CHAPTER XXII

FUNDAMENTAL RIGHTS (3)
RIGHT TO EQUALITY (ii)

SYNOPSIS

A. NO DISCRIMINATION ON GROUNDS OF RELIGION ETC.

Article 15(1) specifically bars the state from discriminating against any citizen of India on grounds *only* of religion, race, caste, sex, place of birth, or any of them.

Article 15(2) prohibits subjection of a citizen to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex or place of birth with regard to—

(*a*) access to shops, public restaurants, hotels and places of 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 general public.

Under Art. 15(3), the state is not prevented from making any special provision for women and children.

Article 15(4) or Art. 29(2) does not prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[1]

Provisions contained in Arts.15 and 16 are merely enabling provisions. No citizen of India can claim reservation as a matter of right and accordingly no writ of mandamus can be issued.[2]

(a) ART. 15(1)

Article 15(1) prohibits differentiation on certain grounds mentioned above. Commenting on Art. 15(1), the Supreme Court has observed:[3]

> "Art. 15(1) prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it".

Article 15(1) is an extension of Art. 14. Art 15(1) expresses a particular application of the general principle of equality embodied in Art. 14.

Just as the principle of classification applies to Art. 14 so it does to Art. 15(1) as well. The combined effect of Arts. 14 and 15 is not that the state cannot pass unequal laws, but if it does pass unequal laws, the inequality must be based on some reasonable ground (Art. 14), and that, due to Art. 15(1), religion, race, caste, sex, or place of birth alone is not, and cannot be, a reasonable ground for discrimination.

Under Art. 15(4), the State can make special provisions for certain sections of the society as stated above. But for any section of population not falling under Art. 15(4), special provisions can be made if there is reasonable classification.

The word 'discrimination' in Art. 15(1) involves an element of unfavourable bias. The use of the word 'only' in the Arts. 15(1) and 15(2) connotes that what is discountenanced is discrimination purely and solely on account of any of the grounds mentioned. A discrimination based on any of these grounds and also on other grounds is not hit by Arts. 15(1) and 15(2) though it may be hit by Art. 14.[4] If religion, sex, caste, race or place of birth is merely one of the factors which the Legislature has taken into consideration, then, it would not be discrimination only on the ground of that fact. But, if the Legislature has discriminated only on one of these grounds, and no other factor could possibly have been present, then, undoubtedly, the law would offend against Art. 15(1).

Further, to adjudge the validity of an Act under these Articles, a distinction is to be drawn between the object underlying the impugned Act and the mode and manner adopted therein to achieve that object. The object underlying the Act may be good or laudable but its validity has to be judged by the method of its operation and its effect on the fundamental right involved. The crucial question to ask therefore is whether the operation of the impugned Act results in a prohibition only on any of the grounds mentioned in Arts. 15(1) and 15(2). It is the effect of the impugned Act that is to be considered and if its effect is to discriminate on any of the prohibited grounds, it is bad.

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1. For comments on Art. 29, see, *infra*, Ch. XXX, Sec. A.
2. *A.P. Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1 : (2009) 5 JT 563.
3. *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011 at 1019 : (1996) 3 SCC 545.
4. *Narasappa v. Shaik Hazrat*, AIR 1960 Mys. 59.

Article 15 is a facet of Art. 14. Like Art. 14, Art. 15(1) also covers the entire range of state activities. But, in a way, the scope of Art. 15 is narrower than that of Art. 14 in several respects.

One, while Art. 14 is general in nature in the sense that it applies both to citizens as well as non-citizens, Art. 15(1) covers only the Indian citizens, and does not apply to non-citizens. No non-citizen can claim any right under Art. 15, though he can do so under Art. 14.

Two, while Art. 14 permits any reasonable classification on the basis of any rational criterion, under Art. 15(1), certain grounds mentioned therein can never form the basis of classification.

The residents of Madhya Bharat were exempted from payment of a capitation fee for admission to the State medical college, while the non-residents were required to pay the same. The Supreme Court negatived the plea of discrimination by the non-residents under Art. 15(1) because the ground of exemption was 'residence' and not 'place of birth'. Residence and place of birth are two distinct concepts with different connotations. Art. 15(1) prohibits discrimination on the basis of place of birth but not residence.[5] And, in the instant case, classification on the basis of 'residence' was held to be reasonable. Education is a State subject. A State spends money on the upkeep of educational institutions. There is, therefore, nothing wrong in the State if it so orders the educational system that some advantage ensures for the benefit of the State. Some of the resident students after securing their degree may settle in the State as doctors and serve the community. Thus, the justification for the classification on the basis of residence rested on the assumption that the residents of the State would after becoming doctors settle down and serve the needs of the people of the State.

In *N. Vasundara v. State of Mysore*[6], the Supreme Court has sustained the constitutional validity of reservation based on the requirement of 'residence' within the State for the purpose of admission to medical colleges.

Under the City of Bombay Police Act, while a person born outside Greater Bombay could be externed if he was convicted of any of the offences mentioned therein, no such action could be taken against a person born within Greater Bombay. This was discrimination on the basis of 'place of birth' and so was invalid under Art. 15(1).[7]

Under the U.P. Court of Wards Act, 1912, while a male proprietor could be declared incapable of managing his property only on one of the five grounds mentioned therein, and that too after giving him an opportunity of showing cause as to why such a declaration should not be made, a female proprietor could be declared incapable to manage her property on any ground and without giving her any show cause notice. The provision is bad as it amounts to discrimination on the ground of sex.[8]

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5. *D.P. Joshi v. Madhya Bharat,* AIR 1955 SC 334 : (1955) 1 SCR 1215.
Also see, *infra*.

6. AIR 1971 SC 1439 : (1971) 2 SCC 22.
Also see, *infra*, under "Reservation in Admissions", Sec. D.

7. In re *Shaikh Husein Shaik Mahomed,* AIR 1951 Bom 285.

8. *Rajeshwari v. State of Uttar Pradesh,* AIR 1954 All 608.

A law providing for elections to municipalities on the basis of separate electorates for members of different religious communities,[9] or delimitation of panchayat circles for purposes of election to a panchayat on the basis of castes, would offend Art. 15(1).[10]

If the office of the President of a municipality is not reserved or is meant for general category, all the candidates irrespective of their caste, class or community and irrespective of the fact whether they have been elected from a reserved ward or a general ward are entitled to seek election and contest for the office of the President of the municipality. The unreserved seats euphemistically described as general category seats are open seats available for all candidates who are otherwise qualified to contest to that office. Wherever the office of the President of a municipality is required to be filled in by a member belonging to Scheduled Caste, Scheduled Tribe or Backward Class as the case may be, it would be enough if one belongs to one of those categories irrespective of the fact whether they have been elected from a general ward or a reserved ward.[11]

Acting on reports that the inhabitants of certain villages were harbouring dacoits, the Government of Rajasthan sanctioned posting of additional police in those villages. The expenses were to be borne by the villagers but the Harijan and Muslim inhabitants of these villages were exempt from this liability. This was quashed as being discriminatory on the ground of 'caste' or 'religion' as it discriminated against the peace-loving villagers other than Harijans and Muslims.[12] Allotment of building sites by a municipality only to the members of a particular religion would violate Arts. 15 and 14.[13]

Reservation does not limit number of candidates from reserved category to be elected. They are eligible to contest from the unreserved seats and get elected resulting in increase of their representation in the local bodies.[14]

(b) ART. 15(2)

Article 15(2), mentioned above, contains a prohibition of a general nature and is not confined to the state only. On the basis of this provision, it has been held that if a section of the public puts forward a claim for an exclusive use of a public well, it must establish that the well was dedicated to the exclusive use of that particular section of the public and not to the use of the general public.[15] A custom to that effect cannot be held to be reasonable, or in accordance with enlightened modern notions of utility of public wells because of the force of Art. 15.

In Art. 15(2) occurs the expression 'a place of public resort'. There is difference of opinion on the exact significance of this phrase. One view holds that a place is a 'place of public resort' only if the public have access to it as a matter of legal right.[16] A broader view, however, regards a place of public resort as one to which members of the public are allowed access and where they habitually resort

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9. *Nainsukh v. State of Uttar Pradesh*, AIR 1953 SC 384.
10. *Bhopal Singh v. State of Rajasthan*, AIR 1958 Raj 41.
11. *Bihari Lal Rada v. Anil Jain (Tinu)*, (2009) 4 SCC 1 : (2009) 2 JT 455.
12. *State of Rajasthan v. Pratap Singh*, AIR 1960 SC 1208 : (1961) 1 SCR 222.
13. *Chikkadasappa v. Town Municipal Corporation*, AIR 1983 Kant 201.
14. *Bihari Lal Rada v. Anil Jain (Tinu)*, (2009) 4 SCC 1 : (2009) 2 JT 455.
15. *Arumugha v. Narayana*, AIR 1958 Mad 282.
16. *A.M. Deane v. Commr. of Police*, 64 CWN 348.

to.[17] The latter view appears to be more in accord with the tenor and purpose of the constitutional provision as it would bar discrimination on a wider front.

(c) PERSONAL LAWS

In family matters, India has a system of personal laws, *i.e.* Hindu law for the Hindus, Muslim law for the Muslims and so on.[18] Some of these laws have been amended by statutes; some like Muslim law has been left unamended. Challenges to these laws on the basis of religious differentiation, or on the basis of differentiation between males and females have not been accepted.[19]

Legislation making provisions for Hindus specifically on matters falling within the ambit of Hindu Law has been upheld even though similar provisions have not been made for other groups. A law introducing monogamy among the Hindus, but leaving the Muslims free to take any number of wives, was upheld against the charge of discrimination on the ground of 'religion' only. The court pointed out that the Hindus have been enjoying for long their own indigenous system based on Hindu scriptures in the same way as the Mohammedans were subject to their own personal law.[20]

The Supreme Court has taken the stand that personal laws are immune from being challenged under Fundamental Rights which do not touch upon these laws. Personal laws fall outside the scope of the Fundamental Rights.[21] This seems to be a policy, rather than a legalistic, approach as the courts do not want to adjudicate upon aspects of these systems of laws which would not be able to stand the test of Fundamental Rights. The court desires that Parliament ought to deal with these matters in a rational manner.

Section 15(2)(*b*) of the Hindu Succession Act has been held to be not invalid on the ground of discrimination on the basis of sex. According to the Bombay High Court, the true principle is that the community governed by the given personal law itself forms a recognised class, and that itself a reasonable class of persons, for testing the given legislation and the same has to be examined in the background of the principles by which such class is governed by the tenets of its personal law. If those principles are otherwise reasonable in the context of the

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17. *Liberty Cinema v. Corp. of Calcutta,* AIR 1959 Cal 45.

18. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, Ch. XXV.
Also see, *supra,* Ch. XXI, for challenges to these laws under Art. 14.

19. *Gurdial Kaur v. Mangal Singh,* AIR 1968 P & H 396 (Pre-constitution customs cannot be challenged as contravening Fundamental Rights); *Sangannagouda v. Kalkangouda,* AIR 1960 Mys. 147 (non-statutory law of adoption held valid); *Santhamma v. Neelamma,* AIR 1956 Mad. 642 (non-statutory law of partition held valid); *Bibi Maniram v. Mohd. Ishaq,* AIR 1963 Pat. 229 (Mohammedan Law of gift held invalid); *Abdul Khan v. Chand Bibi,* AIR 1956 Bhopal 71 (Muslim law of marriage held not invalid on the ground of sex discrimination).
But, on customs, see, Ch. XX, Sec. E, *supra.*

20. *Srinivasa Aiyar v. Saraswati,* AIR 1952 Mad. 193; *State of Bombay v. N. Appa,* AIR 1952 Bom. 84; *H.B. Singh v. T.N.H.O.B. Devi,* AIR 1959 Mani. 20. A statutory provision regarding divorce applicable to a sect of Hindus held not invalid under Art. 14 in *Sudha v. Sankarappa Rai,* AIR 1963 Mys. 245.

21. *Krishna Singh v. Mathura Ahir,* AIR 1980 SC 707 : (1981) 3 SCC 689; *Sarla Mudgal v. Union of India,* (1995) 3 SCC 635 : AIR 1995 SC 1531; *Madhu Kishwar v. State of Bihar,* (1996) 5 SCC 125; *Ahmedabad Women Action Group v. Union of India,* AIR 1997 SC 3614 : (1997) 3 SCC 573.
Also see, Ch. XX, Sec. E.

history of the given system of personal law, then the challenge is hardly maintainable. The court has made this statement in the context of new legislation enacted to modify personal laws.[22]

The Andhra Pradesh High Court declared S. 9 of the Hindu Marriage Act which provides for the restitution of conjugal rights as invalid on the ground that, in practice, it works against the females and not against the males.[23] The court argued that sexual cohabitation is an inseparable ingredient of a decree of restitution of conjugal rights. To have sex with an unwilling party against her will offends the inviolability of the body and mind. S. 9 of the Hindu Marriage Act infringes Art. 14 for two reasons: (1) S. 9 does not satisfy the traditional classification test. Although, on its face, S. 9 makes the remedy of restitution of conjugal rights available to both, husband and wife, in practice, it is almost exclusively invoked by the husband against his wife, and so the remedy becomes partial and one-sided. (2) S. 9 fails to pass the test of minimum rationality required by any statute law. It subserves no social good and promotes no legitimate public purpose.

On the other hand, the Delhi High Court has upheld the constitutional validity of S. 9 of the Hindu Marriage Act.[24] The court has said that restitution aims at cohabitation and consortium and not merely at sexual intercourse. Agreeing with the Delhi High Court, in *Saroj Rani v. Sudarshan Kumar*[25], the Supreme Court has held the provision to be valid *vis-a-vis* Arts. 14 and 21.[26] The court has emphasized that one must see the decree of restitution of conjugal rights in its proper perspective. In India, conjugal rights, i.e., the right of the husband or wife to the society of the other is not merely a creature of the statute; it is inherent in the very institution of marriage itself. There are sufficient safeguards in S. 9 to prevent it from becoming tyrannical. S. 9 is only a codification of the pre-existing law. Only when the decree is disobeyed wilfully, the court may order attachment of property. "It serves a social purpose as an aid to the prevention of break-up of marriage."

Section 16 of the Hindu Marriage Act confers legitimacy on children born out of a void marriage. The section has been held valid *vis-a-vis* Art. 14 as it treats all illegitimate children similarly circumstanced as forming one class for conferment of legitimacy.[27]

Under S. 6(a) of the Hindu Minority and Guardianship Act, 1956, the father of a Hindu minor is the only guardian and the mother of the minor is relegated to an inferior position. She could become the guardian only 'after' the father. The provision was challenged under Arts. 14 and 15 on the ground of gender discrimination. The argument was that the mother was relegated to an inferior position on the ground of 'gender' alone as her right, as a natural guardian of the minor, is made cognisable only 'after' the father.

The Supreme Court agreed with the premise that 'gender equality' is one of the basic principles of the Constitution. If the word 'after' in S. 6(a) were to be

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22. *Sonubai v. Bala*, AIR 1983 Bom. 156.
Also, *Kaur Singh v. Jaggar Singh*, AIR 1961 Punj. 489.
23. *T. Sareetha v. T. Venkata Subbaiah*, AIR 1983 AP 356.
24. *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.
25. AIR 1984 SC 1562 : (1984) 4 SCC 90.
26. For discussion on Art. 21, see, *infra*, Ch. XXVI.
27. *P.E.K. Kalliani Amma v. K. Devi*, AIR 1996 SC 1963 : (1996) 4 SCC 76.

interpreted to mean that the mother was disqualified to act as the guardian of the minor during the father's lifetime, and that she could act as such only after his death, then the same would definitely run counter to the basic requirement of the Constitutional mandate as it would lead to differentiation between male and female. But the provision in question could be so interpreted as to make it compatible with Art. 14. Accordingly, the Court interpreted S. 6 so as to mean that the mother could act as the natural guardian of the minor during the father's lifetime if the father was not in actual charge of the affairs of the minor. Similar interpretation was given to S. 19(b) of the Guardians and Wards Act, 1890.[28]

Under S. 10, Divorce Act, 1869, a Christian husband can get divorce from his wife on the ground of her adultery *simpliciter*. On the other hand, a Christian wife to get divorce from her husband has to prove not only his adultery but also something more, such as, adultery, incest, bigamy, rape, cruelty or desertion. The Bombay High Court has ruled in *Pragati Varghese v. Cyril George Varghese*,[29] that S. 10 is discriminatory on the ground of sex and is, thus, violative of Art. 15(1). Further, a Christian woman cannot seek divorce on the grounds of cruelty and desertion while women under other systems can do so. This is discrimination based merely on the ground of religion and this is also violative of Arts. 14 and 15.

The validity of the Muslim Women (Protection of Rights and Divorce) Act, 1986, was challenged on the ground that the Act, when compared with s. 125, Cr. P.C., is discriminatory against Muslim divorcee women. But the Supreme Court negatived the contention. The Court has ruled that the purpose of both laws is the same *viz*., to meet a situation where a divorced woman is likely to be led into destitution and vagrancy. The Muslim Act codifies and regulates the obligations due to a Muslim woman divorcee but puts her outside s. 125, Cr. P.C., The Court interpreting s. 3(1)(a) of the Act benevolently has stated that the provision means that in addition to *mehr* and maintenance to her during the *iddat* period, the husband is also obligated to make "a reasonable and fair provision" as provided for under s. 3(3) consistent with the needs of the divorced woman, the means of the husband, and the standard of living the woman enjoyed during her married life. Thus, interpreted, the scheme contained in the impugned Act is equally, if not more, beneficial to the Muslim women than s. 125, Cr.P.C.[30]

A law applicable to Hindu religious endowments only, and not to charitable and religious endowments belonging to other religions, has been upheld. Classification of religious endowments as Hindu, Muslim or Christian is neither arbitrary nor unreasonable keeping in view the purpose of the Act, *viz*., the better management of institutions. The distinction has existed for over a century and was not being made for the first time. The incidents and nature of the endowments belonging to different religious groups differ in several respects, and the classification cannot be said to be based solely on religion as the institutions included in the Act were both religious and secular, and keeping in view the object of the Act, the institutions having several common features can be classified under one group.[31]

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28. *Githa Hariharan v. Reserve Bank of India,* AIR 1999 SC 1149 : (1999) 2 SCC 228.
29. AIR 1997 Bom 349.
30. *Danial Latifi v Union of India*, AIR 2001 SC 3958 : (2001) 7 SCC 740.
31. *Lakshmindra Swamiar v. Commissioner, H.R.E.,* AIR 1952 Mad. 613; *Moti Das v. S.P. Sahi,* AIR 1959 SC 942 : 1959 Supp (2) SCR 563; *Pannalal Bansilal Patil v. State of Andhra Pradesh,* AIR 1996 SC 1023 : (1996) 2 SCC 498.

B. ART. 15(3) : WOMEN AND CHILDREN

Articles 15(3) and 15(4) constitute exceptions to Arts. 15(1) and 15(2).

According to Art. 15(3), the state is not prevented from making any "special provision" for women and children.

Articles 15(1) and 15(2) prevent the state from making any discriminatory law on the ground of gender alone. The Constitution is thus characterised by gender equality. The Constitution insists on equality of status and it negates gender bias. Nevertheless, by virtue of Art. 15(3), the state is permitted, despite Art. 15(1), to make any special provision for women, thus carving out a permissible departure from the rigours of Art. 15(1). Articles 15 and 16 do not prohibit special treatment of women. The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex. In English law 'but-for-sex" test has been developed to mean that no less favourable treatment is to be given to women on gender based criterion which would favour the opposite sex and women will not be deliberately selected for less favourable treatment because of their sex. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally charted affirmative action plan.[32]

Article 15(3) recognises the fact that the women in India have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of Art. 15(3) is to eliminate this socio-economic backwardness of women and to empower them in such a manner as to bring about effective equality between men and women. The object of Art. 15(3) is to strengthen and improve the status of women. Art. 15(3) thus relieves the state from the bondage of Art. 15(1) and enables it to make special provisions to accord socio-economic equality to women.[33]

The scope of Art. 15(3) is wide enough to cover the entire range of state activity including that of employment. Art. 15(3) is a special provision in the nature of a proviso qualifying the general guarantees contained in Arts. 14, 15(1), 15(2), 16(1) and 16(2).[34]

A doubt has been raised whether Art. 15(3) saves any provision concerning women, or saves only such a provision as is in their favour.[35] The better view would appear to be that while the state can make laws containing special provisions for women and children, it should not discriminate against them on the basis of their gender only. This appears to be the cumulative effect of Arts. 15(1) and 15(3). Although there can be no discrimination in general on the basis of sex, the Constitution itself provides for special provisions being made for women and children by virtue of Art. 15(3). Reading Arts. 15(3) and 15(1) together, it seems to be clear that while the state may discriminate in favour of women against men,

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32. *Air India Cabin Crew Assn. v. Yeshaswinee Merchant,* (2003) 6 SCC 277 : AIR 2004 SC 187.

33. On this theme, also see, "Directive Principles", *infra,* Ch. XXXIV; "Safeguards to Minorities," *infra,* XXXV.

34. For discussion on Art. 16, see, next Chapter.

35. MUKHARJI, J., in *Mahadeb v. Dr. Sen,* AIR 1951 Cal 563.
Also, *Anjali v. State of West Bengal,* AIR 1952 Cal 825; Cf. BOSE, J., *ibid.,* 825.

it may not discriminate in favour of men against women. However, only such provisions can be made in favour of women under Art. 15(3) as are reasonable and which do not altogether obliterate or render illusory the constitutional guarantee mentioned in Art. 15(2).

The operation of Art. 15(3) can be illustrated by the following few cases:

(a) Under S. 497, I.P.C., the offence of adultery can be committed only by a male and not by a female who cannot even be punished as an abettor. As this provision makes a special provision for women, it is saved by Art. 15(3). The Supreme Court has observed:[36]

> "Sex is a sound classification and although there can be no discrimination in general on that ground the Constitution itself provides for special provisions in the case of women and children by clause (3) of Art. 15. Arts. 14 and 15 thus read together validate the last sentence of Section 497, I.P.C., which prohibits the women from being punished as an abettor of the offence of adultery."

Upholding S. 497, the Bombay High Court had said in an earlier case that the discrimination made by S. 497 is based not on the fact that women have a sex different from that of men, but "women in this country were so situated that special legislation was required in order to protect them."[37]

(b) The discretionary nature of the power of judicial review is illustrated when the supreme Court even after finding that the reservation policy of the State Government in force was contrary to Arts. 14,15 and 16 took into consideration the fact that a large number of young girls below the age of 10 years were taught in primary schools and that it would be preferable that such young girls are taught by women and held that reservation of 50% in favour of female candidates was justified.[38]

In the matter of distribution of state largesse where dealership of retail outlets of petrol pumps were reserved for women, financial capacity and ability to provide infrastructure and facilities are not relevant and material criteria when the instrumentality of the State is providing finance and the concerned outlet site is owned and retail outlet is to be operated by such instrumentality.[39]

(c) Where a female employee's grievance was the writing of a sensuous letter expressing love to her, admiring her qualities and beauty, and extending unsolicited help, it was held that the female employee's grievance ought to have been looked into according to the directions given in *Vishaka* Case.[40]

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36. *Yusuf Abdul Aziz v. State of Maharashtra,* AIR 1954 SC 321 : 1954 SCR 930.
Also see, *Sowmithri Vishnu v. Union of India,* AIR 1985 SC 1618 : 1985 Supp SCC 137; *Revathi v. Union of India,* AIR 1988 SC 835 : (1988) 2 SCC 72.

37. CHAGLA, C.J., in *Yusuf Abdul Aziz v. State of Maharashtra,* AIR 1951 Bom 470.

38. *Rajesh Kumar Gupta v. State of UP,* (2005) 5 SCC 172 : AIR 2005 SC 2540.

39. *A. Ritu Mahajan v. Indian Oil Corpn.,* (2009) 3 SCC 506 : (2009) 2 JT 327.

40. (1997) 6 SCC 241 : AIR 1997 SC 3011; *D.S. Grewal v. Vimmi Joshi,* (2009) 2 SCC 210 : (2009) 1 JT 400.

(d) S. 497, Cr.P.C., 1898, prohibited release of a person accused of a capital offence on bail except a woman or a child under 16 or a sick man. The provision has been held valid as it metes out a special treatment to women which is consistent with Art. 15(3). The Rajasthan High Court observed:[41]

> "The State may make laws containing special provisions for women and children, but no discrimination can be made against them on account of their sex alone."

(e) In *Walter Alfred Baid, Sister Tutor (Nursing) Irwin Hospital v. Union of India*,[42] a rule making male candidates ineligible for the post of Senior Tutor in the School of Nursing was held to be violative of Art. 16(2) and was not saved by Art. 15(3).

The Delhi High Court took the view that the matter relating to employment falls under Art. 16 and not under Art. 15(3). "The equality of opportunity in the matter of employment between the sexes and the corresponding prohibition against discrimination is absolute in nature and no exception has been carved out of it in Art. 16 unlike in Art. 15." The Court refused to read Art. 15(3) into Art. 16 so as to restrict the scope of the prohibition contained in Art. 16(2).[43]

(f) On the other hand, the Punjab & Haryana High Court took a different view in *Shamsher Singh v. State of Punjab*.[44] A rule granting a special allowance to the women principals working in a wing of the Punjab Educational Services was challenged on the ground that their male counterparts were not given the same benefit although both performed identical duties and were part of the same service. The constitutional validity of the rule was challenged under Art. 16(2).

The High Court upheld the impugned rule under Art. 15(3), holding that even though the discrimination was based on the ground of sex, it was saved by Art. 15(3). The court ruled that Art. 15(3) could be invoked for construing and determining the scope of Art. 16(2). According to the court, Art. 15(3) extends to the entire field of state activity, including the field of public employment which has been specifically dealt with in Art. 16. The Court stated that if a particular provision squarely falls within the ambit of Art. 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the basis of sex. "Articles 14, 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, clause (3) of Article 15 can be invoked for construing and determining the scope of Art. 16(2)."

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41. *Mt. Choki v. State of Rajasthan*, AIR 1957 Raj 10.
This provision now is S. 437, Cr.PC, 1973.
Also see, *Nirmal Kumar v. State of Rajasthan*, Cr LJ 1582; *Shehat Ali v. State of Rajasthan*, 1992 Cr LJ 1335.

42. AIR 1976 Del 302.

43. For Art. 16, see, next Chapter.

44. AIR 1970 P & H 372.

The Court however ruled that "only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2)."

(g) A rule was made by the Punjab Government rendering women ineligible for posting in the men's jails except for the posts of clerks and matrons. Thus, a woman could not be appointed as the Superintendent of Jails. This rule was challenged as being discriminatory on the ground of sex only.

The High Court rejected the challenge in *Raghubans Saudagar Singh v. State of Punjab*.[45] The High Court held, "if the sex added a variety of other factors and considerations form a reasonable nexus for the object of classification then the bar of Arts. 15 and 16(2) cannot possibly be attracted." The court said that, testing the proposition in reverse, the state may for identical considerations exclude men from the post of warden and other jail officials who may have to come in direct and close contact with the women inmates of such a jail.

(h) There existed a common cadre of Probation Officers for males and females. However, for the post of the Head of the Institute for destitute women, only females were regarded as eligible. This was challenged as being discriminatory.

In *B.R. Acharya v. State of Gujarat*,[46] the High Court said that only because there was a common cadre, in which the officers of both sexes were appointed, it did not mean that all posts in the higher cadre must also be filled in by persons belonging to both the sexes. Keeping in view the nature of duties to be performed, the State Government may decide that only a woman will head a women's institution. Art. 15(3) enables the State to make any special provision for women and children and so the impugned rule could not be held to be unconstitutional.

(i) The Bombay Government enacted a statutory provision reserving a few seats for women in the municipalities. The provision was challenged as discriminatory. Rejecting the challenge in *Dattatraya v. Motiram More*,[47] the High Court pointed out that whereas under Art. 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Art. 15(3), the State may discriminate in favour of women without offending Art. 15(1). The court went to state:

> "Even if in making special provision for women for giving them reserved seats the State has discriminated against men, by reason of Art. 15(3) the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex."

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45. AIR 1972 P & H 117.
46. 1988 Lab IC 1465.
47. AIR 1953 Bom 311.

(j) The most significant pronouncement on Art. 15(3) is the recent Supreme Court case *Government of Andhra Pradesh v. P.B. Vijay Kumar*.[48]

The Supreme Court has ruled in the instant case that under Art. 15(3), the State may fix a quota for appointment of women in government services. Also, a rule saying that all other things being equal, preference would be given to women to the extent of 30% of the posts was held valid with reference to Art. 15(3).

It was argued that reservation of posts or appointments for any backward class is permissible under Art. 16(2) but not for women and so no reservation can be made in favour of women as it would amount to discrimination on the ground of sex in public employment which would be violative of Art. 16(2). Rejecting this argument, the Supreme Court has ruled that posts can be reserved for women under Art. 15(3) as it is much wider in scope and covers all state activities. While Art. 15(1) prohibits the State from making any discrimination *inter alia* on the ground of sex alone, by virtue of Art. 15(3), the State may make special provisions for women. Thus, Art. 15(3) clearly carves out a permissible departure from the rigours of Art. 15(1).

The Court has emphasized that an important limb of the concept of gender equality is creating job opportunities for women. Making special provisions for women in respect of employment or posts under the state is an integral part of Art. 15(3). "To say that under Art. 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the state is an integral part of Article 15(3)."[49] This power conferred by Art. 15(3) is not whittled down in any manner by Art. 16.[50]

What does the expression "special provision" for women mean? The "special provision" which the state may make to improve women's participation in all activities under the supervision and control of the state can be in the form of either affirmative action or reservation. Thus, Art. 15(3) includes the power to make reservations for women. Talking about the provision giving preference to women, the Court has said that this provision does not make any reservation for women. It amounts to affirmative action. It operates at the initial stage of appointment and when men and women candidates are equally meritorious. Under Art. 15(3), both reservation and affirmative action are permissible in connection with employment or posts under the state. Art. 15 is designed to create an egalitarian society.

The Supreme Court has explained the relationship between Arts. 15 and 16 as follows. Art. 15 deals with every kind of state action in relation to Indian citizens. Every sphere of state activity is controlled by Art. 15(1) and, therefore, there is no reason to exclude from the ambit of Art. 15(1) employment under the state. Art. 15(3) permits

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48. AIR 1995 SC 1648 : (1995) 4 SCC 520.
49. *Ibid.*, at 1651.
50. For discussion on Art. 16, see, next Chapter.

special provisions for women. Arts. 15(1) and 15(3) go together. In addition to Art. 15(1), Art. 16(1) places certain additional prohibitions in respect of a specific area of state activity, *viz.,* employment under the state. These are in addition to the grounds of prohibition enumerated under Art. 15(1) which are also included under Art. 16(2). The Court has observed:

> "Therefore, in dealing with employment under the state, it has to bear in mind both Arts. 15 and 16 the former being a more general provision and the latter, a more specific provision. Since Art. 16 does not touch upon any special provision for women being made by the state, it cannot in any manner derogate from the power conferred upon the state in this connection under Art. 15(3). This power conferred by Art. 15(3) is wide enough to cover the entire range of state activity including employment under the state."

It may be noted that Art. 16(2) is more limited in scope than Art. 15(1) as it is confined to employment or office under the state. The prohibited grounds of discrimination under Art. 16(2) are somewhat wider than those under Art. 15(2) because Art. 16(2) prohibits discrimination on the additional grounds of descent and residence apart from religion, caste, sex and place of birth.

(k) The Punjab University made a rule barring a male lecturer from being appointed as Principal in a Girls' College. The constitutional validity of the rule was challenged and the High Court by a majority of 3:2 held the rule to be unconstitutional. While the minority view was that the said rule fell, and was justified, under Art. 15(3), the majority ruled that the rule in question did not fall under Art. 15(3) and that the rule was discriminatory on the basis of sex.

The majority applied a qualitative test to the rule. The majority opined that discrimination can be made in favour of women under Art. 15(3) if it is found that the women are not equal with the men and are lagging behind the men in the field where reservation is sought to be made. As and when any reservation is made in favour of women, the same is to be tested on the ground of reasonableness. The state has to *prima facie* justify the grounds for making the reservation. In the instant case, it was held by the majority that there was no principle or criterion involved in denying the post of the Principal of a Girls' College to a male when males could be appointed as teachers and heads of departments in such colleges. The functions of Principal are mostly administrative in nature and there is no bar in a female being appointed as the Principal of a Boys' College.[51]

If separate colleges or schools for girls are justifiable, rules providing appointment of a lady Principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. Hence, rules empowering the authority to appoint only a lady

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51. *M.C. Sharma v. Punjab University, Chandigarh,* AIR 1997 P & H 87.

principal or a lady teacher or a lady doctor or a woman Superintendent are not violative of Articles 14, 15 or 16.[52]

C. ARTICLE 15(4) : BACKWARD CLASSES

Article 15(1) would have come in the way of making favourable provisions for backward sections of society. This can be illustrated by referring to two cases.

The Madras Government issued an order [popularly known as the Communal G.O] allotting seats in the State medical colleges community-wise as follows: Non-Brahmin (Hindus) 6; Backward Hindus, 2; Brahmins, 2; Harijans, 2; Anglo-Indians and Indian Christians, 1; Muslims, 1. This G.O. was declared invalid because it classified students merely on the basis of 'caste' and 'religion' irrespective of their merit.[53] A seven Judge Bench of the Supreme Court struck down the classification as being based on caste, race and religion for the purpose of admission to educational institutions on the ground that Art. 15 did not contain a clause such as Art. 16(4).

In another case, a government order requisitioning land for construction of a colony for harijans was held to be discriminatory under Art. 15(1) because the facilities were being given to them as a 'community' as such when other members of the public were equally in need of similar facilities.[54]

To tide over the difficulties created by such decisions in the way of helping backward classes by making discriminatory provisions in their favour, Art. 15(4) was added to the Constitution in 1951. Art. 15(4) says that the state is not prevented from making any special provisions for "the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

Thus, an order acquiring land for constructing a colony for harijans is now valid under Art. 15(4).[55] Art. 15(4) does not justify grant of special remission to the prisoners of Scheduled Castes and Scheduled Tribes and not to others. The grant of remission of convicted prisoners belonging to these classes can hardly be said to be a measure for the "advancement" of the Scheduled Castes and Scheduled Tribes.[56]

It may be noted that the Constitution makes a few more provisions for development and amelioration of the condition of these classes of people which are discussed later at the appropriate places.[57]

Article 15(4) confers a discretion and does not create any constitutional duty or obligation. Hence no mandamus can be issued either to provide for reservation or for relaxation.[58]

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52. *Vijay Lakshmi v. Punjab University,* (2003) 8 SCC 440 : AIR 2003 SC 3331.
53. *State of Madras v. Champkam Dorairajan,* AIR 1951 SC 226 : 1951 SCR 525.
Also see, under Art. 29(2), *infra,* Ch. XXX, Sec. A.
54. *Jagwant Kaur v. State of Maharashtra,* AIR 1952 Bom. 461.
55. *Moosa v. State of Kerala,* AIR 1960 Ker. 355.
56. *State of Madhya Pradesh v. Mohan Singh,* AIR 1996 SC 2106 : (1995) 6 SCC 321.
57. See, under Art. 29, *infra,* Ch. XXX, Sec. A; under "Directive Principles of State Policy", *infra,*
Ch. XXXIV, "Safeguards to Minorities" etc., Ch. XXXV.
58. *Union of India v. R. Rajeshwaran,* (2003) 9 SCC 294 : (2001) 10 JT 135.

Under Art. 15(4), in innumerable cases,[59] the reservation of seats for Scheduled Castes, Scheduled Tribes and Backward Classes in engineering, medical and other technological colleges has been upheld. Reservations are possible under Art. 15(4) for the advancement of any backward class of citizens or for Scheduled Castes and Scheduled Tribes. Rejecting the argument that Art. 15(4) envisages "positive action" while Art. 16(4)[60] is a provision warranting programmes of "positive discrimination", the Supreme Court has observed in *Indra Sawhney v. Union of India*:[61]

> "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 reservation in educational institutions and other walks of life can be provided under Art. 15(4) just as reservations can be provided in services under Art. 16(4). If so, it would not be correct to confine Art. 15(4) to programmes of positive action alone. Art. 15(4) is wider than Art. 16(4) is as much as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs (Socially and Educationally Backward Classes), Scheduled Castes and Scheduled Tribes, whereas Art. 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts."

The scope of Art. 15(4) is wider than Art. 16(4). Art. 15(4) covers within it several kinds of positive action programmes in addition to reservations. However, reservation of posts and appointments must be within reasonable limits, *viz.,* 50% at the maximum. The same limit applies to Art. 15(3). Reservation to a backward class is not a constitutional mandate, but a prerogative of the State.[62]

Reservation for a backward class is not a constitutional mandate. The provisions of Articles 330(1)(b) and (c) show that the Constitution has treated Scheduled Tribes in the autonomous districts of Assam as a separate category distinct from all other Scheduled Tribes. This clearly indicates that when the Constitution makers wanted to make a subclassification of Scheduled Tribes, they have themselves made it in the text of the Constitution itself and have not empowered any legislature or Government to make such a subclassification.[63]

In *Chinnaiah*[64] the Court also said that Art. 341 indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any subclassification or division in the said list except, may be, for the limited purpose of Article 330. Therefore, it is clear that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group cannot be subdivided for any purpose. The constitution intended

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59. See below.
60. See Ch. XXIII, Sec. E, *infra*.
61. AIR 1993 SC 477 : 1992 Supp (3) SCC 217.
For a fuller discussion on *Indra Sawhney*, see, *infra.*
62. *E. V. Chinnaiah v. State of A.P.,* (2005) 1 SCC 394 : AIR 2005 SC 162.
63. *E. V. Chinnaiah v. State of A.P.,* (2005) 1 SCC 394: AIR 2005 SC 162.
64. *Ibid.*

that all the castes included in the Schedule under Article 341 would be deemed to be one class of persons.

The principles laid down in *Indra Sawhney* case,[65] for subclassification of other Backward Classes cannot be applied as a precedent for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of other backward classes is not applicable to scheduled castes and scheduled tribes. This is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Government.[66]

A woman who by birth did not belong to a backward class or community, would not be entitled to contest a seat reserved for a backward class community merely on the basis of her marriage to a male of that community.[67]

The validity of the Scheduled Castes and Scheduled Tribes (Provision of Transfer of Certain Lands Act, 1978) which restricted the transfer by SC or ST of any land granted to them for particular period of time (e.g. 3 years) has been upheld because of their poverty, lack of education and backwardness which was exploited by the stronger section of the society was not unreasonable and hence not violative of Art. 19(1)(f) of the Constitution. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the State's jurisdiction while exercising its executive or legislative power is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. Having already fulfilled this part of its constitutional obligation, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class. It is not open to the State to subclassify a class already recognized by the Constitution and allot a portion of the already reserved quota amongst the State created subclass within the list of scheduled casts. Furthermore, the emphasis on efficient administration placed by Art. 335 of the Constitution must also be considered when the claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered. Since the State had already allotted 15% of the total quota of the reservation available for backward classes to the Scheduled Castes the question of allotting any reservation under the impugned Act to the backward classes did not arise. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or sub-classified further. An uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. For the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but

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65. 1992 Supp (3) SCC 217.
66. *E. V. Chinnaiah v. State of A.P.,* (2005) 1 SCC 394 : AIR 2005 SC 162.
67. *Sandhya Thakur v. Vimla Devi Kushwah,* (2005) 2 SCC 731: AIR 2005 SC 909.

the same would not mean that in the process of rationalizing the reservation to the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated. Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.[68]

As regards the identification of the "Scheduled Castes" and "Scheduled Tribes", reference is to be made to Arts. 341 and 342. These constitutional provisions are discussed later in this book.[69]

(a) SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES

A major difficulty raised by Art. 15(4) is regarding the determination of who are 'socially and educationally backward classes.' This is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determination. Art. 15(4) lays down no criteria to designate 'backward classes'; it leaves the matter to the state to specify backward classes, but the courts can go into the question whether the criteria used by the state for the purpose are relevant or not.

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the Supreme Court's approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and efficiency and public interest have to be maintained in public services because it is implicit in the very idea of reservation that a less meritorious person is being preferred to a more meritorious person. The Court also seeks to guard against the perpetuation of the caste system in India and the inclusion of advance classes within the term backward classes.

From the several judicial pronouncements concerning the definition of backward classes, several propositions emerge. First, the backwardness envisaged by Art. 15(4) is *both* social and educational and *not* either social *or* educational. This means that a class to be identified as backward should be *both* socially and educationally backward.[70] In *Balaji*, the Court equated the "social and educational backwardness" to that of the "Scheduled Castes and Scheduled Tribes". The Court observed: "It was realised that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Scheduled Tribes and it was thought that some special provision ought to be made even for them."

Secondly, poverty alone cannot be the test of backwardness in India because by and large people are poor and, therefore, large sections of population would fall under the backward category and thus the whole object of reservation would be frustrated.[71]

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68. *E. V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : AIR 2005 SC 162.
69. See. Ch. XXXV, *infra.*
70. *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649 : 1963 Supp (1) SCR 439.
71. *Janki Prasad Parimoo v. State of Jammu & Kashmir,* AIR 1973 SC 930 : (1973) 1 SCC 420.

Thirdly, backwardness should be comparable, though not exactly similar, to the Scheduled Castes and Scheduled Tribes.

Fourthly, 'caste' may be a relevant factor to define backwardness, but it cannot be the sole or even the dominant criterion. If classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society.[72] Also this test would break down in relation to those sections of society which do not recognise caste in the conventional sense as known to the Hindu society.

Fifthly, poverty, occupations, place of habitation, all contribute to backwardness and such factors cannot be ignored.

Sixthly, backwardness may be defined without any reference to caste. As the Supreme Court has emphasized, Art. 15(4) "does not speak of castes, but only speaks of classes", and that 'caste' and 'class' are not synonymous. Therefore, exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests.

(b) *BALAJI*

After the enactment of the above mentioned first Constitutional Amendment in 1951, *Balaji* was the first case which came up before the Supreme Court.[73]

An order of the Mysore Government issued under Art. 15(4) reserved seats for admission to the State medical and engineering colleges for Backward classes and 'more' Backward classes. This was in addition to the reservation of seats for the Scheduled Castes (15%) and for the Scheduled Tribes (3%). Backward and more Backward classes were designated on the basis of 'castes' and 'communities'.

The Supreme Court characterised Art. 15(4) as an exception to Art. 15(1) [as well as to Art. 29(2)].[74] The Court stated—"there is no doubt that Art. 15(4) has to be read as a proviso or an exception to Arts. 15(1) and 29(2)".

The Court declared the order bad on several grounds in *Balaji v. State of Mysore*[75]. The first defect in the Mysore order was that it was based solely on caste without regard to other relevant factors and this was not permissible under Art. 15(4). Though caste in relation to Hindus could be a relevant factor to consider in determining the social backwardness of a class of citizens, it must not be made the sole and dominant test in that behalf. Christians, Jains and Muslims do not believe in the caste system and, therefore, the test of caste could not be applied to them. In as much as identification of all backward classes under the impugned order had been made solely on the basis of caste, the order was bad. "Social backwardness is in the ultimate analysis the result of poverty to a very large extent."

Secondly, the test adopted by the State to measure educational backwardness was the basis of the average of student-population in the last three high school classes of all high schools in the State in relation to a thousand citizens of that community. This average for the whole State was 6.9 per thousand. The Court

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72. See also, *infra*, *Safeguards to Minorities*, Ch. XXXV.
73. See, note 54, *supra.*
74. For discussion on Art. 29(2), see, *infra*, Ch. XXX, Sec. A.
75. AIR 1963 SC 649 : 1963 Supp (1) SCR 439.

stated that assuming that the test applied was rational and permissible to judge educational backwardness, it was not validly applied. Only a community well below the State average could properly be regarded as backward, but not a community which came near the average. The vice of the Mysore order was that it included in the list of backward classes, castes or communities whose average was slightly above, or very near, or just below the State average, *e.g.*, Lingayats with an average of 7.1 per cent were mentioned in the list of backward communities.

Thirdly, the Court declared that Art. 15(4) does not envisage classification between 'backward' and 'more backward classes' as was made by the Mysore order. Art. 15(4) authorises special provisions being made for really backward classes and not for such classes as were less advanced than the most advanced classes in the State. By adopting the technique of classifying communities into backward and more backward classes, 90 per cent of the total State population had been treated as backward. The order, in effect, sought to divide the State population into the most advanced and the rest, and put the latter into two categories—backward and more backward—and the classification of the two categories was not envisaged by Art. 15(4). "The interests of weaker sections of society which are a first charge on the State and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4)." The State has "to approach its task objectively and in a rational manner."

In *Balaji*, the Supreme Court could sense the danger in treating 'caste' as the sole criterion for determining social and educational backwardness. The importance of the judgment lies in realistically appraising the situation when the Court said that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome of social backwardness. The Court drew distinction between 'caste' and 'class'. An attempt at finding a new basis for ascertaining social and educational backwardness in place of caste is reflected in the *Balaji* decision.

The Court also ruled that reservation under Art. 15(4) should be reasonable. It should not be such as to defeat or nullify the main rule of equality enshrined in Art. 15(1). While it would not be possible to predicate the exact permissible percentage of reservation it can be stated in a general and broad way that it ought to be less than 50%; "how much less than 50% would depend upon the relevant prevailing circumstances in each case". Also a provision under Art. 15(4) need not be in the form of a law, it could as well be made by an executive order.

(c) AFTER *BALAJI*

An order saying that a family whose income was less than Rs. 1,200 per year, and which followed such occupations as agriculture, petty business, inferior services, crafts etc. would be treated as 'backward', was declared to be valid in *Chitralekha v. State of Mysore*[76]. Here two factors—economic condition and profession—were taken into account to define backwardness, but caste was ignored for the purpose.

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76. AIR 1964 SC 1823 : (1964) 6 SCR 368.

In *Balaji*, the Supreme Court had mentioned caste as one of the relevant factors for determining social backwardness. The order in the instant case was challenged on the ground that caste had been completely ignored for the purpose. The Supreme Court ruled that though caste is a relevant circumstance in ascertaining backwardness of a class, there is nothing to preclude the authority concerned from determining social backwardness of a group of citizens if it could do so without reference to caste. Identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste is not bad and would not offend Art. 15(4). SUBBA RAO, J., speaking for the majority of the Constitution Bench 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 individuals may be considered along with other relevant factors in putting him in particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Art. 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests."

In course of time, the judicial view has undergone some change in this respect and 'caste' as a factor to assess backwardness has been given somewhat more importance than in *Balaji*. The Supreme Court has taken note of the fact that there are numerous castes in the country which are backward socially and educationally and the state has to protect their interests. A caste is also a 'class' of citizens and, therefore, if an entire caste is found to be socially and educationally backward, as a fact, on the basis of relevant data and material, then inclusion of the caste as such would not violate Art. 15(1). When backwardness is defined with reference to castes, the Court wants to be satisfied that not 'caste' alone, but other factors have also been considered for the purpose.

On this basis, the Court upheld a Madras order defining backward classes mainly with reference to castes. Looking at the history as to how the list had come to be formulated, the Court felt satisfied that caste was not taken as the sole basis of backwardness; the main criterion for inclusion in the list was social and educational backwardness of the castes based on their occupations. Castes were only a compendious indication of the classes of people found to be socially and educationally backward.[77] In *Rajendran*,[78] WANCHOO, C.J., speaking for the Constitution Bench pointed out that "if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Art. 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Art. 15(4)."

Similarly, in *Balaram*,[79] a list prepared by the Backward Classes Commission appointed by the Andhra Government was held valid even though backward classes were enumerated mainly by their caste names because the Court found that the Commission had prepared the list after a detailed enquiry and applying several tests like general poverty, occupations, caste and educational backward-

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77. *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786. Also see, *A Periakaruppan v. State of Tamilnadu*, AIR 1971 SC 2303.

78. *Ibid.*

79. *S.V. Balaram v. State of Andhra Pradesh*, AIR 1972 SC 1375 : (1972) 1 SCC 660.

ness. The Court felt satisfied that the Commission had enough material before it to be satisfied that the persons included in the list were really socially and educationally backward. But where list was prepared solely with reference to castes, and no material was placed before the Court to show that other factors besides caste had been considered in preparing it, the list was quashed as violative of Art. 15(1).[80] The Court observed in *Sagar,* "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."[81]

The judicial approach that castes may be listed as backward classes provided they are found to be backward on the basis of some factors other than mere 'caste', may possibly be more practical in the context of the facts of the Indian life. But there is no doubt that this dilutes, to some extent, the *Balaji* approach. The danger in this judicial thinking is that it will give a lease of life to the caste system in India, and the quest for formulae to define backwardness, delinked from the caste system, will recede into the background. In this way, the goal of evolving a casteless society in India in the foreseeable future will receive a set back.

A government order excluded the candidates belonging to socially and educationally backward classes from claiming the benefit of reservation if the aggregate annual family income was Rs. 10,000 or over. The order was challenged by a candidate belonging to the backward class, but who was denied the privilege of preferential admission to medical college because her family income exceeded Rs. 10,000 annually. The Supreme Court emphasized in *K.S. Jayasree v. State of Kerala,*[82] that social backwardness is the result of caste and poverty. Poverty or economic standard is a relevant factor in determining backwardness, but cannot be the sole determining factor. Caste cannot also be the sole or dominant test for the purpose. "Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests". Both of these factors are relevant to determine backwardness. "Social backwardness which results from poverty is likely to be magnified by caste considerations". Occupations, place of habitation may also be relevant factors for the purpose. With the improvement in economic position of a family, social backwardness disappears. To allow these persons to take advantage of the privileges meant for backward persons, will result in depriving the real backward persons of their chance to make progress.

In a number of cases,[83] it has been held that a lady marrying a Scheduled Caste/Scheduled Tribe/Other Backward Citizen (OBC), or one transplanted by adoption or any other voluntary act, does not *ipso facto* become entitled to claim

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80. *State of Andhra Pradesh v. P. Sagar,* AIR 1968 SC 1379 : (1968) 3 SCR 595.
Also see, 11 *JILI,* 371 (1969); *Chhotey Lal v. State of Uttar Pradesh,* AIR 1979 All 135.

81. Also see, SHAH, J., in *Triloki Nath v. State of Jammu & Kashmir,* AIR 1969 SC 1 : (1969) 1 SCR 103.

82. AIR 1976 SC 2381 : (1976) 3 SCC 730.
Also see, *Chhotey Lal v. State of Uttar Pradesh,* AIR 1979 All 135.

83. *Kumari Madhuri Patil v. Addl. Commissioner, Tribal Development,* (1994) 6 SCC 241 : 1994 SCC (199) 1349 : AIR 1995 SC 94; *A.S. Sailja v. Kurnool Medical College, Kurnool,* AIR 1986 AP 209; *N.B. Rai v. Principal Osmania Medical College,* AIR 1986 AP 196; *Smt. D. Neelima v. The Dean of P.G. Studies, A.P. Agricultural Universities, Hyderabad,* AIR 1993 AP 299.

reservation under either Art. 15(4) or Art. 16(4).[84] In *Valsamma Paul v. Cochin University*,[85] the Supreme Court has explained the rationale behind this ruling as follows:[86]

> "It is seen that Dalits and Tribes suffered social and economic disabilities recognised by Articles 17 and 15(2). Consequently, they became socially, culturally and educationally backward; the OBC also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities... Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also undergo same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation".

The Court went on to say that a person who has had an advantageous start in life having been born in forward caste is transplanted into a backward caste by adoption / marriage / conversion does not become eligible to the benefit of reservation either under Art. 15(4) or 16(4). "Acquisition of the status of SC, etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the foreign constitutional policy under Arts. 15(4) and 16(4) of the Constitution."

What happened in *Valsamma* was that a Syrian Catholic (a forward caste) lady married to a Latin Catholic was appointed as a lecturer as a reserved candidate. This was challenged and the Supreme Court ultimately quashed her appointment on the ground that she was not entitled to the benefit of reservation under Art. 16(4) as a lecturer as the post in question was reserved for the backward class Latin Catholic Community.

The Supreme Court has clarified in *Jagdish Negi v. State of Uttar Pradesh*,[87] that no class of citizens can be perpetually treated as socially and educationally backward. Backwardness cannot continue indefinitely. Every citizen has a right to develop socially and educationally. The State is entitled to review the situation from time to time. There is no rule that once a "backward class of citizens, always such a backward class". Once a class of citizens has been held to be socially and educationally backward class of citizens, it cannot be predicated that in future it may not cease to be so. The State may review the situation from time to time and decide whether a given class of citizens which has been characterised as "socially and educationally backward" has continued to form part of that category or has ceased to fall in that category.

The Supreme Court has observed in *Indra Sawhney*[88] that the policy of reservation has to be operated year-wise and there cannot be any such policy in perpetuity. The State can review from year to year the eligibility of the class of socially and educationally backward class of citizens. Further, it has been held that Art. 15(4) does not mean that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total

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84. For Art. 16(4), see, *infra*, Chapter, XXIII, Sec. E.
85. AIR 1996 SC 1010 : (1996) 3 SCC 545; see, *supra*, Ch. XXI.
86. *Ibid*, at 1022.
87. AIR 1997 SC 3505 : (1997) 7 SCC 203.
88. *Indra Sawhney v. Union of India*, see, Ch. XXIII, Sec. F, *infra.*

population. It is in the discretion of the State to keep reservations at reasonable level by taking into consideration all legitimate claims and the relevant factors.

(d) QUANTUM OF RESERVATION

What is the extent of reservation that can be made under Art. 15(4)?

The Supreme Court has set its face, generally speaking, against excessive reservation, for it is bound to affect efficiency and quality by eliminating general competition.

For the first time, in *Balaji*,[89] the question was raised before the Supreme Court relating to the extent of special provisions which the States can make under Art. 15(4). In this case, reservation up to 68% was made by the State of Mysore for backward classes for admission to the State medical and engineering colleges. The break-up of the reservation was as follows: 50% seats for backward and 'more' backward classes; 15% seats for Scheduled Castes; 3% seats for the Scheduled Tribes. In effect, 68% seats were reserved in medical, engineering and other technical colleges for the weaker sections of the society, leaving only 32% seats for the merit pool.

The State even argued that since Art. 15(4) does not contain any limitation on the State's power to make reservation, cent percent reservation could be made in favour of backward classes in the higher educational institution if the problem of backwardness in a State so demanded. The Supreme Court rejected this extreme argument. The Court also rejected the rule of 68% reservation.

The Court agreed, on the one hand, that Art. 15(4) must be read with Art. 46, a directive principle,[90] and steps ought to be taken to redress backwardness and inequality from which the backward classes, Scheduled Castes and Scheduled Tribes suffer otherwise for them political freedom and Fundamental Rights would have little meaning. On the other hand, the Court insisted that Art. 15(4) being a special provision cannot denude Art. 15(1) of all its significance. Art. 15(4) "is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society." The Court observed:

> "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) 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 consisting of the rest of the society were to be completely ignored."

The Court emphasized that a special provision contemplated by Art. 15(4) must be within reasonable limits. The interests of the weaker sections of society have to be adjusted with the interests of the community as a whole. The Court insisted that considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the reasonableness of a special provision under Art. 15(4). The Court observed on this point:

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89. *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *supra.*
90. *Infra,* Ch. XXXIV.

> "The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by wholesale reservation of seats in all technical, medical or engineering colleges or institutions of that kind".

Thus, the Supreme Court set its face against excessive reservation under Art. 15(4), for it may affect efficiency by eliminating general competition. The general principle laid down by the Court is that the maximum limit of reservation should not be more than 50% for all classes under Art. 15(4), *viz.*, backward classes, Scheduled Castes and Scheduled Tribes. Thus, reservation of 68% was declared void in *Balaji*. The Court observed that the interests of the weaker sections of the society need to be adjusted with interests of the society as a whole.

In *Balaji*, the Supreme Court clearly indicated that in giving effect to reservations for SCs, STs and OBCs, a balance ought to be struck so that the interests of the backward classes, STs and SCs are properly balanced with the interests of the other segments of the society. In order to safeguard the interests of the reserved classes, the interests of the community as a whole cannot be ignored. It has to be remembered that Art. 15(4) is an enabling provision and its objective is to advance the interests of the weaker elements in society. Reservations under Art. 15(4) must be within a reasonable limit. If a provision under Art. 15(4) ignores the interests of the society as a whole, it would be clearly outside the purview of Art. 15(4). It may be noted that the over-all limit of 50% reservation is only for the categories mentioned in Art. 15(4); there could be additional reservation for other classes.

For admission to the State medical colleges, the Madhya Pradesh Government made the following reservation of seats: Scheduled Castes, 15%; Scheduled Tribes, 15%; Women candidates, 15%; Children of military personnel, 3%; Nominees of the Central Government, 3% and nominees of Jammu & Kashmir Government, 3%. The Scheme was challenged but the Supreme Court upheld it in *State of Madhya Pradesh v. Nivedita Jain*.[91]

D. RESERVATION IN ADMISSIONS

The question of reservations has become a very knotty socio-politico issue of the day. Because of keen competition for limited opportunities available in the country, governments are pressurized to indulge in all kinds of reservations for all kinds of groups apart from reservations for Scheduled Castes, Scheduled Tribes and backward classes. Basically, any reservation is discriminatory for reservation means that as between two candidates of equal merit, the candidate belonging to the reserve quota is preferred to the one having no reserve quota. Many deserving candidates thus feel frustrated because of reservation for the less deserving persons and they seek to challenge the scheme of reservation as unconstitutional. The relevant Articles are 14, 15 and 16.

Under Art. 15, reservation in educational institutions can be made for:

(1) Women under Art. 15(3);

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91. AIR 1981 SC 2045 : (1981) 4 SCC 296.

(2) Socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes under Art. 15(4);

(3) Other groups not falling under Arts. 15(3) and 15(4).

Questions arise frequently regarding reservation of seats for administration in educational institutions for categories of persons other than those falling under Arts. 15(3) and 15(4). This can be done under Art. 15(1) itself but the main question to consider is whether the classification is reasonable. The tests applied here are the same as are applicable in case of Art. 14 to adjudge whether the classification is reasonable.[1] Thus, the 'equality' principle contained in Art. 15(1) is not infringed so long reservation is made for a class which can be identified on the basis of a rational, relevant and intelligible differentia, and there is nexus between the differentia and the object to be achieved, *viz.,* to get the best talent for admission to professional colleges. As the Supreme Court has stated, the "socially and educationally backward" can be shown some preferential treatment because of Art. 15(4). The underlying idea is that in course of time, these persons will be able to stand in equal position with the more advanced sections of the society. The same principle may be applied to other handicapped sections which do not fall under Art. 15(4). Thus, reservation of seats for children of defence personnel, ex-defence personnel, political sufferers has been upheld.[2]

Constitution being a living organ, rights are to be determined in terms of judgments interpreting the Constitution. Right of a meritorious student to get admission in a postgraduate course is a fundamental and human right which is required to be protected. Such a valuable right cannot be permitted to be whittled down at the instance of less meritorious students.[3]

Fixation of a district-wise quota on the basis of the district population to the total State population for admission to the State medical colleges has been held to be discriminatory. The object in selecting candidates for admission is to get the best possible material for admission to colleges. Whether selection is from the socially and educationally backward classes or from the general pool, the object of selection must be to secure the best possible talent from the two sources. But this purpose cannot be achieved by allocation of seats district-wise as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted.[4] As the object to be achieved is to get the best talent for admission to professional colleges, the allocation of seats district-wise has no reasonable relation with the object to be achieved. If anything, such allocation will result in the object being destroyed in many cases.

As a sequel to the above pronouncement, the State Government introduced a new scheme of admissions to medical colleges. These colleges in the State were grouped into several units and an applicant could seek admission to a unit. This scheme was also held to be void as being violative of Art. 14 because the students in some of the units were in a better position than those who applied in other units, since the ratio between the applicants and the number of seats in each

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1. *Supra.*
2. *D.N. Chanchala v. State of Mysore,* AIR 1971 SC 1762 : (1971) 2 SCC 293.
3. *Dr. Saurabh Chaudri v. Union of India* (2004) 5 SCC 618 : AIR 2004 SC 2212.
4. *P. Rajendran v. State of Madras,* AIR 1968 SC 1012 : (1968) 2 SCR 786.
Also, *Mohan Bir Singh Chawla v. Punjab University,* AIR 1997 SC 788 : (1977) 2 SCC 171.

unit varied and several applicants who secured lesser marks than the petitioners were selected merely because their applications came to be considered in other units. The Supreme Court characterised the scheme as discriminatory against some students.[5]

Reservation for children of residents of the Union Territories (other than Delhi) in professional institutions has been upheld because of general backwardness of these areas and absence of such institutions there. Also, reservation for children of government servants posted abroad in Indian Missions has also been upheld because these persons face (because of exigencies of service) lot of difficulties in the matter of education.[6] There could be reasonable classification based on intelligible differentia for purposes of Arts. 15(1) and 15(4). The Court said that since the government bears the financial burden of running the medical colleges it can decide the sources from where the students are to be admitted. "If the sources are properly classified on territorial, geographical or other reasonable basis it is not for courts to interfere with the manner and method of making the classification." In the instant case, the Court ruled that there was no discrimination against the appellants on grounds only of religion, race, caste, language, sex or place of birth and the classification made by the Central Government was reasonable and based on intelligible differentia.

Since SCs and STs form a separate class by themselves and outside the creamy layer area and having regard to Art.46, these socially backward categories are to be taken care of at every stage and even in specialized institutions like IITs. The argument of maintenance of high standards made on behalf of Delhi IIT was rejected although the Court accepted the position that 'the petitioners were not able to secure the required credits as against the stipulated minimum requirements for continuation' of their studies.[7] This is close to Arun Shourie's 'Bending over Backwards' and discourages merit and excellence.

For admission to the medical college in the State, 60 per cent seats were to be filled on merit, 20 per cent from Scheduled Castes and other reserved categories including socially and educationally backward classes and the remaining 20 per cent of the seats were earmarked for "ensuring rectification of regional imbalances." In *Nishi Meghu v. State of Jammu and Kashmir*,[8] the classification made for "rectification of regional imbalances" was declared invalid as being too vague as areas suffering from imbalances had not been identified. Thereafter, the State Government identified certain villages as socially and educationally backward for applying the principle of "rectification of regional imbalances" in different parts of the State. The Supreme Court again held in *Arti Sapru v. State of Jammu and Kashmir*[9] that the classification suffered from the vice of arbitrariness, because there was no intelligible data before the Court for sustaining the classification. The Court invoked the principle advocated in *Pradip Tandon*.[10]

The Nagpur University made some reservation for wards of the university employees for admission to the Institute of Technology. The reservation was sought

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5. *A. Periakaruppan v. State of Tamil Nadu*, AIR 1971 SC 2303.
6. *Chitra Ghosh v. Union of India*, AIR 1970 SC 35 : (1969) 2 SCC 228.
Also see, *Narayan Sharma v. Pankaj Kumar Lehkar*, AIR 2000 SC 72 : (2000) 1 SCC 44.
7. *Avinash Singh Bagri v. Registrar, IIT Delhi*, (2009) 8 SCC 220 : (2009) 11 SCALE 535.
8. AIR 1980 SC 1975 : (1980) 4 SCC 95.
9. AIR 1981 SC 1009 : (1981) 2 SCC 484.
10. *Infra*, footnote 21 on 1321.

to be justified on the ground of 'welfare of the employees'. The High Court held the scheme to be irrational. The High Court denied that such a ground could be a relevant basis for purposes of admission of students.[11]

Reservation of seats in medical colleges for sons and daughters of employees serving in the Health Department of the State was quashed as being arbitrary and irrational.[12] Similarly, 5% seats reserved for admission to the B. Tech Course in the University in favour of the sons andwards of the University employees was quashed by the Supreme Court as being violative of Art. 14.[13] The Court observed:

> "The reservation of seats for admission to the B. Tech. Course in favour of the sons and wards of the employees of the University is violative of the doctrine of equality enshrined in Art. 14 of the Constitution. There is no rationale for the reservation of the seats in favour of the sons and wards of the employees of the University nor any such reservation has any rational nexus with the object which is sought to be achieved by the University".

It may be noted that such reservation falls under Art. 15(1) and not under Art. 15(4) and this can be valid only if it fulfils the tests of reasonable classification as laid down under Art. 14.

The same principle has been applied in the case of an unaided technological institution affiliated to the University. The Court has ruled that such an institution has to abide by the University rules and the University is bound by Art. 14. Reservation of seats in the B. Tech course of the Institute in favour of the wards of the college staff does not satisfy the test of admission being given strictly on the basis of merit.[14] The Court has taken the position that any preferential treatment has to be consistent with Art. 14 which permits reasonable classification. Such classification should have a reasonable *nexus* with the object of the rules providing for such admission, namely, to select the most meritorious amongst the candidates to have advantage of such education.

For purposes of admission to the post-graduate courses in medicine, provision was made for weightage of 15 per cent marks on the basis of service in rural areas. The High Court ruled that while some weightage on this basis *per se* might not be discriminatory, the amount of weightage in question was excessive as a second class candidate could get precedence over a first class candidate. Also, reserving seats for medical officers who have been unsuccessful in post-graduate examination outside the State was held not justifiable as this amounted to putting a premium on incompetency.[15]

For admission to the medical course, a common entrance test was prescribed for candidates who had passed the pre-University course and the Higher Secondary course. The candidates were to be admitted on the basis of the results of the test. A reservation of 40 per cent of seats was made in favour of the H.S.C. candidates. The reservation was held discriminatory and arbitrary. There can be no

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11. *Prasanna v. Director-in-Charge, LIT, Nagpur,* AIR 1982 Bom. 176.
12. *Teachers Association, Silchar Medical College v. State of Assam,* AIR 1996 Gau 97.
13. *Chairman/Director, Combined Entrance Examination v. Osiris Das,* (1992) 3 SCC 543.
14. *Thapar Institute of Engineering & Technology v. State of Punjab,* AIR 1997 SC 793 : (1997) 2 SCC 65.
15. *Niranjan Pradhan v. State of Orissa,* AIR 1982 Ori. 153.

valid classification after a common test has been prescribed. Such a classification has no nexus to the object of selecting the best candidates for medical course.[16]

Two per cent seats were reserved in the Kerala University for candidates from other universities in the post-graduate course in medicine. The Supreme Court held in *Charles K. Skaria v. Dr. C. Mathew*,[17] that this paltry reservation for outside candidates was not sufficient and infringed Art. 14 and 15. These articles do not recognise State frontiers or 'the cult of the sons of the soil.' The necessary implication of these constitutional provisions is that every basic degree holder who fills the bill can apply for admission for post-graduate courses. The niggardly quota of 2 per cent of the total number of seats for candidates of the entire country minus Kerala did not represent "a catholic approach informed by nationalist generosity". It is not a sufficient fulfilment of Arts. 14 and 15. "Fundamental rights of candidates do not depend on the grace of governments and Indians are not aliens in their own motherland when asking for seats on the score of equal opportunity."

In *Chanchala's* case,[18] university-wise allocation for admission in medical colleges in the State of Karnataka was held to be valid. The scheme was that students passing from colleges affiliated to one University were first admitted to government medical colleges affiliated to that University and only 20 per cent seats in each of such medical colleges could be allotted to outsiders. This was upheld on the ground that Universities were set up for satisfying the educational needs of different areas. The Supreme Court upheld University-wise distribution of seats, though it was not in conformity with the principle of section based on merit and marked a departure from this principle. The justification for taking this view was that constitutional preference was not constitutionally impermissible for two reasons. One, it would be quite legitimate for students attached to a University to desire to have training in specialised subjects, like medicine, in colleges affiliated to their own University as it would promote institutional continuity which has its own value. Two, any student from any part of the country can pass the qualifying examination of that University, irrespective of the place of his birth or residence.

The scheme of University-wise allocation was then modified by adding the rider that the proportion of admissions should be fixed by the proportion of the number of students presented by the concerned Universities for the pre-degree and B.Sc. examinations. This was held to be bad. The Court could not see any nexus between the registered student-strength and the seats to be allotted. The result of the rider was to discriminate against the backward area where the pre-degree or degree students would be fewer. The fewer the colleges, the fewer the pre-degree or degree students and so the linkage of the division of seats with the registered student-strength would make an irrational inroad into the scheme of University-wise allocation. "Such a formula would be a punishment for backwardness, not a promotion of their advancement."[19] It is clear from this decision that the Court would accept some kind of reservation if it is designed to remove backwardness.

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16. *State of Andhra Pradesh v. U.S.V. Balram*, AIR 1972 SC 1375 : (1972) 1 SCC 660.

17. AIR 1980 SC 1230 : (1980) 2 SCC 752.
See also, *Jagdish Saran v. Union of India, infra*, footnote 34, on 1323.

18. AIR 1971 SC 1762 : (1971) 2 SCC 293; *infra*, footnote 55, on 1330.

19. *State of Kerala v. T.P. Roshana*, AIR 1979 SC 766, 774 : (1979) 1 SCC 572.

Admissions to the LL.B. course of Punjab University were made on merit with the rider that 10% of the marks obtained in the qualifying examination were to be added in case of candidates from the Punjab University. Following *Chanchala*, the Supreme Court upheld the scheme. The Court ruled that "university-wise preference is permissible provided it is relevant and reasonable." But the Court also ruled that 10% preference was on the higher side in this competitive age and such a preference ought not to increase 5%.[20]

The U.P. Government made reservation of seats in the State medical colleges in favour of two classes of candidates—(1) Those who came from hill areas and Uttrakhand; (2) Those who came from rural areas. The Supreme Court upheld reservations in favour of candidates from hill areas and Uttrakhand as it was satisfied that the people therein were socially and educationally backward, but reservation in favour of rural people was held unconstitutional. The rural population being 80 per cent of the entire State population, the Court found it incomprehensible as to how such a large population could be regarded as backward. Thus, the Court ruled that the reservation for rural areas as such could not be sustained on the ground that the rural population represented socially and educationally backward class of citizens. The Court held that rural element did not make it a class.

The Court refused to accept the test of poverty as the 'determining factor of social backwardness'. Poverty is not the common trait of rural people alone; it is widespread in India, and to take poverty as the exclusive test would mean that a large population in India is held backward.[21]

Similarly, in *Janki Prasad*,[22] the Court did not approve declaration of 'small cultivators' and 'low paid pensioners' as backward for this is to form artificial groups to confer certain benefits under the Constitution, and is to place economic considerations above other considerations which go to show whether a particular class is socially and educationally backward. Mere poverty cannot be a test of backwardness because in this country except for a small percentage of the population, the people are generally poor—some being more poor, others less poor.

The Court also held that each of the factors, traditional occupations or residents of certain inaccessible areas, can be applied by itself, to list backward classes. The Court ruled that residents of certain areas may remain in primitive conditions because of lack of communication, inaccessibility, lack of resources etc., and residents of such areas may be validly treated as socially and educationally backward. A government order laying down a list of socially and educationally backward classes but exempting therefrom the families having an aggregate income of Rs. 6,000 annually or more is valid. Poverty is a relevant factor to determine social and educational backwardness, but it cannot be an exclusive or dominant factor.[23]

The Supreme Court has emphasized that the primary consideration for selecting candidates for admission to medical colleges is merit. But departure

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20. *Mohan Bir Sigh Chawla v. Punjab University, Chandigarh*, AIR 1997 SC 788 : (1997) 2 SCC 171.

21. *State of Uttar Pradesh v. Pradip Tandon*, AIR 1975 SC 563 : (1975) 1 SCC 267.
Also see, *Narayan Sharma v. Pankaj Kumar Lekhar*, AIR 2000 SC 70 : (2000) 1 SCC 44.

22. *Janki Pd. v. State of Jammu & Kashmir*, AIR 1973 SC 930 : (1973) 1 SCC 420.

23. *State of Kerala v. Krishna Kumar*, AIR 1976 Ker. 54.

from the merit principle is permissible where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals. Merit principle may thus be departed from either in State interest,[24] or on the consideration of a region's claim for backwardness.[25]

While 'residence' may be the basis of reservation, according to the Supreme Court in *Pradeep Jain v. Union of India*,[26] it may be tested on the touch stone of Art. 14. Accordingly, the Court has condemned as unconstitutional and void under Art. 14 "wholesale reservation" on the basis, of the 'domicile' or 'residence' requirement within the State,[27] or on the basis of 'institutional' preference for students passing the qualifying examination for admission so as to exclude all students not satisfying the requirement regardless of merit.

The Court pointed out that the principle of selection can be diluted on the ground of regional backwardness. If the State Government starts a medical college in a backward region, and reserves most of the seats therein to the students from the region, then such reservation or preferential treatment cannot be regarded as discriminatory. Students from backward region can hardly compete with the students from advanced region. Reservation or preference in such a case may be of a high percentage but it cannot be total.

The Court however accepted reservation up to 70% of the total number of open seats (after deducting other kinds of reservations validly made) for admission to the M.B.B.S. Course on the ground of 'residence'. The Court accepted this outer limit in order to reconcile the "apparently conflicting claims of equality and excellence". But the 30% of all seats should remain open and available for admission to students on an All-India basis irrespective of the State or University from which they come.

As regards the 30% unreserved seats in the M.B.B.S. Course, the Supreme Court has ruled in *Dinesh Kumar v. Motilal Nehru Medical College*,[28] that these seats must not be filled on the basis of comparison of the marks obtained by the candidates at different qualifying examinations because the standard of judging

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24. *D.P. Joshi*, *supra*, also, *P. Rajendran*, *infra.*

25. Also see, *State of Uttar Pradesh v. Pradip Tandon*, AIR 1975 SC 563 : (1975) 1 SCC 267; *supra*.

26. AIR 1984 SC 1420 : (1984) 3 SCC 654.

27. On this point, BHAGWATI, J., speaking for the Court made the following pithy remark:

> "The entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one Nation and there is only one citizenship, namely, citizenship of India, and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteeed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of the law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognise the essential unity and integrity of the country by treating it as if it were a mere conglomeration of independent States." AIR 1984 SC 1420 at 1424, 1425 : (1984) 3 SCC 654.

28. AIR 1985 SC 1059 : (1985) 3 SCC 22. This case may be called as *Dinesh* I.

may vary and may not be uniform. "That would indeed be blatantly violative of the concept of equality enshrined in Art. 14." Admissions must be based on evaluation of relative merits through an entrance examination open to all candidates throughout the country. The Court has suggested that a common All-India Entrance examination be held by the Indian Medical Council for the purpose.

In *Dinesh II*[29], the Supreme Court has revised the formula laid down in *Dinesh I.* The Court has now fixed a quota of 15% of the total number of seats in a medical college without taking into account any reservation to be filled through an All-India Entrance Examination. The defect in the old formula was that a State could reduce the number of All-India seats by the simple expedient of increasing the number of reserved seats. The Court has also decided that the medium of the All-India Entrance Examination would be English and no regional language and that the examination would be conducted by the Central Board of Secondary Examination instead of the Medical Council of India which does not have the necessary infrastructure for the purpose of conducting an examination.

In *Ravinder Kumar Rai v. State of Maharashtra*,[30] the Supreme court has rejected the contention of the State that conducting entrance examination would delay the admission process.

The Ahmedabad Municipality started a medical college and reserved admission therein to 'local students to the MBBS Course. However, 15% of the seats were reserved for students on an All-India basis. In *Ahmedabad Municipal Corporation v. Nilaybhai R. Thakore*,[31] the Supreme Court held the rule to be valid. The Court pointed out that the Municipality has started the college out of municipal funds. "Its desire to provide as many seats as possible to its students is a natural and genuine desire emanating from its municipal obligations which deserves to be upheld to the extent possible." The object of the municipality, the Court said, was laudable. The Court also pointed out that the municipality has complied with its constitutional obligation by providing 15% of the seats available to All-India students.[32] The term "local student" has been interpreted by the Court to mean any permanent resident student of Ahmedabad city who has acquired his qualification from an institution situated within the Ahmedabad Urban Development Area.

So far as the undergraduate courses are concerned, the reservations based on domicile, University or Institution are permissible provided that the said reservations are not wholesale.[33] As regards admission to the post-graduate and super-speciality courses, no reservations are possible.[34]

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29. *Dinesh Kumar v. Motilal Nehru Medical College (II),* AIR 1986 SC 1877 : (1986) 3 SCC 727.

30. AIR 1998 SC 1227 : (1998) 3 SCC 183.

31. AIR 2000 SC 114 : (1999) 8 SCC 139.

32. In this connection, see, *Dinesh II, supra.*

33. In this connection, see, *Dinesh II, supra.*

34. AIR 2000 SC 114 at 117 : (1999) 8 SCC 139.

Also see, *D.P. Joshi v. State of Madhya Pradesh,* AIR 1955 SC 334 : (1955) 1 SCR 1215; *supra; D.N. Chanchala v. State of Mysore,* AIR 1971 SC 1762 : (1971) 2 SCC 293, *supra; Dr. Pradeep Jain v. Union of India,* AIR 1984 SC 1420 : (1984) 3 SCC 654, *supra,* footnote 26; *Jagdish Saran v. Union of India,* AIR 1980 SC 820 : (1980) 2 SCC 768; *supra,* footnote 17 on 1320.

In *Nidmarti Maheshkumar v. State of Maharashtra*,[35] for purposes of admission to the MBBS Course, region-wise classification was made in the State. The rule said that the students passing the XII standard examination from institutions within the jurisdiction of one University would claim admission only in the medical colleges in that region and would not be eligible for admission to medical colleges situated within the jurisdiction of another University in the State. This region-wise classification made by the State government was challenged under Art. 14. The Court ruled that Art. 14 is violated if a State is compartmentalized into different regions and mobility of students from one region to another for medical education is completely banned and, thus, they are denied equal opportunity with others in the State for medical education. This cannot be defended even on the ground of regional backwardness. Why should a brilliant student from a so-called backward region be denied admission in a medical college in an advanced region? Why should mobility for educational advancement be impeded by geographical limitations within the State especially when uniform educational standards are being maintained throughout the State, when a common examination is held by the Secondary Board, students are graded uniformly throughout the State, and only results are published and merit list prepared region-wise?

The Court characterised it as discriminatory that a student with lesser marks may be admitted in one region while a student with higher marks may be denied admission in another region. Also, a student in one region could not get admission in another region even though students with lesser marks than him have been admitted there.

The Court distinguished the instant case from *Chanchal* on two grounds: (1) In *Chanchal,* there was no common or uniform examination, while here there was one examination throughout the State; (2) In *Chanchal,* 20% seats were allowed for students from other regions, while in the instant case there was 100% regional reservation.

However, the Court reiterated its earlier view that region-wise reservation upto 70% of the total number of open seats in a medical college after taking into account other kinds of reservations could be made for students who had studied in institutions situated within that region. This could be justified for two reasons:

(1) many students are not able to avail of medical education away from their region, as because of lack of resources, they cannot study far away from their places of residence, and may, thus, be deprived of medical education;

(2) girl students may find it difficult to pursue medical education in another region beyond their places of residence.

But such reservation based on residence requirement or institutional preference should not exceed 70% of the total number of open seats after taking into account all other kinds of reservations validly made. The remaining 30% of the open seats at least should be made available for admission to students from other regions within the State. The Court clarified that the expression "total number of open seats", means the seats after deducting the seats required to be made available on an All-India basis as decided by the Court in Dr. *Pradeep Jain's* case.

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35. AIR 1986 SC 1362 : (1986) 2 SCC 534.

In *Jagdish Saran*[36] and *Pradeep Jain*,[37] the Supreme Court has already upheld residential or institutional preference for admission to medical colleges. Following these cases, in *Anant Madan*,[38] the Supreme Court has ruled that the condition that a candidate should have studied in 10th, 10+1 and 10+2 classes in a recognised institution in the State for admission to the medical college is valid. This eligibility criterion is in conformity with the rulings in *Jagdish Saran* and *Pradeep Jain* and is not arbitrary or unreasonable or violative of Art. 14.

On the whole, the impact of judicial pronouncements in the area has been wholesome. The growing tendency to make reservations in technical institutions for all and sundry has been curbed to some extent. In the absence of Judicial control, reservation would have run riot, excluding all merit. Had this tendency not been controlled, it would have led to the inevitable result of falling standards which would have been a national loss. Many deserving and better qualified candidates from the so called advanced sections of society would have been forced to go without education and this would have been unjust to them. The Supreme Court's pronouncements put the whole problem posed by Art. 15(4) within a reasonable mould. It was also necessary to play down the importance of caste lest the caste system instead of being obliterated should be perpetuated.[39] A very important achievement of the Court is that 15% seats in medical colleges are to be filled in on an All India basis.

To this extent, the Court has overruled its earlier decision in *Post-Graduate Institute of Medical Education and Research Chandigarh v. K.L. Narasimham.*[40] However, at the next below stage of post-graduate level, there could be some nominal reservation, but the question has not been finally decided in *Preeti Sagar*.

(a) POST GRADUATE COURSES

While the Supreme Court has shown some flexibility of approach in the matter of fixation of criteria/reservation/preference for admission to graduate courses like M.B.B.S., as discussed above, it has adopted somewhat stringent approach towards admissions to post-graduate courses and still more stringent attitude to admissions to super-specialities. The basic proposition laid down by the Supreme Court is that admission to post-graduate courses should be based strictly on merit and that there should be no dilution of standards in such courses.[41] This judicial approach is illustrated by the following judicial pronouncements.

In a number of cases, the Supreme Court has expressed doubt whether there can be any reservation at the post-graduate level for backward classes. For example, in a post-graduate medical course, only M.B.B.S. candidates can be admitted. Can an M.B.B.S. be regarded as backward even though he may belong to a backward class. Reservation in the higher courses would perpetuate the perni-

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36. *Supra*, note, 15.
37. *Supra*, note 15.
38. *Anant Madaan v. State of Haryana*, AIR 1995 SC 955 : (1995) 2 SCC 135.
39. MARC GALANTAR, *Protective Discrimination for Backward Classes in India*, 3 *JILI*, 39 (1961); I.L.I., *EDUCATIONAL PLANNING*, 56-113 (1967); *Radhakrishnan, Units of Social Economic and Educational Backwardness*: *Caste and Individual*. 7 *JILI*, 263 (1965); I.L.I., *MINORITIES AND THE LAW* (1972); SMITH, *INDIA AS A SECULAR STATE* (1963).
40. AIR 1997 SC 3687 : (1997) 6 SCC 283.
41. *Narayan Sharma (Dr.) v. Pankaj Kr. Lehkar*, AIR 2000 SC 72 : (2000) 1 SCC 44.

cious theory "once backward always backward." The Court has advocated the principle that the higher you go in the ladder of education, the lesser should be the reservation.

Generally speaking, at the post-graduate level, it is merit that ought to count. Thus, the Supreme Court has observed in *Jagdish Saran*,[42] that to encourage SC/ST/OBC students, the State may reserve seats for them at the under graduate level, but at the level of Ph.D., M.D., or levels of higher proficiency, "equality", measured by matching excellence, has more meaning and cannot be diluted much without grave risk." At the highest scales of proficiency or speciality, "the best skill or talent, must be hand-picked by selecting according to capability." At that level, "where international measure of talent is made, where losing one great scientist or technologist-in-the making is a national loss, the considerations we have expanded upon as important lose their potency."

In *Pradeep Jain*,[43] the Supreme Court expressed great reluctance in accepting any reservation for admissions to post graduate courses where ordinarily merit should prevail. The case dealt with reservation of seats for the residents of the State or the students of the same University for admission to the medical colleges.[44] The Court said in the instant case, that considerations for admission to the post-graduate courses such as M.D. and the like for reservation based residence requirements within the State or institutional preference were different from those for admission to the M.B.B.S. course. The Court emphatically stated that excellence cannot be allowed to be compromised by any other considerations because that would be detrimental to national interests. The Court thus opined that in case of admissions to the post-graduate courses, such as M.S., M.D. and the like, "it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference. The Court observed further:

> "This proposition has greater importance when we reach the higher levels of education like Post-Graduate Courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines of social consequence, but more at the higher levels of sophisticated skills and strategic employment. To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise."

However, the Court directed in *Pradeep Jain* that while residence within the State would not be a ground for reservation in admissions to post-graduate courses, a certain percentage of the seats could be reserved on the basis of 'institutional preference' in the sense that a student who has passed the MBBS course from a medical college or University, may be given preference for admission to the post-graduate course in the same medical college or University. But such reservation on the basis of institutional preference should not in any event exceed 50% of the total number of open seats available for admission to the post-graduate course.

But the Court directed that even in regard to admissions to the post-graduate course, so far as super-specialities such as neurosurgery and cardiology are con-

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42. *Jagdish Saran (Dr.) v. Union of India*, AIR 1980 SC 820 : (1980) 2 SCC 768.
43. *Pradeep Jain (Dr.) v. Union of India*, AIR 1984 SC 1420 : (1984) 3 SCC 654.
44. See, *supra.*

cerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on an all India basis.[45]

The Court observed further that admission to the non-reserved seats for post-graduate courses such as M.S., M.D. and the like cannot be made on the basis of marks obtained by the students at different MBBS examinations held by different universities since there will be no comparable standard by reference to which the relative merits of the students seeking admission to post-graduate courses can be judged. In order to meet the demands of the equality clause, admissions to 50% non-reserved seats in the post-graduate courses must be made on the basis of comparative evaluation of merits of the students through an entrance examination. The Court preferred such an examination being held by the Indian Medical Council on all India basis. But if this was not possible for some reason, then such an examination could be held by the State Government or the University for the medical colleges situated within the State or affiliated to the University. Again, the Supreme Court has observed in the following case[46] that "with regard to post-graduate and super-specialities, this Court has prohibited any reservation whatsoever".

But, the Supreme Court has now changed its stance on this question and has ruled that there may be reservation of seats for backward classes in admission to post-graduate, speciality or super-speciality courses in medicine. The Court has argued that after admission, every student has to undergo the same courses and the same examination even though at the admission stage the cut-off point may be lower for backward candidates than for general candidates.[47]

In *Dinesh Kumar I*,[48] the Supreme Court has insisted that admission to the open seats in post-graduate medical courses (*viz.* 50%) ought to be made on the basis of the marks obtained in an all India examination and not on the basis of the marks obtained by the candidates at various qualifying examinations held by various bodies where the standard of judging may not be uniform. Some Universities may be very liberal in their marking while others may be strict. There would thus be no comparable standard on the basis of which the relative merits of the students may be judged and that "would indeed be blatantly violative of the concept of equality enshrined in Art. 14 of the Constitution." The Court directed the Indian Medical Council to prepare a scheme for holding the qualifying examination.

In *Dinesh Kumar II*,[49] the Supreme Court reconsidered some of the matters decided by it in *Dinesh Kumar I* and issued some fresh and modified directions as regards admissions to Post-Graduate Medical Courses. One, the medium of the all India examination to be conducted for admission for these courses shall be English. Two, instead of making available 50% of the open seats after taking into

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45. AIR 1984 SC at 1442.
Also see, *Indra Sawhney v. Union of India*, Ch. XXIII, Sec. F, *infra.*

46. *Ahmedabad Municipal Corp. v. Nilaybhai R. Thakore*, AIR 1986 SC 1362.

47. *P.G. Institute of Medical Education & Research v. K.L. Narasimham,* AIR 1997 SC 3687 : (1997) 6 SCC 283.

48. *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad,* AIR 1985 SC 1059 : (1985) 3 SCC 22.

49. *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad,* AIR 1986 SC 1877 : (1986) 3 SCC 727.

account reservations validly made, 25% of the total number of seats without taking into account any reservations should be made available for being filled on the basis of an all India entrance examination. The reason behind the new formula was that a State could, under the old formula, reduce the number of the open seats by increasing reservations on various grounds. The new formula frees the open seats from any reservations which may be made by a State. Three, the entrance examination would be conducted by the All India Medical Science Institute instead of the Medical Council of India which does not have the necessary infrastructure for the purpose. In *Dinesh II*, the Supreme Court also rejected the suggestion that a weightage of 15% of the total marks obtained by a candidate of the All India Entrance Examination for admission to the Post-Graduate Course to the doctors who had put in a minimum of three years of rural service. The Court insisted that selection of candidates for admission to Post- Graduate medical course should be based on merits and no factor other than merit should be allowed to tilt the balance in favour of a candidate.

The University of Rajasthan issued an ordinance providing for the addition of 5% marks to the total marks obtained by a student at the entrance examination by way of college-wise institutional preference which meant that these marks were to be added to the marks obtained by a student applying for admission to the post-graduate course in any of the five medical colleges in the State, provided the student had passed his MBBS course from the same college to which admission was sought in the post-graduate course. In *State of Rajasthan v. Dr. Ashok Kumar Gupta,*[50] the Supreme Court disapproved the college-wise institutional preference as violative of Art. 14.

A rule provided for college-wise institutional preference for admission to post-graduate courses in Medical Science being run in the medical colleges of the State and the Municipal Corporation. The rule meant that the students of each particular college passing their MBBS examination from that college would exclude all other students obtaining their MBBS degree from the other colleges. The Supreme Court declared the rule invalid in *Greater Bombay Municipal Corp. v. Thukral Anjali Deokumar*.[51] The Court ruled that there was no place for college-wise reservation. The Court was in favour of removing institutional preference and pooling together all the candidates from the University. Because of the impugned rule, many meritorious students could not get admission even if they secured higher marks than those admitted in the post-graduate degree course. There arose a patent discrimination in as much as students obtaining lesser marks were preferred to those obtaining higher marks. There was no intelligible differentia for the classification by way of college-wise institutional preference. "So far as educational institutions are concerned, unless there are strong reasons for exclusion of meritorious candidates, any preference other than in order of merit, will not stand the test of Article 14 of the Constitution. So, the impugned rules are discriminatory and do not satisfy the tests of reasonable classification and, as such, cannot be sustained."

Another instance of institutional preference came before the Supreme Court in *Goel*.[52] The State of Uttar Pradesh has seven medical colleges offering post-

50. AIR 1989 SC 177 : (1989) 1 SCC 93.
51. AIR 1989 SC 1194 : (1989) 2 SCC 249.
52. *P.K. Goel v. U.P. Medical Council,* AIR 1992 SC 1475 : (1992) 3 SCC 232.

graduate medical courses. A combined entrance examination was held for admission to these courses and the results of the examination were announced so as to provide for a separate merit list for each college out of the institutional students of that college and seats in each college filled on the basis of the separate merit list. An 'institutional student' meant a student obtaining MBBS degree of that institution. This was challenged.

The Supreme Court declared the issuing of separate merit list for each college invalid under Art. 14 as the classification on the basis of college-wise institutional preference was held to be discriminatory and arbitrary. "There cannot be any vested right in seeking admission in a particular college. Merit as the basis for selection in the speciality in a post-graduate degree course in one college cannot be sacrificed against convenience." If the rule of merit on the basis of institutional preference were applied, "a candidate having secured a very high position in merit in the combined merit list for the whole State of Uttar Pradesh may be deprived of getting a speciality of his choice even though he might be prepared to go in another medical college in the same State of Uttar Pradesh."

Reservation of 70% of seats by the Delhi University for admission to the post-graduate course in Dermatology for Delhi University graduates was frowned upon by the Supreme Court in *Jagdish Saran v. Union of India*.[53] In the instant case, a medical graduate from Madras University was seeking admission to post-graduate degree course in the Delhi University as his father had been transferred to Delhi. Though he qualified in the entrance examination, yet he was denied admission because of the rule reserving 70% of the seats at the post-graduate level to Delhi University graduates. He challenged the validity of the rule.

The Supreme Court emphasized that the primary imperative of Arts. 14 and 15 is equal opportunity for all across the nation to attain excellence. The philosophy and pragmatism of excellence through universal equal opportunity is part of the Indian culture and constitutional creed. This norm of non-discrimination, however, admits of just exceptions geared to equality, and does not forbid such basic measures as are needed to abolish the gaping realities of current inequalities afflicting 'socially and educationally backward classes' and 'the Scheduled Castes and the Scheduled Tribes'. But reservation by a university for its own graduates creates a new kind of discrimination which is not sanctioned by Arts. 14 and 15. Delhi University students do not form an educationally backward class. But the Court also emphasized that at the post-graduate level "equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk." Further, "it is difficult to denounce or renounce the merit criterion when the selection is for post-graduate or post-doctoral courses in specialized subjects…. To sympathize mawkishly with the weaker sections by selecting sub-standard candidates, is to punish society as a whole by denying the prospect of excellence say in hospital service…So it is that relaxation on merit, by overruling equality and quality altogether, is a social risk where the stage is post-graduate or post-doctoral".[54] It may be pointed out that this reservation could not be justified under Art. 15(4) as the students of the Delhi University could not be regarded as educationally backward.

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53. AIR 1980 SC 820 : (1980) 2 SCC 768.
54. AIR 1980 SC 820 at 829.

Institution-wise reservation has no place in the scheme of Art. 15, although social and educational destitution may be endemic in some parts of the country where a college or university may be started to remedy this glaring imbalance and reservation for those alumni for higher studies may be permitted. Thus, reservation is to be linked to backwardness. However, the Court stressed that reservation should not run riot otherwise that will bring about a fall in medical competence. The very best should not be rejected from admission because that will be a national loss. The Court consequently laid down the following principles for this purpose:

(i) Reservation must be kept in check by the demands of competence. A certain percentage must be available for meritorious students. Shelter of reservation should not be extended where minimum qualifications are absent.

(ii) Reservation on the ground of backwardness cannot prevail in the same measure at the highest scale of speciality where the best skill or talent must be picked up.

Chanchala's case[55] was now explained by the Court as follows: "…University-wise preferential treatment may still be consistent with the rule of equality of opportunity where it is calculated to correct an imbalance or handicap and permit equality in the larger sense." The Court pointed out that advantaged groups are exploiting the propositions applicable to disabled categories. The Court thus stated:[56]

> "If university-wise classification for post-graduate medical education is shown to be relevant and reasonable and the differentia has a nexus to the larger goal of equalisation of educational opportunities the vice of discrimination may not invalidate the rule."

Excessive reservation is an obvious inequality. The basis of classified quota can be promotion of better opportunities to the deprived categories of students or better supply of medical service to neglected regions of the country. The Delhi University reservation did not fit into these criteria as Delhi is in no sense an educationally or economically backward human region. Merit as a criteria should not be renounced for selection to post-graduate or post-doctoral courses in specialised subjects, but the court thought that some reservation for Delhi graduates may be justified for the following reasons:

(i) Delhi students belong to families which are drawn from all over India. This is not based on the 'sons of the soil' doctrine. This reservation is, therefore, qualitatively different.

(ii) Other Universities shut their doors on Delhi students.

(iii) There ought to be institutional continuity.

The Court did not specifically veto 70% reservation rule in this case as there was not sufficient data before the Court to decide the issue. But the Court any way directed that the petitioner be admitted.

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55. *Supra*, footnote 18, on 1320.
56. AIR 1980 SC 831.

The Gujarat University made a rule giving preference to its own students over those from other Universities in admission to super-speciality medical course. The rule in question ran as follows:

> "The first preference is to be given to the candidates from Gujarat University. Second preference to be given to students from other Universities in Gujarat. Any vacancy remaining after this shall remain unfilled."

In *Gujarat University v. Rajiv Gopinath Bhatt*,[57] the Supreme Court upheld the rule with the following remarks:

> "If a rule has been framed that out of the merit list prepared, preference is to be given for admission in the super speciality course to the students of the University in question *per se* it cannot be held to be arbitrary, unreasonable or violative of Art. 14."

The ruling seems to be debatable in view of what the Court had observed earlier in *Pradeep Jain*. The last clause in the rule that the "vacancy shall remain unfilled" was, of course, vetoed by the Court.

In *Mohan Bir Singh Chawla v. Punjab University*,[58] the Supreme Court said that at higher levels of education it would be dangerous to depreciate merit and excellence. The court thus declared:

> "The higher you go in any discipline, lesser should be the reservations—of whatever kind."

In *Narayan Sharma v. Pankaj Kumar Lehkar*,[59] the Supreme Court considered the validity of the following scheme of reservation made by the Assam Government for seats in the post-graduate medical courses in its medical colleges: (*i*) 25% All India quota; (*ii*) 4 seats for North Eastern Council; (*iii*) 6 seats for teachers in medical colleges, (*iv*) 20 seats for doctors who had worked for five years in a health centre outside the municipal limits; (*v*) 7% for Scheduled Caste candidates and (*vi*) 15% OBC candidates. An entrance examination was to be conducted but candidates in categories (*i*), (*ii*), (*iii*) and (*iv*) were not required to appear at such an examination.

The Supreme Court upheld reservation for category (*ii*) as these seats were meant for the five Eastern States having no medical college of their own. The students of these States being handicapped in getting medical education formed a separate class and reserving a few seats for them did not violate Art. 14. But the provision exempting them from appearing at an entrance examination was quashed as selection ought to be based on merit and could not be left to the arbitrary discretion of any administrative body.

Reservation for category (*iii*) was also upheld. It was mandatory for teachers in medical colleges to have a postgraduate degree for their future promotions. They thus formed a separate elan by themselves and the classification was based on an intelligible differentia having rational nexus to the object of the rule. The teachers being constantly in touch with medical subjects could be validly exempted from the entrance examination.

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57. AIR 1996 SC 2066 : (1996) 4 SCC 60.
58. AIR 1997 SC 788 : (1997) 2 SCC 171.
59. AIR 2000 SC 72 : (2000) 1 SCC 44.

Reservation for category (*iv*) was quashed as per the reasoning in *State of U.P. v. Pradip Tandon*[60] and *Dinesh II*,[61] rural element could not be the basis of any classification.

There was absolutely no controversy as regards category (*i*) which was in pursuance of several earlier pronouncements of the Supreme Court.[62]

In a recent case, *A.I.I.M.S. Students' Union v. A.I.I.M.S.*,[63] the Supreme Court has given its powerful support to the test of merit over that of reservation for admission to post-graduate medical courses. The All India Institute of Medical Sciences situated at Delhi is a premier medical institution in India. It runs several post graduate courses. For admission to these courses, the Institute holds an All India Entrance Examination. The Institute followed a rule of reserving 40% seats in these courses for its medical graduates irrespective of their performance in the entrance examination. This resulted in internal students with low marks at the entrance examination being admitted at the cost of other students with higher marks. Accordingly, the rule was challenged and the Supreme Court quashed it. The Court permitted 25% reservation for Institute graduate with the rider that a uniform minimum cut-off of 50% marks at the competitive entrance examination be followed for all students and that the margin of difference between the qualifying marks for Institute's candidates and the general category candidates should not be too wide.

The Court ruled : "Such a reservation based on institutional continuity in the absence of any relevant evidence in justification thereof is unconstitutional and violative of Art. 14 of the Constitution and has therefore to be struck down".[64]

The Court also pointed out that institutional reservation is not supported by the Constitution or constitutional principles. "A certain degree of preference for students of the same institution intending to prosecute further studies therein is permissible on grounds of convenience, suitability and familiarity with an educational environment. Such preference has to be reasonable and not excessive.… Minimum standards cannot be so diluted as to become practically non-existent."[65]

(b) *PREETI SRIVASTAVA*

The Supreme Court has rendered a momentous decision in *Dr. Preeti Sagar Srivastva v. State of Madhya Pradesh*.[66]

The factual context in which this case arose was as follows: For admission to post-graduate degree/diploma courses in medicine, candidates were required to appear at an entrance examination. The State Government fixed a cut-off percentage of 45% marks in this examination for admission of the general category students while no cut off percentage of marks was fixed for SC/ST candidates. This meant that there was no minimum qualifying marks in the entrance examination prescribed for the reserved category candidates for admission to the post-graduate medical courses. This was challenged and the Supreme Court quashed

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60. *Supra*, footnote 25.
61. *Supra*, footnote 49.
62. *Supra.*
63. (2002) 1 SCC 428 : AIR 2001 SC 3262.
64. *Ibid*, 461.
65. *Ibid*, 459.
66. AIR 1999 SC 2894 : (1999) 7 SCC 120.

the same in *Dr. Sadhna Devi v. State of Uttar Pradesh*,[67] with the remark that if this was done, merit would be sacrificed altogether.

The Supreme Court was of the opinion that even for the reserved category candidates, there should be some minimum qualifying marks if not the same as prescribed as bench marks for general category students. Thus, there cannot be zero qualifying marks for reserved category candidates in the entrance test for admission to the post-graduate courses. The government having installed the system of holding an admission test, would not be entitled to do away with the requirement of obtaining minimum qualifying marks for the special category candidates. The government cannot say that even if these candidates have not obtained even the minimum qualifying marks they must still be selected for post-graduate courses. This amounts to rendering the admission test an idle formality because these candidates would qualify for admission even though they did not secure any marks. This thus amounts to sacrificing merit altogether. This could not be done. Therefore, if these students fail to secure the minimum qualifying marks, then the seats reserved for them should not go waste but should be released for the candidates of the general category. Otherwise there would be a national loss.[68]

In sum, in *Sadhna*, the Supreme Court insisted that for admission to post-graduate medical course, there ought to be prescribed a minimum cut off percentage of marks at the entrance examination for Scheduled Castes, Scheduled Tribes and other Backward Classes. It would be unconstitutional as being violative of the right to equality to keep this cut off point at zero percent.

As a sequel to the *Sadhna* ruling, the State of Uttar Pradesh prescribed a Post-Graduate Medical Entrance Examination for admission to Post-Graduate Degree/Diploma Course in medicine and fixed a cut-off percentage of 45 at the entrance examination for the general category candidates for admission to the post-graduate medical course. But for admission of reserved category candidates, the cut-off percentage was fixed at 20%. In addition, 50% of the seats in the post-graduate course were reserved for Scheduled Castes, Scheduled tribes and Backward classes candidates. A similar scheme was laid down in Madhya Pradesh. The Supreme Court was called upon to adjudge the validity of these schemes *vis-à-vis* Art. 15(4). However, in *Preeti Sagar* the Supreme Court did not express any opinion on the question whether reservation of seats is permissible at the post-graduate level in medicine as this question was not debated before it. The Court only examined the question whether lower qualifying marks could be prescribed for admission of reserved category candidates.

The Court has pointed out in *Preeti Sagar* that Arts. 15(3) and 15(4) permit compensatory or protective discrimination in favour of certain classes. Every policy pursued under Article 15(4) makes a departure from the equality norm for the benefit of the backward. Therefore, it has to be designed and worked in a manner conducive to the ultimate building up of an egalitarian non-discriminatory society. That is its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Art. 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time, these programmes cannot be unreasonable or arbitrary, nor can they be exe-

67. AIR 1997 SC 1120 : (1997) 3 SCC 90.
68. *Ibid*, at 1124.

cuted in a manner which undermines other vital public interests or the general good of all. "All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good….Art. 15(4) also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests."[69]

The Court has emphasized: "Consideration of national interest and the interests of the community or society as a whole cannot be ignored in determining the reasonableness of a special provision under Article 15(4)."[70]

Any special provision under Art. 15(4) has to balance the importance of having, at the higher levels of education, students who are meritorious and who have secured admission on their merit, as against the social equity of giving compensatory benefit of admissions to the SC/ST candidates who are in a disadvantaged position. Selection of the right calibre of students is essential in the public interest at the level of specialised post-graduate education. Special provisions for SC/ST candidates at the speciality level have to be minimal.

In the interest of selecting suitable candidates for specialised education, it is necessary that the common entrance examination be of a standard and qualifying marks are prescribed for passing that examination. Accordingly, the Supreme Court has refused to accept the argument that there need not be any qualifying marks prescribed for the qualifying examination for admission to the post-graduate medical courses as the candidates have already passed the M.B.B.S. examination which is the essential pre-requisite to post-graduate medical courses.

The Court has ruled that even if minimum qualifying marks can be lower for the reserved categories candidates, there cannot be a wide disparity between the minimum qualifying marks for the reserved category candidates as against the general category candidates at the post-graduate level. This disparity must be minimal. The Court has held that the disparity between 20% marks for the reserved category and 45% marks for the general category is too great a disparity "to sustain the public interest at the level of post-graduate medical training and education". This is contrary to the mandate of Art. 15(4).

The Court has not itself laid down how much relaxation can be given to the reserved category candidates in the matter of minimum qualifying marks as compared to the general candidates. The Court has left the matter for decision to the Medical Council of India "since it affects standards of post-graduate medical education."[71]

An argument was advanced before the Court that if the threshold requirement for admission of SC/ST candidates was high then the seats allotted to them in medical colleges would not be filled up. The Court rejecting the argument maintained that the purpose of higher education is not to just fill seats by lowering standards. The purpose is to impart education to the SC/ST candidates and to enable them to rise to the standards which are expected of persons having the post-graduate medical qualification. While Art. 15(4) provides for protective discrimination in favour of the weaker sections, one cannot also ignore the wider interests of society while devising special provisions for them. A large differen-

69. AIR 1999 SC 2894 at 2904 : (1999) 7 SCC 120.
70. *Ibid.*, at 2905.
71. *Ibid.*, at 2909.

tiation of the qualifying marks between the two groups of students would make it very difficult to maintain the requisite standard of teaching and training at the post-graduate level.

The Court has also ruled in *Preeti Sagar* that at the level of super-specialization, there cannot be any special provision as it is contrary to national interest. Merit alone can be the basis of selection. This means that no reservation can be made in the super-speciality courses in favour of the reserved classes because any dilution of merit at this stage would adversely affect the national goal of having the best possible candidates at the highest levels of professional and educational training. "Opportunities for such training are few and it is in the national interest that these are made available to those who can profit from them, *viz;* the best brains in the country, irrespective of the class to which they belong."[72] To this extent, the Court has overruled its earlier decision in *Post-Graduate Institute of Medical Education and Research, Chandigarh v. K.L. Narasimham*. However, at the next lower stage of post-graduate level, there could be some nominal reservation, but the question has not been finally decided in *Preeti Sagar.*

So far as admission to the M.B.B.S. Course is concerned, at one stage, the Court did agree that while in the entrance examination for admission to the M.B.B.S. course, a cut off point is fixed as regards the minimum marks which a general candidate must obtain to get admission, there need be no such limit for the reserve categories candidates. For example, in *State of Madhya Pradesh v. Nivedita Jain,*[73] an order issued by the M.P. Government dispensing with the requirement of obtaining any minimum qualifying marks in the pre-medical entrance examination for admission to the M.B.B.S. course for SC/ST candidates has been held valid. The order was passed because of the paucity of qualified SC/ST candidates. The factual context in which the order was passed was as follows: The State reserved 15% seats each for SC and ST candidates for admission to the M.B.B.S. course. This meant 108 seats each for the two groups out of a total of 720 seats. When the result of the Pre-Medical entrance examination was published, only 18 SC candidates and 2 ST candidates qualified. In view of the large unfilled quota of SC/ST candidates, the State completely relaxed the condition relating to the minimum qualifying marks for these two categories. Upholding the relaxation, the Court argued that the relaxation in the admission qualification would not effect any relaxation in the standard of medical education or curriculum of studies in medical colleges for those candidates after their admission to the college, and the standard of examination and the curriculum would remain the same for all students.

But now the Supreme Court has changed its opinion as appears from *Preeti Sagar*. The Court has specifically disagreed with the view expressed by it in several earlier cases that the process of selection of candidates for admission to medical colleges has no real impact on the standard of medical education.[74] The Court has observed in *Preeti Sagar*:

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72. AIR 1997 SC 3687 : (1997) 6 SCC 283; *supra*.
73. AIR 1981 SC 2045 : (1981) 4 SCC 296.
74. *Nivedita Jain, supra; Ajay Kumar Singh v. State of Bihar,* (1994) 4 SCC 401; *Post-Graduate Institute of Medical Education & Research v. K.L. Narasimham,* (1997) 6 SCC 283 : AIR 1997 SC 3687.

> "…the criteria for the selection of candidates have an important bearing on the standard of education which can be effectively imparted in the medical colleges. We cannot agree with the proposition that prescribing no minimum qualifying marks for admission for the Scheduled Castes and the Scheduled Tribes would not have an impact on the standard of education in the medical colleges."

The Court has now disagreed with the view expressed in earlier cases that since all students pass the same examination, standards of education are maintained and it does not matter even if students of lower merit are admitted.[75]

This approach of the Supreme Court is most welcome as it is a very important step towards maintenance of a semblance of standard in medical education. Weak students are bound to pull down the level of teaching as the teacher has to tone down his teaching to the level of weak students in the class. If the teacher talks at a higher level then it will pass over the heads of weak students. Accordingly, the better students will be the sufferer as the weaker students always act as a drag on the entire class.

75. Also see, *supra*, Ch. X, Sec. G(iii)(d).