CHAPTER XXIII

FUNDAMENTAL RIGHTS (4)
RIGHT TO EQUALITY (iii)

SYNOPSIS

A. EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

Article16(1) is a facet of Art. 14. Arts. 14 and 16(1) are closely interconnected. Art. 16(1) takes its roots from Art. 14. Art. 16(1) particularizes the generality of Art. 14 and identifies, in a constitutional sense, "equality of opportunity" in matters of employment under the state.

An important point of distinction between Arts. 14 and 16 is that while Art. 14 applies to all persons, citizens as well as non-citizens, Art. 16 applies only to citizens and not to non-citizens.

Article16(1) guarantees equality of opportunity to all citizens "in matters relating to employment" or "appointment to any office" under the state. According to Art. 16(2), no citizen can be discriminated against, or be ineligible for any employment or office under the state, on the grounds only of religion, race, caste, sex, descent, place of birth or residence or any of them.

Adherence to the rule of equality in public employment is a being feature of our constitution and the rule of law is its core, the Court cannot disable itself from making an order inconsistent with Articles 14 and 16 of the Constitution.[1]

Article16(2) is also an elaboration of a facet of Art. 16(1). These two clauses thus postulate the universality of Indian citizenship. As there is common citizenship, residence qualification is not required for service in any State.

Public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India. The State although is a model employer, its right to create posts and recruit people therefor emanates from the statutes or statutory rules and/or rules framed under the proviso appended to Article 309 of the Constitution of India. The recruitment rules are to be framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.[2]

On a comparative basis, Art. 16 deals with a very limited subject, *viz.*, public employment. On the other hand, the scope of Art. 15(1) is much wider as it covers the entire range of state activities. The ambit of Art. 16(2) is restrictive in scope than that of Art. 15(1)[3] because Art. 16(2) is confined to employment or office under the state, meaning services under the Central and State Governments and their instrumentalities. However, Art. 15 being more general in nature covers many varied situations of discrimination. Further, the prohibited grounds of discrimination under Art. 16(2) are somewhat wider than those under Art. 15(2) be-

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1. *Reserve Bank of India v. Gopinath Sharma*, (2006) 6 SCC 221 : AIR 2006 SC 2614.
2. *Principal, Mehar Chand Polytechnic v. Anu Lamba*, (2006) 7 SCC 161 : AIR 2006 SC 3074.
3. *Supra*, Ch. XXII.

cause Art. 16(2) prohibits discrimination on the additional grounds of descent and residence apart from religion, race, caste, sex and place of birth.

Article 15 does not mention 'descent' and 'residence' as the prohibited grounds of discrimination, whereas Art. 16 does. Thus, with regard to the grounds of discrimination, Art. 15 is somewhat narrower than Art. 16. What Art. 16 guarantees is that all citizens in matters of state service shall be treated alike under like circumstances both in privileges and obligations. There should be no discrimination between one employee and another on the basis of any prejudice, bias or any extraneous ground.

The word 'discrimination' in Art. 16(2) involves an element of unfavourable vice. As already noted, Art. 14 guarantees right of equality generally; Arts. 15 and 16 are instances of the same right of equality in specific situations. Art. 14 is the genus while Art. 16 is a species. Arts. 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words, Art. 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. Accordingly, 'equality' in Art. 16(1) means equality as between member of the same class of employees, and not equality between members of separate, independent, classes.

Equal protection of the laws does not postulate equal treatment of all persons without distinction; it merely guarantees the application of the same laws alike without discrimination to all persons similarly situated.[4] Therefore, Art. 16 does not bar a reasonable classification of employees or reasonable tests for selection. Equality of opportunity of employment means selection. Equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent, classes. There can be no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Those who are similarly circumstanced are entitled to equal treatment.

To illustrate the above proposition, reference may be made to *Bagari.*[5] The Army Act classifies army officers into various categories based on the requirements of the armed forces. The Supreme Court has ruled that such a classification cannot be regarded as arbitrary. Art. 14 or 16 is not violated if different pay, perks or other privileges are granted to these officers. Thus, the distinction drawn between the commissioned officers, on the one hand, and the non-commissioned officers, on the other, in the matter of grant of study leave is not "discriminatory, arbitrary or irrational". It cannot be said that this distinction in the instant case is not founded on any intelligible differentia and that it has no relation with the object sought to be achieved. The character and duties of the two classes of officers are different.[6]

The State cannot amend the statutory rules adversely affecting the pension of retired employees with retrospective effect who became entitled to the benefits of

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4. *All India Station Masters' and Assistant Station Masters' Association Delhi v. Gen. Man., Central Railway*, AIR 1960 SC 384 : (1960) 2 SCR 311; *Jagannath Prasad Sharma v. State of Uttar Pradesh*, AIR 1961 SC 1245; *Indian Rly. SAS Staff Association v. Union of India*, (1998) 2 SCC 651 : AIR 1998 SC 805.

5. *Union of India v. S.C. Bagari*, AIR 1999 SC 1412 : (1999) 3 SCC 709.

6. *Ibid*., at 1415.

the revised scales of pay, and consequently to the pension calculated on such basis[7]

Article 16(1) is much wider in scope than Art. 16(2) and the grounds of discrimination expressly mentioned in Art. 16(2) are not exhaustive. Art. 16(2) brings out emphatically, in a negative form, what is guaranteed affirmatively by Art. 16(1). Discrimination is a double edged weapon; it would operate in favour of some persons but against some others. Art. 16(2) prohibits discrimination and, thus, assures the effective enforcement of the Fundamental Right guaranteed in Art. 16(1).

The emphasis in Art. 16(2) is on the word '*only*'. Where there is discrimination *only* on the grounds mentioned therein, that Article may be attracted; but where discrimination is based partly on one such ground and partly on some other ground not mentioned in Art. 16(2), the matter may fall under Art. 16(1), but not under Art. 16(2). If the other ground is relevant for the purpose of appointment to the post, there is no contravention of the constitutional provision.

Article 16 uses the term 'office' which is synonymous with the term 'office' used in Arts. 102(a) and 191(a) discussed earlier.[8] 'Office' means a subsisting, permanent, substantive position, having an existence independent of the person who fills it, which is filled in succession by successive holders and which has more or less a public character to which duties are attached.[9]

The equality guaranteed by Art. 16(1) takes within its fold all stages of service. The expression 'matters relating to employment' in Art. 16(1) is not restricted only to the initial stage of appointment; the expression "appointment to an office" in Art. 16(1) does not mean merely the initial appointment. Art. 16(1) includes all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment or which form part of the terms and conditions of such employment, such as, salary, periodical increments, leave, promotion, fixation of seniority, gratuity, pension, superannuation and even termination of employment. The guarantee of Art. 16(1) could become illusory if narrowly construed, for then the state could comply with its formal requirement by affording equality at the initial stage, but defeat its object by making discriminatory provisions as regards other matters subsequently.[10]

Articles 16(1) and 16(2) give effect to Arts. 14 and 15. All these Articles form part of the same constitutional code of guarantees and supplement each other. Art. 16(1) should, therefore, be construed in a broad and general way, and not in a pedantic and technical way. When so construed, the expression "matters relating to employment" cannot mean merely matters prior to the act of appointment nor can "appointment to any office" mean merely the initial appointment; it must include all matters relating to employment, whether prior or subsequent to the

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7. *U.P. Raghavendra Acharya v. State of Karnataka*, (2006) 9 SCC 630 : AIR 2006 SC 2145.

8. *Supra*, Chs. II and VI.

9. *Kanta Kathuria v. Manak Chand Surana, supra*, Ch. II*; State of U.P. v. Bhola Nath*, AIR 1972 All. 460.

10. *Gen. Manager, S. Rly. v. Rangachari*, AIR 1962 SC 36 : (1962) 2 SCR 586; *Ganga Ram v. Union of India*, AIR 1970 SC 2178 : (1970) 1 SCC 377; *State of Kerala v. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310; *ABSK Sangh (Rly.) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.

employment, or whether these are either incidental to such employment or form part of its terms and conditions.[11]

The protection of Arts. 14 and 16 is available even to a temporary government servant if he has been arbitrarily discriminated against and singled out for harsh treatment in preference to his juniors, similarly circumstanced.[12]

As under Art. 14, so under Art. 16, equality cannot be a mathematical equality. Reasonable classification is permissible for various purposes relating to employment. The onus to establish discrimination is on him who asserts it. He has to show that the classification does not rest on any just or reasonable basis.[13] Thus, differentiation made between graduate and non-graduate supervisors in the matter of promotion has been held not to be violative of Art. 16.

A warning has however been sounded against "mini-classifications based on micro-distinctions".[14] "Every inconsequential differentiation between two things does not constitute the vice of discrimination, if law clubs them together ignoring venial variances." But when recruitment rules are made, employer is bound to comply with the same and in case of non compliance the appointment would be *ultra vires* the regulations as well as Articles 14 and 16 where the employer is a state owned or operated corporation.[15]

SEXUAL HARASSMENT

An incident of sexual harassment of a female at the place of work, amounts to violation of her Fundamental Right to gender equality under Art. 16(2).[16]

B. MATTERS OF EMPLOYMENT

(a) SERVICE CONDITIONS

Under Art. 309, rules regulating service conditions of government servants can be made by the government,[17] but such rules have to stand the tests of Arts. 14 and 16 and, thus, have to be reasonable and fair and not grossly unjust.[18] In the absence of a rule or regulation, service conditions may be prescribed by executive instructions.

The legal position of a government servant is more one of status rather than that of contract and his rights and duties are no longer determined by contract or consent of parties but by statutes or statutory rules, which may be unilaterally

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11. *State of Kerala v. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310; see, *infra*; *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.

12. *Govt. Branch Press v. D.B. Belliappa*, AIR 1979 SC 429 : (1979) 1 SCC 477.

13. *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76. Also, *Prabhakar v. State of Maharashtra*, AIR 1976 SC 1093 : (1976) 2 SCC 890.

14. *State of Jammu & Kashmir v. T.N. Khosa*, AIR 1974 SC 1; *State of Kerala v. T.P. Roshana*, AIR 1979 SC 765, 770 : (1979) 2 SCR 974.

15. *National Fertilizers Ltd. v. Somvir Singh*, (2006) 5 SCC 493 : AIR 2006 SC 2319.

16. *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625 : (1999) 1SCC 759.
For further discussion on this question, see, *infra*, Chs. XXVI and XXXIV.

17. *Infra*, Ch. XXXVI.

18. *State of Uttar Pradesh v. Ramgopal*, AIR 1981 SC 1041 : (1981) 3 SCC 1.
For further discussion on Art. 309, see, *infra*, Ch. XXXVI.

altered without the consent of the employees.[19] But these rules have to be consistent with the Fundamental Rights.[20]

Reading Arts. 14 and 16 together, the Supreme Court has laid down several propositions regulating various aspects of service—from appointment to dismissal—of public servants. The endeavour of the Court has been to eliminate administrative discrimination, favouritism, arbitrariness and misuse of power from this area.

Seniority is not a Fundamental Right. It is merely a civil right. Article 16 is applicable in the case of an appointment. It does not speak of fixation of seniority.[21] Unilateral change of status of its employee by an instrumentality of the State is arbitrary violating Arts. 14 and 16.[22]

(b) APPOINTMENT

Appointments can be made under executive power if no statutory service rules have been made. In the case noted below,[23] power to make service rules for improvement trusts in the State vested in the State Government, but no such rules were made. The Supreme Court ruled that, in the absence of the rules, a trust could make appointments under its administrative power. The Court enunciated the following proposition: "In the absence of any statutory rules governing the service conditions of the employees, the executive instructions and/or decisions taken administratively would operate in the field; appointments/promotions can be made in accordance with such executive instructions, administrative directions".

But if statutory rules are made, then the executive power to make appointments has to be exercised in accordance with them. The executive power can supplement the rules by filling the gaps therein, but cannot supplant the same.[24] Appointments ought to be made strictly according to the rules. Appointments made in violation of the rules infringe Arts. 14 and 16 and, as such, the government cannot later regularise them.[25]

If *ad hoc* appointments have been made *de hors* the rules, these appointees ought to be replaced as soon as possible by regularly selected persons according to the rules. Such a temporary employee can also compete along with others for such regular selection. If he is selected, well and good; if he is not selected, he

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19. *Calcutta Dock Labour Board v. Jaffar Imam*, AIR 1966 SC 282 : (1965) 3 SCR 453; *Roshanlal Tandon v. Union of India*, AIR 1967 SC 1889 : (1968) 1 SCR 185; *Sirsi Municipality v. Cecelia Francis Tellis*, AIR 1973 SC 855 : (1973) 1 SCC 409; *D.T.C. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, 186.

20. *Chairman, Railway Board v. C.R. Rangadhamaiah*, AIR 1997 SC 3828 : (1997) 6 SCC 623. For discussion on rule-making power under Art. 309, see, *infra*, Ch. XXXVI.

21. *Bimlesh Tanwar v. State of Haryana*, (2003) 5 SCC 604 : AIR 2003 SC 2000.

22. *BALCO Captive Power Plant Mazdoor Sangh v. National Thermal Power Corpn.* (2007) 14 SCC 234 : AIR 2008 SC 336.

23. *Nagpur Improvement Trust v. Yadaorao Jagannath Kumbhare*, (1999) 8 SCC 99 : AIR 1999 SC 3084.

24. *J&K Public Service Commission v. Narinder Mohan*, AIR 1994 SC 1808 : (1994) 2 SCC 630.

25. *State of Orissa v. S. Mohapatra*, (1993) 2 SCC 486 : AIR 1993 SC 1650; *Dr. M.A. Haque v. Union of India*, (1993) 2 SCC 213; *J&K Public Service Comm. v. Dr. Narendra Mohan*, (1994) 2 SCC 630 : AIR 1994 SC 1808.

must give way to the regularly selected candidates. The government cannot relax rules for appointment. The Supreme Court has observed in this connection:[26]

> "Backdoor *ad hoc* appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity."

Ad hoc appointees who had been working for more than 13 years asked for regularisation of their appointments. The Supreme Court refused. Under the rules, regular appointments were to be made by the Public Service Commission. The principle is that recruitment to the service ought to be governed by the service rules and ought to be made by the appropriate authority. Consequently, *ad hoc* appointments would be only temporary appointments *de hors* the rules pending regular recruitment without conferring any right to regularisation of service.[27]

These qualifications to regularization have ultimately resulted in the Supreme Court declaring the regularization route impermissible. In *Umadevi(3)*[28] a Constitution Bench held that any public employment has to be in terms of the Constitutional scheme. The Court also lamentably referred to the Courts' (perhaps including the Supreme Court also) issuing orders for regularizing recruitment.

The argument advanced on behalf of the employees that an equity has arisen in their favour as a result of such appointments and their continuance of working was repelled by the Court. It also pointed out that the concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on adhoc or temporary or on no process of selection as envisaged in the concerned rules. Such regularization would also attract the vice of treating "unequals as equal" violating Articles 14 and 16.

Appointments fall within the executive sphere, and can be made under administrative directions without formal rules having been made. But posts and conditions of service should be advertised before making the selections so that every one eligible for the posts may have an opportunity of being considered by the appointing authority.[29]

When a rule requires that before appointment to a post, it should be suitably publicised, appointment made to the post without publicity is invalid.[30] An authority must be rigorously held to the standards by which it professes its action to be judged.[31] Also, compliance with such a rule seems to be necessary in the

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26. *J.K. Public Service Comm. v. Dr. Narinder Mohan,* (1994) 2 SCC 630, 637 : AIR 1994 SC 1808.
Also, *State of Haryana v. Piara Singh,* (1992) 4 SCC 118; *V. Sreenivasa Reddy v. Govt. of A.P.,* AIR 1995 SC 586 : 1995 Supp (1) SCC 572.

27. *J&K Public Service Comm. v. Dr. Narinder Mohan, supra.*
Also, *Dr. Surinder Singh Jamwal v. State of Jammu & Kashmir,* AIR 1996 SC 2775 : (1996) 9 SCC 619.

28. *Secretary, State of Karnataka v. Umadevi (3),* (2006) 4 SCC 1 : AIR 2006 SC 1806.

29. *B.N. Nagarajan v. State of Mysore,* AIR 1966 SC 1942 : (1966) 3 SCR 682; *supra.*
But see, *State of U.P. v. Bhola Nath,* AIR 1972 All. 460, saying that advertisement may not be necessary in some situations, *e.g.*, for filling the posts of government law officers who are appointed from the Bar to look after government work in the High Court.

30. *B.S. Minhas v. Indian Statistical Institute,* AIR 1984 SC 363, 371 : (1983) 4 SCC 582.

31. *R.D. Shetty v. International Airport Authority,* AIR 1979 SC 1628, 1635 : (1979) 3 SCC 489; *supra,* Ch. XXI.

name of fairplay. If a vacancy is advertised, all eligible persons may apply and the selection committee will have a large field to choose from. There will be no doubt of arbitrariness in the minds of eligible candidates for the post.[32]

Only so many posts ought to be filled as are advertised. It would be an improper exercise of power to make appointments over and above the posts advertised. It is only in a rare and exceptional circumstance and emergency situation that this rule can be deviated from. It is not as a matter of course that the appointing authority can fill up posts over and above those advertised. It should be clearly spelled out under what policy such a decision has been taken. Exercise of such power has to be tested on the touchstone of reasonableness.[33]

Where selection is to be made only on the basis of interview, and the number of applications for the posts are enormous with reference to the number of posts available to be filled up, the selection board should adopt some rational and reasonable basis to short list the candidates who have to be called for interview. The Supreme Court has decried the practice of calling a large number of candidates for interview for each post as it gives an opportunity for manipulation. Also, when large number of candidates have to be interviewed, interviews tend to be casual, superficial and sloppy and the true personality of the candidates cannot be assessed properly.[34]

Reasonable rules can be made, qualifications laid down,[35] or reasonable selective tests and processes employed, for making selections for any employment.[36] This means that there should be reasonable relation between the prescribed test for suitability of the candidate and the post as such.[37] It is permissible for the government to prescribe appropriate qualifications for appointment or promotion to various posts.[38] Qualifications for a particular post can be a "rational differentia" within the meaning of Art. 16. Prescription of stenographic ability of 100 words per minute is a relevant qualification.

Educational qualification is an acceptable criterion for determining suitability for an appointment to a particular post or cadre. For example, a requirement that the professor in orthopaedics must have a post-graduate degree in the particular speciality is valid.[39] Prescribing a first or second class post-graduate degree for the head of an educational institution has a direct nexus with the object of excellence sought to be achieved, and it cannot be said to be discriminatory. The posts of principals are not purely administrative; the principals have to take up teaching work in addition to their administrative duties.[40]

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32. The Court has cautioned that the rule of advertising or publicising the vacancy cannot apply to each and every post, such as, high constitutional posts as there is no provision for publicity in such cases.

33. *Surinder Singh v. State of Punjab,* AIR 1998 SC 18 : (1997) 8 SCC 488.

34. *M.P. Public Service Comm. v. Navnit Kumar Potdar,* AIR 1995 SC 77 : (1994) 6 SCC 293; *State of Haryana v. Subash Chander Marwaha,* AIR 1973 SC 2216 : (1974) 3 SCC 220; *Ashok Kumar Yadav v. State of Haryana,* AIR 1987 SC 454 : (1985) 4 SCC 417.

35. *Banarasi Dass v. State of Uttar Pradesh,* AIR 1956 SC 520 : 1956 SCR 357.

36. Rules for selection were held violative of Arts. 14 and 16 in *State of Maharashtra v. Raj Kumar,* AIR 1982 SC 1301 : (1982) 3 SCC 313.

37. *In State of Maharashtra v. Raj Kumar, supra,* footnote 36, rules for selection for certain posts were quashed as there was no nexus between the rules and the object sought to be achieved.

38. *State of Jammu & Kashmir v. Shiv Ram Sharma,* AIR 1999 SC 2012 : (1999) 3 SCC 653.

39. *Union of India v. Dr. Kohli,* AIR 1973 SC 811 : (1973) 3 SCC 592.

40. *B. Venkata Reddy v. State of Andhra Pradesh,* AIR 1983 S C 1108 : (1984) 1 SCC 645.

Educational qualifications can be made the basis for classification of employees in State service in the matter of pay scales, promotion, etc. Higher pay scale can be prescribed for employees possessing higher qualifications.[41] Similarly, in the matter of promotion, classification on the basis of educational qualification so as to deny eligibility to a higher post to an employer possessing lesser qualifications is valid. Educational qualifications can justifiably be made the basis for qualification for the purpose of promotion to the higher post.[42]

A candidate for appointment for a post must have the requisite qualifications prescribed in the rules.[43] When qualification has been prescribed for a post, that cannot be obliterated by posting those who do not fulfil that qualification as against those who have that qualification.[44]

For selection to an ex-cadre selection post, seniority is not relevant; the government can appoint to such a post a person whom it considers as the most suitable, and the Court will not interfere except on the ground of *mala fides*.[45]

Appointments based on the hereditary principle are bad because 'descent' is a prohibited ground of discrimination under Art. 16(2).[46] Abolition of hereditary posts of village officers is neither arbitrary nor unreasonable because such posts are feudalistic in character and anachronisms in the modern age.[47] A provision in the Punjab Police Rules, 1934, provided for giving preference in recruitment to sons and near relations of the police personnel. The provision was held to be invalid *vis-a-vis* Arts. 16(1) and (2).[48]

For the combined competitive examination—civil services examination, 1979, the candidates hailing from the Eastern States (Mizoram, Meghalaya, Negaland etc.) were given an option to take or not to take the paper on Indian languages. This was held to be non-discriminatory as these States have handicaps in the matter of language. These linguistically less advanced groups who are outside the Eighth Schedule to the Constitution may suffer serious disabilities if forced to take examinations in the languages set out in that Schedule. "This concession is not contravention of equality but conducive to equality. It helps a handicapped group and does not hamper those who are ahead."[49]

Appointment of candidates by 'pick and choose' without preparing any merit list amounts to an arbitrary exercise of power.[50]

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41. *State of Mysore v. P. Narasingh Rao,* AIR 1968 SC 349; *V. Markandeya v. State of Andhra Pradesh,* AIR 1989 SC 1308.

42. *State of Jammu & Kashmir v. Triloki Nath Khosa,* AIR 1974 SC 1 : (1974) 1 SCC 19; *Roop Chand Adalakha v. Delhi Development Authority,* AIR 1989 SC 307 : 1989 Supp (1) SCC 116; *RSEB Accountants Association, Jaipur v. RSEB,* AIR 1997 SC 882 : (1997) 3 SCC 103; *J.N. Goel v. Union of India,* AIR 1997 SC 729 : (1997) 2 SCC 440.

43. *M.C. Bindal v. R.C. Singh,* AIR 1989 SC 134 : (1989) 1 SCC 136.

44. *Subhash Chand v. Delhi Electricity Supply Undertaking,* AIR 1981 SC 75.

45. *J.N. Sharma v. State of Bihar,* AIR 1971 SC 1318.

46. *Gazula Dasharatha Rama Rao v. State of Andhra Pradesh,* AIR 1961 SC 564 : (1961) 2 SCR 931.

47. *K. Rajendran v. State of Tamil Nadu,* AIR 1982 SC 1107 : (1982) 2 SCC 273.

48. *Yogender Pal Singh v. Union of India,* (1987) 1 SCC 631.

49. *Javed Niaz Beg v. Union of India,* AIR 1981 SC 794 : 1980 Supp SCC 155.
For the Eighth Schedule to the Constitution, see, *supra,* Ch. XVI.

50. *State of Bihar v. Kaushal Kishore Singh,* AIR 1997 SC 2643.

Generally speaking, the judicial approach is that appointments ought to be made on the basis of a written test plus a *viva voce* test and not *solely* on the basis of a *viva voce* test. While *viva voce* is an important factor, it ought not to be the sole factor in the process of selection. The reason is that reliance thereon may lead to "sabotage of the purity of the proceedings". There is always room for suspicion if common appointments are made through oral interview only. There may be posts requiring persons of mature personality and such posts may be filled solely on the basis of a *viva voce* test. The Supreme Court has ruled in *Praveen Singh v. State of Punjab*[51] that the posts of block development officers at the panchayat level in the State do not require persons of mature personality and, therefore, appointment to these posts ought to be made on the basis of a written test and *viva voce* and not solely through *viva voce.*[52]

An individual applicant for any particular post does not get any right to be enforced by a *mandamus* unless and until he is selected in the process of selection and gets the letter of appointment.[53] Mere inclusion of a candidate's name in the list of selected candidates does not confer on him any indefeasible right to be appointed unless the relevant rules so indicate. Such a candidate could feel aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no valid or *bona fide* reason.[54]

Merely because the name of a candidate has been placed on the waiting list, it does not confer on him any right of being appointed to any post.[55] A waiting list can remain in force only for a reasonable time and not *in infinitum* so that other qualified persons are not deprived of their chance of applying for the posts in the succeeding years and being selected for appointment.[56] A waiting list cannot be used as a perennial source of recruitment filling up the vacancies not advertised.

A candidate put on the waiting list cannot be appointed to a post arising subsequently without notifying the same for recruitment. Under Arts. 14 and 16, every one is entitled to claim consideration for appointment to a post under the State. The vacant posts arising or expected should be notified. No one can be appointed without due notification of vacancies and selection according to the rules.[57]

Termination of the services of temporary employees when duly selected candidates are available is valid in law.[58]

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51. AIR 2001 SC 152 : (2000) 8 SCC 633.

52. See, *supra*, Ch. XXI on *viva voce.*
Also see, *Lila Dhar v. State of Rajasthan,* AIR 1981 SC 1777 : (1981) 4 SCC 159.

53. *Union of India v. Tarun K. Singh,* AIR 2001 SC 2196.

54. *State of Haryana v. Subash Chander Narwaha,* AIR 1973 SC 2216 : (1974) 3 SCC 220; *Shankar Das v. Union of India,* AIR 1991 SC 1583; *Union Territory of Chandigarh v. Dilbagh Singh,* (1993) 1 SCC 154 : AIR 1993 SC 796; *State of Bihar v. Secretariat Assistants Successful Examinees Union,* (1994) 1 SCC 126 : AIR 1994 SC 736; *N. Mohanam v. State of Kerala,* AIR 1997 SC 1826.

55. *K. Jayamohan v. State of Kerala,* AIR 1997 SC 2619 : (1997) 5 SCC 170.

56. *Nagar Mahapalika, Kanpur v. Vinod Kumar Srivastava,* AIR 1987 SC 847 : (1987) 1 SCC 602; *Babita Prasad v. State of Bihar,* (1993) Suppl (3) SCC 268.

57. *Ashok Kumar v. Chairman, Banking Service Recruitment Board,* AIR 1996 SC 976; *K. Jayamohan,* AIR 1997 SC 2619; *Prem Singh v. Haryana State Electricity Board,* (1996) 4 SCC 319; *Gujarat State Dy. Executive Engineers Ass. v. State of Gujarat,* (1994) Supp (2) SCC 591; *Surinder Singh v. State of Punjab,* AIR 1998 SC 18.

58. *Surendra Kumar v. State of Rajasthan,* AIR 1993 SC 115 : (1992) 4 SCC 464.

Articles 16 and 14 do not forbid the government from creating different cadres or categories of posts carrying different emoluments. Also, there is no bar in the way of the state integrating different cadres into one cadre. "It is entirely a matter for the state to decide whether to have several different cadres or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of the equality clause."[59]

The Supreme Court has deprecated the tendency of denying appointment to a person in government service on the ground of his political beliefs. In *State of Madhya Pradesh v. Ramashankar Raghuvanshi*,[60] the Court has emphasized that one cannot be turned back at the very threshold on the ground of his past political activities. According to the Court "it offends the Fundamental Rights guaranteed by Arts. 14 and 16 of the Constitution to deny employment to an individual because of his past political affinities, unless such affinities are considered likely to affect the integrity and efficiency of the individual's service.[61] The Court has emphasized that "the whole idea of seeking a police report on the political faith and the past political activity of a candidate for public employment appears to our mind to cut at the very root of the Fundamental Rights of equality of opportunity in the matter of employment, freedom of expression and freedom of association."[62] Report on his involvement in any criminal or subversive activity can however be sought to determine his suitability for public employment.

A State Public Service Commission announced the list of selected candidates for certain posts. Thereafter, the State Government forwarded to the Commission a list of candidates who were also selected for these posts under a rule authorising the Commission to consider any candidate who had requisite qualifications but did not apply. The Supreme Court quashed these appointments holding that the rule was intended not to bypass selections based on merit but only to cover candidates of exceptional merit. Here many of the candidates selected under the rule were found to be less meritorious than those selected earlier.[63]

A rule empowered the State Government to appoint any successful candidate at a service competitive examination to any cadre. A candidate was appointed to a lower cadre while other candidates lower in rank at the examination were appointed to a higher cadre. The rule was held to be discriminatory as it made no provisions for testing the candidate's suitability for a particular cadre, did not give an opportunity to a candidate to join the cadre of his preference and vested arbitrary power of patronage in the government as it could say at its sweet will that a particular candidate was more suitable for a particular cadre.[64]

In *Janki Pd. v. State of Jammu & Kashmir*,[65] the Supreme Court set aside the selections as it found the interview process to be thoroughly unsatisfactory. The interview committee did not take into account the service records of the candidates and the candidates who had secured even less than 30 per cent marks at the

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59. *Kishori Mohanlal Bakshi v. Union of India*, AIR 1962 SC 1139; *Reserve Bank of India v. N.C. Paliwal*, AIR 1976 SC 2345, 2357 : (1976) 4 SCC 838.
60. AIR 1983 SC 374 : (1983) 2 SCC 145.
61. *Ibid.*, 376.
62. *Ibid.*, 375.
63. *Channabasavaih v. State of Mysore*, AIR 1965 SC 1293 : (1965) 1 SCR 360.
64. *State of Mysore v. Jayaram*, AIR 1968 SC 346 : (1968) 1 SCR 349.
65. AIR 1973 SC 930 : (1973) 1 SCC 420.

interview were selected. The Court ruled that selection made on such a poor basis cannot be regarded as a real selection at all.

Where selection was made without interview or fake or ghost interviews, final records were tampered with and documents were fabricated, an inference can be drawn that the whole selection process was motivated by extraneous considerations. The entire selection process was set aside as being arbitrary. The selectees had no right to assume office.[66] The Supreme Court commented on the whole episode as follows:[67]

> "The whole examination and the interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud."

Reservation of 25% of posts for sons of bank employees and relaxation of educational qualifications and percentage of marks in their favour for appointment violates Arts. 16(1) and 16(2).[68]

Under Art. 16(2), residential requirement will be unconstitutional as a condition of eligibility for employment or appointment to an office under the State or its instrumentality.[69]

A service rule made by the Andhra Pradesh Government provided for 5% weightage to be given to Telugu medium candidates in the competitive examination held by the Public Service Commission in all Group II Service Examination. The Supreme Court declared the rule invalid *vis-à-vis* Arts. 14 and 16. The Court ruled that such a rule would frustrate the very concept of recruitment on merits to public posts. The Court also pointed out that the object of Arts. 14 and 16 is to ensure equality to all those who are similarly situated. In other words, all the citizens applying for employment under the State are entitled to be treated alike. If that is so then how having once allowed all candidates having minimum graduation qualification in any medium to compete for the posts, a further special benefit could be given only to the candidates having passed the minimum qualifying examination in the Telugu medium.[70]

A service rule requiring a female employee to obtain written permission of the government before solemnization of her marriage and denial of her right to be appointed on the ground that she was a married woman are discriminatory. The Supreme Court has said:[71]

> "We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern."

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66. *Krishan Yadav v. State of Haryana,* AR 1994 SC 2166 : (1994) 4 SCC 165.

67. *Ibid,* at 2172.
Also see, *Union of India v. Tarun K. Singh,* AIR 2001 SC 2196 : AIR 2001 SC 2196.

68. *Auditor General of India v. G. Ananta Rajeswara Rao,* AIR 1994 SC 1521 : (1994) 1 SCC 192.

69. *Dr. Pradeep Jain v. Union of India,* AIR 1984 SC 1420 : (1984) 3 SCC 654; *V.N. Sunanda Reddy v. State of Andhra Pradesh,* AIR 1995 SC 914 : 1995 Supp (2) SCC 235.

70. *V.N. Sunanda Reddy v. State of Andhra Pradesh,* AIR 1995 SC 914 : 1995 Supp (2) SCC 235.

71. *C.B. Muthamma v. Union of India,* AIR 1979 SC 1868 : (1979) 4 SCC 260.

Giving preference in appointment to government posts on the basis of residence within a district or rural areas of a district has been held to run counter to the peremptory language of Art. 16(2). It has overtones of parochialism and runs counter to "our constitutional ethos founded on unity and integrity of the nation". Residence by itself—be it within a state, region, district or a lesser area within a district—cannot be a ground to accord preferential treatment or reservation, save as provided in Art. 16(3). "It is not possible to compartmentalize the State into districts with a view to offer employment to the residents of that district on a preferential basis."[72]

(c) COMPASSIONATE APPOINTMENT

Appointment on compassionate grounds of a son, daughter or widow to assist the family to relieve economic distress because of the sudden demise in harness of a government servant has been held to be valid *vis-a-vis* Arts. 16(1) and 16(2). The rationale underlying provision of compassionate appointments to the heirs of the deceased employee is that he was the bread winner for the family and his exit has left the family in the lurch and in precarious and vulnerable economic position.[73]

Appointment in public services on compassionate ground has been carved out, as an exception, in the interests of justice, to the general rule that appointments in the public services should be made strictly on the basis of open invitation of applications and merit and no other mode of appointment nor any other consideration is permissible.[74]

Such an appointment is to be made according to the rules and guidelines that may have been framed by the concerned authority. No person can claim appointment on compassionate grounds in disregard of such rules and guidelines.[75] No such appointment can be made if no post is available. "It will be a gross abuse of power of a public authority to appoint persons when vacancies are not available. If persons are so appointed and paid salaries, it will be a mere misuse of public funds, which is totally unauthorised."[76]

But if a vacancy is available, such an appointment should be made as soon as possible. "It is improper to keep such case pending for years…"[77] Such appointment should be made immediately to redeem the family in distress. In *Sushma Gosain*,[78] the candidate was kept waiting for four years. Criticising this, the Supreme Court observed: "The denial of appointment is patently arbitrary and cannot be supported in any view of the matter". There was absolutely no reason to make her to wait for such a long time.

A rule denying compassionate employment if the employee dies within two years from the date of superannuation has been held to be valid under Art. 14 as the rule is not discriminatory.[79]

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72. *Kailash Chand Sharma v. State of Rajasthan,* (2002) 6 SCC 562 : AIR 2002 SC 2877.
73. *Balbir Kaur v. Steel Authority of India Ltd.,* AIR 2000 SC 1596 : (2000) 6 SCC 493.
74. *Indian Bank v. Usha,* AIR 1998 SC 866, 874 : (1998) 2 SCC 663.
75. *Umesh Kumar Nagpal v. State of Haryana,* (1994) 4 SCC 138 : (1994) 3 JT 525.
76. *Life Insurance Corp. v. Asha Ramchandra Ambekar,* 1994 AIR SCW 1947.
77. *Indian Bank v. K. Usha,* AIR 1998 SC 566, 874 : (1998) 2 SCC 663.
78. *Himachal Road Transport Corporation v. Dinesh Kumar,* 1996 AIR SCW 2727 : (1996) 4 SCC 560.
Also see, *Hindustan Aeronautics Ltd. v. A. Radhika Thirumalai,* AIR 1997 SC 123 : (1996) 6 SCC 394.
79. *Smt. Sushma Gosain v. Union of India,* AIR 1989 SC 1976 : (1989) 4 SCC 468.

The Supreme Court has ruled that compassionate appointment is not to be made as a matter of course but only after examining the financial condition of the family. It is only if the concerned authority is satisfied that, but for the provision of employment, the family of the deceased employee will not be able to meet the crisis that a job is to be offered to an eligible member of the family. Such an appointment can be made only against the lowest post in non-manual and manual categories.[80]

(d) PROBATION

As regards probation, the employer has the prerogative to put an employee on probation and watch his performance.[81]

(e) PROMOTION

No employee has a vested right to promotion but he certainly has the right to be considered for promotion according to the rules. Chances of promotion are not conditions of service and are defeasible by law. A rule which merely affects the chances of promotion does not amount to a change in the conditions of service. But if a rule confers a right of actual promotion, or a right to be considered for promotion, is a service rule.[82] As the Supreme Court has observed in *State of Maharashtra v. Chandrakant Anant Kulkarni*:[83]

> "Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not".

A change in promotional policy by the Government was challenged by the employee concerned on the ground that, as a result thereof, his service conditions were adversely affected since his chances of promotion were adversely affected thereby. The Supreme Court rejected the challenge saying that a mere chance of promotion is not a condition of service, and the fact that there was reduction in the chances of promotion would not be tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, chances of promotion are not.[84]

The government can formulate or change the policy regarding promotions but the policy must conform to the principle of equality.[85] Accordingly, promotion

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Also, *West Bengal State Electricity Board v. Samir K. Sarkar,* (1999) 7 SCC 672 : AIR 1999 SC 3415.

80. *Umesh Kumar Nagpal v. State of Haryana,* (1994) 4 SCC 138 : (1994) 4 JT 525.
Also, *Smt. Sushma Gosain v. Union of India,* AIR 1989 SC 1976 : (1989) 4 SCC 468; *Director of Edcuation (Secondary) v. Pushpendra Kumar,* AIR 1998 SC 2230 : (1998) 5 SCC 192.

81. *Ajit Singh v. State of Punjab,* AIR 1983 SC 494 : (1983) 2 SCC 217.

82. *High Court of Calcutta v. Amol Kumar Roy,* AIR 1962 SC 1704; *Mohd. Shujat Ali v. Union of India,* AIR 1974 SC 1631 : (1975) 3 SCC 76; *Mohd. Bhakar v. Y. Krishna Reddy,* 1970 SLR 768 (SC); *Ramachandra Shankar Deodhar v. State of Maharashtra,* (1974) 1 SCC 317; *Syed Khalid Rizvi v. Union of India,* (1993) Supp (3) SCC 575; *State of Mysore v. G.N. Purohit,* 1967 SLR 753 (SC).

83. AIR 1981 SC 1990 : (1981) 4 SCC 130.
Also, *K. Jagadeesan v. Union of India,* AIR 1990 SC 1072 : (1990) 2 SCC 228.

84. *State of West Bengal v. Pranab Ranjan Roy,* AIR 1998 SC 1882 : (1998) 3 SCC 209.
Also, *Union of India v. S.L. Dutta,* AIR 1991 SC 363, 367 : (1991) 1 SCC 505.

85. *A.S. Sangwan v. Union of India,* AIR 1981 SC 1545 : 1980 Supp SCC 559.

rules were held to be discriminatory and unjust in *State of Uttar Pradesh v. Ramgopal*.[86]

Persons holding posts in different grades or categories cannot claim equality in matters of promotion. Because of multifarious state activities, persons have to be employed in different cadres and classes. Each class may be a separate entity having its own rules of promotion.[87] The railways provide the guards with a better channel of promotion to higher grade station-masters than to the roadside station-masters. This is not discriminatory as the guards and the station-masters belong to separate categories with separate avenues of promotion. Equality of opportunity cannot be predicated between them.[88] 'Equality' under Art. 16 means equality as between members of the same class of employees and not equality between members of separate, independent classes.

Difficult questions have at times arisen in matters of promotion from lower to a higher grade within the same category. How far distinctions are permissible within the same class for promotion purposes? The general rule is that inequality of opportunity of promotion among members of a single class, which is based on no rational criteria, is not valid under Art. 16.[89]

The Supreme Court, generally speaking, does not countenance non-egalitarian 'micro-distinctions' in the area of promotions. The Supreme Court has warned that the doctrine of classification should not be taken to a point where instead of being a useful servant, it becomes a dangerous master. However, conditions designed to promote efficiency and best service have been accepted as valid, *e.g.*, the basis of seniority-*cum*-merit.[90] In a State, mamlatdars were recruited partly directly and partly by promotion from a lower grade. But after appointment, all mamlatdars were integrated into one cadre as they had the same designation, pay scale, functions, etc. It was held that as all mamlatdars formed one class, it would not be valid to accord a favoured treatment to the appointed mamlatdars *qua* the promotee mamlatdars, and thus to discriminate them, for purposes of promotion to the posts of deputy collectors.[91]

Once a cadre is formed by recruiting persons drawn from various departments, there would normally be no justification for discriminating between them by subjecting one class to more onerous terms in the matter of promotional chances.[92] If, however, people being appointed to a cadre from different sources are not fully integrated into one class, then differential rules of further promotion according to the original source may be valid.[93]

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86. AIR 1981 SC 1041.
87. *Sham Sunder v. Union of India*, AIR 1969 SC 212 : (1969) 1 SCR 312.
88. *All India Station-Masters' Ass. v. Gen. Manager, C. Rly.*, AIR 1960 SC 384 : (1960) 2 SCR 311.
89. *State of Mysore v. Krishna Murthy*, AIR 1973 SC 1146 : (1973) 3 SCC 559.
Also, *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76.
90. *Union of India. v. V.J. Karnik*, AIR 1970 SC 2092 : (1970) 3 SCC 658.
Also, *State of Jammu & Kashmir v. T.N. Khosa*, AIR 1974 SC 1 : (1974) 1 SCC 19.
91. *S.M. Pandit v. State of Gujarat*, AIR 1972 SC 252 : (1972) 4 SCC 778.
92. *S.L. Sachdev v. Union of India*, AIR 1981 SC 411 : (1980) 4 SCC 562.
93. *Ram Lal Wadhwa v. State of Haryana*, AIR 1972 SC 1982.
Also, *General Manager, S.C. Rly. v. A.V.R. Sidhanti*, AIR 1974 SC 1755.
For discrimination in promotion see : *Roshan Lal Tandon v. Union of India*, AIR 1967 SC 1889 : (1968) 1 SCR 185; *Distt. Registrar, Palghat v. M.B. Royakutty*, AIR 1979 SC 1060.

Usually, the Supreme Court has upheld classification, for the purposes of promotion, based on educational qualifications. However one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.[1] For example, in *Kothandaraman*,[2] the Supreme Court has reiterated that higher educational qualification is a permissible basis of classification but the acceptability thereof will depend on the facts and circumstances of each case. In the instant case, the Court found that differentiation between degree holders and diploma holders existed for a long time; that the degree holders were given different designation and gazetted status and a higher scale of pay whereas diploma holders did not enjoy these benefits. Thus, the higher educational qualification had relevance insofar as the higher promotional post was concerned, in view of the nature of the functions and duties attached to that post. "The classification has, therefore, nexus with the object to be achieved." Thus, validity of classification has to be judged on the facts and circumstances of each case.

In the Maharashtra Industrial Development Corporation, promotion to the post of superintending engineer was available to both degree-holder and diploma-holder executive engineers according to merit-cum-seniority. In 1988, the Corporation passed a resolution reserving 75% of the posts of superintending engineers to degree-holder executive engineers and 25% of these posts to diploma-holder executive engineers. The resolution was challenged on the ground that all executive engineers formed one cadre and did the same kind of work and, therefore, the classification made on the basis of educational qualifications was discriminatory under Arts. 14 and 16. But the Court rejected the contention and held the resolution valid saying that, for the purposes of promotion, a valid classification could be made among the members holding the same post on the basis of their qualifications. The Court also ruled that in the absence of a rule or regulation, service condition could be prescribed by executive instructions.[3]

On the other hand, there are some cases where in the context of the specific facts and circumstances, classification for the purpose of promotion, on the basis of educational qualifications has been held to be not reasonable. In the following case,[4] a quota was fixed between diploma-holders and non-diploma holders among linemen for promotion to line superintendent. The Supreme Court struck down the classification made saying that "all the linemen either diploma-holders or non-diploma-holders are performing the same kind of work and duties and they belong to the same cadre having a common/joint seniority list for promotion to the post of line Superintendent." In the instant case, because of the quota, linemen junior to the petitioner had been promoted and the Court regarded this as discriminatory and violative of the equality clause contained in Arts. 14 and 16.

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1. *State of Jammu & Kashmir v. Triloki Nath Khosa,* AIR 1974 SC 1 : (1974) 1 SCC 19; *Roop Chand Adlakha v. Delhi Development Authority,* AIR 1989 SC 307 : 1989 Supp (1) SCC 116; *P. Murugesan v. State of Tamil Nadu,* (1993) 2 SCC 340; *Rajasthan State Electricity Board Accountants Association v. Rajasthan State Electricity Board,* (1997) 3 SCC 103 : AIR 1997 SC 882 : (1994) 6 JT 157.

2. *T.R. Kothandaraman v. Tamil Nadu Water Supply and Drainage Board,* (1994) 6 SCC 282.

3. *Shamkant Narayan Deshpande v. Maharashtra Industrial Development Corp.,* AIR 1993 SC 1173 : 1993 Supp (2) SCC 194.

4. *Punjab State Electricity Board, Patiala v. Ravinder Kumar Sharma,* AIR 1987 SC 367 : (1986) 4 SCC 617.

In an earlier case *Mohammad Shujat Ali v. Union of India*,[5] the Supreme Court had observed that "it cannot be laid down as an invariable rule" that any classification made on the basis of "variant educational qualification" would be valid, "irrespective of the nature and purposes of the classification or the quality and extent of the differences in the educational qualifications". The Court emphasized that the test of reasonable classification ought to be applied in each case on its peculiar facts and circumstances. In the instant case, a quota for promotion fixed for graduates and non-graduates was quashed. As both were regarded fit for promotion, fixing a quota between them and giving preferential treatment to graduates in the matter of promotion was held violative of the equality clause.

Similarly, fixation of quota for promotion to the posts of excise inspectors between graduate and non-graduate preventive officers was held to be violative of Arts. 14 and 16. For all purposes they were being effectively treated as equal. They all constituted a single cadre and they were all equal members of it. More non-graduates were recruited to the service. The Court noted that all preventive officers whether graduate or non-graduate-performed the same type of work. Once they were promoted as excise inspectors, there was no distinction between graduate or non-graduate excise inspectors.[6]

In Food Corporation of India v. Om Prakash Sharma,[7] for purposes of promotion, the eligibility criterion was fixed at three years of service for graduates and five years of service for matriculates. This differentiation was quashed by the Supreme Court on the ground that the nature of work performed by the promotees was not such as to make differentiation between graduates and non-graduates. All promotees performed the same type of work. The corporation had placed no material before the Court to justify the classification between graduates and non-graduates. The differentiation was thus held unconstitutional as offending the equality clause.

For purposes of promotion, two tests are generally applied, *viz.*, "merit-cum-seniority" or "seniority-cum-merit". The second test involves consideration of *inter se* seniority of the employees who are eligible for consideration for promotion. The test means that "given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made."[8] On the other hand, if the test of "merit-cum-seniority" is adopted then a comparative assessment of merit of the candidates is required to be made. This test lays greater emphasis on merit and not on length of service which plays a less significant role. Seniority is to be given weight if merit and ability are approximately equal.[9]

The Supreme Court has suggested to the Union and State Governments a complete change in the system of maintaining confidential rolls of their employees because a solution has to be found to the long delays in communicating the adverse entries against the employees and also against the misuse of the powers

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5. AIR 1974 SC 1631 : (1975) 3 SCC 76.
6. *N. Abdul Basheer v. K.K. Karunakaran*, AIR 1989 SC 1624 : 1989 Supp (2) SCC 344.
7. AIR 1998 SC 2682 : (1998) 7 SCC 676.
8. *State of Mysore v. C.R. Sheshadri*, AIR 1974 SC 460 : (1974) 4 SCC 308; *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490 : (1976) 2 SCC 310.
9. *Union of India v. Mohan Lal Capoor*, AIR 1974 SC 87; *B.V. Sivaiah v. K. Addanki Babu*, AIR 1998 SC 2565 : (1998) 6 SCC 720.

by officials who write the confidential reports. Under the prevailing system, entries are first made in the confidential report of an officer behind his back and then he is given an opportunity to make a representation against the entry by communicating the same to him after considerable time. Any representation made by him is considered by a higher authority some years later by which time any evidence that may be there to show that the entries made were baseless may have vanished. Suspensions, adverse remarks and frequent transfers from one place to another are ordered many a time without justification and without giving a reasonable opportunity to the employee concerned. Such actions surely result in the demoralisation of the services. The Courts could give very little relief in such cases. Hence the government itself should devise effective means to mitigate the hardship caused to the employees who are subjected to such treatment.

The Court has made these observations while disposing of the case of Amar Kant Choudhary, a 1964 directly-recruited Deputy Superintendent of Police in Bihar, who was wrongly left out of the list by the selection committee for promotion on the basis of adverse entries in his confidential rolls which were not communicated to him for several years, and which were later expunged by the government. The Court directed that within four months, the selection committee must consider Mr. Choudhary's case for promotion, and if he is selected, he would be entitled to the seniority and all other consequential benefits flowing therefrom.[10]

The Supreme Court has clarified the position as regards promotion of an employee against whom disciplinary proceedings have been initiated. The Court has stated in *State of Madhya Pradesh v. J.S. Bansal*,[11] that if disciplinary proceedings are pending on the date on which names of other employees are considered for promotion to the next higher post, the delinquent employee if he is similarly circumstanced as other employees and is also eligible, has a right to be considered for promotion to the next higher post along with other employees. His name cannot be omitted from consideration merely because of the pendency of the departmental proceedings against him. An employee cannot be denied his right at the interlocutory stage of the departmental proceedings as he is still to be found to be guilty on the basis of the evidence to be produced against him. Only because of the suspicion against him, till the charges are proved, he cannot be deprived of his right to be considered for promotion. "Mere suspicion is not a substitute for proof". To consider him for promotion along with other eligible candidates is to effectuate his fundamental right which is available even to a delinquent employee under Arts. 14 and 16 of the Constitution. After considering him for promotion, the recommendation of the promotions committee is to be kept in a sealed cover so that if he is exonerated from the charge against him, he may be promoted immediately to the next higher post.

(f) SENIORITY

Difficult questions arise from time to time regarding fixation of *inter se* seniority in a cadre. Seniority is governed by service rules. No one has a vested right

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10. *Amar Kant Choudhary v. State of Bihar*, AIR 1984 SC 531 : (1984) 1 SCC 694.
Also, *Gurdial Singh Fiji v. State of Punjab*, AIR 1979 SC 1622 : (1981) 4 SCC 419.

11. AIR 1998 SC 1015, at 1019 : (1998) 3 SCC 714.
Also see, *Union of India v. Tejinder Singh*, (1991) 4 SCC 129; *Union of India v. K.V. Jankiraman*, (1991) 4 SCC 109 : AIR 1991 SC 2010.

to seniority but an employee has an interest in seniority acquired by working out the rules. It can be taken away only by operation of a valid law.[12]

The rule-making authority can determine with objectivity and fairness what rules should govern the *inter se* seniority and ranking of the personnel working in the concerned department. But the rules so formulated should be reasonable, just and equitable.[13] The rules ought not to be arbitrary and irrational resulting in inequality of opportunity amongst employees belonging to the same class.[14] Revision of seniority *inter se* of employees in a grade arbitrarily without any rule or principle has been held to be invalid under Art. 16(1).[15]

Seniority of an officer is determined with reference to the date of his regular appointment made according to the rules. This is consistent with Arts. 14 and 16.[16] Any earlier temporary or *ad hoc* service before regular appointment is to be considered as fortuitous and is not to be counted for purposes of seniority.[17] Appointment in accordance with the rules is a condition precedent to count seniority.[18] Temporary, *ad hoc* or fortuitous appointment, not being appointment according to the rules, cannot be counted towards seniority.[19] The date of promotion to a particular grade or category determines the seniority in that grade or category.[20] However, if the circumstances so require, a group of persons can be treated as a class separate from the rest, for any preferential or beneficial treatment while fixing their seniority.[21]

A University has merit promotee Professors and Readers and directly recruited Professor and Readers. The two constitute distinct classes as they are not at par with each other but are unequal in several respects. They cannot all be treated equally for the purposes of seniority. Fixation of *inter se* seniority of directly recruited Readers and Professors and those promoted on merit on the yardstick of

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12. *A.K. Bhatnagar v. Union of India*; *Indian Adm. Service (S.C.S.) Assn. v. Union of India; Akhil Bhartiya Soshit Karamchari Sangh v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.

13. *R.S. Makashi v. I.M. Menon*, AIR 1982 SC 101, 116 : (1982) 1 SCC 379.
Reasonableness of the specific rules for fixing seniority has been considered in the following cases: *Mervyn Continho v. Collector of Customs*, AIR 1967 SC 52 : (1966) 3 SCR 600; *Govind D. Kelkar v. Chief Controller of Imports & Exports*, AIR 1967 SC 839 : (1967) 2 SCR 29; SC. *Jai Singhani v. Union of India*, AIR 1967 SC 1427; *Bishan Sarup Gupta v. Union of India*, AIR 1972 SC 2627; *Union of India v. Bishan Sarup Gupta*, AIR 1974 SC 1618; *Prabhakar v. State of Maharashtra*, AIR 1976 SC 1093; *N.K. Chauhan v. State of Gujarat*, AIR 1977 SC 251 : (1977) 1 SCC 308.

14. *Reserve Bank of India v. N.C. Paliwal*, AIR 1976 SC 2345, 2357 : (1976) 4 SCC 838; *Amarjit Singh v. State of Punjab*, AIR 1975 SC 984, 990.

15. *S.K. Ghosh v. Union of India*, AIR 1968 SC 1385 : (1968) 3 SCR 631.

16. *Pushpa Vishnu v. State of Maharashtra*, AIR 1995 SC 1346; *Direct Recruitment, Class II Engineering Officers' Ass. v. State of Maharashtra*, AIR 1990 SC 1607 : (1990) 2 SCR 900; *State of West Bengal v. Aghore Nath Dey*, (1993) 3 SCC 371.

17. *K.C. Joshi v. Union of India*, AIR 1991 SC 284; *Union of India v. S.K. Sharma*, (1992) 2 SCC 728; *D.N. Agrawal v. State of Madhya Pradesh*, AIR 1990 SC 311; *V. Sreenivasa Reddy v. Govt. of A.P*, AIR 1995 SC 586 : 1995 Supp (1) SCC 572.

18. *Direct Recruits Class II Officers Ass. v. State of Maharashtra*, (1990) 2 SCR 900.

19. *D.N. Agrawal v. State of Madhya Pradesh*, AIR 1990 SC 1311; *K.C. Joshi v. Union of India*, AIR 1991 SC 284 : 1992 Supp (1) SCC 272; *V. Sreenivasa Reddy v. Govt. of Andhra Pradesh*, AIR 1995 SC 586 : 1995 Supp (1) SCC 572; *J&K Public Service Comm. v. Dr. Narinder Mohan*, (1994) 2 SCC 630.

20. *Karam Chand v. Haryana State Electricity Board*, AIR 1989 SC 261 : 1995 Supp (1) SCC 572.

21. *Ram Janam Singh v. State of Uttar Pradesh*, AIR 1994 SC 1722 : (1994) 6 SCC 622.

continuous officiation has been held to be illegal and unconstitutional under Arts. 14 and 16(1).

Seniority is to be fixed within the same class on the basis of continuous officiation.[22] An ex cadre employee cannot be treated as a cadre employee for determining their *inter se* seniority as unequals cannot be treated as equals.[23]

A rule leaving "the valuable right of seniority to depend upon the mere accident of confirmation", notwithstanding the length of service is hit by Art. 16.[24] Appointment of a person with retrospective effect so as to affect the seniority of others violates Arts. 14 and 16.[25]

Service conditions pertaining to seniority are liable to alteration, by subsequent changes in the relevant rules. Except to the extent of protecting promotions that have already been earned under the previous rules, the revised rules will govern the seniority and future promotion prospects of all the persons in the concerned service. The Court can, however, assess whether the principle for determining seniority laid down in the rules is "just, fair and reasonable", or whether it is unreasonable or arbitrary.[26]

The Supreme Court has said in *Makashi* that there is no invariable normal rule that seniority is to be determined only on the basis of the respective dates of appointment to the post and that any departure from such a rule will be *prima facie* unreasonable and illegal. The rule-making authority can formulate rules of seniority. However, such rules must be "reasonable, just and equitable."[27]

(g) TRANSFER

An order of transfer of an employee is a part of the service conditions. The Court does not interfere with such an order unless it is *mala fide*, or that the service rules prohibit such an order, or that the authority issuing the order was not competent to do so.[28]

A government employee, or a servant of a public undertaking, has no legal right to insist for being posted at any particular place unless specifically provided in his service conditions.[29]

When an honest officer was transferred by the Government because of the pressure of vested interests, the Supreme Court quashed the same characterising it as *mala fide*, a case of "victimisation of an honest officer" and not in public interest. The Court said, "the transfer of the appellant is nothing but *mala fide*

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22. *Rashm Srivastava v. Vikram University,* AIR 1995 SC 1694 : (1995) 3 SCC 653.
23. *Direct Recruit Class II Engineering Officers Association v. State of Maharashtra,* AIR 1990 SC 1607 : (1990) 2 SCC 715.
24. *S.B. Patwardhan v. State of Maharashtra,* AIR 1977 SC 2051, 2066 : (1977) 3 SCC 399; *Pushpa Vishnu v. State of Maharashtra,* AIR 1995 SC 1346 : 1995 Supp (20) SCC 276.
25. *Ramendra Singh v. Jagdish Prasad,* AIR 1984 SC 885 : 1984 Supp SCC 142.
26. *J. Kumar v. Union of India,* AIR 1982 SC 1964, 1970.
27. Fixation of seniority was held reasonable in *K .B. Shukla v. Union of India,* AIR 1979 SC 1136 : (1979) 4 SCC 673, but unreasonable and legally erroneous in *G.R. Luthra v. Lt. Gov. of Delhi,* AIR 1979 SC 1900, and *B.L. Goal v. State of Uttar Pradesh,* AIR 1979 SC 228.
28. *State Bank of India v. Anjan Sanyal,* AIR 2001 SC 1748 : (2001) 5 SCC 508.
29. *Chief General Manager, N.E. Telecom Circle v. Rajendra Bhattacharjee,* AIR 1995 SC 813 : (1995) 2 SCC 532.

exercise of the power to demoralise honest officers who would efficiently discharge the duties of a public office."[30]

(h) COMPULSORY RETIREMENT

Provision for compulsory retirement of government servants in public interest does not infringe Arts. 14 and 16. These Articles do not prohibit the prescription of reasonable rules for compulsory retirement[31] which neither involves any civil consequences,[32] nor any stigma.[33]

It is valid to put a ban on re-appointment of persons compulsorily retired as it has a reasonable basis and has some relation to the suitability for employment or appointment to an office.[34]

(i) RETIREMENT

The expression "conditions of service" would take within its fold, fixation of the age of superannuation. Therefore, service rules made under Art. 309 may revise and reduce the age of retirement. In *Nagaraj*,[35] the age of superannuation was reduced from 58 to 55 years by amending the service rules. The Supreme Court ruled that service rules can be amended under Art. 309.[36]

(j) TERMINATION

There should be no discrimination in the matter of termination of service. Out of the 2000 officiating sub-inspectors of police, only the respondent was reverted while persons junior to him were allowed to officiate. This was held to be discriminatory and so bad under Art. 16.[37] Dismissal of a person on the sole ground that he is a 'non-Andhra' was held void as amounting to discrimination only on the ground of place of birth which is prohibited by Art. 16(2).[38] The constitutional provision draws no distinction between temporary and permanent posts and applies to all posts with equal rigour.

Retrenchment of employees in a department by applying a selective test which is not arbitrary, unreasonable or discriminatory would not offend Art. 16. A selective test cannot be reasonable unless there is some proximate connection between the test and the efficient performance of duties and obligations of the particular office. Therefore, while retrenching staff, preference given to 'political sufferers' and 'displaced persons' and thus retained in service was not valid, for the circumstance of a person being a 'political sufferer' had no bearing on the question whether or not he would efficiently perform his duties.[39]

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30. *Arvind Dattatraya Dhande v. State of Maharashtra*, AIR 1997 SC 3067 : (1997) 6 SCC 169.
31. *Shiv Charana Singh v. State of Mysore*, AIR 1965 SC 280; *P. Radhakrishna Naidu v. State of Andhra Pradesh*, AIR 1977 SC 854 : (1977) 1 SCC 561.
32. *Union of India v. J.N. Sinha*, AIR 1971 SC 40 : (1970) 2 SCC 458; *Tara Singh v. State of Rajasthan*, AIR 1975 SC 1487 : (1975) 4 SCC 86.
33. See, *infra*, Ch. XXXIII.
34. *P.R. Naidu, supra*, footnote 31.
35. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 : (1985) 1 SCC 523; *State of Andhra Pradesh v. S.K. Mohinuddin*, AIR 1994 SC 1474.
36. For discussion on Art. 309, see, *infra*, Ch. XXXVI.
37. *State of Uttar Pradesh v. Sughar Singh*, AIR 1974 SC 423 : (1974) 1 SCC 218.
38. *Jankiraman v. State of Andhra Pradesh*, AIR 1959 AP 185.
39. *Sukhnandan Thakur v. State of Bihar*, AIR 1957 Pat. 617; *Ghulam Ahmad v. Inspector-General of Police*, AIR 1959 J.K. 136.

The services of a person employed in the Central Tractor Organisation were terminated after six years as being "no longer required". The Government also placed a ban on his being ever taken into service. Declaring the ban bad, the Court stated that the ban should have a reasonable basis and must have some relationship to his suitability for employment to an office. An arbitrary imposition of a ban against employment of a certain person under the government amounts to a denial of the right of equal opportunity of employment under Art. 16(1) which includes the right of being considered on merits for the post applied for.[40]

A rule empowering the government to terminate the services of a government employee by giving him one month's notice was held not invalid under Art. 16(1). Division of government service into permanent, *quasi*-permanent and temporary, and applying different rules of termination of service to different classes of government servants, does not involve discrimination. Nor would it amount to discrimination if the services of a person are dispensed with on the ground of unsatisfactory conduct, and persons junior to him are continued in service. It would, however, be a different matter if temporary employees were to be retrenched in which case qualifications and length of service of those holding temporary posts may be relevant, but not so in case of termination of service.[41]

Retaining the services of a junior while terminating the services of a senior, when it is not shown that the services of the latter are worse than those of the junior, is discriminatory and arbitrary.[42] The services of a temporary employee were terminated without any reason while several employees similarly situated and junior to him in the same temporary cadre had been retained. This was held to be discriminatory and arbitrary and was hit by Art. 16. No discrimination may arise under Art. 16 if the services of a temporary servant are dispensed with because of "unsatisfactory work or his unsuitability for the job". But if his services are terminated arbitrarily, and not on the ground of his "unsuitability, unsatisfactory conduct or the like" which put him in a class apart from his juniors in the same service, then a question of unfair discrimination may arise."[43]

Services of eleven executive officers of several improvement trusts were terminated by the State Government. The Government justified this action by pleading that all the improvement trusts in the State were dissolved and hence these officers were rendered redundant. The Court found as a fact that the trusts were functioning as before and discharging their normal functions; the whole of the staff of the trusts was intact except the eleven officers. What had actually been dissolved were the boards of trustees of the trusts and not the trusts themselves. A trust had a corporate personality independent of the board of trustees. The Court thus found the reasons for dispensing with the services of the petitioners as untenable and the action of the Government arbitrary and violative of Arts. 14 and 16. The Court observed: "..... Such thoroughly arbitrary action cannot be sustained."[44]

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40. *Krishan Chander Nayar v. Chairman, C.T.O.*, AIR 1962 SC 602 : (1962) 3 SCR 187.
41. *Champak Lal v. Union of India*, AIR 1964 SC 1854 : (1964) 5 SCR 190.
42. *R.X.A de Monte Furtado v. Administrator, Goa*, AIR 1982 Goa 34.
43. *Government Branch Press v. D.B. Belliappa*, AIR 1979 SC 429 : (1979) 1 SCC 477.
44. *Ajit Singh v. State of Punjab*, AIR 1983 SC 494 : (1983) 2 SCC 217.
On termination of service, also see, *Jaswant Singh v. Union of India*, AIR 1980 SC 115 : (1979) 4 SCC 440.
Reversion of an employee from a higher to a lower post after six years was held unreasonable and arbitrary; *C.C. Padmanabhan v. Director, Public Instruction*, AIR 1981 SC 64 : 1980 Supp SCC 668.

The respondent never participated in any illegal, vicious or subversive activity after his appointment in government service. Nevertheless, he was dismissed from service on account of his political beliefs prior to his appointment. The Supreme Court held this to be invalid. Membership of a political party prior to his appointment is irrelevant for government service. Seeking of a report on the political faith of a candidate for government service is repugnant to the Constitution. Of course, a person cannot engage in political activity after entry in government service.[45]

A rule providing for a subsistence allowance of Re 1/- to a civil servant under suspension, and convicted of an offence, but pending appeal to a higher Court, is unreasonable and illusory and infringes Art. 16. He should get his normal allowance irrespective of whether he is in jail or on bail otherwise he cannot pursue his appeal effectively.[46]

Under a regulation made by the Delhi Transport Corporation, a public sector undertaking, services of an employee could be terminated by giving one month's notice. The Supreme Court declared the regulation to be arbitrary, unjust, unfair and unreasonable offending Arts. 14 and 16(1).[47]

C. EQUAL PAY FOR EQUAL WORK

The Supreme Court has deduced the principle of "equal pay for equal work" from Arts. 14, 16 and 39(d) and the Preamble to the Constitution. No such principle is expressly embodied in the Constitution but the principle has now matured in a Fundamental Right. As the Supreme Court has explained in *State of Madhya Pradesh v. Pramod Bhartiya*,[48] the doctrine of "equal pay for equal work" is implicit in the doctrine of equality enshrined in Art. 14, and flows from it. The rule is as much a part of Art. 14 as it is of Art. 16(1). The doctrine is also stated in Art. 39(d), a directive principle, which ordains the State to direct its policy towards securing equal pay for equal work for both men and women.[49]

The Court has enunciated the doctrine as follows:[50]

> "The doctrine of equal work for equal pay would apply on the premise of similar work but it does not mean that there should be complete identity in all respects. If the two classes of persons do some work under the same employer, with similar responsibility, under similar working conditions, the doctrine of 'equal work equal pay', would apply and it would not be open to the State to discriminate one class with the other in paying salary."

But it cannot be said that being a Directive Principle, it is not enforceable in a Court of law because it is also a part of Art. 14. The Fundamental Rights and Di-

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45. *State of Madhya Pradesh v. Ramashanker Raghuvanshi*, AIR 1983 SC 374 : (1983) 2 SCC 145.

46. *State of Maharashtra v. Chandrabhan*, AIR 1983 SC 803 : (1983) 3 SCC 387.

47. Also, *Delhi Transport Corp. v. DTC Mazdoor Corporation*, AIR 1991 SC 101, 206; *Central Inland Water Transport Corporation v. Brojonath*, AIR 1986 SC 1571 : (1986) 3 SCC 156.
On termination of services of a government employee, also see, *infra*, Ch. XXXVI.

48. AIR 1993 SC 286 : (1993) 1 SCC 539.

49. For discussion on Directive Principles, see, *infra*, Ch. XXXIV.
For Preamble to the Constitution, see, Ch. I, *supra* and Ch. XXXIV, *infra.*

50. *Jaipal v. State of Haryana*, AIR 1988 SC 1504, at 1509 : (1988) 3 SCC 354.

rective Principles are not supposed to be exclusionary of each other; they are complimentary to each other.[51]

The parameters for invoking the principle of equal pay for equal work include, *inter alia,* the nature of the work and common employer.[52] The principle may properly be applied to the cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.[53] Thus, where all relevant considerations are the same, persons holding identical posts and discharging similar duties should not be treated differentially.

Employees under one and the same employer holding the same rank, performing similar functions and discharging similar duties and responsibilities must also be given similar scales of pay. The Court has emphasized that this is not an abstract doctrine but one of substance. Though not declared expressly in the Constitution, it is certainly a constitutional goal. The principle has been applied in a large number of cases.[54]

The principle of equal pay for equal work does not apply when the employers are different. Employees of Regional Rural Banks sponsored by a co-operative bank cannot claim the same salary and allowances as are payable to the employees of Regional Rural Bank which are sponsored by the commercial and nationalised banks.[55]

Article 14, as already stated, permits reasonable classification which means that the classification is to be based on an intelligible basis which distinguishes persons or things grouped together from those that are left out of the group and that differentia must have a rational nexus with the object to be achieved by the differentia made. In other words, there ought to be causal connection between the basis of classification and the object of classification. The doctrine of equal pay for equal work applies in case of unequal scales of pay based on no classification or irrational classification, though those drawing the different scales of pay do identical work under the same employer.

Accordingly, the Court has found it difficult to envisage a situation in research institutes where persons holding Doctorate qualification and enjoying the status of professor are governed by two different scales even though their duties, functions and responsibilities are identical.

Difference in salary of driver constables in the Delhi Police Force and other drivers in the service of the Delhi Administration has been held to be irrational as there is no reason to give driver constables a lower scale than other drivers as

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51. For further discussion on this point, see, *infra*, Ch. XXXIV.

52. *Alvaro Noronha Ferriera v. Union of India,* AIR 1999 SC 1356 : (1999) 4 SCC 408.

53. *P.K. Ramachandra Iyer v. Union of India,* AIR 1984 SC 541 : (1984) 2 SCC 141.

54. *Dhirendra Chamoli v. State of Uttar Pradesh,* (1986)1 SCC 637; *Union of India v. R.G. Kashikar,* AIR 1986 SC 431 : (1986) 1 SCC 458; *TRC Scientific Officers (Class I) Ass. v. Union of India,* AIR 1987 SC 490; *Bhartiya Dak Tar Mazdoor Manch v. Union of India,* AIR 1987 SC 2342; *M.P. Singh v. Union of India,* AIR 1987 SC 485; *Mewa Ram Kanojia v. AIIMS,* (1989) 2 SCC 235 : AIR 1989 SC 1256; *Employees of T & F Corporation of India v. Union of India,* AIR 1991 SC 1367; *S.M. Ilyas v. Indian Council of Agricultural Research,* AIR 1993 SC 384 : (1993) 1 SCC 182; *Ajay Jadhav v. Govt. of Goa,* AIR 2000 SC 451 : (1999) 9 SCC 4.

55. *Kshetriya Kisan Gramin Bank v. D.B. Sharma,* AIR 2001 SC 168 : (2001) 1 SCC 353.

their duties are more, not less, onerous than those of other drivers.[56] The Court refused to accept the argument of the Delhi Administration that the circumstance that persons belong to different departments of the government is itself a sufficient reason to justify different scales of pay irrespective of the identity of their powers, duties and responsibilities.

In *Savita*,[57] classification between two groups of senior draughtsmen was held to be without any basis as they performed the same duties and the differentiation between them was not based on any intelligible ground.

In *Bhagwan Dass v. State of Haryana*,[58] the Supreme Court has said that "once the nature and functions and the work are not shown to be dissimilar the fact that the recruitment was made in one way or the other would hardly be relevant from the point of view of "equal pay for equal work" doctrine".

Also, the fact that appointments are for temporary periods and the schemes are temporary in nature is irrelevant. Once it is shown that the nature of the duties and functions discharged and the work done are similar, the doctrine of "equal pay for equal work" is attracted.[59]

But this principle cannot be applied invariably to professional services. For example, dressing of a wound by a doctor or a compounder cannot be equated and be compensated on an equal basis. Similarly, a senior or a junior lawyer cannot be treated equally in the matter of remuneration. "In the field of rendering professional services at any rate the principle for equal work would be inapplicable." Therefore, doctors with different qualifications (Graduate or licensiates in indigenous medicine) can be graded differently for purposes of remuneration even though they are in charge of dispensaries.[60]

Classification on the basis of educational qualifications has always been upheld by the Supreme Court as reasonable and permissible under Art. 14. In the instant case,[61] the Government of Karnataka had prescribed two different scales of pay for the tracers—a higher scale for matriculate tracers and a lower pay scale for non-matriculate tracers. The Court negatived the plea of discrimination by the non-matriculate tracers. The Court ruled that prescribing two different scales for matriculates and non-matriculates is not violative of Arts. 14 and 16 and that distinction made on the basis of technical qualifications or for that matter even on the basis of general educational qualifications relevant to the suitability of the candidate for public service is permissible. The Court proceeded on the assumption that both matriculates and non-matriculates "were doing the same kind of work", and yet the classification made was upheld as permissible under Arts. 14 and 16.

In *State of Jammu & Kashmir v. Triloki Nath Khosa*,[62] the Assistant Engineers were classified into diploma holders and degree holders and more promotional

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56. *Randhir Singh v. Union of India*, AIR 1982 SC 879 : (1982) 1 SCC 618.
57. *P. Savita v. Union of India*, AIR 1985 SC 1124 : 1985 Supp SCC 94.
58. AIR 1987 SC 2049 : (1987) 4 SCC 634.
59. *Jaipal v. State of Haryana*, AIR 1988 SC 1504 : (1988) 3 SCC 354.
60. *Dr. C. Girijambal v. Govt. of Andhra Pradesh*, AIR 1981 SC 1537, 1539 : (1981) 2 SCC 155.
61. *State of Mysore v. P. Narasingha Rao*, AIR 1968 SC 349 : (1968) 1 SCR 407. Also see, *Mohd. Shujat Ali v. Union of India*, AIR 1974 SC 1631 : (1975) 3 SCC 76.
62. AIR 1974 SC 1 : (1974) 1 SCC 19.

avenues were provided to degree holders. This was upheld as reasonable. In *Sita Devi*,[63] the Supreme Court upheld the distinction drawn by the Haryana Government between matriculate and under-matriculate instructors in the Adul literacy Programme. The under-matriculate petitioners had not made any attempt in their writ petition to allege and establish that their qualifications, duties and functions were similar to the matriculate teachers.

In *Markendeya v. State of Andhra Pradesh*,[64] difference in pay scales between graduate supervisors holding degree in Engineering and non-graduate supervisors being diploma and licence-holders was upheld. It was held that on the basis of difference in educational qualifications such difference in pay scales was justified and would not offend Arts. 14 and 16. The Court pointed out that where two classes of employees perform identical or similar duties and carry out the same functions with the same measure of responsibility having the same academic qualifications, they would be entitled to equal pay. "Principle of equal pay for equal work is applicable among equals. It cannot be applied to unequals". Equal treatment cannot be accorded to totally distinct and unequal categories of employees.[65] Thus, daily-rated workers cannot be equated with regular employees of the state in the matter of wages. There are differences of qualifications, age, manner of selection between the two categories of employees.[66] The Court observed in *Markandeya*:[67]

> "Relief to an aggrieved person seeking to enforce the principle of equal pay for equal work can be granted only after it is demonstrated before the Court that invidious discrimination is practised by the State in prescribing two different scales for the two classes of employees without there being any reasonable classification for the same."

Equality under Art. 16(1) means equality between members of the same class of employees and not between members of separate classes.[68] Thus, giving special pay to members of Rajasthan Administrative Service, but not to the members of Secretarial Service, is not discriminatory as methods of recruitment, qualifications etc. of the two services are not identical.[69]

In *Purshottam v. Union of India*,[70] implementation of revised pay scales as recommended by the Pay Commission for certain categories of servants but non-implementation thereof for certain other categories was held to be discriminatory. The Government had made a reference to the Commission in respect of all its employees, and when it accepted its recommendations it should implement them in respect of all employees. Not to implement the recommendations with respect to some employees only violated Arts. 14 and 16.[71]

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63. Also see, *Sita Devi v. State of Haryana,* AIR 1996 SC 2764 : (1996) 10 SCC 1.
64. AIR 1989 SC 1308 : (1989) 3 SCC 191.
65. *State of Tamil Nadu v. M.R. Alagappan*, AIR 1997 SC 2006 : (1997) 4 SCC 401.
66. *State of Haryana v. Jasmer Singh,* 1997 (1) Supreme 137 : (1996) 11 SCC 77; *Babu Lal, Convenor v. New Delhi Municipal Committee,* (1994) Suppl. 2 SCC 633 : AIR 1994 SC 2214; *State of Orissa v. Balram Sahu,* (2002) 8 JT 477 : AIR 2003 SC 33.
67. Paras 9, 10, 13 of AIR 1989 SC 1308.
68. *C.A. Rajendran v. Union of India,* AIR 1968 SC 507 : (1968) 1 SCR 721; *Sham Sunder v. Union of India*, AIR 1969 SC 212 : (1969) 1 SCR 312.
69. *Menon v. State of Rajasthan*, AIR 1968 SC 81 : (1967) 3 SCR 430.
70. AIR 1973 SC 1088 : (1973) 1 SCC 651.
71. Also see, *Laljee Dubey v. Union of India,* AIR 1974 SC 252 : (1974) 1 SCC 230.

An army instruction conferring some benefit on those joining the Army Medical Corps after acquiring the post-graduate qualification was held not violative of Arts. 14 and 16. It was given as an incentive with a view to attract more persons having higher qualifications.[72]

In judging the equality of work, consideration may be given to educational qualifications, qualitative difference between posts and quantum of responsibilities associated with the posts. If the classification has reasonable nexus with the objective of achieving efficiency in administration, the State would be justified in prescribing different pay scales. As the Supreme Court has emphasized: "Equality must be among the equals. Unequal cannot claim equality".[73]

A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of equal pay for equal work requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ Court can lightly interfere.[74]

In *Federation of A.I. Custom and Central Excise Stenographers (Recog.) v. Union of India*,[75] the Supreme Court has emphasized that equal pay must depend on the "nature of the work done", and not "mere volume of work" as "there may be qualitative difference as regards reliability and responsibility". "Functions may be the same but the responsibilities make a difference." The Court has further observed:

> "The same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less—it varies from nature and culture of employment. The problem about equal pay cannot always be translated into a mathematical formula....."

In the instant case, stenographers attached with officers in the pay scales of Rs. 2500-2750 claimed parity with the stenographers attached with the Joint Secretaries and Officers above that rank. Their contention was that they held identical posts and discharged same functions. Nevertheless, the Court rejected their contention saying that "it is not possible to say that the differentiation is based on no rational nexus with the object sought for to be achieved". The Government had justified the differentiation amongst the two classes of stenographers on the

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72. *D.D. Joshi v. Union of India,* AIR 1983 SC 420.

73. *State of Uttar Pradesh v. J.P. Chaurasia,* (1989) 1 SCC 121 : AIR 1989 SC 19; *Gopal Krishna Sharma v. State of Rajasthan,* AIR 1993 SC 81 : 1993 Supp (2) SCC 375.
Also see, *Babulal v. New Delhi Municipal Committee,* AIR 1994 SC 2214 : 1994 Supp (4) SCC 633.

74. *State of Haryana v. Charanjit Singh* (2006) 9 SCC 321 : AIR 2006 SC 161.

75. AIR 1988 SC 1291 : (1988) 3 SCC 91.

ground of difference in their responsibility, confidentiality and the relationship with public.

The claim of the employees of *grih kalyan kendras* for pay parity with the employees working in the New Delhi Municipal Committee and other departments of the Delhi Administration was rejected by the Supreme Court.[76] These *kendras* are run by a welfare organisation working under the aegis of the Deptt. of Personnel and Administrative Reforms. Employment in these *kendras* is unique in character and not comparable with any other employment. "It is difficult to conceive of any other service which one can enter at any age, regardless of educational qualifications, and from which one can retire when one chooses". Therefore, the principle of equal pay for equal work cannot be applied to *kendra* employees. It is trite that the concept of equality implies and requires equal treatment for those who are situated equally. One cannot draw comparisons between unequals.

In *State of Madhya Pradesh v. Pramod Bhartiya*,[77] the lecturers working in the higher secondary schools in Madhya Pradesh claimed parity in pay with lecturers working in Technical schools. The qualifications prescribed for, and service conditions of, both groups of lecturers were the same and the status of both types of schools was also the same. Nevertheless, the Court still refused to concede to the lecturers in higher secondary schools the same pay as the lecturers in the Technical schools were getting on one ground, *viz.*, there was no material to suggest that the functions and responsibilities of both the categories of lecturers was qualitatively speaking similar. On this crucial point, the Court observed:[78]

> "It is not enough to say that the qualifications are same nor is it enough to say that the schools are of the same status. It is also not sufficient to say that the service conditions are similar. What is more important and crucial is whether they discharge similar duties, functions and responsibilities."

The Court went on to observe that the quality of work may vary from post to post, institution to institution. "We cannot ignore or overlook this reality. It is not a matter of assumption but one of proof."

The Court also clarified another significant point. Since the plea of equal pay for equal work has to be examined with reference to Art. 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be.[79] In the instant case, the petitioners (respondents before the Supreme Court) failed to discharge this onus.

The principle of "equal pay for equal work" does not apply to two sets of employees working in different organisations and when there is qualitative difference in the duties and functions discharged by them.[80]

At times, it may prove very difficult for the Court to apply the principle of equal pay for equal work as there are inherent difficulties in comparing and evaluating work done by different persons in different organizations, or even in

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76. (1991) 1 SCC 619.
77. AIR 1993 SC 286; *supra.*
78. *Ibid,* at 291.
79. *Supra*, Ch. XXI, Sec. B.
Also see, *State Bank of India v. M.R. Ganesh*, JT 2002 (4) SC 129, 136 : (2002) 4 SCC 556 : AIR 2002 SC 1955.
80. *Garhwal Jal Sammelan Karmachari v. State of U.P.,* AIR 1997 SC 2143 : (1997) 4 SCC 24.

the same organization.[81] Often the difference is a matter of degree and there is an element of value judgment. The Supreme Court has observed in this connection:[82]

> "So long as such value judgment is made *bona fide* reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. It is important to emphasize that equal pay for equal work is a concomitant of Art. 14 of the Constitution. But it follows naturally that equal pay for unequal work will be a negation of that right."

The above discussion reveals that the initial zeal to do justice got tempered by too many claims for equality requiring the Court to take up intensive factual enquiry beyond its competence. However in *Dineshan*, after noticing the restrictive approach of the Supreme Court in relation to the principle of "equal pay for equal work" it was held held that it would not be correct to lay down as an absolute rule that merely because determination and granting of pay scale is the prerogative of the executive, the Court had no jurisdiction to examine any pay structure and an aggrieved employee has no remedy if he is unjustly treated by arbitrary State action or inaction. It was pointed out that when there is no dispute with regard to the duties and responsibilities of the persons who held identical posts or ranks but they are treated differently merely because they belonged to different departments or the basis of classification of posts which is *ex facie* irrational, arbitrary or unjust, the Court had power to intervene.[83] The case, however, is important because of the virtual resurrection of the principle as to the reviewability of an issue relating to equal pay for equal work and Article 14 in that context.

Like in some other areas the Court has adopted a restrictive approach perhaps because of realizing that it had opened the doors wider than what was required. On the authority of *Charanjit Singh*[84] it has been held that Art. 39(d) could be of no assistance for application of the rule of equal pay for equal work unless the Court is satisfied that the incumbents are performing equal and identical work as discharged by the employees vis-à-vis whom the claim is made.[85] The Court could have avoided the 'identity' criterion since the claim in the case involved obviously different classes of teachers on the one hand and clerical staff on the other.

D. EXCEPTIONS TO ARTS. 16(1) & 16(2)

The right of equality guaranteed by Arts. 16(1) and (2) are subject to a few exceptions.

(a) ART. 16(3)

First, under Art. 16(3), Parliament may make a law to prescribe a requirement as to residence within a State or Union Territory for eligibility to be appointed

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81. See, *State of Haryana v. Jasmer Singh,* 1997 (1) Supreme 137 : (1996) 11 SCC 77 : AIR 1997 SC 1788.

82. *Federation of All India Customs and Central Excise Stenographers (Recognized) v. Union of India,* AIR 1988 SC 1291 : (1988) 3 SCC 91.
Also see, *State of Uttar Pradesh v. Ministerial Karmachari Sangh,* AIR 1998 SC 303 : (1988) 1 SCC 422; *State Bank of India v. Ganesh, op. cit.*

83. *Union of India v. Dineshan KK,* (2008) 1 SCC 586 : AIR 2008 SC 1026, here, the Union of India's affidavit, however, admitted the disparity in the pay scales.

84. *State of Haryana v. Charanjit Singh,* (2006) 9 SCC 321 : AIR 2006 SC 161.

85. *S. C. Chandra v. State of Jharkhand,* (2007) 8 SCC 279, 288 : AIR 2007 SC 3021.

with respect to specified classes of appointments or posts. Thus, Art. 16(2) which bans discrimination of citizens on the ground of 'residence' only in respect of any office or employment under the state, can be qualified as regards residence, and a 'residential qualification' imposed on the right of appointment in the State for specified appointments. This provision, therefore, introduces some flexibility, and takes cognisance of the fact that there may be some very good reasons for restricting certain posts in a State for its residents.

Article 16(3), however, incorporates a safeguard to ensure that it is not abused. Power has been given to Parliament and not to the State Legislatures to relax the principle of non-discrimination on the ground of residence so that only a minimum relaxation is made in this regard. The State Legislatures being subjected to greater local pressures might have been tempted to create all kinds of barriers in the matter of public services.

Under Art. 16(3), Parliament has enacted the Public Employment (Requirement as to Residence) Act, 1957. The Act repeals all laws in force prescribing a requirement as to residence within a State or Union Territory except Himachal Pradesh, Manipur, Tripura and Telengana—the area transferred to Andhra Pradesh from the erstwhile State of Hyderabad. Due to the backwardness of these areas, the Act permits prescription of a residential qualification for a period up to March 21, 1974, in regard to non-gazetted services.

In *A.V.S. Narasimha Rao v. State of Andhra Pradesh*,[86] the Supreme Court declared that part of the Act unconstitutional which prescribed a residence qualification for government services in Telengana—a part of the State of Andhra Pradesh. The Court took the view that under Art. 16(3), Parliament can impose a residential qualification for services in the whole State, but not in a part of the State, for Art. 16(3) uses the word 'State' which signifies 'State' as a unit and not parts of a State as districts, taluqs, cities, etc. Art. 16(3) speaks of the whole state as the venue for residential qualification. Thus, while Parliament can reserve certain posts in the State of Andhra Pradesh for the residents of the State, it cannot reserve posts in Telengana (which is a part of the State) for the residents of Telengana. The life of this Act came to an end in 1974. For Andhra Pradesh, however, some special provisions have been made under Art. 371D.[87]

(b) ART. 16(5)

Secondly, Art. 16(5) provides that a law may prescribe that the incumbent of an office in connection with the affairs of a religious or denominational institution, or a member of the governing body thereof, shall belong to the particular religion or denomination.

(c) ART. 16(4)

Thirdly, Art. 16(4) constitutes a very significant exception to the principle of equality embodied in Art. 16(1) and, therefore, needs to be discussed in some detail.

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86. AIR 1970 SC 422 : (1969) 1 SCC 839. Further, on the Telengana issue see, *Director of Industries & Commerce v. V. Venkata Reddy*, AIR 1973 SC 827 : (1973) 1 SCC 99.
See, *infra*, Ch. XXXIII, Sec. E, under Art. 35.

87. See, *supra*, Ch. IX.

E. RESERVATIONS IN SERVICES : ART. 16(4)

Under Art. 16(4), the state may make reservation of appointments or posts in favour of any 'backward class' of citizens which, in the opinion of the state, is not adequately represented in the public services under the state. The term 'state' denotes both the Central and the State Governments and their instrumentalities.[88] State as an employer is entitled to fix separate quotas of promotion for degree holders, diploma holders and certificate holders in exercise of its rule making power under Art. 309.[89]

Explaining the nature of Art. 16(4), the Supreme Court has stated in *Mohan Kumar Singhania v. Union of India*,[90] that it is "an enabling provision" conferring a discretionary power on the state for making any provision or reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the service of the state. Art. 16(4) neither imposes any constitutional duty nor confers any Fundamental Right on any one for claiming reservation.[91]

Under Art. 16(4), it is incumbent on a State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the State services. Different States may have different methods of reservation and it is not for the Court to look into the wisdom of the method adopted.[92] While doing so, the State Government may take the total population of a particular backward class and representation in the State services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed strictly. If some Scheduled Caste or backward class candidates are appointed or promoted against the general posts, they are not to be counted against the reserved posts. The number ofreserved posts cannot be reduced on this account. The State may, however, on an overall view of the situation review the matter and refix the percentages of reservation.[93]

Reservation does not rule out merits. Judging of merit may be at several tiers. It may undergo several filtrations. Ultimately, the constitutional scheme is to have the candidates who would be able to serve the society and discharge the functions attached to the office. Vacancies are not filled up by way of charity. Emphasis has all along been made, times without number, to select candidates and/or students based upon their merit in each category. The disadvantaged group or the socially backward people may not be able to compete with the open category people but that would not mean that they would not be able to pass the basic minimum criteria laid down therefor.[94]

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88. See, *supra*, Ch. XX, Sec. D.
89. *Chandravathi P. K. v. C. K. Saji*, (2004) 5 SCC 618 : AIR 2004 SC 2212.
90. AIR 1992 SC 1, 26 : 1992 Supp (1) SCC 594.
91. *Indra Sawhney v. Union of India, infra*, Sec. G; *Ajit Singh v. State of Punjab*, (2000) 1 SCC 430.
92. *Nair Service Society v. Dr. T. Beermasthan*, (2009) 5 SCC 545 : (2009) 4 JT 614.
93. *R.K. Sabharwal v. State of Punjab*, AIR 1995 SC 1371, 1375 : (1995) 2 SCC 745.
94. *Andhra Pradesh Public Service Commission v. Baloji Badhavath*, (2009) 5 SCC 1 : (2009) 5 JT 563.

One of the tests to be applied when a statutory provision for reservation is challenged is whether the width of the power has given rise to excessive reservation and that as to whether this wide extent would make an inroad into the principles of equality under Article 16(1) and it is for the state concerned to show in each case the extent of the existence of compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. Since, however, the constitutional amendments which were under challenge were enabling provision, it was open to the state to exercise their discretion to make such provisions after collecting quantifiable date showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Art. 355 subject to the clarification that the reservation provision does not exceed the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.[1]

Further Art. 16(4) has to be interpreted in the background of Art. 335.[2]

The equality of opportunity guaranteed by Art. 16(1) is to each individual citizen of the country while Art. 16(4) contemplates special provision being made in favour of the socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. Accordingly, the rule of 50% reservation in a year should be taken as a unit and not the entire strength of the cadre, service or the unit as the case may be.[3]

The term 'Backward Class', as used in Art. 16(4), takes within its fold Scheduled Castes and Scheduled Tribes. Art. 15(4) speaks about "socially and educationally backward classes of citizens". Art. 16(4) speaks only of "any backward class of citizens." However, it has been settled by a series of judicial pronouncements that the expression "backward class of citizens" in Art. 16(4) means the same thing as the expression "any socially and educationally backward classes of citizens" in Art. 15(4). Thus, to qualify for being called a 'backward class citizen' under Art. 16(4), one must be a member of a 'socially and educationally backward class'.[4]

It has been emphasized that the expression "Backward Class" is not synonymous with "backward caste" or "backward community". In determining whether a section of population forms a Backward Class for purposes of Art. 16(4), a test *solely* based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted because it would directly be violative of Art. 16(2).[5]

Article 16(4) does not, however, cover the entire ground covered by Arts. 16(1) and 16(2). Some of the matters relating to employment in respect of which equality of opportunity has been predicated by Arts. 16(1) and 16(2) do not fall within the scope of the *non-obstante* clause in Art. 16(4). For instance, as regards conditions of service relating to employment, such as, salary increment, gratuity, pension and age of superannuation are matters relating to employment and, as

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1. *M.Nagaraj v. Union of India,* (2006) 8 SCC 212 : AIR 2006 SC 71.
2. For discussion on Art. 335, see, *infra,* Ch. XXXV, Sec. F.
3. *Indra Sawhney v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217; see, *infra,* Sec. G.
4. *Janki Prasad Parimoo v. State of Jammu & Kashmir,* AIR 1973 SC 930 : (1973) 1 SCC 420.
5. *Triloki Nath v. State of Jammu & Kashmir,* AIR 1969 SC 1 : (1969) 1 SCR 103.
Also see, *State of Uttar Pradesh v. Pradip Tandon,* AIR 1975 SC 563 : (1975) 1 SCC 267.

such, they do not form the subject matter of Art. 16(4). It means that, in these matters, there can be no exception even in regard to the backward classes of citizens. In other words, these matters relating to employment are absolutely protected by the doctrine of equality and do not form the subject-matter of Art. 16(4).

Article 16(4) neither confers a right on anyone to claim, nor imposes a constitutional duty on the government to make, any reservation for any one in public services. It is merely an enabling provision and confers a discretionary power on the state to reserve posts in favour of backward classes of citizens, which, in its opinion, are not adequately represented in the state services. A balance needs to be struck between individual rights under Arts. 14 and 16(1), on the one hand, and the affirmative action taken by the state under Art. 16(4). Therefore, reservation under Art. 16(4) has to be within reasonable and legitimate limits. In making reservation under Art. 16(4), the state cannot ignore the Fundamental Rights of the rest of the citizens.[6]

The amalgamation of two classes of people for reservation would be unreasonable as two different classes are treated similarly which is in violation of the mandate of Article 14 which mandates 'to treat similar similarly and to treat different differently". It is well settled that to treat different unequals as equals violates Article 14 of the Constitution.[7]

Article 16(4) does not envisage any reservation in services independent of backwardness. Reservation of posts was made in a State on the basis of various castes and communities like Harijans, backward Hindus, Muslims, Hindu Brahmins, non-Brahmins and Christians. The Supreme Court ruled in *Venkataraman*[8] that Art. 16(4) expressly permits reservation of posts in favour of backward classes but not with regard to those not regarded as backward. While reservation of posts in favour of any backward class of citizens cannot be voided, reservation of posts between Hindus, Muslims and Christians infringes Arts. 16(1) and (2).[9] This is not reservation for backward classes but distribution of posts on the basis of community, a ground prohibited by Art. 16(2). The expression 'backward class' used in Art. 16(4) is not synonymous with 'backward caste' or 'backward community'. To determine whether a section of the population forms a 'class' for purposes of Art. 16(4), a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted.

In *Rangachari*,[10] the validity of the circulars issued by the Railway Administration providing for reservation in favour of the Scheduled Castes/Scheduled Tribes in promotions (by selection) was questioned. The argument was that Art. 16(4) was confined to direct recruitment only and did not comprehend reserva-

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6. *C.A. Rajendran v. Union of India,* AIR 1968 SC 507 : (1968) 1 SCR 721.
Also see, *P & T Scheduled Caste/Tribe Employees Welfare Ass. (Regd.) v. Union of India,* AIR 1989 SC 139 : (1988) 4 SCC 147; *S.B.I. SC/ST Employees Welfare Ass. v. State Bank of India,* AIR 1996 SC 1838, 1841; *Ajit Singh v. State of Punjab,* (1999) 7 SCC at 229.

7. *Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation,* (2006) 6 SCC 718 : AIR 2006 SC 2814.

8. *Venkataramana v. State of Madras,* AIR 1951 SC 229.

9. Also see, *Triloki Nath Tiku v. State of Jammu & Kashmir,* AIR 1969 SC 1 : (1969) 1 SCR 103; *Makhan Lal v. State of Jammu & Kashmir,* AIR 1971 SC 2206.

10. *General Manager, Southern Rly. v. Rangachari,* AIR 1962 SC 36 : (1962) 2 SCR 586, for a comment on the case see, 3 *JILI* 367 (1961).
Also, *State of Punjab v. Hira Lal,* AIR 1971 SC 1777 : (1970) 3 SCC 567.

tion in the matter of promotions as well. The Supreme Court ruled by a majority of 3 : 2 that under Art. 16(4), reservation in government services can be made not only at the initial stage of recruitment, but even in the matter of promotion from a lower to a higher post or cadre. Thus, selection posts can also be reserved for backward classes.

The Court went on to explain that the expression 'adequately represented' in Art. 16(4) imports considerations of 'size' as well as 'values', numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. Adequacy of representation of backward classes in any service has to be judged by reference to numerical as well as qualitative tests. The advancement of the socially and educationally backward classes require not only that they should have adequate representation in the lowest rung of services but that they should secure adequate representation in selection posts as well. Inadequacy of representation of backward classes can be cured by applying reservation to senior posts as well.

The Courts have interpreted Art. 16(4) liberally because the Constitution attaches great importance to advancement of backward classes. However, reservation should not be excessive for two reasons. One, Art. 335[11] enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments in connection with the affairs of the Union or a State, the policy of the State should be consistent with "the maintenance of efficiency of administration". Insisted the Court: "It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration." Therefore, the Court observed:[12]

> "There can be no doubt that the Constitution-makers assumed …….. that while making adequate reservation under article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation….Therefore, like the special provision improperly made under Article 15(4), reservation made under article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a *fraud on the* Constitution."

Secondly, because Art. 16(4) forms an exception to Arts. 16(1) and 16(2), Art. 16(4) could not be given such an operation as to destroy the main Articles. Reservation for backward classes could not be so excessive which would in effect efface the guarantee under Art. 16(1) of equal opportunity in the matter of public employment, or at best make it illusory.

(a) *BALAJI*

The *locus classicus* on this question is the *Balaji* case.[13] In this case, the Court attempted to impose a constitutional limit on the extent of preference, not on the "narrower ground of reservation," but on the broader grounds of policy. The Court spoke of adjusting the interests of the weaker sections of society with the interests of the community as a whole. The Court declared that a formula must be evolved which would strike a reasonable balance between the several relevant considerations.

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11. *Infra*, Ch. XXXV, Sec. F.
12. *Rangachari*, AIR 1962 SC 36, at 42-44; see, *supra*, footnote 10.
13. *Balaji v. State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *supra*, Ch. XXII.

While striking down as unconstitutional a government order by which 68% of the seats in educational institutions were reserved for Scheduled Castes, Scheduled Tribes and other Backward Classes on the ground of excessive reservation and as a fraud on the Constitution, the Court observed:[14]

> "Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."

(b) *DEVADASAN*

Immediately thereafter came the *Devadasan*[15] case before the Supreme Court in which the Court was required to adjudge the validity of the 'carry forward' rule.

The 'carry forward' rule envisaged that in a year, 17½ per cent posts were to be reserved for Scheduled Castes/Tribes; if all the reserved posts were not filled in a year for want of suitable candidates from those classes, then the shortfall was to be carried forward to the next year and added to the reserved quota for that year, and this could be done for the next two years. The result of the rule was that in a year out of 45 vacancies in the cadre of section officers, 29 went to the reserved quota and only 16 posts were left for others. This meant reservation upto 65% in the third year, and while candidates with low marks from the Scheduled Castes and Scheduled Tribes were appointed, candidates with higher marks from other classes were not taken.

Basing itself on the *Balaji* principle, the Supreme Court declared that more than 50 per cent reservation of posts in a single year would be unconstitutional as it *per se* destroys Art. 16(1). The Court emphasized that in the name of advancement of backward communities, the Fundamental Rights of other communities should not be completely annihilated. By a majority of 4:1, the Court held that as Art. 16(4) was a proviso or an exception to Art. 16(1), it should not be interpreted so as to nullify or destroy the main provision, as otherwise it would in effect render the guarantee of equality of opportunity in the matter of public employment under Art. 16(1) wholly illusory and meaningless. The Court observed:

> "The overriding effect of Cl. (4) of Art. 16 on Cls. (1) and (2) could only extend to the making of a reasonable number of reservations of appointments and posts in certain circumstances. A 'reasonable number' is one which strikes a reasonable balance between the claims of the backward classes and those of other citizens."

The Court emphasized that each year of recruitment has to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

The Supreme Court has ruled in *Arati*[16] that in order to effectuate the guarantee contained in Art. 16(1), each year of recruitment has to be considered separately by itself and "the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of

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14. AIR 1963 SC 649, at 663.
15. *T. Devadasan v. Union of India,* AIR 1964 SC 179 : (1964) 4 SCR 680.
16. *Arati Ray Choudhury v. Union of India,* AIR 1974 SC 532 : (1974) 1 SCC 87.

other communities". Reservation for vacancies up to 45% in a year has been held valid in the instant case.

The Supreme Court has observed in the case noted below,[17] that Art. 16(4) is an enabling provision and the reservation thereunder should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the Fundamental Rights of the rest of the citizens.

The above-mentioned judicial decisions did, on the whole, improve the position of the Scheduled Castes, etc. But an optimum limit on reservation of posts in their favour in any one year was also placed. Underlying the *Devadasan* case was the feeling on the part of the judiciary that filling of senior posts by not so qualified candidates in preference to the better qualified candidates, while discriminatory to the latter, was also subversive of administrative efficiency. It was this feeling which had led the minority in the *Rangachari* case to confine Art. 16(4) to initial appointments only. But the majority thought otherwise. That the majority view in the *Rangachari* case was full of pit-falls was soon revealed in the *Devadasan* case.

The governments in India have been under a great political pressure to make larger and larger reservations in favour of various categories of persons both in the services as well as admission to technical institutions.[18] By prescribing the optimum limit on such reservations, both under Arts. 15(4) and 16(4), the Supreme Court did seek to help the governments to withstand these pressures to some extent in the interests of administrative efficiency or educational standards.

(c) THOMAS

In *State of Kerala v. N.M. Thomas*.[19] the Supreme Court held that it was permissible to give preferential treatment to Scheduled Castes/Tribes under Art. 16(1) outside Art. 16(4). In *Devadasan,* the majority had taken the view that Art. 16(4) was an exception to Arts. 16(1) an 16(2). This was the view expressed also in *Balaji* and *Rangachari.* On the other hand, in *Devadasan,* in a dissenting opinion, SUBBA RAO, J., had expressed the opinion that Art. 16(4) was not an exception to Art. 16(1), but was a legislative device by which the framers of the Constitution had sought to preserve a power untrammelled by the other provisions of the Article. It was a facet of Art. 16(1) as "it fosters and furthers the idea of equality of opportunity with special reference to under privileged and deprived classes of citizens."

In *Thomas,* the majority accepted this view of SUBBA RAO, J. Accordingly, the Court observed: "Art. 16(4) is not in the nature of an exception to Art. 16(1). It is a facet of Art. 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an under privileged and deprived class of citizens…." Thus, Art. 16(1) being a facet of the doctrine of equality enshrined in Art. 14 permits reasonable classification just as Art. 14 does. The majority ruled in *Thomas* that Art. 16(4) is not an exception to Art. 16(1). Art. 16(1) itself permits reasonable classification for attaining equality of opportunity assured by it.

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17. *P.G. Institute of Medical Education & Research v. Faculty Ass.,* AIR 1998 SC at 1780 : (1998) 4 SCC 1.

18. The question of reservations in admissions has been discussed in Ch. XXII, Sec. D, *supra.*

19. AIR 1976 SC 490 : (1976) 2 SCC 310.

For assuring equality of opportunity, it may be necessary in certain situations to treat unequally situated persons unequally. Not doing so would perpetuate and accentuate inequality. Art. 16(4) is an instance of classification implicit in, and permitted by, Art. 16(1). The "backward class of citizens" are classified as a separate category deserving a separate treatment in the nature of reserving appointments or posts in the services of the state. Art. 16(4) should be read along, and in harmony, with Art. 16(1). Indeed even without Art. 16(4), the state could have reserved posts for backward classes. Art. 16(4) merely puts the matter beyond any doubt or controversy in specific terms.

However, two judges expressing a dissenting view in *Thomas* adhered to the majority view in *Devadasan* that Art. 16(4) was an exception to Arts. 16(1) and (2). In their view, Art. 16(1) only embodied the notion of formal or legal equality and, therefore, there was no scope for spelling out any concept of preferential treatment from the language of Art. 16(1).

Thomas marks the beginning of a new judicial thinking on Art. 16 and leads to greater concessions to S/C, S/T and other backward persons. If the Supreme Court had stuck to the view propagated in earlier cases that Art. 16(4) was an exception to Art. 16(1), then no reservation for any other class, such as army personnel, freedom fighters, physically handicapped, could have been made in services.[20]

The fact situation in *Thomas* was that the Kerala Government made rules to say that promotion from the cadre of lower division clerks to the higher cadre of upper division clerks depended on passing a test within two years. For S/Cs and S/Ts, exemption could be granted for a longer period. These classes were given two extra years to pass the test. This exemption was challenged as discriminatory under Art. 16(1) on the ground that Art. 16 permitted only reservation in favour of backward classes but it was not a case of reservation of posts for S/Cs and S/Ts under Art. 16(4) and that these persons were not entitled to any favoured treatment in promotion outside Art. 16(4).

By majority, the Supreme Court rejected the argument. It ruled that Art. 16(1) being a facet of Art. 14, would permit reasonable classification and, thus, envisaged equality between the members of a the same class of employees but not equality between members of a separate, independent class. Classification on the basis of backwardness did not fall within Art. 16(2) and was legitimate for the purposes of Art. 16(1). Giving preference to an under-represented backward community was valid and would not contravene Arts. 14, 16(1) and 16(2). Art. 16(4) removes any doubt in this respect. In the words of RAY, C.J.: "The classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing the special tests for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public office."[21]

It was emphasized that the basic qualification for promotion, *viz*., seniority, was not being relaxed in case of S/Cs and S/Ts. Only a temporary relaxation was being given in the passing of the qualification test. This was warranted by their

20. Also see, *Indra Sawhney, infra*, Sec. F.
21. AIR 1976 SC, at 500.

inadequate representation in the services and their over-all backwardness. Without providing for such a relaxation for a temporary period, it would not have been possible to give adequate promotion to the lower division clerks belonging to the S/Cs and S/Ts. To achieve equality, differential treatment of persons who are unequal was permissible. This is characterised as "compensatory discrimination" or "affirmative action".

It was also emphasized that Scheduled Caste was not a caste within the ordinary meaning of caste as envisaged by Art. 16(2). S/Cs were notified by the President under Art. 341.[22] The object of Art. 341 was to provide protection to the members of the S/Cs having regard to the economic and educational backwardness from which they suffer. However, the over-all needs of administrative efficiency must be kept in view. A view was also expressed that the rule of 50% reservation evolved in *Balaji* was "a mere rule of caution" and was not meant to be exhaustive of all categories.[23]

The minority view, on the other hand, was that the principle of classification could not be extended so as to confer a preferential treatment on members of the S/Cs and S/Ts outside Art. 16(4). The principle of preferential treatment for backward classes was contained in Art. 16(4) and Art. 16(1) would not warrant any preference to any citizen against the other. A classification based upon the consideration that an employee belonged to a particular section of the population with a view to accord preferential treatment for promotion would be a clear violation of Art. 16(1). Classification and differential treatment for purposes of promotion among employees who possessing the same educational qualifications were initially appointed, as in the present case, to the same category of posts was not permissible. Any exemption, temporary or otherwise, could not validly be granted to one set of employees withholding the same from the other.

The majority adopted a very liberal attitude in *Thomas* as regards S/Cs and S/Ts and backward classes. The result of the pronouncement is to enable the state to give the backward classes a preferential treatment in many different ways other than reservation of posts as envisaged in Art. 16(4). This would, no doubt, help the backward classes a great deal. But there lurks a danger also in this formulation. The guarantee of equality could be completely eroded if this preferential treatment is overdone under political pressure. Thus, the obligation of the Courts to be ever vigilant in this area does correspondingly increase. After all, preferential treatment for one is discriminatory treatment for another and, therefore, it is necessary to draw a balance between the interests of the backward classes and the other classes. The Supreme Court has shown consciousness of this danger and, therefore, has laid down a few criteria which a classification must fulfil, *viz.*:

(*i*) the basis of the classification has to be backwardness;

(*ii*) the preferential treatment accorded to backward classes has to be reasonable and must have a rational nexus to the object in view, namely, adequate representation of the under-represented backward classes;

(*iii*) the overall consideration of administrative efficiency should be kept in view in giving preferential treatment to the backward classes.

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22. *Infra*, Ch. XXXV, Sec. B.
23. Per FAZAL ALI, J., in *Thomas.*

It is obvious that in *Thomas*, the Court has taken a more flexible view of Art. 16(1) than had been taken by it in earlier cases. It is now clearly established that Art. 16(4) does not cover the entire field covered by Arts. 16(1) and (2) and some of the matters relating to employment in respect of which equality of opportunity is guaranteed by Arts. 16(1) and (2) do not fall within Art. 16(4). The *Thomas* decision threw into the melting pot the decision in *Devadasan* in which the "carry forward rule" was called in question. Even the rule requiring that the overall limit of reservation should not exceed 50% was now sought to be diluted as this rule was characterised by FAZL ALI, J., as a rule of 'caution' rather than an 'absolute' rule. In *Thomas*, the Court upheld filling of 34 vacancies out of 51 by members of SCs and STs on the basis of the carry forward rule relating to Class III posts.

Thomas represents a new trend—a high water mark—on the question of reservation in services for, and grant of other concessions to, the backward classes.

(d) AFTER THOMAS

In *A.B.S.K. Sangh (Rly.) v. Union of India,*[24] the Supreme Court again went into the question of reservation in public services *vis-a-vis* Art. 16. The Court upheld reservation of posts at various levels and making of various concessions in favour of the members of the Scheduled Castes and Scheduled Tribes.

The Court reiterated the *Thomas* proposition that under Art. 16(1) itself, the state may classify, "based upon substantial differentia, groups or classes" for recruitment to public services, and "this process does not necessarily spell violation of Articles 14 to 16."[25]

Article 16(2) expressly forbids discrimination on the basis of 'caste'. Scheduled Castes and Scheduled Tribes are not castes within the ordinary meaning of caste. These are backward human groups. There is a great divide between these persons and the rest of the community. As Scheduled Castes and Scheduled Tribes suffer from socio-economic backward status, the fundamental right of equality of opportunity justifies categorisation of Scheduled Castes and Scheduled Tribes separately for the purpose of 'adequate representation' in the state services. This is constitutionally sanctioned in terms, as Arts. 16(4) and 46 specificate.[26] The Court emphasized that equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate and independent classes.

Thus, reservation in selection posts in railways for Scheduled Castes and Scheduled Tribes was held valid. The quantum of reservation (17½%) in railway services for Scheduled Castes and Scheduled Tribes was held not excessive and the field of eligibility was not too unreasonable. The 'carry forward' rule for three years was held not bad. In the *Devadasan* case,[27] the 'carry forward' rule for backward classes was struck down as it far exceeded 50%. In the instant case, under the carry forward rule, the quota for Scheduled Castes/Tribes could go up to a maximum of 66% of posts. This was upheld with the remark that figures on

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24. *Akhil Bhartiya Soshit Karmachari Sangh (Railway) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246.
25. *Ibid*.
26. For Art. 46, a Directive Principle, see, *infra*, Ch. XXXIV.
27. AIR 1981 SC, at 321.

paper were not so important as the facts and circumstances in real life which showed that the quota was never fully filled. But this fixation was subject to the rider that, as a fact, in any particular year, there would not be a substantial increase over 50% in induction of reserved candidates. According to the Court: "There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty percent."

Reservation in promotion posts based on seniority-cum-suitability as well as in non-selection posts was also held valid. If reservation in selection posts where the role of merit is functionally more relevant than in the non-selection posts is valid, then reservation in non-selection posts is a *fortiori* valid.

The Court sounded a warning regarding backward classes outside the Scheduled Castes and Scheduled Tribes. Such classes cannot bypass Art. 16(2) save where any substantial cultural and economic disparity stares at society. In the words of the Court: "The dubious obssession with 'backwardness' and the politicking with castes labelled backward classes may, on an appropriate occasion, demand judicial examination. The politics of power cannot sabotage the principles of one man, one value."[28]

In *A.B.S.K. Sangh*, the Court took the actual facts, rather than the paper rules, into consideration. As a fact, the Court found that the actual intake of the Scheduled Castes and Scheduled Tribes against vacancies reserved for them in recruitment and promotion categories in the railways had been slow and painful. The Court also administered a warning with respect to Art. 16(4). It observed:

> "The success of state action under Art. 16(4) consists in the speed with which result oriented reservation withers away as no longer a need, not in the ever widening and everlasting operation of an exception [Art. 16(4)] as if it were a super-fundamental right to continue backwardness all the time. To lend immortality to the reservation policy is to defeat its *raison d'etre*; to politicise this provision for communal support and party ends is to subvert the solemn undertaking of Art. 16(1), to casteify 'reservation' even beyond the dismal groups of backward most people, euphemistically described as scheduled castes and scheduled tribes, is to run a grave constitutional risk. Caste, *ipso facto*, is not class in a secular State."

Whether or not reserved vacancies would be deserved or not is a matter primarily for the government to decide. De-reservation could be resorted to only when it is not reasonably possible within the contemplation of the law to fill the reserved vacancies.[29]

(e) SINGLE POST : NO RESERVATION

It has been ruled by the Supreme Court in *Chakradhar Paswan v. State of Bihar*,[30] that where there is only one post in the cadre, "there can be no reservation for the backward classes (ST, SC, and OBC) with reference to that post either for recruitment at the initial stage or filling up a future vacancy in respect of that post. A reservation which would come under Art. 16(4), pre-supposes the availability of at least more than one post in that cadre.' According to *Devadasan*, no reservation could be made under Art. 16(4) so as to create a monopoly. Other-

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28. AIR 1981 SC at 330.
29. *S.S. Sharma v. Union of India*, AIR 1981 SC 588.
30. AIR 1988 SC 959 : (1988) 2 SCC 214.

wise, the guarantee of equal opportunity contained in Arts. 16(1) and 16(2) would be rendered wholly meaningless and illusory.

A single promotional post cannot also be reserved.[31] The Constitution Bench of the Supreme Court has upheld this principle and has observed in *Post-Graduate Institute of Medcial Edcuation and Research, Chandigarh v. Faculty Association*:[32]

> "In a single post cadre, reservation at any point of time on account of rotation or roster is bound to bring about a situation where such single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permitted within the constitutional framework."

Hence, until there is plurality of posts in a cadre, the question of reservation does not arise.[33] The Court has emphasized: "Articles 14, 15 and 16 including Arts. 16(4), 16(4A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes."[34] The Court has further observed in this regard:

> "It cannot, however, be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought by which the chance of appointment is completely taken away so far as the members of other segments of the society are concerned by making such single post cent per cent reserved for the reserved categories to the exclusion of other members of the community even when such member is senior in service and is otherwise more meritorious."[35]

Adequate reservation does not mean proportional representation. Thus when or rule has been inserted mechanically without taking into consideration the prerequisites for making such a provision as required under Article 16(4-A) of the Constitution of India.[36]

This proposition has since been reiterated by the Court in *S.R. Murthy v. State of Karnataka*.[37]

F. WHAT ARE BACKWARD CLASSES?

In *K.C. Vasanth Kumar v. State of Karnataka*,[38] the Supreme Court had an occasion to consider the question of characterising backward classes. The Karnataka Government wanted to appoint a commission to go into this question and the Government requested the Court to lay down guidelines for the commission in the discharge of its task. However, the judges expressed a diversity of views on this complex question. Five Judges participating in the decision wrote five separate opinions.

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31. *Chetna Dilip Motghare v. Bhide Girls Education Society, Nagpur*, AIR 1994 SC 1917 : 1995 Supp (1) SCC 157.
32. AIR 1998 SC 1767 : (1998) 4 SCC 1.
33. On this point, the Supreme Court has overruled several of its own earlier decisions holding that a single post in a cadre could be reserved: *State of Bihar v. Bageshwari Prasad*, (1995) Supp (1) SCC 432; *Union of India v. Madhav*, (1997) 2 SCC 332 : AIR 1997 SC 3074; *Union of India v. Brij Lal Thakur*, (1997) AIR SCW 1937; *Post Graduate Institute of Medical Education and Research v. Faculty Association*, (1997) AIR SCW 2274 : (1998) 4 SCC 1.
34. AIR 1998 SC, at 1780.
35. *Ibid*.
36. *Anil Chandra v. Radha Krishna Gaur*, (2009) 9 SCC 454 : (2009) 5 JT 147.
37. AIR 2000 SC 450 : (1999) 8 SCC 176.
38. AIR 1985 SC 1495 : 1985 Supp SCC 714.

According to CHANDRACHUD, C.J., two tests should be conjunctively applied for identifying backward classes: one, they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and, two, they should satisfy the means test, that is to say, the test of economic backwardness, laid down by the State Government in the context of the prevailing economic conditions.[39]

DESAI, J., was against 'caste' being regarded as a major determinant of backwardness. He argued, "If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system which contradicts secular principles and also run against Art. 16(2). Also, caste based reservation had been usurped by the economically well-placed section in the same caste". According to DESAI, J., the only criterion which can be realistically devised is the one of economic backwardness."[40] Adoption of an economic criterion would translate into reality two constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian society and to take a firm step towards establishing a casteless society; and, two, to progressively eliminate poverty.[41]

According to CHINNAPPA REDDY, J., "poverty, caste, occupation and habitation are the principal factors contributing to social backwardness". As regards caste, his view was that the caste-system has firm links with economic power and that "caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste."[42]

According to SEN, J.: "The predominant and the only factor for making special provisions under Art. 15(4) or for reservation of posts and appointments under Art. 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes and Scheduled Tribes". VENKATARAMIAH, J., stressed upon the relevance of caste factor as an index of backwardness. According to him, the expression 'backward classes' can only refer to certain castes, races, tribes or communities or parts thereof other than Scheduled Castes, Scheduled Tribes and Anglo-Indian community, which are backward', and "caste or community is an important relevant factor in determining social and educational backwardness". He, however, suggested caste-cum-means test as a 'rational test' to identify backward people for purposes of Arts. 15(4) and 16(4) for all members of a caste need not be treated as backward.

The only points on which there appears to be a unanimity of views are: 'caste' cannot be the sole determinant of backwardness, but it is not an irrelevant test either and can be taken into account along with certain other factors. Also, backwardness is something comparable to the position of the Scheduled Castes and Scheduled Tribes. Poverty is also a relevant factor to determine backwardness.

In *Vasanth Kumar*,[43] it was emphasized that the doctrine of protective discrimination embodied in Arts. 15(4) and 16(4) and the mandate of Art.

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39. *Ibid*., at 1499.
40. *Ibid.*, at 1506.
41. *Ibid.*, at 1507.
42. *Ibid.*, at 1512.
43. *Supra*, footnote 38.

29(2)[44] were subject to the requirements of Art. 335[45] and could not be stretched beyond a particular limit. The Court sounded a caution:[46]

> "The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but tear apart the fabric of society. It is primarily the duty and function of the State to inject moderation into the decisions taken under Arts. 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fuelled by unwise state action, will destroy, not advance, social justice. If the state contravenes the constitutional mandates of Art. 16(1) and Art. 335 this Court will of course have to perform its duty."

An idea was thrown in this case that there could be some services where expertise and skill are of the essence, such as, medical services which directly affect and deal with the health and life of the populace; pilots and aviation engineers where a high degree of technical knowledge and operation skill is required. Besides, "there are other similar fields of governmental activity where professional technological, scientific or other special skill is called for". In such services or posts under the Union or the States, suggested the Court, "there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments."[47] This idea has been further projected by the Court in *Indra Sawhnay*.[48]

The policy of reservation gives rise to some evils. This has been brought out in the following observation by KRISHNA IYER, J., who was one of the most liberal Supreme Court Judges. IYER, J., observed in *State of Kerala v. N.M. Thomas*:[49]

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

The ideas thrown out in the above quotation have been further projected by the Supreme Court in *Indra Sawhney*.[50]

G. THE MANDAL COMMISSION CASE : INDRA SAWHNEY V. INDIA

Indra Sawhney v. Union of India,[51] known as the Mandal Commission case, is a very significant pronouncement of the Supreme Court on the question of reser-

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44. *Infra*, Ch. XXX, Sec. A.
45. *Infra*, Ch. XXXV, Sec. F.
46. *Ibid.*, at 1531—per SEN J.
47. *Ibid.*—SEN, J.
48. See below, Sec. G.
49. AIR 1976 SC 490 : (1976) 2 SCC 310.
50. See, *infra*, Sec. G.
51. AIR 1993 SC 477 : 1992 Supp (3) SCC 217.

vation of posts for backward classes. The Court has dealt with this question in a very exhaustive manner.

The Mandal Commission was appointed by the Government of India in terms of Art. 340 of the Constitution in 1979 to investigate the conditions of socially and educationally backward classes.[52] One of the major recommendations made by the Commission was that, besides the Scheduled Castes (SCs) and Scheduled Tribes (STs), for Other Backward Classes (OBCs) which constitute nearly 52% component of the population, 27% government jobs be reserved so that the total reservation for all, SCs, STs and OBCs, amounts to 50%.

No action was taken on the basis of the Mandal Report for long after it was submitted, except that it was discussed in the Houses of Parliament twice, once in 1982 and again in 1983. On Aug. 13, 1990, the V.P. Singh Government at the centre issued an office memorandum accepting the Mandal Commission recommendation and announcing 27% reservation for the socially and educationally backward classes in vacancies in civil posts and services under the Government of India.

This memorandum led to widespread disturbances in the country. In 1991, the Narasimha Rao Government modified the above memorandum in two respects: one, the poorer sections among the backward classes would get preference over the other sections; two, 10% vacancies would be reserved for other "economically backward sections" of the people who were not covered by any existing reservation scheme.

Ultimately, the constitutional validity of the memorandum came to be questioned in the Supreme Court through several writ petitions. The question of constitutional validity of the memorandum was considered by a Bench of 9 Judges. Six opinions were delivered. The leading opinion was delivered by JEEVAN REDDY, J., on behalf of himself, KANIA, C.J., VENKATACHALIAH, and AHMADI, JJ. Two judges, PANDIAN and SAWANT, JJ., in separate opinions concurred with REDDY, J. Three judges, THOMMEN, KULDIP SINGH and SAHAI, JJ., in separate opinions dissented from REDDY, J., on several points.

After referring to the previous decisions of the Supreme Court on Arts. 15 and 16,[53] and also after taking note of some of the decisions of the U.S. Supreme Court on racial discrimination, REDDY, J., in his elaborate judgment answered the several questions which emerged in the instant case. Some of the significant points emerging from REDDY, J.'s opinion are noted below:

1. A measure of the nature contemplated by Art. 16(4) can be provided not only by the Parliament/Legislature but also by the executive through administra-

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52. For Art. 340, see, *infra*, Ch. XXXV, Sec. E.

53. Reference was made *inter alia* to the following cases: *State of Madras v. Champakam, Dorairajan, supra*; *Venkataramana v. State of Madras, supra*; *Balaji v. State of Mysore, supra*; *General Manager, Southern Rly. v. Rangachari, supra*; *Devadasan v. Union of India, supra*; *Chitralekha v. State of Mysore, supra*; *P. Rajendran v. State of Madras, supra*; *Trilokinath v. State of Jammu & Kashmir, supra*; *Peeriakaruppan v. State of Tamil Nadu, supra*; *State of Andhra Pradesh v. U.S.V. Balram, supra*; *Janki Prasad Parimoo v. State of J&K, supra*; *State of Uttar Pradesh v. Pradip Tandon, supra*; *State of Kerala v. N.M. Thomas, supra*; *K.C. Vasanth Kumar v. State of Karnataka, supra; Comptroller & Auditor-General v. Mohan Lal Mehrotra,* AIR 1991 SC 2288 : (1992) 1 SCC 20.

tive instructions in respect of Central/State services and by the local bodies and 'other authorities' as contemplated by Art. 12, in respect of their services.

2. The provision made by the executive under Art. 16(4) becomes effective and enforceable by itself without its being enacted into a law made by a legislature.[54]

3. The Court has reiterated the view, expressed by it earlier in *Thomas*,[55] that Art. 16(1) permits classification for ensuring attainment of equality of opportunity assured by Art. 16(1) itself. Art. 16(1) is a facet of Art. 14. Just as Art. 14 permits reasonable classification so does Art. 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Art. 16(1), appointments and/or posts can be reserved in favour of a class.

Article 16(4) is not an exception to Art. 16(1), but only an instance of classification implicit and permitted by Art. 16(1). Even without Art. 16(4), the State could have classified "backward class of citizens" in a separate category for special treatment in the nature of reservation of posts/appointments in government services. Art. 16(4) merely puts the matter beyond any shadow of doubt in specific terms.

4. Art. 16(4) permits reservation in favour of any "backward classes of citizens". Backward classes having been classified by the Constitution itself as a class deserving special treatment, and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Art. 16(4).

Article 16(4) is exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. No reservations can be provided outside Art. 16(4) in favour of backward classes though it may not be exhaustive of the very concept of reservation.

Reservations for other classes can be provided under Cl. 16(1). If for backward classes, reservations are made both under Clause (4) as well as Cl. (1), then "the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do".

In one sense, the Court has given a broad interpretation to Art. 16(4). The Court has broadly interpreted the word 'reservation" therein. "Reservation" does not mean "reservation *simpliciter"* but takes in "other forms of special provisions like preferences, concessions and exemptions." "Reservation is the highest form of special provision" while "preference, concession and exemption are lesser forms", and the former includes the latter. Thus, the Court has observed:

> "The Constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration—the admonition of Art. 335."[56]

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54. *State of Kerala v. N.M. Thomas, supra.*
55. *Ibid.*
56. For Art. 335, see, *infra,* Ch. XXXV.

This means that all supplemental and ancillary provisions to ensure full availment of provisions for reservations can be provided as part of reservation itself under Art. 16(4) and there is no need to fall back upon Art. 16(1) for this purpose as was done in *Thomas.*[57] In this sense, Art. 16(4) is exhaustive of the special provisions that can be made in favour of the backward classes. The Court has observed in this regard:

> "Backward classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Art. 16."[58]

5. Even under Art. 16(1), reservations cannot be made on the basis of economic criterion alone.

6. What is the meaning of the expression "backward class of citizens" used in Art. 16(4)? What does the expression signify and how should such classes be identified? The accent of Art. 16(4) is on social backwardness. From a review of the previous case-law in the area, the Court has concluded that the judicial opinions emphasize the integral connection between caste, occupation, poverty and social backwardness. Social, educational and economic backwardness are closely intertwined in the Indian context. As regards identification of backward classes, caste may be used as a criterion because caste often is a social class in India. But caste cannot be the sole criterion for reservation. Reservation is not being made under Art. 16(4) in favour of a caste but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for purposes of Art. 16(4). "Besides castes (whether found among the Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. REDDY, J., has observed in this connection:[59]

> "..... the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State."

Among the non-Hindus, there are several occupational groups, sects and denominations which, for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Art. 16(4).

7. Backwardness under Art. 16(4) need not be social as well as educational as is the case under Art. 15(4).[60] Art. 16(4) does not contain the qualifying words "socially and educationally" as does Art. 15(4). It is not correct to say that "backward class of citizens" in Art. 16(4) are the same as the "socially and educationally backward classes" in Art. 15(4). "Saying so would mean and imply reading a limitation into a beneficial provision like Art. 16(4)." Backwardness contemplated by Art. 16(4) is mainly social backwardness.

A backward class cannot be identified only and exclusively with reference to economic criterion. A backward class may, however, be identified on the basis of occupation-cum-income without any reference to caste. There is no constitutional

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57. *Supra*, footnote 49.
58. AIR 1993 SC, at 541.
59. AIR 1993 SC 477, at 555.
60. See, *Supra*, Ch. XXII, Sec. C.

bar in the State categorising the backward classes as 'backward' and 'more backward'.

8. The Court has left the task of actually identifying backward classes to the commission/authority to be appointed by the Government. This body would evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria. (See point 20 below).

9. A very important recommendation made by the Court is that the "creamy layer", the socially advanced members of a backward class, should be excluded from the benefit of reservation. Such exclusion would benefit the truly backward people and, thus, more appropriately serve the purpose of Art. 16(4). But the real difficulty is how and where to draw the line? "For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other." REDDY, J., has opined that the basis of exclusion should not merely be economic, unless, of course, "the economic advancement is so high that it necessarily means social advancement".

There are however certain positions, the occupants of which can be treated as "socially advanced" without any further inquiry. Thus, when a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For giving them benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.

However, instead of itself laying down finally the test to identify the 'creamy layer', the Court has directed the Government to specify the basis of exclusion—whether on the basis of income, extent of holding or otherwise.

This ruling aims at ensuring that the benefit of reservation reaches the proper and the weakest section of the backward class. For the idea of excluding the 'creamy layer' of a backward class from the benefit of reservation, reference may be made to the opinion of KRISHNA IYER, J., in *Thomas*.[61]

10. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the state. This matter lies within the subjective satisfaction of the State under Art. 16(4). However, there must be some material upon the basis of which the opinion is formed by the state.

11. The total reservation cannot exceed 50% in any one year. Art. 16(4) speaks of 'adequate representation' and not 'proportional representation'. The power under Art. 16(4) must be exercised in a fair manner and within reasonable limits. Therefore, reservation under Art. 16(4) should not exceed 50% of the appointments or posts "barring certain extraordinary situations" as explained hereafter. Accordingly, 27% reservation in favour of backward classes together with reservation in favour of Scheduled Castes and Scheduled Tribes, comes to a total of 49.5%.

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61. *Supra*, footnotes 49 and 54.

12. The extraordinary situations meriting exceptions from the 50% rule have been explained thus by REDDY, J.:[62]

> "While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

13. Further, if a member belonging to, say, a Scheduled Caste gets selected in the open competition on the basis of his own merit, he will not be counted against the quota reserved for the Scheduled Castes; he will be treated as open competition candidate.[63]

14. The Court has divided the total reservation of 50% into "vertical" and "horizontal" reservations. The reservation in favour of S/C, S/T and other backward classes (OBC) under Art. 16(4) may be called vertical reservation whereas reservation made in favour of physically handicapped [under Art. 16(1)] can be referred to as horizontal reservation. Horizontal reservations cut across the vertical reservations what is called interlocking reservations.

To be more precise, suppose 3% of the vacancies are reserved for physicially handicapped persons. This reservation is relatable to Art. 16(1). The persons selected against this quota will be placed in the appropriate category, i.e. if he belongs to the S/C category, he will be placed in that quota by making necessary adjustments; similarly, if he belongs to the open competition category, he will be placed in that category by making necessary adjustments. Even after providing for those horizontal reservations, the over-all percentage of reservations in favour of Backward class of citizen "remain and should remain the same".

15. A year is to be taken as a unit for the purposes of applying the 50% rule. The Court has now overruled the *Devadasan* case[64] which ruled out the 'carry forward' rule. Thus, reserved posts remaining unfilled in one year may be carried forward to the next year but subject to the over-all limit that over-all reservation in any one year ought not to be more than 50%.

16. A significant point made by the Court is not to apply the rule of reservation to promotions. Under Art. 16(4), reservation is permissible only at the stage of entry into the State service, *i.e.* only at the initial stage of direct recruitment and not at the subsequent promotional stage. The Court has now disagreed with the proposition that Art. 16(4) "contemplates or permits reservation in promo-

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62. AIR 1993 SC, at 566.

63. This proposition has been applied by the Supreme Court in *Ritesh R. Sah v. Y.L. Yamul*, AIR 1996 SC 1378 : (1996) 3 SCC 253.

But see, *K. Duraisamy v. State of Tamil Nadu*, AIR 2001 SC 717 : (2001) 2 SCC 538, where the Court refused to apply this proposition. Where quotas for admission to super speciality and post-graduate medical courses were fixed for in-service candidates and non-service candidates. This was done not under Art. 16(4). The Court drew a line of distinction between "reservation" and "fixation of quota". The two "drastically differ in their purport and contents as well as the object".

64. *T. Devadasan v. Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680.

tions as well". The Court has reached this conclusion as a result of the combined reading of Art. 16(4) and Art. 335.[65] REDDY, J., has observed on this point:[66]

> "While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream—a vertical division of the administrative apparatus..... All this is bound to affect the efficiency of administration... At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; ....They are expected to operate on equal footing with others....."

Thus, the Court now overruled *Rangachari*[67] which had held the field for the last thirty years. To soften the adverse impact of the new ruling, the Court directed that it would be operative only prospectively and wherever reservations had been provided in promotions, it would continue for a period of five years.[68]

The Court has also ruled that "it would not be impermissible for the state to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration".

17. For the reserved category in service, minimum standards can be prescribed. In fact, Art. 335 demands that some such standards be prescribed. In the words of REDDY, J.;[69]

> "It may be permissible for the Government to prescribe a reasonable lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes—consistent with the requirements of efficiency of administration—it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public also should be kept in mind."

18. For certain services and certain posts, it may not be advisable to apply the rule of reservation. These are posts where merit alone counts. The Court has included the following posts in this category:

(i) Defence services including all technical posts therein but excluding civil posts;

(ii) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment;

(iii) Teaching posts of Professors—and above, if any;

(iv) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects;

(v) Posts of pilots (and co-pilots) in Indian Airlines and Air India.

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65. For Art. 335, see, *infra,* Ch. XXXV, Sec. F.
66. AIR 1993 SC, at 573.
67. *Gen. Manager, Southern Rly. v. Rangachari,* AIR 1962 SC 36 : (1962) 2 SCR 586.
68. On the doctrine of Prospective Overruling, see, *infra,* Ch. XL.
69. AIR 1993 SC, at 576.

These are some of the posts mentioned. The above list is only illustrative and not exhaustive. It has been left to the Government of India "to consider and specify the service and posts to which the rule of reservation shall not apply". Justifying exclusion of certain posts from the rule of reservation, REDDY, J., has observed:[70]

> "We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Art. 335."

19. It is open to the Government to notify which classes among the several designated OBCs are more backward and apportion reserved vacancies/posts among 'backward' and more 'backward'.

20. The Court has rejected the reservation of 10% posts (made by the Narasimha Rao Government) in favour of "other economically backward sections of the people who are not covered by any existing schemes of reservations." Such a category cannot be related to Art. 16(4). If at all, it can be related to Art. 16(1). Even so, the Court could not sustain it. Reservation of 10% vacancies among open competition candidates on the basis of income/property-holding means exclusion of those who are above the demarcating line from those 10% seats. It is not permissible to debar a citizen from being considered for appointment to an office under the state solely on the basis of his income or property-holding. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Art. 16(1).

21. The Court has directed that there ought to be established a permanent body—commission or tribunal, both at the Centre and in each State, which can look into the complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of OBCs. Such a body would go a long way in redressing genuine grievances. A body of this type can be created under Art. 16(4) itself. Persons aggrieved can approach it for appropriate redress.

22. There should be a periodic revision of lists of OBCs so as to exclude those who have ceased to be backward or to include new classes. The above-mentioned body may be consulted in this exercise.

In *Indra Sawhney*, the Supreme Court has taken cognizance of many complex but very momentous questions having a bearing on the future welfare and stability of the Indian society. The Supreme Court has delivered a very thoughtful, creative and exhaustive opinion dealing with various aspects of the reservation problem. Basically reservation in government services, is anti-meritocracy, because when a candidate is appointed to a reserved post, it inevitably excludes a more meritorious candidate. But reservation is now a fact of life and it will be the ruling norm for years to come. The society may find it very difficult to shed the reservation rule in the near future. But the Court's opinion has checked the system of reservation from running riot and has also mitigated some of its evils.

Three positive aspects of the Supreme Court's opinion may be highlighted.

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70. *Ibid.*, 577.

One, the over-all reservation in a year is now limited to a maximum of 50%.

Two, amongst the classes granted reservation, those who have been benefited from reservation and have thus improved their social status (called the 'creamy layer' by the Court), should not be allowed to benefit from reservation over and over again. This means that the benefit of reservation should not be misappropriated by the upper crust but that the benefit of reservation should be allowed to filter down to the lowliest so that they may benefit from reservation to improve their position.

This proposition raises the ticklish question of finding suitable socio-economic tests to identify the creamy layer among the backward classes. The Court admits that identifying the elite classes may not be an easy exercise. Accordingly, the Court has left the task of chalking out the criteria for the purpose to the government concerned. However, the Court has given one clear indication of its thinking on this issue. The Court has said that if a member of a backward family becomes a member of IAS, IPS or any other All-India Service, his social status rises; he is no longer socially disadvantaged. This means that, in effect, a family can avail of the reservation only once.

Three, an element of merit has now been introduced into the scheme of reservation. This has been done in several ways, *e.g.*:

(a) promotions are to be merit-based and are to be excluded from the reservation rule;

(b) certain posts are to be excluded from the reservation rule and recruitment to such posts is to be merit-based;

(c) minimum standards have to be laid down for recruitment to the reserved posts. In fact, the Court has insisted that some minimum standards must be laid down even though the same may be lower than the standards laid down for the non-reserved posts.

(a) AFTER *INDRA SAWHNEY*

The Court has not been able to completely eliminate the caste factor in identifying the backward classes. However, the Court has sought to keep the caste factor within limits. Caste can be one of the factors, but not the sole factor, to assess backwardness.

Reservation has become the bane of the contemporary Indian life. More and more sections of the society are demanding reservation for themselves in government services. The politicians are also vying among themselves for demanding reservations to all and sundry groups whether deserved or not. Needless to say, reservation is inequitable insofar as a meritorious candidate may have to be passed over in favour of a much less meritorious candidate in the reserved category.

Reservation normally implies a separate quota which is reserved for a special category of persons. Within that category, appointments to the reserved posts may be made in the order of merit. However, the category for whose benefit reservation is provided is not required to compete on equal terms with the open category. Their selection and appointment to the reserved posts is made independently on their *inter se* merit and not as compared with the merit of candi-

dates in the open category. The very purpose of reservation is to protect the weak category against competition from the general category candidates. As the Supreme Court has explained in *Indra Sawhney*, "The very idea of reservation implies selection of a less meritorious person." The only justification for reservation is social justice. It is a constitutionally recognised method of overcoming backwardness. This may adversely affect efficiency in administration.

But, for the present, the system of reservation has to be accepted as necessary. However, while accepting reservation upto a point as a present day politico-sociolo-gical necessity, it does not mean that it must not be kept within strict limits. The defects of the system of reservation ought not to be minimised as far as possible.

The Supreme Court's opinion in *Indra Sawhney* makes a signal contribution to this end. For example, there should be prescribed some minimum qualifications for the candidates of the reserved categories. Also, the list of services where merit will prevail may be enlarged. Above all, it seems to be essential that reservation for more than 50% ought to be declared unconstitutional as adversely affecting the 'basic' feature of the constitutions, *viz.*, equality, so that reservation may not be increased beyond 50% even by a constitutional amendment. This is necessary to contain the growing demand of politicians for more and more reservation in favour of groups they seek to represent.

The reservation should be made on the basis of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. The Court appears to have introduced the principle of proportionality by saying that "even if the State has compelling reasons ….. the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."[71]

What is needed for the future socio-economic development of the nation, as a whole, is progressively lessening, not increasing, reservation, so that ultimately meritocracy may have some chance to prevail over mediocrity. Art. 335 lays down the ideal of "efficiency of administration". It is suggested that Art. 335 should be treated not only as a "directive principle" but as an "operative and binding constitutional principle" so that any move towards reservation, and any administrative decision concerning reservation, should be assessed by the Court on the touchstone laid down in Art. 335, *viz.*, "efficiency of administration". [72]

Art. 335 refers only to the Scheduled Castes and Scheduled Tribes. There is no specific provision insisting on the need for maintenance of "efficiency of administration" so far as the backward classes are concerned. But the Supreme Court has insisted in *Indra Sawhney II*[73] that the principle of efficiency of administration is equally paramount and is implied in Arts. 14 and 16 of the Constitution so far as backward classes are concerned. To hold otherwise would not only be irrational but even discriminatory between the two classes of backward citizens, *viz.*, Scheduled Castes/Sche-duled Tribes and Other Backward Classes. Therefore, considerations underlying Art. 335 prevail even while making provisions in favour of Other Backward Classes under Art. 16(4). "Reservation even

71. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.
72. For discussion on Art. 335, see, *infra*, Ch. XXXV, Sec. F.
73. *Indra Sawhney v. Union of India (II)*, AIR 2000 SC 498, at 515 : (2000) 1 SCC 168.

for Backward Classes can be made only if it will not undermine the efficiency of the administration in the particular department".[74] As the Supreme Court has observed in *Ajit Singh v. State of Punjab (II)*:[75]

> "It is necessary to see that the rule of adequate representation in Art. 16(4) for the Backward Classes….do not adversely affect the efficiency in administration….. Thus, in the matter of due representation in services for Backward Classes…. maintenance of efficiency in administration is of paramount importance".

The Court has also suggested a periodic review of the list of backward classes. The Court has opined that inclusion of castes in the list of backward classes should not be done without adequate relevant data. Forward castes should not get included in this list. The process of periodic review of the list of OBCs may lead to the exclusion of a backward class if it ceases to be socially backward or if it is adequately represented in the services. The maxim "Once backward, always backward is not acceptable."[76]

Even policy matters have to be tested on the touchstone of arbitrariness and to be struck down if it is held to be discriminatory or arbitrary.[77] The Supreme Court has explained that the effect of Indra *Sawhney*[78] in the determination of the question of categorisation of the backward classes did not provide for any mandatory requirement for adducing empirical evidence or materials to show that the community in question was adequately represented before taking away of benefit of reservation.[79] The Court has also said that sub-division of class is not unconstitutional and it was open to the state to categorize backward classes as backward and more backward. There is no Constitutional bar to a State categorising the backward classes as backward and more backward class. The actions of the State Government while including or excluding classes to the list is subject to judicial review.

(b) CREAMY LAYER

In the *Mandal* case, the Supreme Court has clearly and authoritatively laid down that the "socially" advanced members of a backward class, the "creamy layer", has to be excluded from the backward class and the benefit of reservation under Art. 16(4) can only be given to the "class" which remains after the exclusion of the 'creamy layer'. This would more appropriately serve the purpose and object of Art. 16(4).

The reason underlying this approach is that an effort be made so that the most deserving section of the backward class is benefited by reservations under Art. 16(4). At present, the benefits of job reservations are mostly chewed up by the more effluent sections of the backward class and the poorer and the really backward sections among them keep on getting poorer and more backward. The jobs are few in comparison to the population of the backward classes and it is not possible to give them adequate representation in state services. Therefore, it is neces-

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74. *Ibid.*
75. AIR 1999 SC 3471 : (1999) 7 SCC 209.
76. *Indra Sawhney II,* AIR 2000 SC, at 505 : (2000) 1 SCC 168.
77. *Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation,* (2006) 6 SCC 718 : AIR 2006 SC 2814.
78. 1992 Supp (3) SCC 217.
79. *Ibid.*

sary that the benefit of reservation should reach the poorer and the weakest section of the backward class.

In his opinion in *Indra Sawhney*, JEEVAN REDDY, J., has emphasized that upon the member of a backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out. The Court has opined that exclusion of creamy layer, *i.e.*, socially advanced members, will make the class a truly backward class and would more appropriately serve the purpose and object of Art. 16(4). JEEVAN REDDY, J., has stated that there are sections among the backward classes who are highly advanced socially and educationally, and they constitute the forward section of the community. These advanced sections do not belong to the true backward class. "After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."

A line has to be drawn between the forward in the backward class and the rest of the backward. If the creamy layer is not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. If the creamy layer among backward classes were given same benefits as backward classes, it will amount to treating unequals equally which amounts to the violation of the equality clause.

According to JEEVAN REDDY, J., the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. It is difficult to draw a line where a person belonging to the backward class ceases to be so and becomes part of the 'creamy layer'. It is not possible to lay down the criteria exhaustively. But JEEVAN REDDY, J., specifically laid down one criterion.

There are certain positions the occupants of which can be treated as socially advanced without any further inquiry. The Court has specifically declared that the children of the I.A.S., I.P.S., or any other All India Services in the Backward Classes constitute the creamy layer and this is true without further inquiry. The social status of any such officer rises and he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the area of life. It is but logical that his children be not given the benefit of reservation for by giving them the benefit of reservation other disadvantaged members of that backward class may be deprived of the benefit. In other cases, in a big country like India, norms may differ from State to State or from region to region. Accordingly, the Court has directed that a body be constituted both at the Centre and at the State level to identify the creamy layer within the backward classes.

The Supreme Court has observed in this connection:

> "The backward class under Art. 16(4) means the class which has no element of "creamy layer" in it. It is mandatory under Art. 16(4)—as interpreted by this Court—that the State must identify the 'creamy layer' in a backward class and thereafter by excluding the 'creamy layer' extend the benefit of reservation to the 'class' which remains after such exclusion."

There has been a good deal of resistance on the part of the States to the idea of excluding the creamy layer. The States have adopted various devices to continue to confer benefits of reservation on the creamy layer. The reason may be that the

policy-making power vests in the creamy layer and such persons do not like to curtail their own privileges. This is illustrated by the following two cases.

In *Ashoka Kumar Thakur v. State of Bihar*,[80] the Supreme Court has assessed the validity of unrealistically high levels of income or holding of other conditions prescribed by the Legislatures of Uttar Pradesh and Bihar as criteria to identify the creamy layer. For example, while the Supreme Court in the *Mandal* case has categorically said that the Children of IAS or IPS, etc. without anything more could not avail the benefit of reservation, in the scheme drawn in UP and Bihar, a few more conditions were added for falling in the creamy layer, such as, he/she should be getting a salary of Rs. 10,000/- p.m. or more; the wife or husband to be a graduate and owning a house in an urban area. Or, if a professional doctor, surgeon, lawyer, architect, etc., he should be having an income not less than Rs. 10 lakhs, his/her spouse is a graduate and having family property worth Rs. 20 lakhs. Similar conditions were added in case of others, such as, traders, artisans, etc.

The Supreme Court has quashed these conditions as discriminatory. The Court has ruled that these conditions laid down by the two States have no 'nexus' with the object sought to be achieved. The criteria laid down by the two States to identify the creamy layer are violative of Art. 16(4), wholly arbitrary, violative of Art. 14, and against the law laid down by the Supreme Court in the *Mandal* case, where the Court has expressed the view that a member of the All India Service without anything more ought to be regarded as belonging to the "creamy layer". The Court has observed in this regard:[81]

> "The backward class under Article 16(4) means the class which has no element of 'creamy layer' in it. It is mandatory under Art. 16(4)—as interpreted by this Court—that the state must identify the 'creamy layer' in a backward class and thereafter, by excluding the 'creamy layer' extend the benefit of reservation to the 'class' which remains after such exclusion. This Court has laid down, clear and easy to follow guidelines for the identification of 'creamy layer'. The States of Bihar and Uttar Pradesh have acted wholly arbitrary and in utter violation of the law laid down by this Court in *Mandal* case. It is difficult to accept that in India where the per capita national income is Rs. 6929 (1993-94), a person who is a member of the IAS and a professional who is earning less than Rs. 10 lakhs per annum is socially and educationally backward. We are of the view that the criteria laid down by the States of Bihar and Uttar Pradesh, for identifying the 'creamy layer' on the face of it is arbitrary and has to be rejected."

The Kerala Legislature passed an Act in 1995 declaring that there was no creamy layer in the State of Kerala. The validity of the State Act was challenged in the Supreme Court. In *Indra Sawhney v. Union of India (II)*,[82] the Court has explained further the rationale underlying the rule of exclusion of 'creamy-layer'. As the 'creamy layer' is not entitled to the benefits of reservation, non-exclusion thereof will be discrimination and violation of Arts. 14 and 16 in as much as unequals cannot be treated as equals, *i.e.*, equal to the rest of the backward class. Therefore, any executive or legislative action refusing to exclude the creamy

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80. AIR 1996 SC 75 : (1995) 5 SCC 403.
81. AIR 1996 SC, at 85.
82. AIR 2000 SC 498 : (2000) 1 SCC 168. The case is also known as the *Kerala Creamy Layer* case.

layer from the benefits of reservation will amount to violation of Arts. 14, 16(1) and 16(4).

In the instant case, the Court has declared the Kerala Act declaring that there are no socially advanced sections in any backward class in the State as unconstitutional as being violative of Arts. 14 and 16(1). According to the Court, the Act has shut its eyes to the realities and facts; it has no factual basis. "The declaration is a mere cloak and is unrelated to facts in existence". The Court has emphasized that equality is the basic feature of the Constitution and neither Parliament nor any State Legislature can transgress this principle.[83] Non-exclusion of creamy layer will not only be a breach of Art. 14 but even of the basic structure of the Constitution and, therefore, totally illegal.[84] The Court has criticised the attitude of the State of Kerala in this matter in trenchant terms, characterising the State action as being against Rule of Law and amounting to "deliberate violation of the directions of the Court". The Court has observed:[85]

> "……. the unreasonable delay on the part of the Kerala Government and the discriminatory law made by the Kerala Legislature have been in virtual defiance of the rule of law and also an indefensible breach of the equality principle which is a basic feature of the Constitution. They are also in open violation of the judgments of this Court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the constitution. The State has already been held guilty of contempt."

The Court has directed the State to make provision for the exclusion of the creamy layer among the backward classes in the State.

Just as the Court has insisted on the exclusion of the creamy layer from the backward classes, so also the Court has insisted on the exclusion of the forward classes from the list of backward classes. The Court has again referred to this matter in *Indra Sawhney II*. This exclusion is necessary with a view to confer full benefits of reservation on the real backward classes. If forward classes are included in the list of backward classes, most of the benefits will be knocked away by the forward classes and the same will not reach the really backward among the backward classes. "That will leave the truly backward, backward for ever".

The Court has emphasized that to include a forward class as a backward class will amount to treating unequals as equals and this will amount to violation of Arts. 14 and 16.

The Court seems to have reacted to excessive affirmative action following Indra Sawhney-I.[86] In *Nagaraj*[87] a Constitution Bench pointed out that although the State was free to exercise its discretion in providing for reservation, such discretion was not unfettered but subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of posts keeping in mind the overall administrative efficiency, and that, even if the State had reasons to make reservation but the law enacted for implementing such

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83. For the Doctrine of "Basic features of the Constitution", see, *infra*, Ch. XLI.
84. *Ibid*.
85. The *State of Kerala Creamy Layer* case, *supra*, footnote 82, at 521.
86. 1992 Supp. (3) SCC 217 : AIR 2007 SC 71.
87. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

reservation was liable to be set aside if it violated any of the substantive limits on the width of the power.

(c) ART. 16(4) : A TRANSITORY PROVISION

Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no Constitutional right upon the members of the backward classes to claim reservation. This article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued under Arts. 341(1) or 342(1) for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union Territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such in relation to that State or Union Territory then such a provision would be perfectly valid. The UT of Pondicherry having adopted a policy of the Central Government whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.[88]

In *Preeti Sagar*[89] that the Constitution permits preferential treatment for historically disadvantaged groups in the context of entrenched and clearly perceived social inequalities. That is why Art. 16(4) permits reservation of appointments or posts in favour of any backward class which is not adequately represented in the services under the State. Reservation is linked with adequate representation in the services. Reservation is thus a dynamic and flexible concept. The departure from the principle of equality of opportunity has to be constantly watched. So long as the backward group is not adequately represented in the services under the State, reservations should be made.

From the above it is clear that the mechanism of reservation has been considered as a transitory measure that will enable the backward to enter and be adequately represented in the state services against the backdrop of prejudice and social discrimination. But, finally, as the social backdrop changes—and a change in the social backdrop is one of the constitutional imperatives, as the backward are able to secure adequate representation in the services, the reservations will not be required. Art. 335 enters a further caveat on reservations, *viz.*, while considering the claims of the Scheduled Castes and Scheduled Tribes as well as backward classes, for appointments, the maintenance of efficiency of administration is to be kept in sight.

(d) RESERVATION IN JUDICIAL SERVICES

Reference has already been made earlier to *State of Bihar v. Bal Mukund Sah*[90] The Supreme Court declared a State Act seeking to make reservation for SCs, STs and OBCs in subordinate judiciary unconstitutional, as the State enacted the Act without any consultation with the concerned High Court.

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88. *S. Pushpa v. Sivachanmugavelu,* (2005) 3 SCC 1 : AIR 2005 SC 1038.
89. *Dr. Preeti Sagar v. State of Madhya Pradesh,* (1997) 7 SCC 120, 142 143 : AIR 1999 SC 2894; *supra.*
90. AIR 2000 SC 1296 : (2000) 4 SCC 640; *supra,* Ch. VIII, Sec. G(h).

The Court has insisted that Art. 16(4) must be read with Art. 335. This means that maintenance of efficiency of administration in the making of appointments to services and posts is a *sine qua non* before considering the case for reservation in judicial services. Further, the High Court must be consulted before enacting any such law as according to Art. 235, the High Court is entrusted with full control over subordinate judiciary. The Supreme Court has asserted that the "independence of the judiciary" and "separation of powers between the Legislature, Executive and the judiciary" are the two principles which constitute the "basic structure of the Constitution and thus these principles cannot be violated by any law.[91]

H. CONSTITUTIONAL AMENDMENTS

After *Indra Sawhny*, two Constitutional Amendments have been incorporated in Art. 16(4) to somewhat tone down the impact of the Supreme Court pronouncement.

(a) ART. 16(4A)

In *Rangachari*,[92] the Supreme Court by majority had held that Art. 16(4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection posts. This proposition was reiterated in several subsequent pronouncements by the Supreme Court.[93] The Supreme Court had thus interpreted the term 'appointment' in Art. 16 liberally as including initial appointment as well as promotion. This position continued till the *Indra Sawhney* pronouncement.

In *Indra Sawhney*, as stated above, eight out of nine Judges opined that Art. 16(4) was confined to initial appointments only and it did not permit or warrant reservations in the matter of promotion as such, as this gave rise to several untoward and inequitous results.[94] The Court however permitted the existing rules in that behalf to operate for a period of five years from the date of the judgment. Thus, *Rangachari* decision was overruled.

Since then, however, the 77th Constitutional Amendment has been brought into effect permitting reservation in promotion to the Scheduled Castes and Scheduled Tribes.[95] The following clause [4A] has been added to Art. 16 in 1995:

> "Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State."

The Constitutional Amendment was brought into effect before the expiry of the time-limit set by the Supreme Court, *viz.*, five years from the date of the

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91. For the Doctrine of Basic Features, see, Ch. XLI, *infra.*
92. *Supra*, footnote 67.
93. See, for example, *State of Kerala v. Thomas*, *supra*, note 39 and 42; also, Sec. E(c), *supra; Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India*, AIR 1981 SC 298 : (1981) 1 SCC 246, *supra*, Sec. E(d), *supra.*
94. *Supra*, 1130; also see below under (b).
95. Also see, *infra*, Ch. XLII.

judgment for the rule permitting reservation in promotion to end. Art. 16(4A) came into force from 17-6-1995.

Thus, by amending the Constitution, Parliament has removed the base as interpreted by the Supreme Court in *Indra Sawhney* that "appointment" does not include "promotion". Art 16(4A) thus revives the interpretation put on Art. 16 in *Rangachari*. Rule of reservation can now apply not only to initial recruitment but also to promotions as well where the state is of the opinion that the Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in services under the state.[1]

It may however be noted that Art 16(4A) permits reservation in promotion posts only for the members of the Scheduled Castes and Scheduled Tribes but not for other Backward Classes. This means that the position taken by the Supreme Court in *Indra Sawhney* still prevails as regards OBCs in respect of promotion posts. No reservation can be made in promotion posts for the OBCs.

The Supreme Court has emphasized that Art. 16(4A) ought to be applied in such a manner that a balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes as well as for other members of the society.[2]

It has also been held that Art. 16(4A) is an enabling provision. It the State makes no reservation, the High Court has no jurisdiction under Art. 226 of the Constitution to issue any direction therefor.[3]

(b) PROMOTION & SENIORITY

Promotion of S/C and S/T employees out of turn because of the scheme of reservation gives rise to several problems, especially, pertaining to seniority of such persons over the employees belonging to the general category. The Supreme Court has sought to grapple with such problems keeping in view considerations of equity and fairness.

In *Union of India v. Virpal Singh Chauhan*,[4] a two-Judge Bench of the Supreme Court reiterated what the Court had said in *Indra Sawhney* that providing reservation in promotion was not warranted by Art. 16(4). The rule of reservation in promotion factually created a very poignant and objectionable situation in *Virpal*.

Of the 33 candidates being considered for promotion to 11 vacancies, all were SC/ST candidates. Not a single candidate among them belonged to the general category. The Court described the resultant situation arising out of reservation in promotion posts as follows:[5]

> "Not only the juniors are stealing a march over the seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Castes/

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1. See, *Commissioner of Commercial Taxes, Andhra Pradesh v. G Sethumadhava Rao,* AIR 1996 SC 1915 : (1996) 7 SCC 512; *G.S.I.C. Karmachari Union v. Gujarat Small Scale Industries Corpn.,* (1997) 2 SCC 339.

2. *P.G. Institute of Medical Education and Research v. Faculty Association,* AIR 1998 SC 1767 : (1998) 4 SCC 1.

3. *A.P. Sarpanch Association v. Govt. of A.P.*, AIR 2001 AP 474.

4. AIR 1996 SC 448 : (1995) 6 SCC 684.

5. *Ibid.*, at 461.

> Scheduled Tribes candidates in the service have also been left behind. Such a configuration could not certainly have been intended by the framers of the Constitution or the framers of the rules of reservation".

The Court stated in *Virpal* that there is no uniform or prescribed method of providing reservation. The extent and nature of reservation is a matter for the state to decide having regard to the facts and requirements of each case. It is open to a state to say that while the reservation is to be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of the rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate would regain his seniority over the reserved candidate notwithstanding that he has been promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the state to so provide.

In *Ajit Singh Januja v. State of Punjab*,[6] a three-Judge Bench of the Supreme Court has gone a step ahead than *Virpal*. Reading Arts. 14, 16 and 335, the Supreme Court has now categorically laid down that when there arises a question to fill up a post reserved for a SC/ST candidate in a still higher grade, then a SC/ST candidate is to be promoted first, but when the question is in respect of promotion to a general category post, then the general category candidate who has been promoted later would be considered first for promotion applying either the principle of seniority cum merit or merit cum seniority.

The Court has agreed with the *Virpal* ruling that seniority between the reserved category candidates and the general candidates in the promoted category shall continue to be governed by their panel position, *i.e.*, with reference to their *inter se* seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". Explaining the rationale underlying this ruling, the Court has observed:

> "If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or spirit of Articles 16(4) or Article 335 of the Constitution."[7]

Accordingly, the Court ruled that the question of seniority at the promotional level must be decided according to the provisions of Arts. 14 and 16(1) and "if any order, circular or rule provided that such reserved candidates who got promotions at roster points were to be treated as senior to the senior candidates who were promoted later, then such an order, circular or rule would be violative of Articles 14 and 16(1)".

The position, however, would be different if before the senior general candidate got his promotion under the normal rule of seniority or selection, the reserved candidate who was promoted earlier at the roster point, had got a further promotion. The Court said in *Ajit Singh I*, that the balance must be maintained in

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6. AIR 1996 SC 1188 : (1996) 2 SCC 715.
7. *Ibid.*, at 1201.

such a manner that there is no reverse discrimination against the general candidates and that any rule, circular or order giving seniority to the reserved candidates promoted at roster point, would be violative of Arts. 14 and 16(1) of the Constitution of India.

But, then, in *Jagdish Lal v. State of Haryana*,[8] a three Judge Bench differed from the above rulings. The Court now argued that the normal rule of seniority ought to prevail in this area as well, *viz.*, that the seniority rule ought to apply meaning thereby that the seniority is to be counted from the date of promotion.

Ultimately, the Court reconsidered the whole matter in *Ajit Singh II*.[9] A Constitution Bench has now overruled *Jagdish Lal* and has restored the view as expressed in *Ajit Singh I.*

The Court has now stated that the primary purpose of Art. 16(4) is due representation of certain classes in certain posts. But, along with Art. 16(4), there are Arts. 14, 16(1) and 335 as well. Arts. 14 and 16 lay down the permissible limits of the affirmative action by way of reservation which may be taken under Arts. 16(4) and 16(4-A). While permitting reservations, Art. 14 and 16(1) also lay down certain limitations at the same time. Art. 335 ensures that the efficiency of administration is not jeopardized.[10]

The right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is a Fundamental Right guaranteed by Art. 16(1). Art. 16(1) provides to every employee otherwise eligible for promotion, or who comes within the zone of consideration, a Fundamental Right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his Fundamental Right to be "considered" for promotion, which is his personal right.

Article 16(4) or 16(4A) contains no directive or command; it is only an enabling provision;[11] it imposes no constitutional duty on the state and confers no Fundamental Right on any one. It is necessary to balance Art. 16(1) and Arts. 16(4) and 16(4A). The interests of the reserved classes must be balanced against the interests of other segments of society.[12]

The doctrine of equality of opportunity in Art. 16(1) is to be reconciled in favour of backward classes under Art. 16(4) in such a manner that Art. 16(4), while serving the cause of backward classes shall not unreasonably encroach upon the field of equality. It is necessary to strike such a balance so as to attract meritorious and talented persons to the public services. It is also necessary to ensure that the rule of adequate representation in Art. 16(4) for the backward classes and the rule of adequate representation in promotion for SC/ST under Art. 16(4-A) do not adversely affect the efficiency in administration as warranted by Art. 335.

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8. AIR 1997 SC 2366 : (1997) 6 SCC 538.
9. AIR 1999 SC 3471 : (1999) 7 SCC 209.
10. See, *infra*, Ch. XXXV, Sec. F, for Art. 335.
11. See, *C.A. Rajendran v. Union of India, supra; P & T Scheduled Caste/Tribe Employees' Welfare Assn. v. Union of India,* (1988) 4 SCC 147 : AIR 1989 SC 139; *State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India,* (1996) 4 SCC 119. The Court overruled *Ashok Kumar Gupta v. State of Uttar Pradesh,* (1997) 5 SCC 201 : 1997 SCC (L&S) 1299 and *Jagdish Lal*.
12. See, *M.R. Balaji v. State of Mysore, supra, Indra Sawhney, supra; Post Graduate Institute of Medical Education and Research v. Faculty Assn.,* (1998) 4 SCC 1 : AIR 1998 SC 1767; see also *Mangat Ram v. State of Punjab,* (2005) 9 SCC 323.

When a reserved candidate is recruited at the initial level he does not go through the same normal process of selection which is applied to a general candidate. A reserved candidate gets appointment to a post reserved for his group. He is promoted to a higher post without competing with general candidates. The normal seniority rule, *viz.,* from the date of "continuous officiation" from the date of promotion applies when a candidate is promoted in the normal manner and not to the promotion of a reserved candidate. Accordingly, in *Ajit Singh II,* the Court has laid down the following principle to regulate the seniority of the promoted reserved candidates:[13]

> "…. the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post—*vis-a-vis* the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate—he will have to be treated as senior, at the promotion level, to the reserved candidate even if the reserved candidate was earlier promoted to that level."

The Court has ruled that *Virpal* and *Ajit Singh I* have been correctly decided but not *Jagdish Lal.*

In *M.G. Badappanavar v. State of Karnataka,*[14] the Supreme Court has again confirmed its earlier ruling in *Ajit Singh II* and directed that the seniority lists as between the general and reserved promotees, and promotions, be reviewed in the light of the ruling in that case. The Court directed that the seniority of the general candidates be restored accordingly.

(c) ART. 16(4B)

The Constitution (Eighty-First Amendment) Act, 2000, has added Art. 16(4B) to the Constitution. Art. 16(4B) runs as follows:

> "Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year."

The Amendment envisages that the unfilled reserved vacancies in a year are to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year. The rule of 50% reservation laid down by the Supreme Court is to be applied only to the normal vacancies and not to the posts of backlog of reserved vacancies. This means that the unfilled reserved vacancies are to be carried forward from year to year without any limit, and are to be filled separately from the normal vacancies.

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13. *Ajit Singh v. State of Punjab II,* AIR 1999 SC 3471, 3491 : (1999) 7 SCC 209; *supra,* note 81.

This ruling has been followed in *Jatindra Pal Singh v. State of Punjab,* AIR 2000 SC 609 : 1999 (7) SCC 257; *Ram Prasad v. D.K. Vijay,* AIR 1999 SC 3563 : (1999) 7 SCC 251.

14. JT 2000 (Suppl. 3) SC 408 : AIR 2001 SC 260 : (2001) 2 SCC 666.

Also see, *Sube Singh Bahanani v. State of Haryana,* (1999) 8 SCC 213 : 1999 SCC (L&S) 1453.

This Amendment also modifies the proposition laid down by the Supreme Court in *Indra Sawhney.*

The Amendment does increase the employment opportunities for the S/C, S/T and OBC candidates.

I. ABOLITION OF UNTOUCHABILITY

Article 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of "untouchability" is to be an offence punishable in accordance with law.

Abolition of untouchability in itself is complete and its effect is all pervading applicable to state action as well as acts or omissions by individuals, institutions or juristic body of persons.[15]

The main object of Art. 17 is to ban the practice of untouchability in any form. To give effect to Art. 17, Parliament enacted the Untouchability (Offences) Act, 1955, prescribing punishments for practising untouchability in various forms. In 1976, the Act was renamed as the "Protection of Civil Rights Act, 1955".

The word "untouchability" has not been defined either in the Constitution or in the Act, because it is not capable of any precise definition.

It has however been held that the subject-mater of Art. 17 is not untouchability in its literal or grammatical sense but the "practice as it had developed historically in this country". Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, *e.g.*, suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do not come within the purview of Art. 17. Art. 17 is concerned with those regarded untouchables in the course of historic development.[16] Thus, instigation of a social boycott of a few individuals, or their exclusion from worship, religious services or food, etc., is not within the contemplation of Art. 17.[17] It is not clear whether Art. 17 would prohibit outcasting or ex-communication of a person of a higher caste from his caste.[18]

The State Legislature passed a law to improve the conditions of living of untouchables. Accordingly, the Act provided for acquisition of land for constructing a colony for them. It was argued against the validity of the law that the construction of a colony would not be in conformity with Art. 17. The Madras High Court rejected the argument.[19] The Court stated that what Art. 17 prohibits is singling out the Harijan community for hostile treatment as a socially backward community. By no process of reasoning, could Art. 17 be held to prohibit the State from

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15. *State of Karnataka v. Appa Balu Ingale,* AIR 1993 SC 1126 : 1995 Supp (4) SCC 469.

16. Denial of access to a Jain temple to a person on the ground of his being a non-JAIN, but not on the ground of his being a *harijan,* does not constitute an offence under the Act; *State of Madhya Pradesh v. Puranchand,* AIR 1958 MP 352.

Also see, MARC GALANTER, *Caste Disabilities and Indian Federalism,* 3 *JILI,* 205 (1961).

See, *infra,* Ch. XXIX, Sec. B, under Art. 25.

17. *Devarajiah v. Padmanna,* AIR 1961 Mad 35, 39.

Also see, *I.L.I.,* MINORITIES AND THE LAW, 143-170(1972).

18. *Hadibandhu Behera v. Banamali Sahu,* AIR 1961 Ori. 33.

19. *Pavadai v. State of Madras,* AIR 1973 Mad 458.

introducing a scheme for improving the condition of living of such persons. The Court also referred to Art. 15(4) in this connection.[20]

Parliament has also enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in order—(i) to prevent the commission of atrocities against the members of the Scheduled Castes and the Scheduled Tribes; (ii) to provide for setting up of special Courts for the trial of offences under the Act and (iii) also to provide for the relief and rehabilitation of victims of such offences. The statement of Objects and Reasons accompanying the corresponding Bill stated as follows:

> "Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons…."[21]

Art. 15(2) also helps in the eradication of untouchability, as no person shall, on the grounds only of "religion, race, caste, sex, place of birth or any of them", be denied access to shops, etc., as mentioned therein.[22]

An interesting point to note is that while the Fundamental Rights, generally speaking, are restrictions mainly on government activities, Arts. 17 and 15(2) protect an individual from discriminatory conduct not only on the part of the state but even on the part of private persons in certain situations.

The Supreme Court has stated that whenever any Fundamental Right like Art. 17 is violated by a private individual, it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the Fundamental Right by the private individual who is transgressing the same. The state is under a constitutional obligation to see that there is no violation of the Fundamental Right of such person. Reference may also be made in this connection to Arts. 14, 21, 23, 25 and 29, discussed later.[23]

The Directive Principles, especially Arts. 38 and 46, obligate the state to render socio-economic and political justice to *Dalits* and improve the quality of their life. [24] "The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the *Dalits* in the national mainstream".[25]

J. ABOLITION OF TITLES

Article 18(1) prohibits the state from conferring any 'title' except a military or academic distinction. Art. 18(2) prohibits citizens of India from accepting any title from a foreign government. A foreigner holding any office of profit or trust under the state cannot accept any title from any foreign state without the consent

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20. *Supra*, Ch. XXII, Sec. C.
21. For comments on this Act, see, *Jai Singh v. Union of India*, AIR 1993 Raj 177; *State of Madhya Pradesh v. Ram Krishna Balothia*, AIR 1995 SC 1198 : (1995) 3 SCC 221.
22. *Supra*.
23. See, Ch. XXI, *supra*, for Art. 14; Ch. XXVI, *infra*, for Art. 21; Ch. XXVIII, Sec. A, *infra*, for Art. 23; Ch. XXIX, Sec. B, *infra*, for Art. 25 and Ch. XXX, Sec. A, *infra*, for Art. 29.
24. For discussion on Directive Principles, see, *infra*, Ch. XXXIV.
25. K. RAMASWAMY, J., *in Appa Balu Ingale*, *supra*, at 1134.

of the President [Art. 18(3)]. No person holding any office of profit under the state is to accept, without the consent of the President, any present, emolument, or office of any kind from or under any foreign state [Art. 18(4)].

It is not clear as to what would happen if a citizen accepts a title in contravention of Art. 18(2). It is open to Parliament, under its residuary powers, to make a law prescribing what should be done with regard to an individual who accepts a title contrary to the Article.[26]

The Supreme Court has ruled in *Balaji Raghavan v. Union of India*,[27] that the national awards like "Bharat Ratna", "Padma Vibhushan", etc. awarded by the Government of India, are not 'titles' within the meaning of Art. 18(1). These awards are not violative of the principles of equality as guaranteed by Arts. 14 and 18. The Court has observed in this connection:[28]

> "The theory of equality does not mandate that merit should not be recognized. Art. 51A of the Constitution speaks of the fundamental duties of every citizen of India. In this context, we may refer to the various clauses of Art. 51A and specifically clause (j) which exhorts every citizen "to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement". It is, therefore, necessary that there should be a system of awards and decorations to recognize excellence in the performance of these duties".[29]

However, awards conferred by the state are not to be used as suffixes or prefixes. The Court has also suggested that the Prime Minister in consultation with the President should appoint a high level committee to lay down criteria for selection of persons for these awards. In the words of KULDIP SINGH, J., "Conferment of Padma awards without any firm guidelines and foolproof method of selection is bound to breed nepotism, favouritism, patronage and even corruption."[30]

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26. *Supra*, Ch. X, Sec. I.
27. AIR 1996 SC 770 : (1996) 1 SCC 361.
28. AIR 1996 SC 770, at 777 : (1996) 1 SCC 361.
29. For discussion on "Fundamental Duties" under Art. 51A, see, *infra*, Ch. XXXIV, Sec. E.
30. AIR 1996 SC 770, at 778 : (1996) 1 SCC 361.