominant factor in ascertaining the backwardness of a class under Article 16(4). 254. In M.R. Balaji v. State of Mysore [1963] Suppl. 1 SCR 439 at page 454 Gajendragadkar, J. observed that "economic backwardness might have contributed to social backwardness. . . ." This observation tends to show that Gajendragadkar, J. was of the view that economic backwardness may contribute to social backwardness. With respect to the learned Judge, I am unable to agree with his view. 255. Desai, J. in Vasanth Kumar has expressed a similar view that if economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of "social and educational backwardness. . . ." thereby holding that only criterion which can be devised is the 'economic backwardness' for identifying 'socially and educationally backward classes' ignoring the predominance of social backwardness. I am unable to share this above view. 256. How far the Courts would be competent to identify the 'Backward class' is explained by Chinnappa Reddy, J. in Vasanth Kumar in the following words: We are afraid Courts are not necessarily the most competent to identify backward classes or to lay down guidelines for their identification except in broad and very general way. We are equipped for; that we have no legal barometers to measure social backwardness. We are truly removed from the people, particularly those of the backward classes, by layer upon layer of gradation and degradation. 257. Let us have a glance over the Report in identifying the 'backward classes' by testing the same on the touchstone of various established criteria. 258. In Chapter XI of the Report (Volume I part I) under the caption 'Socio-Educational Field Survey and Criteria of Backwardness' it is categorically stated that after most comprehensive enquiries and survey in the socio-educational fields with the association and help of top social scientists and specialists in the country as well as experts from a number of disciplines, the Commission had prepared the "Indicators (Criteria) for Social and Educational Backwardness" on the analysis of data and submitted its report. The relevant paragraphs 11.23, 11.24 and 11.25

showing the criteria for identification of backwardness are as follows: Indicators (Criteria) for Social and Educational Backwardness 11.23 As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e. Social, Educational and Economic. They are:- A. Social (i) Castes/Classes considered as socially backward by others. (ii) Castes/Classes which mainly depend on manual labour for their livelihood. (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas. (iv) Castes/Classes where participation of females in work is at least 25% above the State average. B. Educational (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average. (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average. (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average. C. Economic (viii) Castes/Classes where the average value of family assets is at least 25% below the State average. (ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average. (x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households. (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average. 11.24 As the above three groups are not of equal importance for our purpose, separate weightage was given to 'Indicators' in each group. All the social 'Indicators' were given a weightage of 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a wightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also. 11.25 It will be seen that from the values given to each Indicator, the total score adds upto 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50 per cent (i.e. 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference. 259. It is crystal clear that the Commission only on the basis of the galaxy of facts unearthed and massive statistics collected it, has made its recommendations on a very scientific basis of course taking 'caste' as the primary criterion in identifying the backward class in Hindu society and the occupation as the basis for identifying all those in whose societies, the caste system is not prevalent. 260. It is not necessary for a class to be designated as a backward class that it should be situated similarly to the Scheduled Castes and scheduled Tribes. 261. Vaidalaingam, J. in Balaram

while examining a similar issue after making reference to the cases of Balaji, Chitralekha and P. Sagar stated, “None of the above decisions lay down that socially and educationally backward class must be exactly similar in all respects to that of Scheduled Castes and Scheduled Tribes.” 262. Chinnappa Reddy, J. in Vasanth Kumar while dealing with the observations made in Balaji “that the backward classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes” observed thus: There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes. 263. Criticism levelled against Mandal Commission Report 264. The learned senior counsel, Mr. N.A. Palkhiwala, Mr. K.K. Venugopal, Smt. Shyamala Pappu and Mr. P.P. Rao assisted by a battery of layers appearing for the petitioners condemn the recommendations of the Commissions on the various grounds. Therefore, it has become unavoidable to meet their challenges, it may not be necessary otherwise to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. 265. Taking pot-shots at the Mandal Report recommending exclusive reservation for SEBCs, the belligerent anti-reservationists denigrate the report by making scathing criticism and indiscriminately trigger off a volley of bullets against the Report. The first attack against the Report is that it is perpetuating the evils of caste system and accentuating caste consciousness besides impeding the doctrine of secularism, the net effect of which would be dangerous and disastrous for the rapid development of the Indian society as a whole marching towards the goal of the welfare state. According to them, the identification of SEBCs by the Commission on the basis of caste system is bizarre and barren of force, much less exposing hollowness. Therefore, the OMs issued on the strength of the Mandal Report which is solely based on the caste criterion are violative of Article 16(2). 266. The above criticism, in my considered view, is very uncharitable and bereft of the factual position. Hence it has to be straightaway rejected as unmeritorious since that Report is not actually based solely on caste criteria but on the anvil of various factors grouped under three heads i.e. social, educational and economic backwardness but giving more importance - rightly too - to the social backwardness as having a direct consequence of caste status. 267. Adopting the policy of ‘Running with the hare and hunting with the hounds’, a conciliatory argument was advanced saying that although it is necessary to make provisions for providing equality of opportunity in matters of public employment ‘in favour of any backward class’ in terms of Article 16(4), the present Report based on 1931 census can never serve a correct basis for identifying the ‘backward class’, that therefore, a fresh Commission under Article 340(1) of the Constitution is required to be appointed to make a fresh wide survey sumey through out the length and breadth of the country and submit a new list of OBCs (other backward classes) on the basis of the present day Census and that there are million ways of guaranteeing progress of backward classes and ensuring that it percolates down the social scale, but

the Mandal commission is the one. 268. Firstly, in my view if the above argument is accepted it will result in negation of the just claim of the SEBCs to avail the benefit of Article 16(4) which is a fundamental right. 269. Secondly, this attack is based on a misconception. A perusal of the Report would indicate that the 1931 census does not have been even a remote connection with the identification of OBCs. But on the other hand, they are identified only on the basis on the country-wide socio-educational field survey and the census report of 1961 particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes personal knowledge gained through extensive touring and receipt of voluminous public evidence and lists of OBCs notified by various States. It was only after the identification of OBCs, the Commission was faced with the task of determining their population percentage and at that stage 1931 census become relevant. It is to be further noted after 1931 census, no caste-wise statistics had been collected. In fact, the identification of classes by the Commission was based on the realities prevailing in 1980 and not in 1931. It is brought to our notice that the same method had already been adopted in Section 5 of the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976. 270. Thirdly, the Commission cannot be said to have ignored this factual position and found fault with for relying on 1931 census. In fact, this position is made clear by the Commission itself in Chapter XII of its Report, the relevant paragraphs of which read thus: 12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes, communities, and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country. 12.10 Working on the above basis, the Commission culled out caste/community-wise population figures from the census records of 1931 and, then grouped them into broad caste-clusters and religious groups. These collectivities were subsequently aggregated under five major heads i.e. (i) Scheduled Castes and Scheduled Tribes; (ii) Non-Hindu communities, Religious Groups, etc.; (iii) Forward Hindu Castes and Communities; (iv) Backward Hindu Caste and Communities; and (v) Backward Non-Hindu Communities.... 271. In Balaram, wherein a similar argument was addressed, this Court after going through the Report of the Backward Classes Commission of the State of Andhra Pradesh, felt the difficulty of the non-availability of the Caste-wise statistics after 1931 census and pointed out that in Andhra, the figures of 1921 census were available and in Telangana area, 1931 census of caste-wise statistics was available. 272. In the background of the above discussion, the anti-reservationists cannot have any legitimate grievance and justifiably demand this Court to throw the Report over-board on the mere ground that 1931 census had been taken into consideration by the Commission. 273. As pointed out by this Court in Balaram that no conclusions can always be scientifically accurate in such matters. If at all the attack perpetrated on the Report renders any remedy to the anti-reservationists, it would be only for the purpose of putting the Report

in cold storage as has happened to the Report of the First Backward Classes Commission. 274. Therefore, for the aforementioned reasons, I hold that the above submission made against the Report with reference to the consideration of Census of 1931 cannot be conuntenanced. 275. After having gone through the Commission's Report very assiduously and punctiliously, I am of the firm view that the Commission only after deeply considering the social, educational and economic backwardness of various classes of citizens of our country in the light of the various propositions and tests laid down by this Court had submitted its Report enumerating various classes of persons who are to be treated as OBCs. The recommendations made in the present Report after a long lull since the submission of the Report by the First Backward Classes Commission are supportive of affirmative action programmes holding the members of the historically disadvantaged groups for centuries to catch up with the standards of competition set up by a well advanced society. 276. As a matter of fact, the Report wanted to reserve 52% of all the posts in the Central Government for OBCs commensurate with their ratio in the population. However, in deference to legal limitation it has recommended a reservation of 27% only even though the population of OBCs is almost twice this figure. 277. Yet another argument on behalf of the anti-reservationsits was addressed contending that if the recommendations of the Commission are implemented, it would result in the sub-standard replacing the standard and the reins of power passing from meritocracy to mediocrity; that the upshot will be in demoralization and discontent and that it would revitalize caste system, and cleave the nation into two - forward and backward - and open up new vistas for internecine conflict and fissiparous forces, and make backwardness a vested interest. 278. The above tortuous line of reasoning, in my view is not only illogical, inconceivable, unreasonable and unjustified but also utterly overlooks the stark grim reality of the SEBCs suffering from social stigma and ostracism in the present day scenario of hierarchical caste system. The very object of Article 16(4) is to ensure equality of opportunity in matters of public employment and give adequate representation to those who have been placed in a very discontent position from time immemorial on account of sociological reasons. To put it differently, the purpose of Clause (4) is to ensure the benefits flowing from the fountain of this clause on the beneficiaries - namely the Backward Classes - who in the opinion of the Constitution makers, would have otherwise found it difficult to enter into public services, competing with advanced classes and who could not be kept in limbo until they are benefited by the positive action schemes and who have suffered and are still suffering from historic disabilities arising from past discrimination or disadvantage or both. However, unfortunately all of them had been kept at bay on account of various factors, operating against them inclusive of poverty. They continue to be deprived of enjoyment of equal opportunity in matters of public employment despite there being sufficient statistical evidence in proof of manifest imbalance in Government jobs which evidence is sufficient to support an affirmative action plan. If candidates belonging to SEBCs (characterised as mediocre by anti-reservationists), are required to enter the open field competition, along with the candidates belonging to advanced communities without

any preferential treatment in public Services in their favour and go through a rigid test mechanism being the highly intelligence test and professional ability test as conditions of employment, certainly those conditions would operate as "built-in headwinds" for SEBCs. It is, therefore, in order to achieve equality of employment opportunity, Clause 4 of Article 16 empowers the State to provide permissible reservation to SEBCs in the matters of appointments or posts as a remedy so as to set right the manifest imbalance in the field of public employment. 279. The argument that the implementation of the recommendations of the Commission would result in demoralisation and discontent has no merit because conversely can it not be said that the non-implementation of the recommendations would result in demoralisation and discontent among the SEBCs. 280. Though 'equal protection' clause prohibits the State from making unreasonable discrimination in providing preferences and facilities for any section of its people, nonetheless it requires the State to afford substantially equal opportunities to those, placed unequally. 281. The basic policy of reservation is to off-set the inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies. Therefore, a comprehensive methodological approach encompassing jurisprudential, comparative, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of societal discrimination require compensatory treatment. Needless to emphasise that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally. 282. It is more appropriate to recall that "There is equality only among equals and to equate unequals is to perpetuate inequality." 283. Therefore, the submission that the implementation of the recommendations of the Report will curtail concept of equality as enshrined under Article 14 of the Constitution and destroy the basic structure of the Constitution, cannot be countenanced. 284. One of the arguments criticising the Report is that the said Report virtually rewrites the Constitution and in effect buries 50 fathoms deep the ideal of equality and that if the recommendations are given effect to and implemented, the efficiency of administration will come to a grinding halt. This submission is tantamount to saying that the reservation of 27% to SEBCs as per the impugned OMs is opposed to the concept of equality. 285. There is no question of rewriting the Constitution, because the Commission has acted only under the authority of the notification issued by the President. It has after laying down the parameters in the light of the various pronouncements of this Court has ultimately submitted its Report recommending the reservation in tune with the spirit of Article 16(4). 286. The question whether the candidates, belonging to the SEBCs should be given a preferential treatment in matters of public employment to such time as it is necessary, receives a fitting reply in Devadasan wherein Subba Rao, J. (as the learned Chief Justice then was) has observed, by citing an illustration as to how the manifest imbalance and inequality will occur otherwise, thus: To make my point clear, take the illustration of a horse race. Two horses are set down

to run a race - one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced Clause (4) in Article 16. 287. It will be befitting, in my opinion, to extract a passage from the book, Bakke, Defunis and Minority Admissions (The Quest for Equal Opportunity) by Allan P. Sindler wherein at page 9, the unequal competition is explained by an analogy which is as follows: A good way to appreciate the "something more" quandary is to consider the metaphor of the shackled runner, an analogy frequently advanced by spokesmen for minorities: 'Imagine two runners at the starting line, readying for the 100-yeard dash. One has his legs shackled, the other not. The gun goes off and the race begins. Not surprisingly, the unfettered runner immediately takes the lead and then rapidly increases the distance between himself and his shackled competition. Before the finish line is crossed, over the judging official blows his whistle, calls off the contest on the grounds that the unequal conditions between the runners made it an unfair competition, and orders removal of the shackles.' Surely few would deny that pitting a shackled runner against an unshackled one is inequitable and does not provide equality of opportunity. Hence, cancelling the race and freeing the disadvantaged runner of his shackles seem altogether apporpriate. Once beyond this point, however, agreement fades rapidly. The key question becomes: what should be done so that the two runners can resume the contest on a basis of fair competition? Is it enough after removing the shackles, to place both runners back at the starting point? Or is "something more" needed, and if so, what? Should the rules of the running be altered, and if so, how? Should the previously shackled runner be given a compensatory edge, or should the other runner be handicapped in some way? How much edge or handicap? 288. To one of the queries posed by the author of the above analogy, the proper reply would be that even if the shackles whether of iron chains or silken cord, are removed and the shackled person has become unfettered, he must be given a compensatory edge until he realises that there is no more shackle on his legs because even after the removal of shackles he does not have sufficient courage to compete with the runner who has been all along unfettered. 289. Mr. Ram Awadesh Singh, an intervener demonstrably explained that as unwatered seeds do not germinate, unprotected backward class citizens will wither away. 290. The above illustration and analogies would lead to a conclusion that there is an ocean of difference

between a well advanced class and a backward class in a race of open competition in the matters of public employment and they, having been placed unequally, cannot be measured by the same yardstick. As repeatedly pointed out, it is only in order to make the unequals equal, this constitutional provision, namely, Clause (4) of Article 16 has been designed and purposely introduced providing some preferential treatment to the backward class. It is only in case of denial of such preferential treatment, the very concept of equality as enshrined in the Constitution, will get buried 50 fathoms deep. 291. A programme of reservation may sacrifice merit but does not in any way sacrifice competence because the beneficiaries under Article 16(4) have to possess the requisite basic qualifications and eligibility and have to compete among themselves though not with the mainstream candidates. 292. As Chinnappa Reddy, J. in Vasanth Kumar has rightly observed, "Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a mantra which is whispered by the Guru in the Sishya's ear." 293. In yet another context, in the same decision, the learned Judge at page 394 has firmly and irrefutably put the merit argument at rest stating thus: The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is no enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences. 294. Be that as it may, the intelligence, merit, ability, competence, meritocracy, administrative efficiency and achievement cannot be measured by skin-pigmentation or by the surname of an individual indicating his caste. 295. In this regard, the observation of Subba Rao, J. in Devadasan at page 706 may be recapitulated, which to some extent answers the doubt raised by a section of anti-reservationists that reservation will result in deterioration in the standard of service. The said observation reads as follows: If the provision deals with reservation - which I hold it does - I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad. Indeed, the State laid down the minimum qualifications and all the appointments were made from those who had the said qualifications. How far the efficiency of the administrations suffers by this provision is not for me to say, but it is for the State, which is certainly interested in the maintenance of standards of Us administration. Submission on the theory of past discrimination based on the decisions of the Supreme Court of United States 296. Based on certain American decisions, it has been urged that only that group or section of people suffering from the lingering effects of past discrimination can be classified as 'backward classes' and not others. This submission has to be mentioned for being simply rejected for more than one reason. Even today, the caste discrimination is very much prevalent in India

particularly in the rural areas. Secondly, even among the Judges of the Supreme Court of United States, there is a division of opinion on the theory of lingering effects of past discrimination. Thirdly, this theory cannot be imported to the Indian conditions where the Hindu society even today is suffering from the firm grip of discrimination based on caste system. The vastness and richness of the materials unearthed by the various Commissions inclusive of States' Commissions unambiguously and pellucidly reveal that in our country, representation of the SEBCs in the services under the State is grossly inadequate when compared to the representation of the advanced class of citizens, leave apart the complete absence of reservation for SEBCs in the Central Services. This inadequate representation is not confined to any specific section of the people, but all those who fall under the group of social backwardness whether they are Shudras of Hindu community or similarly situated other backward classes of people in other communities, namely, Muslims, Sikhs, Christians etc. 297. Drawing strength on the opinion of Powell, J in Regents of the University of California v. Allan Bakke 57 L Ed 2d 750, an argument has been advanced that Article 16(1) permits only preferences but not reservations. In the above Bakke's case, a white male who had been denied admission to the medical school at the University of California at Davis for two consecutive years, instituted an action for declaratory and injunctive relief against the Regents of the University in the Superior Court of Yolo County, California alleging the invalidity under the equal protection clause of the Fourteenth Amendment, a provision of the California Constitution, and the prescription in racial discrimination in any programme receiving federal financial assistance of the medical school's special admissions programme. The Supreme Court announced its decision amid confusion and controversy. There was no clear majority, but a three-way split namely four Judges took one view and four other Judges took a different view, leaving Justice Powel straddling the middle. In their joint opinion partially concurring and partially dissenting, Justices Brennan, White, Marshal and Blackmun took issue with Powell's conclusion that the Davis programme was unconstitutional and said, "We cannot... let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." 298. Attention was also drawn to Defunis v. Charles Ode guard [1974] 40 L. Ed. 2nd 164. 299. The analytical study of American cases shows that the American-style justification of positive discrimination is on the ground of utility whereas the Indian-style justification is on the ground of constitutional rights. Therefore, the decision in relation to a racial discrimination relating to an admission to the medical school cannot be of much assistance in the matter of identification of 'backward classes' falling under Article 16(4). The dicta in Bakke and Defunis is one akin to the principle covered under Article 15(4) and not under Article 16(1) or 16(4). 300. Whether Article 16(4) is an exception to Articles 16(1) and (2)? 301. Mr Parasaran, the learned senior counsel, appearing on behalf of the Union of India articulated that Articles 16(4) and 335 are so worded as to give a wide latitude to the State in the matter of reservation and that Article 16(4) having no-obstinate clause reading "Nothing in this Article shall prevent the State from making any

provision. . . ." has an over-riding effect on Article 16(2). 302. In support of the above argument based on the non-obstante clause, much reliance was placed on various decisions, namely, (1) Punjab Province v. Daulat Singh and Ors. 1942 F.C.R. 67 at 87 and 88; (2) Orient Paper and Industries Ltd. v. State of Orissa, and 678; (3) In re. Hatschek's Patents 1909 Chancery Division Vol. II 68 at 82 and 85 and (4) Hari Vishnu Kamath v. Syed Ahmed Ishaque and Ors. . 303. Yet another argument placing reliance on Triloki Nath's case (I) (supra) was advanced contending that Article 16(4) is an enabling provision conferring a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens. Placing reliance on the view expressed by Wanchoo, J. (as the learned Chief Justice then was) in General Manager, Southern Railways v. Rangachari it was further urged that Article 16(4) which is in the nature of an exception or proviso to Article 16(1) cannot nullify equality of opportunity guaranteed to all citizens by that article. 304. In my view, that Clause (4) of Article 16 is not an exception to Article 16(1) and (2) but it is an enabling provision and permissive in character overriding Article 16(1) and (2); that it is a source of reservation for appointments or posts in the Services so far as the backward class of citizens is concerned and that under Clause (1) of Article 16 reservation for appointments or posts can be made to other sections of the society such as physically handicapped etc. 305. There is complete unanimity of judicial opinion of this Court that under Article 16(4) the State can make adequate provisions for reservations of appointments of posts in favour of any backward class of citizens, if in the opinion of the State such 'backward class' is not adequately represented in the State. In fact in B. Venkataramana v. State of Madras AIR 1951 SC 229 a seven Judges Bench of this Court held that "reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional". Not a single decision of this Court has cast slightest shadow of doubt on the constitutional validity of reservation. Therefore, in view of the above position of law. I am not inclined to embark upon an elaborate discussion on this question any further. 306. Whether Reservation under Article 16(4) can be made by Executive Order? 307. The next submission that the provision for reservation of appointments or posts under Article 16(4) can be made only by a legislation and not by an executive order is unsustainable. This contention as a matter of fact has already been answered in (1) Balaji (supra) and (2), Comptroller & Auditor General v. Mohan Lal Mehrotra . 308. In passing, it may be stated that this Court while reversing the judgment of the Punjab and Haryana High Court in favour of the appellant State of Punjab v. Hirala Lal and Ors. upheld the reservation which was made not by a legislation but by an executive order. See also Mangal Singh v. Punjab State Police . 309. Agreeing with the reasonings of Balaji, I hold that the provision or reservation in the "Services under the State" under Article 16(4) can be made by an executive order. 310. Whether the power conferred under Article 16(4) is coupled with duty? 311. Mr. K. Parasaran put forth an argument that the enabling power conferred under Article 16(4) is intended for the benefit of the 'backward classes of citizens' who in the opinion of the State are not adequately represented in the Services under the State and that

the power is one coupled with a duty and, therefore, has to be exercised by the state for the benefit of those for whom it is intended. Reference was made to H.W.R. Wade Administrative Law v. Edn. Pages 228 and 229. Halsbury's Laws of England IV Edn. Vol. V paras page 34 para 27 and page 35 para 29. He adds that the duty caused on the State is to be exercised in keeping with the directive principles laid down under Article 46 to 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 to protect them from social injustice and all other forms of exploitation. In this connection, attention was drawn to a few decisions of this Court, namely, (1) Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd. [1950] SCR 536; (2) Official Liquidator v. Dharti Dhan 964; (3) Delhi Administration v. I.K. nangia ; and (4) Jaganathan (supra). 311. Whether formation of opinion by State is subjective? 312. The expression "in the opinion of the State" would mean the formation of opinion by the State which is purely a subjective process. It cannot be challenged in a Court on the grounds of propriety, reasonableness and sufficiency though such an opinion is required to be formed on the subjective satisfaction of the Government whether the identified 'backward class of citizens' are adequately represented or not in the Services under 'the State. But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a sine quo non. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of Statute, or irrelevant and extraneous material then that opinion is challengeable. See (1) Dr. N.B. Khare v. The State of Delhi [1950] SCR 519; (2) Govindji v. Municipal Corporation, Ahmedabad [1957] Bom. 147; (3) Virendra v. The State of Punjab and Anr. [1958] SCR 308; (4) The Barium Chemicals Ltd. and Anr. v. The Company Ltd. Board and Ors. [1966] Suppl. SCR 311 and (5) Rohtas Industries v. S.D. Agarwal and Ors. . 313. In the present case, nothing is shown that the opinion of the Government as regards the inadequacy of representation in the Services is vitiated on any of the grounds mentioned above. 314. Whether the policy of Government can be subjected to judicial review: 315. The action of the Government in making provision for the reservation of appointments or posts in favour of any 'backward class of citizens' is a matter of policy of the Government. What is best for the 'backward class' and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservation is a matter for decision exclusively within the province of the Government and such matters do not ordinarily attract the power of judicial review or judicial interference except on the grounds which are well settled by a catena of decisions of this Court. Reference may be made to (1) Hindustan Zinc v. A.P. State Electricity Board ; (2) Sitaram Sugars v. Union of India and Ors. [1990] 3 SCC 233; (3) D.C.M. v. S. Paramjit Singh ; (4) Minerva Talkies v. State of Karnataka and Ors. 1988 Suppl. SCC 176; (5) State of Karnataka v. Ranganath Reddy ; (6) Kerala State Electricity Board v. S.N. Govind Prabhu [1986] 4 SCC; (7) Prag Ice Company v. Union of India and Ors. [1978] 2 SCC 459; (8) Saraswati Industries Syndicate Ltd. v. Union of India ; (9) Murti Match Works v. As-

sistance Collector, Central Excise and Ors. ; (10) I. Govindraja Mudaliar v. State of Tamil Nadu and Ors. : and (11) Narender Kumar v. Union of India and Ors. [1969] 2 SCR 375. 316. To what extent can the reservation be made? 317. The next baffling question relates to the permissible extent of reservation in appointments. 318. It was for the first time that this Court in Balaji has indicated broadly that the reservation should be less than 50% and the question how much less than 50% would depend on the relevant prevailing circumstances in each case. Though in Balaji, the issue in dispute related only to the reservation prescribed for admissions in the medical college from the educationally and socially backward classes, scheduled caste and scheduled tribes as being violative of Article 15(4), this Court after expressing its view that it should be less than 50% observed further that "the provisions of Article 15(4) are similar to those of Article 16(4).... Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4)...reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution." This decision has gone further holding that the reservation of 68% seats made in that case was offending Article 15(4) of the Constitution. To say in other words, Balaji has fixed that the maximum limit of reservation all put together should not exceed 50% and if it exceeds, it is nothing but a fraud on the Constitution. Even at the threshold, I may emphatically state that I am unable to agree with the proposition fixing the reservation for SEBCs at 50% as the maximum limit. 319. Mr. Jethmalani strongly articulated that the observation in Balaji that reservation under Article 16(4) should not be beyond 50% is only an obiter dicta since that question did not at all arise for consideration in that case. Therefore, according to him, this observation is not a law declared by the Supreme Court within the meaning of Article 141 of the Constitution. He continued to state that unfortunately some of the subsequent decision have mistakenly held as if the question of permissible limit has been settled in Balaji while, in fact, the view expressed in it was an obiter dicta. According to him, the policy of reservation is in the nature of affirmative action, firstly to eliminate the past inhuman discrimination and secondly to ameliorate the sufferings and reverse the genetic damage so that the people belonging to 'backward class' can be uplifted. When it is the main objective of Clause (4) of Article 16 any limitation on reservation would defeat the very purpose of this Article falling under Fundamental Rights and, therefore, reservation if the circumstances so warrant can go even upto 100%. 320. This view of Mr. Jethmalani has been fully supported by Mr. Siva Subramaniam appearing on behalf of the State of Tamil Nadu who pointedly referred to the speech of the Chief Minister of Tamil Nadu made in the Chief Ministers' Conference held on 10th April 1992 and produced a copy of the printed speech of the Chief Minister, issued by the Government of Tamil Nadu as an annexure to the written submission. It is seen from the said annexure that the Chief Minister has categorically emphasised the stand of the Government of Tamil Nadu stating that the total reservation for backward classes, scheduled castes and scheduled tribes is 69%; that it is but fair and proper that socially and educationally backward classes (alone) as a whole should be given at least 50% reservation for employment

opportunities in Central Government services and its undertakings as well as for admission in educational institutions run by the Central Government. It has also been pointed out that in consonance with this avowed policy, the Tamil Nadu Legislative Assembly passed unanimously a resolution on 30.9.1991 urging the Government of India to adopt a policy of 50% reservation for the Backward Classes instead of 27% and to apply this reservation not only for employment opportunities in all Central Government departments and Public Sector Undertakings, but also for admission in all Educational Institutions run by the Central Government. 321. Mr. Rajiv Dhawan appearing in W.P. No. 1094/91 submits that the limits to the reservation in Article 16(4) cannot be fixed on percentage but it must be with the ulterior objective of achieving adequate representation for 'backward classes'. 322. I see much force in the above submissions and hold that any reservation in excess of 50% for 'backward classes' will not be violative of Articles 14 and/or 16 of the Constitution. But at the same time, I am of the view that such reservations made either under Article 16(4) or under Article 16(1) and (4) cannot be extended to the totality of 100%. In fact, my learned brother, P.B. Sawant, J in his separate judgment has also expressed a similar view that "there is no legal infirmity in keeping the reservations under Clause (4) alone or under Clause (4) and Clause (1) of Article 16 together exceeding 50 per cent" though for other reasons the learned Judge has concluded that ordinarily the reservations kept under Article 16(1) and 16(4) together should not exceed 50% of the appointments in a cadre or service in any particular year, but for extraordinary reasons this percentage may be exceeded. My learned brother, B.P. Jeevan Reddy, J in his separate judgment has expressed his view that in given circumstances, some relaxation in the strict rule of reservation may become imperative and added that in doing so extreme caution is to be exercised and a special case made out. 323. As to what extent the proportion of reservation will be so excessive as to render it bad must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula. In fact, Article 16(4) itself does not limit the power of the Government in making the reservation to any maximum pecentage; but it depends upon the quantum of adequate representation required in the Services. In this context, it would be appropriate to recall some of the decisions of this Court, not agreeing with Balaji as regards the fixation of percentage of reservation. 324. The question of percentage of reservation was examined in Thomas wherein Fazal Ali, J not agreeing with Balaji has observed thus: .... Clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid

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. The dominant object of this provision is to take steps to make in adequate representation adequate. 325. Krishna Iyer, J in the same decision has agreed with the above view of Fazal Ali, J stating that "... the arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far." 326. Though Mathew, J did not specifically deal with this maximum limit of reservation, nevertheless the tenor of his judgment indicates that he did not favour 50% rule. 327. Chinnappa Reddy, J in Karamchari case [1981] 2 SCR 185 (supra) has expressed his view on the ceiling of reservation as follows: .... There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty percent. There is no rigidity about the fifty percent rule which is only a convenient guideline laid down by Judges. Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future. Judged in the light of this discussion I am unable to find anything illegal or unconstitutional in any one of the impugned orders and circulars.... 328. Again in Vasanth Kumar, Chinnappa Reddy, J reiterates his view taken in Karamchari in the following words: We must repeat here, what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess of 50 per cent may impair efficiency. 329. I fully share the above views of Fazal Ali, Krishna Iyer, Chinnappa Reddy, JJ holding that no maximum percentage of reservation can be justifiably fixed under Articles 15(4) and/or 16(4) of the Constitution. 330. It should not be out of place to recall the observation of Hegde, J in Hira Lal observing," The extent of reservation to be made is primarily a matter for the State to decided. By this we do not mean to say, that the decision of the State is not open to judicial review.... The length of the leap to be provided depends upon the gap to be covered. (emphasis supplied) 331. Desai, J in Vasanth Kumar expressed his view that in dealing with the question of reservation in favour of Scheduled Castes, Scheduled Tribes as well as other SEBCs 'Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities." Whether the further arbitrary classification as poorer sections' from and out of the identified SEBCs is permissible under Article 16(4) after acceptance and approval of the list without reservation and whether such classification suffers from non-application of mind? 332. The most important pivotal and crucial issue that I would now like to ponder over relates to the intent of para 2(i) of the OM dated 25th September 1991 whereunder it is declared that "Within the 27% of the vacancies in civil posts

and services under the Government of India reserved for SEBCs, preference will be given to the candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates". (emphasis supplied) 333. To say in other words, the Government intends to prescribe an income ceiling for determination of 'poorer sections' of the SEBCs who will be eligible to avail of the preference of reservation of appointments or posts in the Services under the State. It is an admitted fact that the Government so far has not laid down any guideline or test for identifying and ascertaining the 'poorer sections' among the identified SEBCs. 334. The OM has specifically used the expression, 'poorer sections' but not 'weaker sections' as contemplated under Article 46 of the Constitution. Though the expressions 'poorer sections' and 'weaker sections' may connote in general 'the disadvantaged position of a section of the people' they do not convey one and the same meaning and they are not synonymous. When the OM deliberately uses the expression 'pooer sections', it has become incumbent to examine what that expression means and whether there can be any sub-classification as 'poorer' and 'non-poorer' among the same category of potential backward class of citizens on the anvil of economic criterion. 335. The word 'poor' lexically means "having little or no money, goods or other means of support" (Webster's Encyclopedic Unabridged Dictionary) or "lacking financial or other means of subsistence" (Collins English Dictionary). 336. The OM uses the expression 'poorer' in its comparative term for the word 'poor'. It is common knowledge that the superlative term for the word 'poor' is 'poorerst'. The very usage of the word 'poorer' is in comparison with the positive word 'poor'. Therefore, it, necessarily follows that the OM firstly considers all the identified SEBCs in general as belonging to 'poor sections' from and out of which the 'poorer sections' are to be culled out by applying a test to be yet formulated by the Government evidently on economic criterion or by application of poverty test based on the ceiling of income. After the segregation of 'poorer sections' of the SEBCs, the left out would be the 'poor sections'. By the use of the word 'poorer', the Government is super-imposing a relative poverty test for identifying and determining a preferential class among the identified SEBCs. It is stated that the preference will be given first to the 'poorer sections' and only in case there are unfilled vacancies, those vacancies will be filled by the left out SEBCs, namely, those other than the poorer sections. In other words, it means that all the identified SEBCs do not belong to affluent sections but to poor and poorer sections, that the expression 'poorer sections' denotes only the economically weaker sections of SEBCs compared with the remaining same category of SEBCs and that those, other than the 'poorer sections' although socially and educationally backward are economically better off compared with the 'poorer sections'. The view that all the identified SEBCs are considered as 'poor' or 'poorer' is fortified by the fact that there is an inbuilt explanation in the amended OM itself to the effect that those who do not fall within the category of 'poorer sections' also will be entitled for the benefit of reservation but of course subject to the availability of unfilled vacancies. 337. An argument was advanced that for identifying 'poorer sections', the. 'means test' signifying an

imposition of outer income limit should be applied and those who are above the cut off income limit should be excluded so that the better off sections of the SEBCs may be prevented from taking the benefit earmarked for the less fortunate brethren and the only genuine and truly members of 'poorer sections' of SEBCs may avail the benefit of reservation. In support of this argument, an attempt has been made to draw strength on two decisions of this Court rendered in Jayashree and Vasanth Kumar. 338. Chief Justice Ray in Jayashree seems to have been inclined to take the view that reservation of seats in educational institutions should not be allowed to be enjoyed by the rich people suffering from the same communal disabilities. 339. Chinnappa Reddy, J in Vasanth Kumar recognises this 'means test' saying that "an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserved it", with which view Venkataramiah, J (as the learned Chief Justice than was) has agreed. 340. Thus the above argument based on 'means test' though seems to be plausible at the first sight is, in my opinion, not well founded and must be rejected on the ground that the identified category of SEBCs, having common characteristics or attributes - namely the potential social backwardness cannot be bisected or further classified by applying the economic or poverty test. 341. A doubt has been created as to whether the word 'poorer' connotes economic status or social status or is to be understood in any other way. 342. The word 'poorer' when examined in the context in which it is deployed both syntactically and etymologically, in my view, may not convey any other meaning except relative poverty or comparative economic status. If any other meaning is imported which the government evidently appears to have not contemplated, virtually one will be rewriting the second OM. 343. An order of a Constitution Bench dated 1st October 1991 clearly spells out that that Bench was of the view that 'poorer sections' are to be identified by the economic criterion. The relevant portion of the above Order reads as follows: The matters are adjourned to 31st October 1991 when learned Additional Solicitor General will tell us how and when Government would be able to give the list of the economic criteria referred to in the notification of 25th September 1992. (emphasis supplied) 344. The same view is reflected in a subsequent Order dated 4th December 1991 made by this nine-Judges Bench, the relevant part of which reads thus: Learned Additional Solicitor General states that the Government definitely expects to be able to fix the economic criteria by January 28, 1992.... As far as the question of stay granted by us earlier is concerned, we see no reason to pass any order at this stage as the petitions are posted for hearing on January 28, 1992 and in view of the economic criterion not being yet determined and other relevant circumstances, no question of immediate implementation of the notification arises. (emphasis supplied) 345. The above Orders of this Court support my view that the Government has to identify the 'poorer sections' only by the economic criteria or by the application of poverty test otherwise called 'means test'. It appears that this Court has all along been given to understand that 'poorer sections' will be tested by the Government on economic criterion. 346. The above view is further fortified by the very fact that the second OM providing 10% of the reservation 'for economically backward sections of the people not covered by

any other scheme of the reservation' indicates that the Government has taken only the economic criteria in making the classification of the various sections of the people (emphasis supplied). Therefore, I proceed on the basis that the second OM identifies the 'poorer sections' only on the basis of economic status.
347. When the 'means test' is analysed in depth so as to explore its merits and demerits, one would come to an inevitable conclusion that it is not a decisive test but on the other hand it will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods. Further, this test will be totally unworkable and impracticable in the determination of "getting somebody in and getting somebody out" from among the same identified SEBCs. If this 'means test' argument is accepted and put into action by scanning the identified SEBCs by applying a super-imposition test, the very object and purpose of reservation, intended for the socially backward class would reach only a cul-de-sac and the identified SEBCs would be left in a maze. In my considered opinion, it will be a futile exercise for the courts to find out the reasons in support of the division between and among the group of SEBCs and make rule therefor, for multiple reasons, a few of which which I am enumerating hereunder. (1) The division among the identified and ascertained SEBCs having common characteristics and attributes - the primary of which being the potential social backwardness, as 'poorer sections' and 'non-poorer sections' on the anvil of economic criterion or by application of a superimposition test of relative poverty is impermissible as being opposed to the scope and intent of Article 16(4). (2) If this apex Court puts its seal of approval to para 2(i) of the second OM whereunder a section of the people under the label of 'poorer sections' is carved out from among the SEBCs, it becomes a law declared by this Court for the entire nation under Article 141 of the Constitution and is binding on all the Courts within the territory of India and that the decision of this Court on a constitutional question cannot be over-ridden except by the constitutionally recognised norms. When such is the legal position, the law so declared should be capable of being effectively implemented in its applicability to some rare or freakish cases. The law should not be susceptible of being abused or misused and leave scope for manipulation which can remain undetected. If the law so declared by this Court is indecisive and leaves perceivable loopholes, by the aid of which one can defeat or circumvent or nullify that law by adopting an insidious, tricky, fraudulent and strategic device to suit one's purpose then that law will become otiose and remain as a dead letter. I would like to indicate the various reasons in support of my opinion that this process of elimination or exclusion of a section of people from and out of the same category of SEBCs cannot be sustained leave apart the authority of the Government to take any decision and formulate its policy in its discretion or opinion provided that the policy is not violative of any constitutional or legal provisions or that discretion or opinion is not vitiated by non-application of mind, arbitrariness, formulation of collateral grounds or consideration of irrelevant and extraneous material etc. (a) If the annual gross income of a government servant derived from all his sources during a financial year is taken as a test for identifying to 'poorer sections', that test could be defeated by reducing the income below

the ceiling limit by a Government servant voluntarily going on leave on loss of pay for few months during that financial year so that he could bring his annual income within the ceiling limit and claim the benefit of reservation meant fo r 'poorer sections'. Similarly, a person owning extensive land also may lay a portion of his land fallow in any particular year or dispose of a portion of his land so as to bring his agricultural income below the ceiling limit so that he may fall within the category of 'poorer sections'. (b) The fluctuating fortunes or misfortunes also will play an important role in determining whether one gets within the area of 'poorer sections' or gets out of it. (c) Take a case wherein there are two brothers belonging to the same family of 'backward class' of whom one is employed in Government service and another is privately employed or has chosen some other profession. The annual income of the Government employee if slightly exceeds the ceiling limit, his children will not fall within the category of 'poorer sections' whereas the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit. (d) Among the pensioners also, the above anomaly will prevail as pointed out in Janaki Prasad. (e) Any member of SEBCs who is in Government job and is on the verge of his superannuation and whose income exceeds the ceiling limit, will go out of the purview of 'poorer sections' but in the next financial year, he may get into the 'poorer sections' if his total pensionary benefits fall within the ceiling limit. (f) A person who is within the definition of 'poorer sections' may suddenly go out of its purview by any intervening fortuitous circumstances such as getting a marital alliance in a rich family or by obtaining any wind-fall wealth. (g) If poverty test is made applicable for identifying the 'poorer sections' then in a given case wherein a person is socially oppressed and educationally backward but economically slightly advanced in a particular year, he will be deprived of getting the preferential treatment. The above are only by way of illustrations, though this type can be multiplied, for the purpose of showing that a person can voluntarily reduce his income and thereby circumvent the declared law of this Court. In all the above illustrations, enumerated as (a) to (g), the chance of "getting into or getting out of the definition of 'poorer sections' will be like a see-saw depending upon the fluctuating fortunes or misfortunes. (3) The income-test for ascertaining poverty may severally suffer from the vice of corruption and also encourage patronage and nepotism. (4) When the Government has accepted and approved the lists of SEBCs, identified by the test of social backwardness, educational backwardness and economic backwardness which lists are annexed to the Report, there is no justification by dividing the SEBCs into two groups, thereby allowing one section to fully enjoy the benefits and another on a condition only if there are unfilled vacancies. (5) The elimination of a section of SEBCs by putting an arbitrary and unnecessary unjustified. This process of elimination or exclusion of a section of SEBCs will be tentamount to pushing those persons into the arena of open competition along with the forward class if there are no unfilled vacancies out of the total 27% meant for SEBCs. This will cause an irretrievable injustice to all the non-poorer sections though they are also theoretically declared as SEBCs. (6) The second OM providing a scanning test is neither feasible nor practicable. It will be perceptible

and effectual only if the entire identified backward class enjoys the benefit of reservation. (7) The proposed 'means test' is highly impressionistic test, the result of which is likely to be influenced by many uncertain and imponderable facts. (8) It may theoretically sound well but in practice attempts may be made in a underhanded way to get round the problem. 348. What I have indicated above is only the tip of the iceberg and more of it is likely to surface at the time when any scanning process and super-imposition test are put into practice. 349. In this connection, I would like to mention the views of the Tamil Nadu Government as expressed by the Chief Minister of Tamil Nadu in the Chief Ministers' Conference held in New Delhi (already referred to) stating that the application of income limit on reservation will exclude those people whose income is above the 'cut-off limit and literally, it means that they will come under the open competition quota and if caste is not the sole criterion, income limit cannot also be the decisive and determining factor for social backwardness and that the exclusion of certain people from the benefits of reservation by the application of economic criterion will not bring the desired effect for the advancement and improvement of the backward classes who have suffered deprivation from the time immemorial. 350. Reference also may, be made to Balaji wherein it has been ruled that backward classes cannot be further classified into backward and more backward and that such a sub-classification "does not appear to be justified under Article 15(4)". This view, in my opinion, can be equally applied even for sub-classification under Article 16(4). 351. Arguing with the above view of Balaji, I hold that the further sub-classification as 'poorer sections' out of the ascertained SEBCs after accepting that group in which the common thread of social backwardness runs through as an identifiable unit within the meaning of the expression 'backward class', is violative of Article 16(4). 352. Of course, in Vasanth Kumar, Chinnappa Reddy, J. in his separate judgment has taken a slightly contrary view, holding that there can be classification for providing some reservation to the more backward classes compared to little more advanced backward classes. This view is expressed only by the learned Judge (Chinnappa Reddy, J.) on which view other Judges of that Bench have not expressed any opinion. However, it appears that the learned Judge has not said that the entire reservation should go only to the more backward classes but only some percentage of reservation should be provided and earmarked exclusively for the more backward classes. 353. In the present case, the entire reservation of 27 per cent is given firstly to be enjoyed by the 'poorer sections' and only the unfilled vacancies, if any, can be availed of by others. As I have already held, the view expressed by the Constitution Bench in Balaji is more acceptable to me. 354. It may not be out of place to mention here that in Tamil Nadu, based on one of the recommendations of the First Backward Classes Commission constituted in 1969 - known as 'Sattanatham Commission' - the Government issued orders in G.O. Ms. No. 1156, Social Welfare Department, dated 2nd July 1979, superimposing the income ceiling of Rs. 9,000 per annum as additional criterion for the backward classes to be eligible for reservation for admission in educational institutions and recruitment to public services. This order was challenged before the High Court but the High Court by 2:1 upheld the G.O. However, the order

provoked a considerable volume of public criticism. After an All-party meet, the Government in G.O. Ms. No. 72, Social Welfare Department dated 1st February 1980 revoked their orders and the position as it stood prior to 2nd July 1979 was restored. Simultaneously, by another G.O. Ms. No. 73, Social Welfare Department dated 1st February 1980, the Government raised the percentage of reservation for backward classes from 31 per cent to 50 per cent commensurate with the population of the backward classes in the State. Both the GOs i.e. G.O. Ms. No. 72 and 73 dated 1st February 1980 were challenged in the Supreme Court in Writ Petition Nos. 4995-4997 of 1980 along with W.P. No. 402 of 1981. 355. The Constitution Bench of this Court by its order dated 14th October 1980 directed the State Government to appoint another Commission to review the then existing enumeration and classification of backward classes and to take necessary steps for identifying the backward classes in the light of the report of the said Commission and that both the GOs"shall lapse after January 1, 1985". However, by order dated 5.5.1981, the above writ petitions were directed to be listed alongwith W.P. Nos. 1297-98/79 and 1497/79 (Vasanth Kumar). Thereafter, a number of CMPs in the writ petitions for extension of time for implementation of this Court's directions were filed. This Court periodically extended the time upto July 1985. A CMP for further extension of time was dismissed on 23.7.1985 by a three-Judges Bench of this Court since the Judgment in Vasanth Kumar involving the same question was delivered on 8.5.1985. Vide (1) Orders of Supreme Court in W.P. Nos. 4995-97/1980 and W.P. No. 402/1981, (2) Orders of High Court of Madras in W.P. Nos. 3069, 3292 and 3436/79 dated 20th August 1979 and (3) Paragraph 1.01 of Chapter I of the Report of the Tamil Nadu Second Backward Classes Commission (popularly known as Ambasankar Commission). 356. We have referred to the above facts for the purpose of showing that the fixation of ceiling limit on economic criterion was not successful and that for identifying the 'weaker sections', ceiling limit is not the proper test, once the backward class is identified and ascertained. 357. Further, it is clear for the afore-mentioned reasons that the Executive while making the division of sub-classification has not properly applied its mind to various factors, indicated above which may ultimately defeat the very purpose of the division or sub-classification. In that view, para 2(i) not only becomes constitutionally invalid but also suffers from the vice of non-application of mind and arbitrariness. 358. For the fermentation reason, I am of the firm view that the division made in the amended OM dividing a section of the people as 'poorer sections' and leaving the remaining as 'non-poorer sections' on economic criterion from and same unit of identified and ascertained SEBCs, having common characteristics the primary of which is the social backwardness as listed in the report of the Commission, is not permissible and valid and such a division or sub-classification is liable to be struck down as being violative of Clause (4) of Article 16 of the Constitution. 359. A further submission has been made stating that the benefits of reservation are often snatched away or eaten up by top creamy layer of socially advanced backward class who consequent upon their social development no longer suffer from the vice of social backwardness and who are in no way handicapped and who by their high professional qualifica-

tions occupy upper echelons in the public services and therefore, the children of those socially advanced section of the people, termed as 'creamy layer' should be completely removed from the lists of 'Backward Classes' and they should not be allowed to compete with the children of socially under-privileged people and avail the quota of reservation. By way of illustration it is said that if a member of a designated backward class holds a high post by getting through the qualifying examinations of IAS, IFS, IPS or any other All India Service, there can be no justification in extending the benefit of reservation to their children, because the social status is will advanced and they no longer suffer from the grip of poverty. 360. On the same analogy, it has been urged that the children of other professionals such as Doctors, Engineers, Lawyers etc. etc. also should not be given the benefit of reservation, since in such cases, they are not socially handicapped. 361. No doubt the above argument on the face of it appears to be attractive and reasonable. But the question is whether those individuals belonging to any particular caste, community or group which satisfies the test of backward class should be segregated, picked up and thrown over night out of the arena of backward class. One should not lose sight of the fact that the reservation of appointments or posts in favour of 'any backward class of citizens' in the Central Government services have not yet been put in practice in spite of the impugned OMs. It is after 42 years since the advent of our Constitution, the Government is taking the first step to implement this scheme of reservation for OBCs under Article 16(4). In fact, some of the States have not even introduced policy of reservation in the matters of public employment in favour of OBCs. 362. In opposition, it is said that only a very minimal percentage of BCs have stepped into All India Civil Services or any other public services by competing in the mainstream along with the candidates of advanced classes despite the fact that their legs are fettered by social backwardness and hence it would be very uncharitable to suddenly deprive their children of the benefit of reservation under Article 16(4) merely on the ground that their parents have entered into Government services especially when those children are otherwise entitled to the preferential treatment by falling within the definition of 'backward class'. It is further stressed that those children so long as they are wearing the diaper of social backwardness should be given sufficient time till the Government realises on reviews that they are completely free from the shackles of social backwardness and have equated themselves to keep pace with the advanced classes. There are a few decisions of this Court which I have already referred to, holding the view that even if a few individuals in a particular caste, community or group are socially and educationaly above the general average, neither that caste nor that community or group can be held as not being socially backward. (Vide Balaram). 363. In the counter affidavit dated 30th October 1990 filed by the Union of India sworn by the Additional Secretary to the Government of India in the Ministry of Welfare, the following averments with statistical figures are given: Based on the replies furnished by 30 Central Ministries and Departments and 31 attached and subordinate offices and public sector undertakings under the administrative control of 14 Ministries (which may be treated as sufficiently representative of the total picture) the Commission arrived at the following

figures:- Category of Total number Percentage Percentage Employees of employees of SC/ST of OBCs All classes 15,71,638 18.72 12.55 (Extracted from page 92 of First Part of Mandal Commission Report) 364. The above figures clearly show that the SEBCs are inadequately represented in the Services of the Government of India and that the SCs and STs in spite of reservation have not yet been able to secure representation commensurate with the percentage of reservation provided to them. 365. Meeting an almost similar argument that the 'creamy layers' are snatching away the benefits of reservation, Chinnappa Reddy, J. observed in Vasanth Kumar to the following effect: One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunes among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad? 366. The above observation, in my view, is an apt reply to such a criticism with which I am in full agreement. To quote Krishna Iyer, J."For every cause there is a martyr". I am also reminded of an adage,"One swallow does not make the summer." 367. Reverting to the case on hand, the O.M. does not speak of any 'creamy layer test'. It cannot be said by any stretch of imagination that the Government was not aware of some few individuals having become both socially and educationally above the general average and entered in the All India Services or any other Civil Services. Despite the above fact, the Government has accepted the listed groups of SEBCs as annexed to the Report and it has not thought it prudent to eliminate those individuals. Therefore, in such circumstances, I have my own doubt whether the judicial supremacy can work in the broad area of social policy or in the great vortex of ideological and philosophical decisions directing the exclusion of any section of the people from the accepted list of OBCs on the mere ground that they are all 'creamy layers' which expression is to be tested with reference to various factors or make suggestions for exclusion of any section of the people who are otherwise entitled for the benefit of reservation in the decision of the Government so long that decision does not suffer from any constitutional infirmity. 368. Added to the above submission, it has been urged that some pseudo communities have smuggled into the backward classes and they should be removed from the list of OBCs, lest those communities would be eating away the major portion of the reservation which is meant only for the true and genuine backward classes. There cannot be any dispute that such pseudo communities should be weeded out from the list of backward classes but that exercise must be done only by the Government on proper verification. 369. The identification of the backward classes by the Mandal Commission is not with a seal of perpetual finality but on the other hand it is subjected to reviewability by the Government. The Mandal

Commission itself in paragraph 13.40 in Chapter XIII has suggested that "the entire scheme should be reviewed after 20 years." Mr. Jethmalani suggested that the list may be reviewed at the interval of 10 years. There are judicial pronouncements to the effect that Government has got the right of reviewability. There cannot be any controversy indeed there is none - that the Government which is certainly interested in the maintenance of standards of its administration, possesses and retains its sovereign authority to adopt general regulatory measures within the consitutional framework by reviewing any of its schemes or policies. The interval of the period at which the review is to be held is within the authority and discretion of the Government, but of course subject to the constitutional parameters and well settled principles of judicial review. Therefore, it is for the Government to review the lists at any point of time and take a decision for the exclusion of any pseudo community or caste smuggled into the backward class or for inclusion of any other community which in the opinion of the Government suffers from social backwardness. 370. It may be recalled that the petitioner herself in W.P. No. 930 of 1990 has stated,"...the Courts cannot sit as a super legislature to determine and decide the social issue as to who are socially and educationally backward...." 371. It will be appropriate to refer to an observation of the five-Judges Bench of this Court (which heard initially these matters) in its order dated 8th August 1991 stating: The validity of the Mandal Commission Report as such is not in issue before us.... 372. A three-Judges Bench of this Court comprising of Ranganath Mishra, K.N. Singh, M.H. Kania, JJ. (as the learned Chief Justices then were) has observed in their order dated 21st September 1990 that the implementation of executive decisions is in the hands of the Government of the day but constitutional validity of such action is a matter for Court's examination. 373. Thereafter, a Constitution Bench of this Court by their order dated 1st October 1990 explained the earlier order stating "Three out of us sitting as a Bench on the 21st September 1990 made an order after hearing parties wherein we had indicated that the decision to implement three aspects of the recommendations of the Mandal Commission was a political one and ordinarily the Court would not interfere with such a decision." 374. Therefore, when this Court is not called upon to lay a test or give any guideline as to who are all to be eliminated from the listed groups of the Report, there in no necessity to lay any test much less 'creamy layer test'. I find no grey area to be clarified and consequently hold that what one is not free to do directly cannot do it indirectly by adopting any means. Therefore, the argument of 'creamy layer' pales into insignificance. 375. Further I hold that all SEBCs brought in the lists of the Commission which have been accepted and approved by the Government should be given equal opportunity in availing the benefits of the 27 per cent reservation. In other words, the entire 27% of the vacancies in civil posts and services under the Government of India shall be reserved and extended to all the SEBCs. 376. In fact, the first OM dated 13th August 1990 does not make any division or sub-classification as in the amended OM. Para 2(i) of the first OM reads, "27% of the vacancies in civil posts and services in the Government of India shall be reserved for SEBCs." In reading para 2 (i) of the first OM in juxtaposition with para 2(i) of the amended OM, no

basic difference in the policies of the two Government is spelt out; in that both the impugned OMs have made 27% reservation in civil posts and services under the Government of India for SEBCs" on the basis of the recommendations of the Second Backward Classes Commission (Mandal Report). The only difference between the two impugned OMs is that in the amended OM a division among the SEBCs is made as 'poorer sections' and others that the 'poorer sections' is firstly allowed to avail the benefit of reservation of only the unfilled vacancies. Therefore, by striking down para 2(i) of the amended OM as unconstitutional, I hold that there is no legal impediment in implementing para 2(i) of the first OM dated 13th August 1990 which has not been supersed, rescinded or repealed but "deemed to have been amended." 377. Before parting with this aspect of the matter, I would like to express my view that the 'poorer sections' of the SEBCs may be provided with various kinds of concessions and facilities such as educational concessions, special coaching facilities, financial assistance, relaxation of upper age limit, increase of number of attempts etc. for government services with a view to give them equal opportunity to compete and keep pace with the advanced sections of the people. 378. Whether 10% reservation in favour of 'other economically backward section' is permissible under Article 16? 379. Now I shall pass on to paragraph 2(ii) of the amended OM which reveals that 10 per cent of the vacancies in civil posts and services under the 'Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation. 380. This reservation of 10 per cent cannot be held to be constitutionally valid as concluded by my learned brother B.P. Jeewan Reddy, J. for the reasons, mentioned in paragraph 115 of his judgment. I am in full agreement with his conclusion on this issue of 10% reservation. 381. Whether Article 16(4) contemplates reservation in the matter of promotion? 382. In Mohan Kumar Singhania v. Union of India [1992] Supp. 1 SCC 594, a three-Judges Bench of this Court to which I was a party has taken a view that once candidates even from reserved communities are allocated and appointed to a Service based on their ranks and performance and brought under the one and same stream of category, then they too have to be treated on par with all other selected candidates and there cannot be any question of preferential treatment at that stage on the ground that they belong to reserved community though they may be entitled for all other statutory benefits such as the relaxation of age, the reservation etc. Reservation referred to in that context is referable to the reservation at the initial stage or the entry point as could be gathered from that judgment. 383. It may be recalled, in this connection, the view expressed by Chief Justice Ray in Thomas that "efficiency has been kept in view and not sacrificed". 384. Hence, I share the view of my learned brother B.P. Jeevan Reddy, J. holding that "Article 16(4) does not permit provision for reservation in the matter of promotions and that this rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis" and the direction given by him that wherever reservations are provided in the matter of promotion such reservation may continue in operation for a period of five years from this day. 385. In Summation (1) Article 16(4) of the Constitu-

tion is neither an exception nor a proviso to Article 16(1). It is exhaustive of all the reservations that can be made in favour of backward class of citizens. It has an over-riding effect on Article 16(1) and (2). (2) No Reservation can be made under Article 16(4) for classes other than backward classes. But under Article 16(1), reservation can be made for classes, not covered by Article 16(4). (3) The expression, 'backward class of citizens' occurring in Article 16(4) is neither defined nor explained in the Constitution. However, the backward class or classes can certainly be identified in Hindu society with reference to castes along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc. and in communities where caste is not recognised by the above recognised and accepted criteria except caste criterion. (4) In the process of identification of backward class of citizens and under Article 16(4) among Hindus, caste is a primary criterion or a dominant factor though it is not the sole criterion. (5) Any provision under Article 16(4) is not necessarily to be made by the Parliament or Legislature. Such a provision could also be made by an Executive order. (6) The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended. (7) The provision for reservation of appointments or posts in favour of any backward class of citizens is a matter of policy of the Government, of course subject to the constitutional parameters and well settled principle of judicial review. (8) The expression 'poorer sections' mentioned in para 2 (i) of the amended Office Memorandum of 1991 denotes a division among SEBCs on economic criterion. Therefore, no division or sub-classification as 'poorer sections' and other backward class (non poorer sections) out of the identified SEBCs can be made by application of 'means test' based on economic criterion. Such a division in the same identified and ascertained unit consisting of SEBCs having common characteristics and attributes, the primary characteristic or attribute being the social backwardness is violative of Clause (4) of Article 16 of the Constitution. Hence, the division of the SEBCs as 'poorer sections' and others, brought out in para 2(i) of the impugned amended Office Memorandum dated 25th September 1991 is constitutionally invalid and impermissible. Accordingly, para 2(i) of the said amended Office Memorandum is struck down. (9) No maximum ceiling of reservation can be fixed under Article 16(4) of the Constitution for reservation of appointments or posts in favour of any backward class of citizens "in the Services under the State". The decisions fixing the percentage of reservation only up to the maximum of 50% are unsustainable. (10) As regards the reservation in the matter of promotion under Article 16(4), I am in agreement with conclusion No. (7) made in paragraph 121 in Part VII of the judgment of my learned brother. B.P. Jeevan Reddy, J.. (11) I also agree with conclusion No. (8) of paragraph 121 of the judgment of my learned brother, B.P. Jeevan Reddy, J. qua the exception to the rule of reservation to certain Services and posts. (12) The reservation of 10% of the vacancies in civil posts and Services in favour of other economically backward sections of the people who are not covered by any other scheme of the reservation as mentioned in para 2(ii) of the impugned amended Officer Memorandum dated 25th September 1991 is consti-

tutionally invalid and it is accordingly struck down. In this regard, I am also in agreement with conclusion No. (11) of paragraph 121 of the judgment of my learned brother, B.P. Jeevan Reddy, J. (13) No section of the SEBCs can be excluded on the ground of creamy layer till the Government - Central and State - takes a decision in this regard on a review on the recommendations of a Commission or a Committee to be appointed by the Government. (14) Para 2(i) and (ii) of the amended Office Memorandum dated 25th September 1991 for the reasons given in my judgment and the conclusions drawn above, are struck down as being violative of Article 16(4). (15) The impugned Office Memorandum dated 13th August 1990 is held valid and enforceable. So there is no legal impediment in immediately enforcing and implementing this first Office Memorandum of 1990. (16) In Writ Petition No. 1094 of 1991 (Sreenarayana Dharma Paripalana Yogam v. Union of India), there is a prayer (prayer 'b'), inter alia, for issuance of a writ of mandamus directing the respondent to implement the impugned unamended office memorandum dated 13th August 1990. In the light of my conclusions, striking down the amended office memorandum dated 25th September 1991, I direct the Union of India to immediately implement the unamended office memorandum dated 13th August 1990. (17) The Government of India and the State Governments have to create a permanent machinery either by way of a Commission or a Committee within a reasonable time for examining the requests of inclusion or exclusion of any caste, community or group of persons on the advice of such Commission or Committee, as the case may be, and also for examining the exclusion of any pseudo community if smuggled into the list of OBCs. The creation of such a machinery in the form of a Commission or Committee does not stand in the way of immediate implementation of the office memorandum dated 13.8.1990 and the purpose of creating such machinery is for future guidance. (18) I am also of the same view of my learned brother, B.P. Jeevan Reddy, J. that it is not necessary to send the matters back to the Constitution Bench of five-Judges. 386. In the result, for the reasons mentioned in my judgment and the conclusions drawn in the summation, the writ petition No. 1094 of 1991 is partly allowed to the extent indicated above and all other Writ Petitions, Transferred Cases and Interlocutory Applications are disposed of accordingly. No costs. Dr. T.K. Thommen, J. 387. The petitioners challenge O.M. No. 36012/31/90-Estt(SCT) dated 13th August, 1990 as amended by O.M. No. 36012/31/90-Estt(SCT) dated 25th September, 1991 providing in civil posts and services under the Government of India for reservation of 27% of the vacancies for the Socially and Educationally Backward Classes (SEBCs) and 10% of the vacancies for other economically backward sections of the people. The Office Memorandum dated 13th August, 1990, in so far as it is material, reads:- ... 2(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC. (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment.... (iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standard prescribed for the general candidates shall not be adjusted against the reservation quota of 27%. (iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the

report of the Mandal Commission and the State Government's lists. A list of such castes/communities is being issued separately. (v)... 388. The amended Office Memorandum dated 25th September, 1991 provides:- .... 2(i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates. (ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation. (iii) 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. ... 389. The reservation postulated in these orders for the socially and educationally backward classes and also for the economically backward sections of the people in the Central Government services to the extent of 27% and 10% respectively is in addition to the reservation already made for the Scheduled Castes and the Scheduled Tribes to the extent of 22.5%. 390. These orders are made pursuant to the Report submitted by the Backward Classes Commission appointed by the President of India under Article 340 of the Constitution. This Report is generally known by the name of the Chairman of the Commission, the Late B.P. Mandal. The petitioners submit that the Report leading to the impugned Government Orders is not based on any scientific or objective study of backwardness in the country, and any attempt to make reservation on the basis of the data supplied in the Report is irrational, unconstitutional and invalid. They say that the Report is conceived in caste prejudices and motivated by caste hatred. The Report does not address itself to a proper identification of true backwardness for the redressal of which the Constitution permits reservation by quota for the backward classes of citizens to the exclusion of all other persons. On the other hand, the sole criterion on the basis of which backwardness is purportedly identified is caste and nothing but caste. Any order resulting in reservation or other affirmative action on the basis of the wrong conclusions drawn by the Commission is bound to be the very antithesis of equality. 391. The respondents, supporting the impugned Government orders, contend that the Constitution guarantees liberty, equality and fraternity for all classes of people irrespective of their religion, community, caste, occupation, residence or the like. Every citizen is entitled to equal opportunities. For centuries, large sections of our countrymen have been discriminated against on account of their birth. As a result of such inequity, they have been steeped in poverty, ignorance and squalor. To alleviate their misery and elevate them to positions of equality with the more fortunate, affluent and enlightened sections of our countrymen, the Founding Fathers of the Constitution made special provisions for their uplift. These provisions are meant to protect the truly backward people of this country, namely, members of the Scheduled Castes and Scheduled Tribes and other backward classes. They contend that the Mandal Report is a scientific and serious study rationally addressed to the problem of backwardness by identifying it where it

is most acutely felt and loudly present, namely, amongst the lowest of the lowly citizens of this country. Those are the members of the low castes as traditionally recognised and identified by the State and Central Government. The various classes of people belonging to such castes are identified as socially, educationally and economically backward and it is in respect of those people that the Government have made the impugned reservations. 392. The 'indicators' or 'criteria' adopted in the Mandal Report are broadly grouped as social, educational and economic on the basis of castes/classes. The Commission has identified classes with castes and backwardness with particular castes. Castes which are socially, educationally and economically backward are characterised as backward classes entitled to the benefit of reservation. Persons are grouped on the basis of caste either because they are members of it by reason of their being Hindus or because they were members of it in the past prior to their conversion to other religions. Identification of backwardness is thus made with reference to the present or past caste affiliations of the people. The Report says:- 12.4. In fact, caste being the basic unit of social organisation of Hindu Society, castes are the only readily and clearly 'recognisable and persistent collectivities'. 12.6. ... the Commission has also applied some other tests like stigmas of low occupation, criminality, nomadism, beggary and untouchability to identify social backwardness. Inadequate representation in public services was taken as another important test. 393. In regard to non-Hindus, the Report says:- 12.11 There is no doubt that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu communities. Though caste system is peculiar to Hindu society yet, in actual practice, it also pervades the non-Hindu communities in India in varying degrees... even after conversion, the ex-Hindus carried with them their deeply ingrained ideas of social hierarchy and stratification.... 12.14... even after conversion, the lower caste converts were continued to be treated as Harijans by all sections of the society.... 12.18 ... the Commission has evolved the following rough and ready criteria for identifying non-Hindu OBCs:- (i) All untouchables converted to any non-Hindu religion; and (ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples : Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.). The Report has thus treated all persons who belong, or who had once belonged, to what had been regarded as untouchable or other traditionally backward caste or communities or who belong to certain low occupations as socially, educationally and economically backward. 394. The particulars of the Mandal Report and other material relied on by the Government in making the impugned orders do not directly arise for our consideration at this juncture as this Bench has been constituted to examine the concept of equality of opportunity in matters of public employment, as enshrined in Article 16 and other provisions of the Constitution, 'and settle the legal position relating to reservation' and thus lay down the guideline by which the validity and reasonableness of Government Orders on reservation can be tested in appropriate cases. 395. The Concept of Reservation: The fundamental question is, what is the raison d'etre of reservation and what are its limits. The Constitution per-

mits the State to adopt such affirmative action as it deems necessary to uplift the backward classes of citizens to levels of equality with the rest of our countrymen. The backward classes of citizens have been in the past denied access to Government services on account of their inability to compete effectively in open selections on the basis of merits. It is, therefore, open to the Government to reserve a certain number of seats in places of learning and public services in favour of the Scheduled Castes and Scheduled Tribes and other backward classes to the exclusion of all others, irrespective of merits. The impugned Government orders, have made reservation by setting aside quotas in Government services exclusively for backward classes of candidates. 396. Referring to the concept of equality of opportunity in public employment, as embodied in Article 10 of the Draft Constitution, which finally emerged as Article 16 of the Constitution, and the conflicting claims of various communities for representation in public administration, Dr. Ambedkar emphatically declared that reservation should be confined to 'a minority of seats', lest the very concept of equality should be destroyed. In view of its great importance, the full text of this speech delivered in the Constituent Assembly on the point is appended to this judgment. But I shall now read a few passages from it. Dr. Ambedkar stated: ... 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 'poorer look- in' so to say into the administration.... Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, nemely, that there shall be an equality of opportunity....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... 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.... 397. Constituent Assembly Debates, Vol. 7, pp. 701-702 (1948-49). (emphasis supplied) These words embody the raison d'etre of reservation and its limitations. Reservation is one of the measures adopted by the Constitution to remedy the continuing evil effects of prior inequities stemming form discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness. Reservation is meant to be addressed to the present social, educational and economic backwardness caused by purposeful societal discrimination. To attack the continuing ill effects and perpetuation of such injustice, the Constitution permits and empowers the State to adopt corrective devices even when they have discriminatory and exclusionary effects. Any such measure, in so far as one group is preferred to the exclusion of another, must necessarily be narrowly tailored to the achievement of the fundamental constitutional goal. 398. What the Constitution permits is the adoption of suitable and appropriate measures to correct the continuing evil effects of prior discrimination. Over-inclusiveness in such measures by unduly widening the net of reservation to unjustifiably

protect the ill deserved at the expense of the others would result in invidious discrimination offending the Constitutional objective. Benign classification for affirmative action by reservation must stay strictly within the narrow bounds of remedial actions. Any such programme must be consistent with the fundamental objective of equality. Classes of people saddled with disabilities rooted in history of purposeful unequal treatment and consequently relegated to social, educational, economic and political power-lessness particularly qualify to demand the extraordinary and special protection of reservation. 399. Reservation is meant to remedy the handicap of prior discrimination impeding the access of classes of people to public administration. It is for the State to determine whether the evil effects of inequities stemming from prior discrimination against classes of people have resulted in their being reduced to positions of backwardness and consequent under representation in public administration. Reservation is a remedy or a cure for the ill effects of historical discrimination. 400. While affirmative action programmes by preferential treatment short of reservation in favour of disadvantaged classes of citizens may be justified as benign redressal measures based on valid classification, the more positive affirmative action adopting reservation by quota or other 'set aside' measures or goals in favour of certain classes of citizens to the exclusion of others most be narrowly tailored and strictly addressed to the problem which is sought to be remedied by the Constitution. Any such action by the State must necessarily be subjected to periodic administrative review by specially constituted authorities so as to guarantee that such policies and actions are applied correctly and strictly to permitted constitutional ends. 4.1. Reservation is not an end in itself. It is a means to achieve equality. The policy of reservation adopted to achieve that end must, therefore, be consistent with the objective in view. Reservation must not outlast its constitutional object, and must not allow a vested interest to develop and perpetuate itself. There will be no need for reservation or preferential treatment once equality is achieved. Achievement and preservation of equality for all classes of people, irrespective of their birth, creed, faith or language is one on the noble ends to which the Constitution is dedicated. Every reservation founded on benign discrimination, and justifiably adopted to achieve the constitutional mandate of equality, must necessarily be a transient passage to that end. It is temporary in concept, limited in duration, conditional in application and specific in object. Reservation must contain within itself the seeds of its termination. Any attempt to perpetuate reservation and upset the constitutional mandate of equality is destructive of liberty and fraternity and all the basic values enshrined in the Constitution. A balance has to be maintained between the competing values and the rival claims and interests so as to achieve equality and freedom for all. 401. The makers of the Constitution were fully conscious of the unfortunate position of the Scheduled Castes and Scheduled Tribes. To them equality, liberty and fraternity are but a dream; an ideal guaranteed by the law, but far too distant to reach; far too illusory to touch. These backward people and others in like positions of helplessness are the favoured children of the Constitution. It is for them that ameliorative and remedial measures are adopted to achieve the end of equality. To permit those who are not intended to

be so specially protected to compete for reservation is to dilute the protection and defeat the very constitutional aim. 402. The victims of prior injustice are the special favourites of the laws. Their plight is a shameful scar on the national conscience. It is a constitutional command that prompt measures are adopted by the State for the promotion of these unfortunate classes of people specially to positions of comparative enlightement, culture, knowledge, influence, affluence and prestige so as to place them on levels of equality with the more fortunate of our countrymen. 403. Reservation must one day become unnecessary and a relic of an unfortunate past. Every such action must be a transient self-liquidating programme. That is the hope and dream cherished by the Constitution Makers and that is the end to which the State has to address itself in making special provisions for the chosen classes of people for special constitutional protection, so that "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us"; Per Justice T. Marshall, Regents of the University of California v. Allan Bakke 438 US 265, 57 L Ed. 2d 750. See also H. Earl Fullilove v. Philip M. Klutznick 448 US 448, 65 L Ed. 2d 902; Metro Broadcasting Inc. v. Federal Communications Commission 58 I.W. 5053 (Decided on 27.6.1990); Oliver Brown v. Board of Education of Topeka 347 US 483, 98 L Ed. 2d 873; City of Richmond v. J.A. Croson Co. 488 US 469; Wendy Wygant v. Jackson Board of Education 476 US 267, 90 L Ed. 2d 260. 404. Reservation under the Constitution: The Constitution seeks to secure to all its citizens Justice, Liberty, Equality and Fraternity. These are the basic pillars on which the grand concept of India as a Sovereign Socialist Secular Democratic Republic rests. This splendour that is India rests on these magnificent concepts, each of which, supporting the other, upholds the dignity and freedom of the individual and secures the integrity and unity of the nation. 405. Equality is one of the magnificent cornerstones of Indian democracy: Smt. Indira Nehru Gandhi v. Shri Raj Narain ; Minerva Mills Ltd. and Ors. v. Union of India and Ors. ; Waman Rao and Ors. v. Union of India and Ors. . Article 14, 15 and 16 embody facets of the many-sided grandeur of equality; The General Manager, Southern Railway v. Rangachari ; State of Kerala and Anr. v. N.M. Thomas and Ors. . Article 14 prohibits the State from denying to any person within the territory of India equality before the law or the equal protection of the laws. All persons in like circumstances must be treated equally. Equality is between equals. It is parity of treatment under parity of conditions. The Constitution permits valid classification founded on an intelligible differentia distinguishing persons or things grouped together from others left out of the group. And such differentia must have a rational relation to the object sought to be achieved by the law: State of Kerala and Anr. v. N.M. Thomas and Ors. . See also Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors. [1959] SCR 279. 406. Any State action distinguishing classes of persons is liable to be condemned as invidious and unconstitutional unless justified as a benign classificational rationally addressed to the legitimate aim of qualitative and relative equality by means of affirmative action programmes of protective measures with a view to uplifting identified disadvantaged groups. All such measures must bear a reasonable

proportion between their aim and the means adopted and must terminate on accomplishment of their object. Any legitimate affirmative action rationally and reasonably administered is an aid to the attainment of equality. 407. In the words of Judge Tanaka of the International Court of Justice: .... The principle is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference. This is what was indicated by Aristotle as justitia commutative and justitia distributiva. ...the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. ....To treat unequal matters differently according to their inequality is not only permitted but required.... 408. South West Africa Cases (Second Phase), ICJ Rep. p. 6, 305-6. 409. While Article 14 prohibits the State from denying equality to any person, Articles 15 and 16 are specially concerned with citizens. Article 15(1) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth of them. Clause (4) of Article 15 provides that despite the prohibition contained in Article 29(2) against denial of admission to any citizen into any eduational institution maintained or aided by the State on grounds only of religion, race caste, language or any of them, the State is nevertheless free to make 'any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes'. 410. These provisions of Article 15 have been construed by this Court in a number of decisions. It is no longer in doubt that, in order to receive the protection of Clause (4), the classes of people in favour of whom special provisions are made should necessarily be both socially and educationally backward (and not either socially or educationally backward) or should have been notified by the President as the Scheduled Castes or the Scheduled Tribes in terms of Article 341 or 342. M.R. Balaji and Ors. v. State of Mysore [1963] Supp. 1 SCR 439. 411. Apart from the Scheduled Castes and the Scheduled Tribes to whom the special provisions, once notified by the President under Articles 341 and 342, undoubtedly apply, the other 'backward classes' of citizens to whom the special provisions can be extended are not merely backward but are socially and educationally so backward as to be comparable to the Scheduled Castes and the Scheduled Tribes. As stated by this Court in M.R. Balaji and Ors. v. State of Mysore [1963] Supp. 1 SCR 439 at 458:- ...the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes. See also Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr. ; Janki Prasad Parimoo and Ors. v. State of Jummu & Kashmir and Ors. ; State of Uttar Pradesh v. Pradip Tandon and Ors. ; State of Kerala and Anr. v. N.M. Thomas and Ors. ; State of Andhra Pradesh and Anr. v. P. Sagar and K.C. Vasanth Kumar and Anr. v. State of Karnataka [1985] Suppl. 1 SCR 352, 376. 412. In the Constituent Assembly during the discussions on draft Article 10 (Article 16), several members belonging to the Scheduled Castes or the Scheduled Tribes expressed serious apprehension that the expression 'backward'

was not precise and large sections of people who did not belong to the Scheduled Castes or the Scheduled Tribes were likely to claim the benefit of reservation at the expense of the truly backward classes of people. They sought clarification that the expression 'backward' applied only to the Scheduled Castes and the Scheduled Tribes. [See B. Shiva Rao, The Framing of India's Constitution - A Study (1968) pp. 198-199]. K.M. Munshi, in his reply to this criticism, pointed out: .... 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 word 'backward class' was the best possible term. When it is read with Article 301 it is perfectly clear that the word 'backward' signifies that class of people - does not matter whether you call them untouchables or touchables, belonging to this community or that, - a class of people who are so backward that special protection is required in the services and I see, no reason why any member should be apprehensive of regard to the word 'backward', (emphasis supplied) 413. Constituent Assembly Debates, Vol. 7, (1948-49), p. 697 414. Dr. Ambedkar, in his general reply to the debate on the point, stated thus: .... 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.... (emphasis supplied) 415. Constituent Assembly Debates, Vol. 7, (1948-49), p. 702. 416. The President of India issued the Constitution (Scheduled Castes) the Order, 1950 relating to States, and the Constitution (Scheduled Castes) Union Territories Order, 1951 relating to the Union Territories. Para (2) of the 1950 Order speaks of "castes, races or tribes which are to be deemed Scheduled Castes in the territories of the States mentioned in the Order". Para (3) of the Order (as amended by Act 108 of 1976 w.e.f. 27.7.1977) provides "notwithstanding anything contained in para (2), no person professing a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of the Scheduled Castes". See Manual of Election Law, Vol. I (1991), p. 141. 417. The 1950 Order of the President (as amended) shows that in the territories of the States mentioned in the Order no person who is not a Hindu or a Sikh or a Buddhist can be regarded as a member of the Scheduled Castes. Article 15(4) speaks of 'socially and educationally backward classes of citizens' and 'the Scheduled Castes and the Scheduled Tribes' while Article 16(4) speaks only of 'any backward class of citizens'. The 'backward class' mentioned in Article 16(4) is a synonym for the classes mentioned in Article 15(4); M.R. Balaji (supra);

Janki Prasad Parimoo and Ors. (supra). These two provisions read with the President's Order of 1950 (as amended in 1976) show that the benefit of Article 15(4) and Article 16(4) extends to the Scheduled Castes (which expression is confined to those professing the Hindu, the Sikh or the Buddhist religion) and the Scheduled Tribes as well as the backward classes of citizens who must necessarily be such backward classes of citizens who would have, but for their not professing the Hindu, the Sikh or the Buddhist religion, qualified to be notified as members of the Scheduled Castes. This means, all those depressed classes of citizens who suffered the odium and isolation of untouchability prior to their conversion to other religions and whose backwardness continued despite their conversion come within the expression 'backward classes of citizens' in Articles 15(4) and 16(4). Untouchability is a humiliating and shameful malady caused by deep-rooted prejudice which does not disappear with the change of faith. To say that it does would imply that faith is the ultimate cause of untouchability. This is, of course, not true. If backwardness caused by historical discrimination and its consequential disadvantages are the reasons for reservation the Constitution mandates that all backward classes of citizens, who are the victims of the continuing ill effects of prior discrimination, whatever be their faith or religion, or whether or not they profess any religion, receive the same benefits which are accorded to the Scheduled Castes and the Scheduled Tribes. Backward class is composed of persons whose backwardness is in degree and nature comparable to that of the Scheduled Castes and the Scheduled Tribes, whatever be their religion. There can be no doubt about the identity of the Scheduled Castes and the Scheduled Tribes. Nor can there be any doubt about the identity of backward classes other than the Scheduled Castes and the Scheduled Tribes, if this identifying characteristic, bearing the stamp of prior discrimination and its continuing ill effects, is borne in mind. M.R. Balaji and Ors. v. State of Mysore [1963] Supp. 1 SCR 439, 458; State of Uttar Pradesh v. Pradip Tandon and Ors. and Janki Prasad Parimoo and Ors. v. State of Jummu & Kashmir and Ors. . 418. What is sought to be identified is not caste, religion and the like, but social and educational backwardness, generally manifested by disabilities such as illiteracy, humiliating isolation, poverty, physical and mental degeneration, incurable diseases, etc. Living in abject poverty and squalor, engaged in demeaning occupations to keep body and soul together, and bereft of sanitation, medical aid and other facilities, these unfortunate classes of citizens bearing the badges of historical discrimination and naked exploitation are generally traceable in the midst of the lowest of the low classes euphemistically described as Harijans and in fact treated as untouchables. To deny them the constitutional protection of reservation solely by reason of change of faith or religion is to endanger the very concept of secularism and the raison d'etre of reservation. 419. No class of citizens can be classified as backward solely by reason of religion, race, caste, sex, descent, place of birth, residence or any of them. But any one or all of these factors mentioned in Article 15(1) or Article 16(2) can be taken into account along with other relevant factors in identifying classes of citizens who are socially and educationally backward. What is significant is that such identification should not be made solely with reference

to the criteria specified in Article 15(1) or Article 16(2), but with reference to the social and educational backwardness of classes of citizens. Referring to the words "socially and educationally backward classes of citizens" appearing in Article 15(4), this Court stated in State of Uttar Pradesh v. Pradip Tandon and Ors. : The expression 'classes of citizens' indicates a homogeneous section of the people who are grouped together because of certain likeliness and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place or birth will be the uniform element of common attributes to make them a class of citizens. It may, however, be true that backwardness is associated specially with people of a particular religion or race or caste or place of birth or residence or any other category mentioned in Article 15(1) or Article 16(2). In that event, any one or more of such criteria along with other relevant factors, may be taken into consideration to reach the conclusion as to social and educational backwardness. Hard and primitive living conditions in remote and inaccessible areas, where the inhabitants have neither the means of livelihood nor facilities for education, health service or other civic amenities, are some such relevant criteria, Janki Prasad Parimoo and Ors. v. State of Jummu & Kashmir and Ors. ; State of Andhra Pradesh and Anr. v. P. Sagar . 420. The city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases by diseases like leprosy, caught in the vicious grip of grinding penury, and making a meagre living by begging besides the towering mansions of affluence, transcend all barriers of religion, caste, race, etc. in their degradation, suffering and humiliation. They are the living monument of backwardness and a shameful reminder of our national indifference, a cruel betrayal of what the preamble to the Constitution proclaims. No matter what caste or religion they may claim, their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars - a common painful sight in our metropolis - entitles them to every kind of affirmative action to redeem themselves from the in equities of past and continuing discrimination. Rehabilitation and resettlement of these unfortunate victims of societal indifference and Governmental neglect and appropriate and urgent measures for State aided health care, education and special technical training for their progeny with a view to their employment in public services are the primary responsibility of a welfare State. These are the classes of people specially chosen by the law for prompt and effective affirmative action, not by reason of their caste or religion, but solely by reason of their backwardness in tracing which any relevant criterion is a useful tool. 421. In identifying backwardness, caste, religion, residence etc. are of course relevant factors, but none of them is a dominant or much less an indispensable factor. What is of ultimate relevance is the social and educational backwardness of a class of citiznes, whatever be their caste, religion, etc. 422. Identification of the backward classes for the purpose of reservation must be with reference to their social and educational backwardness resulting from the continuing ill effects of prior discrimination or exploitation; and not solely with reference to any one or more of the prohibited criteria mentioned in Article 15(1) or Article 16(2), although any one or more of such criteria may have

been the ultimate cause of such discrimination or exploitation and the resultant poverty and backwardness. As stated by this Court, in R. Chitralekha and Anr. v. State of Mysore and Ors. : ...the expression 'classes' is not synonymous with castes...caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong. 423. What is sought to be identified for the purpose of Article 15(4) or Article 16(4) is a socially and educationally backward class of citizens. A class means 'a homogeneous section of the people grouped together because of certain likeliness or common traits, and who are identifiable by some common attributes'. Triloki Nath and Anr. v. State of Jummu & Kashmir and Ors. [1969] 1 SCR 103, 105. They must be a class of people held together by the common link of backwardness and consequential disabilities. What binds them together is their social and educational backwardness, and not any one of the prohibited factors like religion, race or caste. What chains them, what incapacitates them, what distinguishes them, what qualifies them for favoured treatment of the law is their backwardness: their badges of proverty, disease, misery, ignorance and humiliation. It is conceivable that the entire caste is a backward class. In that event, they form a class of people for the special protection of Articles 15(4) and 16(4), not by reason of their caste, which is merely incidental, but by reason of their social and educational, backwardness which is identified to be the result of prior or continuing discrimination and its ill effects and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. It is also conceivable that a class of people may be identified as backward without regard to their caste, provided backwardness of the nature and degree mentioned above binds them as a class. M.R. Balaji (supra) at pp. 458, 474; Minor P. Rajendran v. State of Madras and Ors. ; State of Andhra Pradesh and Anr. v. P. Sagar ; A. Peeriakaruppan etc. v. State of Tamil Nadu and Ors. ; State of Andhra Pradesh and Ors. v. U.S.V. Balram Etc. ; Triloki Nath and Anr. v. State of Jammu & Kashmir and Ors. [1969] 1 SCR 639. True the discussions in the Constituent Assembly Debates centerd round caste and community. Even Dr. Ambedkar said, 'what are called backward classes are...nothing but a collection of certain castes'. That however cannot be conclusive for construing the expression as, the historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed may be taken into account, 'but not to interpret the Constitution', I.C. Golak Nath v. State of Punjab, . What emerged out of shared understanding by consensus was not backward caste but backward class, an expression of elasticity capable of expanding depending on the nature and purpose of its use. Motivation for use of expression 'backward class' might have come from a feeling to accommodate and benefit those who were deprived of entering into services due to social and economic conditions amongst Hindus. But what is being interpreted is a Constitution, a document, an instrument which is good not for a season or a session but for centuries during the course of which even the most stable society may undergo social, economic, political and scientific changes resulting in transformation of values. Are the values in the society same today as they were in 1950 or 1900? Words or expressions remain the same but its meaning and

application with passage of time changes. When the framers of the Constitution deliberately used an expression of expansive nature then as said by Justice Frenk Furter, 'they should be left to gather meaning from experience. For they relate to whole domain of social and economic fact and statesman who founded this nation knew too well that only a stagnant society remains unchanged'. This Court is being asked to interpret the provision in 1990. It cannot ignore the present by going into past. The law, even as sit honours the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right. Brown was 'law' in 1954, even though the 'separate but equal' doctrine had half a century of precedent and practice behind it. Continuity is essential to law as a whole, but the continuity must be creative. 640. 'Caste is a reality'. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services? Is the State entitled to practice it in any form for any purpose? Not under a Constitution wedded to secularism. State responsibility is to protect religion of different communities and not to practice it. Uplifting the backward class of citizens, promoting them socially and educationally taking care of weaker sections of society by special programmes, and policies is the primary concern of the State. It was visualised so by framers of the Constitution. But any claim of achieving these objectives through race, conscious measures or religiously packed programmes would be uncharitable to the noble and pious spirit of the founding fathers, legally impermissible and constitutionally ultra vires. Deriving inspiration from the American philosophy that, 'just as the race of students must be considered in determining whether a constitutional violation has occurred so also must race be considered in formulating remedy' without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 10(2) and 29(2) would be plunging our Nation into disaster not by what was adopted and promised as principle for governance for our people on our soil but from what has been laid down in a country which is yet far away from, 'equality of result' or 'substantive equality' so far Black or Brown are concerned. 641. Brown v. Board of Education (supra) which is considered as 'turning the clock back' on racial discrimination was given much after Venkataramana. Provisions like Article VI were introduced in America in 1964 only. When Bakke (supra) was delivered Justice Harshal lamented, 'this Court in the Civil Rights cases and Plessy v. Ferguson destroyed the movement towards complete equality. For almost a century no action was taken, and thus non-action was with the approval of the Court. Then we had Brown v. Board of Education and the Civil Rights Acts of Congress, followed by numerous affirmative action programmes. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California'. The lament was because of failure to bring the Negroes in the mainstream, 'in light of the sorry history of discrimination and its devastating impact on the lives of Negroes is to ensure that America will forever remain a divided society'. But to avoid any risk of keeping ours a divided society, the Constitution makers provided ample safeguards for Scheduled Castes and Scheduled Tribes (SC/ST) the only category of backward class which could be compared to the Negroes in America.

American philosophy developed by courts that discrimination having arisen due to race consciousness the remedy too should be race based, appears to have been inspired by our constitutional provisions which takes every precaution to remedy the caste related evil of SC/ST by caste based reservation. But the same can not be adopted for other backward classes as it would be distortion of constitutional interpretation by importing a concept which was deliberately and purposely avoided. Insistence, for claiming reservation for the remaining or for all others who were in so-called broader category of Sudras not because they Were really backward without any regard to social and economic conditions, would be unfair to history and unjust to society. What is constitutionally provided has to be adhered to in spirit but not on assumption that all amongst Hindus who fell in the broader category of Sudras were subjected to same treatment as untouchables in India or Negroes in America. History, social or political, does not bear it out. Reservation for other backward class is no doubt constitutionally permisible, on social and economic conditions which prevailed in the country and are still prevailing and not on benign steps for Negroes upheld by foreign courts. Judicial activism has no doubt in America been remarkable in absence of any constitutional protection for the Negroes but our courts are not required to undertake the exercise as our constitutional statesmanship has no parallel in the world where to achieve egalitatian society truly and really it devised mechanism of treating the backward class of citizens, 'differently' by Articles 16(4) and 15(4) to bring them at par with others so that they could be treated equally. The policy of official discrimination is, unique in the world both in the range of benefits involved and in the magnitude of the groups eligible for them. 642. Caste has never been accepted by this Court as exclusive or sole criteria for determination or identification of backward class. That is why the communal Government Order in Champakam and reservation, except for SC/ST and Hindu backward, in S. Venkatramana v. State of Madras, AIR 1951 SC 229, were invalidated. Caste based evil was so repugnant that even when communal Government Order issued by the State of Madras a legacy of caste based reservation practised in Madras since thirties and forties was struck down and the Constitution was amended and Article 15(4) was added the basic philosophy against the caste was neither eroded nor mitigated and ameliorative steps were made state-responsibility for socially and educationally backward castes. Balaji adopted test of, comparability of backward classes with Scheduled Caste and Scheduled Tribe as a result of combined reading of Article 340(1) and Article 338(3). Two major drawbacks were noticed in identifying backward class with caste, one, 'it may not always be legal and may perhaps contain the vice of perpetuating the caste', and other 'if the caste of the group of citizens was made the sole basis for determining the social backwardness of the social group, the test would inevitably break down in relation to many sections of Indian society which do not recognise caste in the conventional sense known to Hindu society'. In Chitralekha the Court observed that 'caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court (Balaji) which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference

to caste'. P. Rajendran too did not differ with Balaji nor it carved out any new path. The Court accepted the determination of backward class as, the explanation given by the State of Madras had not been controverted by any rejoinder affidavit. The Court observed, 'that though the list shows certain caste the member of those castes are classes of educationally and socially backward citizens'. In Sagar the Court was concerned with a list where backwardness was determined amongst others on caste taking it as one of the relevant test for determination of backwardness. Therefore, the Court agreeing with Balaji observed, 'in determining whether a particular section forms a class caste cannot be excluded altogether. But in the determination of a class a test solely based upon caste or a community cannot also be accepted'. In Peeriakaruppan it was observed that, 'a caste has always been recognised as a class'. Support for this was sought {torn Rajendran and it was observed that it was authority 'for the proposition that the classification of backward classes on the basis of caste is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. But Rajendran was decided as the caste included in the list were in fact socially and educationally backward. Balram, too, followed the same and relying on Rajendran, Sagar and Peeriakaruppan upheld the test as entire caste was found to be socially and economically backward. 'Caste, ipso facto, is not class in secular state' was said in Soshit Karamchari. In Jayshree it was held that caste could not be made the sole basis for reservation. Ratio in Rajendran, Sagar, Balram and Peeriakaruppan are wrongly understood and erroneously applied. All these decisions turned on facts as the Court in each case upheld the classification not because it was done on caste but those included in the list deserved the protection. Different streams of thought may appear from various decisions but none has accepted caste as the sole criteria for determination of backwardness. 643. 'Backward class' in Article 16(4) thus cannot be read as backward caste. What is the scope then? Is it social backwardness, educational backwardness, economic backwardness, social and economic backwardness, natural backwardness etc.? In absence of any indication expressly or impliedly any group or collectivity which can be legitimately considered as, 'backward' for purposes of representation in service would be included in the expression 'backward class'. Word 'any' is indicative of that the backward class was not visualised in singular. When Constitution was framed the anxiety was to undo the historical backwardness. Yet a word of wider import was used to avoid any close-door policy. For instance, backwardness arising out of natural reasons was never contemplated. But today with developments of human rights effort is being made to encourage those to whom nature has not been so kind. Do such persons not form a class? Are they not backward? They cannot, obviously compete on equal level with others. Backwardness which the Constitution makers had to tackle by making special provision, due to social and economic condition, was different but that does not exclude backwardness arising due to different reasons in new set up. 644. Although dictionarily the word 'any' may mean one or few and even all yet the meaning of a word has to be understood in the context it has been used. In Article 16(4) it cannot mean all as it would render the whole Article unworkable. The only, reasonable,

meaning that can be attributed to it is that it should be the States' discretion to pick out one or more than one from amongst numerous groups or collectivity identified or accepted as backward class for purposes of reservation. Whether such picking is reasonable and satisfies the test of judicial review is another matter. That explains the rationale for the non-obstante clause being discretionary and not mandatory. A State is not bound to grant reservation to every backward class. In one State or at one place or at one point of time it may be historical and social backwardness or geographical and habitational backwardness and at another it may be social and educational or backwardness arising out of natural cause. 645. From out of various backward class of citizens who could be provided protection under Article 16(4) the President has been empowered by Article 340 to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India. What does the expression 'socially and educationally backward classes' connote? How it should be understood? Is it social backwardness only? Is the educational backwardness surplus-age?. Article 340(1) of the Constitution reads as under: The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and 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 and 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. A bare reading of the Article indicates that the avowed objective of this provision is to empower the President to appoint a Commission to ascertain the difficulties and the problems of the socially and educationally backward classes and to make recommendations so that steps may be taken by the Union and the States to solve their problems, remove their difficulties and improve their conditions. Since backwardness has been qualified by the words 'social and educational' the ambit of the expression is not as wide as backward class in Article 16(4). What does it mean then? A social class, 'is an aggregate of persons within a society possessing about the same status'. How to determine backwardness of such a class. The yardstick of backwardness in any society is, primarily, economic. But Indian society, 'has made caste as the sole hierarchy of social ranking and uses the caste system as the basic frame of reference'. Expert Panel of Mandal Commission described it as ascribed status, that is, status of a person determined by his birth. The social backwardness in pre-independence period, no doubt, arose because of caste stratification. Members of castes other than Brahmans, Thakurs and Vaishyas were socially backward. But with foreign domination, enlightened movements both social and religious, acquisition of wealth and power a gradual caste mobility took place not only to consolidate but even to assert a higher social status. 'The struggle launched by these backward castes as a subaltern in the pre-independence period, changed its course in the post independence period' due to vested interest in reservation, 'It is well known that up to year 1931, the last census year for which castes are

recorded, there were several castes applying for changing their names to those indicative of higher caste status. In that period name indicated status. The trend now is to claim backwardness both among the Hindus and Muslims by claiming the same caste status by various devices as those who are legally considered as backward caste, are the beneficiaries of reservation. While determining social backwardness, therefore, one cannot loose sight of the type of society, the social mobility, the economic conditions, the political power. Even the Expert Panel noticed few of these but then it got lost in ascribed status. The social backwardness in 1990 for purposes of employment in services cannot be status by birth but backwardness arising out of other elements such as class, power etc. Dr. Pandey in his book [The Caste System in India] after an elaborate study has concluded, 1. Class, independent of caste, determines social ranking in Indian Society in certain domains; 2. Analysis of caste alone is not sufficient to provide the real picture of stratification in India to-day; 3. A proper study of stratification in modern India must concern with other dimensions, viz., class, status and power. While explaining power he has observed in, 'past power was located in the dominant caste'. But it is now changing in two senses, 'first, power is shifting from one caste (or group of castes) to another. Secondly, power is shifting from caste itself and comes to be located in more differentiated political organs and institutions. This has been empirically found by Beeville, and others on the basis of his studies of Kammas and Reddis of Andhra Pradesh. Harrison writes: "This picture of political competition between the two caste groups is only a modern recurrence of an historic pattern dating back to the fourteenth century. Srinivas' analysis of politics in Mysore gives a central place to rivalries between the dominant castes:"As in Andhra, the Congress is dominated by two leading peasant castes, one of which is Lingayat and the other Okkaliga. Lingayat Okkaliga rivalry is colouring every issue, whether it be appointment to government posts or reservation of seats in colleges, or election to local bodies and legislatures." Both - Harrision's study in Andhra Pradesh and Srinivas 'in Mysore depict the rise to power of the two pairs of non-Brahman dominant castes followed by the decline of the Brahmans".' Any determination of social backwardness, therefore, cannot be valid unless these important aspects are taken into consideration. 646. Educational backwardness too was not added just for recitation. No word in Statute, more so in a Constitution, can be read as surplus-age. In none of the decisions of this Court under Article 16(4) it has been held that educational backwardness was irrelevant. In Balaji declaration of minor community as educationally backward was not accepted as correct since the student community of 5 per thousand was not below the State average. In Balram the Court approved acceptance by the government of criteria adopted by the Commission for determining social and edcuational backwardness of the citizen, namely, (i) the general poverty of the class or community as a whole; (ii) Occupations pursued by the classes of citizens, the nature of which must be inferior or unclean or undignified and unremunerative or one which does not carry influence or power; (iii) Caste in relation to Hindus; and (iv) Educational backwardness. In the hoary past the education amongst Hindus was confined to a particular class, that is, the Brahmins, but with advent

of Muslim rule and British regime this barricading fell down, considerably, and the education spread amongst other classes as well. But even in those times there was a section of society which was kept away, deliberately, from education as they were not permitted to enter the schools and colleges. That has been done away with by the Constitution. Yet the educational with all efforts has not filtered to certain classes particularly in rural areas and many traditionally educationally backward still suffer from it. At the same time many groups or collectivity did not opt for education for various reasons, personal or otherwise. Therefore, a Commission appointed under Article 340 cannot determine only social backwardness. Any class to be backward under Article 340 must be both socially and educationally backward. 647. Two things emerge from it, one, that the backward class in Article 16(4) and socially and educationally in Article 340, being expressions with different connotations they cannot be understood in one and same sense. The one is wider and includes the other. A socially and educationally backward class may be backward class but not vice versa. Other is that such investigation cannot be caste based. Meaning of expression 'socially and educationally backward' class of citizens was explained in Pradeep Tandon as under: The expression 'classes of citizens' indicates a homogenous section of the people who are grouped together because of (a) certain likeness and common traits and who are identified by some common attributes. The homogeneity of the class of citizen is social and educational backwardness. Neither caste nor religion nor place of birth will be uniform element or common attributes to make them a class of citizens. 648. Even when the report of first Backward Class Commission was submitted to the Government of India the memorandum prepared by it, and presented to the Parliament, emphasised that, efforts should be made, 'to discover some criteria other than caste, which could be of practical application in determining the backward classes'. Three of the members of the Commission, 'were opposed to one of the most crucial recommendations of the Report, that is, the acceptance of caste as a criteria for social backwardness and reservations of posts in government service on that basis'. One of the reasons given for it by the Chairman in his letter was that adopting of caste criteria was, 'going to have a most unhealthy effect on the Muslim and Christian sections of the nation'. 649. When Second Backward Class Commission was appointed by the President under Article 340 it was required, 'to determine the criteria for determining the socially and educationally backward classes' and, to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State. The order further outlined the procedure to be followed by the Commission as required by Article 340 by directing it to examine the recommendations of the Backward Classes Commission appointed earlier and the considerations which stood in the way of the acceptance of its recommendations by Government. The Commission thus was required to undertake the exercise so as to avoid repetition of those failings of due to which the report of first Commission could not be implemented. The Commission was not oblivious of it as in paragraph 1.17 of the report it observed, Though the above failings are

serious, yet the real weakness of the Report lies in its internal contradictions. As stated in para 1.5 of this Chapter, three of the Members were opposed to one of the most crucial recommendations of the Report, that is, the acceptance of caste as a criterion for social backwardness and the reservation of posts in Government services on that basis. Yet the Commission undertook extensive exercise for ascertaining social system and opined that, 12.4 In fact, caste being the basic unit of social organisation of Hindu society, castes are the only readily and clearly"recognisable and persistent collectivities. Having done so it determined social and educational backwardness in paragraph 11.23 as under : 11.23 As a result of the above exercise, the Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are: A. Social (i) Castes/Classes considered as socially backward by others. (ii) Castes/Classes which mainly depend on manual labour for their livelihood. (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas. (iv) Castes/Classes where participation of females in work is at least 25% above the State average. B. Educational (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average. (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average. (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average. C. Economic (viii) Castes/Classes where the average value of family assets is at least 25% below the State average. (ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average. (x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households. (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average. 11.24 As the above three groups are not of equal importance for our purpose separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each, Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight one fact that socially and educationally backward classes are economically backward also. 11.25 It well be seen that from the values given to each Indicator, the total score adds up to 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this aplication, all castes which had a score of 50 per cent (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (Emphasised supplied) In paragraph 12.2 of the Report the Commission observed, As the unit of identification in the above survey is caste, and caste is a peculiar feature of Hindu society only, the results of the survey cannot have much validity for non-Hindu communities. Criteria for their identification have been given separately. The Commission, thus, on own

showing identified socially and educationally backward class amongst Hindus on caste. The criteria for identifying non-Hindus backward classes was stated in paragraph 12.18: (i) All untouchables converted to any non-Hindu religion; and (ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples : Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.) 650. Caste was thus adopted as the sole criteria for determining social and educational backwardness of Hindus. For members of other communities test of conversion from Hinduism was adopted. The Commission, even, though noticed that the first Commission suffered from inherent defect of identifying on caste proceeded, itself, to do the same. 651. In preceding discussion it has been examined, in detail, as to why caste cannot be the basis of identification of backward class. The constitutional constraint in such identification does not undergo any change because different groups or collectivity identified on caste are huddled together and described as backward class. By grouping together, the cluster of castes does not loose its basic characteristic and continues to be caste. 652. No further need be said as whether the Commission acted in terms of its reference and whether the identification was constitutionally permissible and legally sound, before it could furnish for any exercise, legislative or executive, was to be undertaken by the government. 653. Use of expression, 'nothing in this Article shall prevent Parliament' in Article 16(4) cannot be read as empowering the State to make reservation under Article 16(4) on race, religion or caste. It would result in regenerating the communal representation in services infused by Britishers by different orders issued from 1924 to 1946. How such an expression should be interpreted need not be elaborated. Both the text books and judicial decisions are full of it. To comprehend the real meaning the provision itself, the setting or context in which it has been used, the purpose and background of its enactment should be examined, and interpretational exercise may be resorted to only if there is a compelling necessity for it. In earlier decisions rendered by the Court till sixties Article 16(4) was held to be exception to Article 16(1). But from 1976 onwards it has been understood differently. Today Article 16(1) and 16(4) are understood as part of one and same scheme directed towards promoting equality. Therefore what is destructive of equality for Article 16(1) would apply equally to Article 16(4). The non-obstante clause was to take out absolutism of Article 16(1) and not to destroy the negatism of Article 16(2). 654. Rule of statutory construction explained by jurists is to adopt a construction which may not frustrate the objective of enactment and result in negation of the objective sought to be achieved. Rigour of its application is even more severe in constitutional interpretation as unlike statute its provisions cannot be amended or repealed easily. Accepting race, religion and caste as the remedy to undo the past evil would be against constitutional spirit, purpose and objectives. As stated earlier this remedy was adopted by the framers of the Constitution for SC/ST. What was not provided for others should be deemed, on principle of interpretation, not to have been approved and accepted. Even if two constructions of the provisions could have been possible, 'the Court must adopt that which will ensure smooth

and harmonious working of the Constitution and eschew the other which will lead to absurdity and given rise to practical incovenience'. Since acceptance of caste, race or religion would be destructive of the entire constitutional philosophy and would be contrary to the Preamble of the Constitution it cannot be accepted as a legal method of identification of backward classes for Article 16(4). 655. Would the consequences be different if race, religion or caste etc. are coupled with some other factors? In other words, what is the effect of the word, 'only' in Article 16(2). In the context it has been used it operates, both, as permissive and prohibitive. If is permissive when State action, legislative or executive, is founded on any ground other than race, religion or caste. Whereas it is prohibitive if it is based exclusively on any of the grounds mentioned in Article 16(2). Javed Niaz Beg and Anr. v. Union of India and Anr. , furnishes best illustration of the former. A notification discriminating between candidates of North Eastern States, Tripura, Manipur etc. on the one hand and others for IAS examination and exempting them from offering language paper compulsory for everyone was upheld on linguistic concession. When it comes to any State action on race, religion or caste etc. the word, 'only' mitigates the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. Use of word, 'only' was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. For instance, in State of Rajasthan v. Pradip Singh, , where exemption granted to Muslims and Harijans from levy of cost for stationing additional police force was attempted to be defended because the notification was not based, 'only' on caste or religion but because persons belonging to these communities were found by the State not to have been guilty of the conduct which necessitated stationing of the police force it was struck down as discriminatory since it could not be shown by the State that there were no law abiding persons in other communities. Similarly identification of backward class by such factors as dependence of group or collectivity on manual labour, lower age of marriage, poor schooling, living in kuccha house etc. and applying it to caste would be violative of Article 16(2) not only for being caste based but also for violation of Article 14 because it, excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus, determined would not be caste coupled with other but on caste and caste alone. 656. Today if Article 16(2) is construed as justifying identification of backward class by equalizing them with those castes in which the customary marriage age is lower or majority of whom are living in kuccha houses or a sizeable number is working as manual labour then tomorrow the identification of backward class amongst other communities where caste does not exist on race or religion coupled with these very considerations can-

not be avoided. That would result in making reservation in public services on communal considerations. An interpretation or construction resulting in such catastrophical consequences must be avoided. 657. Backward used in Article 16(4)is wider than socially and educationally used in Article 15(4) and weaker sections used in Article 46. SC/ST are covered in either expression. But same cannot be said for others. Backward, cannot be defined as was, wisely, done by the Constitution makers. It has to emerge as a result of interaction of social and economic forces. It cannot be static. Many of those who were Sudras in 17th and 18th Centuries ceased to be so in 19th and 20th Century due to their educational advancement and social acceptablity. Members of various backward communities, both, in South and North who were moving upwards even before 1950 compare no less in education, status, economic advancement or political achievement with any other class in society. The average lower middle class of Muslims or Christians may not be better educationally or economically and in many cases even socially than the intermediate class of backward class of Sri Paik's list. For instance the bhisties (the water carriers in leather bags) among Muslims. Does Article 340 empowering President to ascertain educational and social backwardness of citizens of this country not include those poor socially degraded and educationally backward. Are they not citizens of this counrty? Could backwardness of Muslims, Christians and Buddhists be recognised for purposes of Article 16(4) only if they were converts from Hinduism or such backwardness for preferential treatment be recognised only if a group or class was Hindu at some time or was occupationally comparable to Hindus. That is if members of other community carry on occupation which is not practised by Hindus, for instance bhisties amongst Muslims, then they cannot be regarded as backward class even if it has been their hereditary occupation and they are socially, educationally and economiclly backward. A Commission appointed under Article 340 by the President is not to identify Hindu, backwards only but the backward class within the territory of India which includes Hindu, Muslim, Sikh or Christian etc. bora and residing in India within meaning of Article 5 of the Constitution. The expression is not only backward class but backward class of citizens. And citizens means all those who are mentioned in Articles 5 and 10 of the Constitution. 658. Thus neither from the language of Article 16(4) nor the literal test of interpretation nor from the spirit or purpose of interpretation nor the present - day social setting, warrants construction of the expression backward class as backward caste. Consequently what comes out of the examination from different aspects leads to conclusion that: (1) Backward class in Article 16(4) cannot be read as backward caste. (2) Expression 'backward class' is of wider import and there being no ambiguity or danger of unintended injustice in giving it its natural meaning it should be understood in its broader and normal sense. (3) Backward class under Article 16(4) is not confined to erstwhile sudras or depressed classes or intermediate backward classes amongst Hindus only. (4) Width of the expression includes in its fold any community Hindu, Muslim, Christian, Sikh, Budha, or Jain etc. as the expression is 'backward class of citizens'. * * * * * 'E' 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 seculiar 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. * * * * * 'F' 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 educationlly 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 very 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 ony by the twice born but even the socalled 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 'coexisted 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. * * * * * 'G' 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. Illionois 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 consitutional 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 rep-

resented 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 transcendent 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 dis-

crimination 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. 'H' 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 Kuldip Singh, for good and sound reasons has rightly opined, that, Rangachri cannot be held to be laying down good law. * * * * * 'I' 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. * * * * * 'J' 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 jurisdication 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.