COMPENSATORY DISCRIMINATION: THE INDIAN CONSTITUTION AND JUDICIAL REVIEW

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[*This article examines the scope of, and judicial reaction to, compensatory discrimination as incorporated in the Indian Constitution. The legality of the criteria used to determine 'backwardness' is discussed with particular emphasis on the acceptability or otherwise of caste as a consideration in this regard. The author considers the reliance of courts on the General Right of Equality to prevent the reservation of positions for members of backward groups adopting monopolistic proportions and questions the appropriateness of fixed parameters in determining the constitutionality of such reservation. Finally, the decision of the Supreme Court in* Kerala v. Thomas *in upholding compensatory discriminitive measures as consistent with the General Right of Equality, is analysed.*]

The Indian Constitution was drafted in the late 1940s in an environment where a strict and entrenched social hierarchy subjected certain classes to severe economic and social disadvantages. In an attempt to ameliorate this condition and with the express objective of establishing an egalitarian society, the framers of the Constitution made special provision for these groups. These measures can be divided into those concerned with ensuring the absence of future discriminatory conduct and, in recognition of the fact that this alone might perpetuate the status quo, 'exceptional and temporary measure(s) to be used only for the purpose of mitigating the inequalities between communities and . . . designed to disappear with these inequalities'.[1] The scope of, and judicial reaction to, these latter measures, will be the focus of this discussion.

A. *EQUALITY IN LAW, EQUALITY IN FACT AND THE DOCTRINE OF COMPENSATORY DISCRIMINATION*

The preamble of the Indian Constitution[2] indicates a resolve 'to secure to all of its citizens . . . equality of status and opportunity'.[3] Accordingly, article 14 provides that 'the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. More specifically, article 15[4] proscribes state discrimination based on religion, race, caste, sex or

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1 Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) 3 *Journal of the Indian Law Institute* 39, 42.

2 The Constitution came into operation on 26 January 1950. With 395 articles, it is a more comprehensive document than its Australian counterpart and encroaches into areas of regulation which in Australia would be dealt with by ordinary statute; for example, art. 364 deals with major ports and airports. Hereinafter, reference to the Indian Constitution will be by citation of article number only.

3 Constitution of India, Preamble; quoted in Galanter, *op. cit.* 39.

4 Art. 15 provides:

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
2. No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to —
   (a) access to shops, public restaurants, hotels and places of public entertainment; or
   (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
3. Nothing in this article shall prevent the State from making any special provision for women and children.

place of birth.[5] Article 16[6] requires 'equality of opportunity for all citizens in matters relating to employment or appointment' to any State Office.[7] Finally, article 29(2) provides that no citizen can be denied admission into any State funded or maintained educational institution on grounds only of religion, race, caste or language.[8]

Article 15(1) is general in its application, covering all classes of discrimination, whilst articles 16(1) and 29(2) are directed at prohibiting particular species of wrong. Accordingly, the maxim *generalia specialibus non derogant* applies and in the areas of state employment and state education, articles 16(1) and 29(2), respectively, are the exclusive statements of legislative intent.[9]

Articles 15(1) and 16(1) are specific applications of the 'equality in law' mandate of article 14. This is to be distinguished from the concept of 'equality in fact' with which this paper is primarily concerned. Briefly, however, equality in law under article 14 precludes discrimination of any kind but not all legislative differentiation is necessarily discriminatory; if based upon a 'reasonable classification' it will be acceptable. Such classification will be 'reasonable' when it is first, founded on substantial differences which distinguish those to be the subject of special measures and, second, rational in relation to the aim sought to be realised (which itself must be constitutional).[10] It should be noted, though, that a law in contravention of article 15(1) or 16(1) cannot be validated by applying the principle of reasonable classification applicable to article 14.[11]

Equality in fact involves an affirmative duty to remedy *existing* inequalities;

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

Emphasis added. The Scheduled Castes and Tribes are designated by the President pursuant to arts 341(1) and 342(1) respectively. The Castes suffer from social disabilities such as untouchability whereas the Tribes live in exclusive territorial communities. See, Witten, S. M., '"Compensatory Discrimination" in India: Affirmative Action as a Means of Combatting Class Inequality' (1983) 21 *Columbia Journal of Transnational Law* 353, 355, nn. 8, 11.

5 *Ibid*. art. 15(1).

6 Art. 16 provides:

1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
2. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
3. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union terrritory] prior to such employment or appointment.
4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Although art. 16(4) refers only to 'any backward class of citizens', this includes the Scheduled Castes and Tribes.

7 *Ibid*. art. 16(1).

8 Further, governmental discrimination is prohibited in regard to compulsory public service (Art. 23(2)). Art. 15(2), *supra* n. 4, prohibits discrimination by private individuals in regard to use of facilities and accommodation open to the public. There is no constitutional provision proscribing discrimination in private employment although, it is submitted that discrimination in the private sector on the basis of 'untouchability' would be in contravention of art. 17 which abolishes the concept.

9 *University of Madras v. Shanta Bai* [1954] A.I.R. Mad. 67.

10 *State of West Bengal v. Anwar Ali* [1952] A.I.R. (S.C.) 75.

11 Mittal, J. K., 'Right to Equality and the Indian Supreme Court' (1965) 14 *American Journal of Comparative Law* 422, 424.

reflecting a notion of compensatory or protective discrimination.[12] In the *Minority Schools in Albania* case, the Permanent Court of International Justice said that:

> Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to obtain a result which establishes an equilibrium between different situations.[13]

In the Indian Constitution the doctrine of compensatory discrimination is embodied in articles 15(4)[14] and 16(4).[15] Article 15(4) applies to all dealings of the State while article 16(4) relates to government employment. Consequently, the specific excludes the general, and preferences in the area of State employment must be within the scope of article 16(4).[16] This may be significant as article 16(4) permits only the '*reservation* of appointments or posts', whereas article 15(4) allows 'any special provision'. Thus, a preference relating to government employment which does not amount to the 'reservation' of a position, will not be within article 16(4) and will be in contravention of article 16(1); it will not be saved by article 15(4).[17]

Notwithstanding that it is a 'Directive Principle of State Policy' that:

> The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation[18]

it is clear that articles 15(4) and 16(4) are merely enabling provisions and that discretion to take action lies in the appropriate government.[19] In addition, the reservations were designed to achieve equality in fact and to disappear with the inequalities. Indeed, it is a requirement that relevant government bodies should constantly review the giving of privileges to backward classes to avoid such measures becoming vested interests.[20]

12 The terms 'protective' and 'compensatory' discrimination are interchangeable and the latter will be used throughout this paper. Although Sadurski prefers the euphemism 'preferential treatment', it is clear that equality in fact requires discrimination against those previously favoured. See Sadurski, W., 'The Morality of Preferential Treatment' (1984) 14 M.U.L.R. 572, 594.

13 (1935) P.C.I.J. Ser. A/B No. 64, 19. Although the Indian Supreme Court referred to the *Minority School's* judgment as the correct approach to the problem of equality and minority rights under art. 30(1), the author agrees with Singh that it is also applicable to the dichotomy between equality in law and equality in fact; Singh, P., '"Equal Opportunity" and "Compensatory Discrimination": Constitutional Policy and Judicial Control' (1976) 18 *Journal of the Indian Law Institute* 300, 301, n. 5.

14 *Supra* n. 4. Although the provision is of general application, most case law in relation to art. 15(4) has developed around the reservation of places in academic institutions. The provision was added by the Constitution (First Amendment) Act 1951, as a result of a decision by the Supreme Court in *State of Madras v. Champakan Dorairajan* [1951] S.C.J. 313, to the effect that there was no power given by art. 15(1) to reserve seats for backward classes in state maintained educational institutions and such a measure was a violation of art. 29(2), see *supra* n. 3.

15 *Supra* n. 6. In addition to the preferences permitted by arts 15(4) and 16(4), art. 15(3) allows the State to make 'any special provision for women and children', *supra* n. 4, and arts 330-334 provide for the reservation of seats in state and national legislatures for Scheduled Castes and Tribes.

16 *Dattatraya Motiram v. State of Bombay* [1953] A.I.R. Bom. 311 (D.B.).

17 It is this point that was significant in *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, where a temporary waiver of exam requirements for promotion within a government instrumentality was held not to be a 'reservation' for the purposes of art. 16(4). Note the dissent of Beg J., 523-524, where he claimed that as the exam did have to be passed, albeit at a later date, the post was being 'reserved' during the interim period between the promotion and satisfaction of the exam requirement.

18 Art.46.

19 *Balaji v. State of Mysore* [1962] A.I.R. (S.C.) 649, 664; *Rajendran v. Union of India* [1968] A.I.R. (S.C.) 507, 513. This is to be contrasted with the compulsory provision of political representation under arts 330-334.

20 *Periakaruppan v. State of Tamil Nadu* [1971] A.I.R. (S.C.) 2303.

The position prior to *Kerala v. Thomas*[21] was that articles 15(4) and 16(4), which establish the constitutionality of compensatory discrimination, amounted to an exception to the 'General Right to Equality'[22] contained in articles 14, 15(1) and 16(1).[23] Accordingly, the goal of equality *in fact* could only be furthered at the expense of equality *at law*; and only within the strict confines provided by those exceptions.

This paper concentrates on the extent of governmental power to make preferences which involve questions of the permissible size of reservations and the criteria to be used in ascertaining the classes to benefit. The significance of judicial review in determining these issues will be noted. Emphasis will be placed on backward classes other than Scheduled Castes and Tribes, as it is here that the uncertainty regarding the application of compensatory discrimination is greatest. Finally, the implications of the Supreme Court decision in *Kerala v. Thomas* will be addressed.[24]

B. *RESERVATION OF POSITIONS UNDER ARTICLES 15(4)*[25] *AND 16(4)*[26]

The interplay between the Right to Equality and the doctrine of compensatory discrimination is clearly reflected in the setting of limits on the power of reservation.[27]

By way of preliminary, there is no indication that the State need reserve any position under articles 15(4) or 16(4); the granting of preferences is optional. It follows that as the State need not grant any preferences, it may grant as few as it wishes.[28]

Of greater significance, given the propensity of the State to grant preferences, is the absence of any limitation on the extent to which reservations may be made. *Prima facie*, articles 15(4) and 16(4) appear to permit the reservation of 100 per cent of available positions.[29] Indeed, in earlier cases such a reading was upheld

21 *Supra* n. 17.

22 The Indian Right to Equality is composed of arts 14 to 17. Although not listed under the 'Right to Equality' caption in the Constitution, the articles referred to in n. 8 and related text, *supra*, are relevant. See, Witten, *op. cit.* n. 4, 357, n. 18.

23 *Balaji, supra* n. 19, 662; *Devadasan v. Union of India* [1964] A.I.R. (S.C.) 179, 187. Art. 15(4) also expressly qualifies art. 29(2).

24 India has a common law legal system, headed by the Supreme Court. Supreme Court decisions are binding on all subordinate courts: art. 141. See Witten, *op. cit.* n. 4, 358, n. 24.

25 *Supra* n. 4.

26 *Supra* n. 6.

27 Witten, *op. cit.*, n. 4, 364. Whereas art. 16(4) permits 'reservation of appointments or posts', art. 15(4) extends to the granting of 'any special provision'. Thus, whilst judicial review of actions under art. 15(4) will usually be concerned with the number of *reservations*, it is possible that the quantum of some other form of preference will be in question and the same considerations would be applied; (*e.g.* the waiver of exam requirements for entry into university of backward class members, would not be a 'reservation' of places but would still be within art. 15(4) as a 'special provision' and would be subject to review as to the extent of the measure).

28 Galanter, *op. cit.* 44

29 Even this expansive interpretation would be subject to the limit imposed by art. 335 so that reservations for Scheduled Castes and Scheduled Tribes under art. 16(4) would have to be made 'consistently with the maintenance of efficiency of administration': *General Manager, Sth. Ry. v. Rangachari* [1962] A.I.R. (S.C.) 36. Art. 335:

> The claims of the members of the *Scheduled Castes and Scheduled Tribes* shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Emphasis added. Art. 335 does not confine the granting of preferences to other backward classes under art. 16(4) and has no application to art. 15(4) which does not involve appointments to state positions.

by the courts. In *Kesava Iyenger v. State of Mysore*,[30] the High Court, whilst conceding that the word 'reservation' in article 16(4) was indicative of a minor percentage, stated '*[e]ach* Backward Class . . . is an independent class whose claim for appointment can be sustained under article 16(4)'.[31] Therefore, the *cumulative* reservations granted to individual classes could monopolise all available positions.[32] This is clearly inconsistent with the intention of the framers of the Constitution. Dr B. R. Ambedkar, the chief draftsman of the Constitution, said the authorized reservation was only of 'a minority of seats'[33] and that an aggregate reservation of 70 per cent would be outside article 16(4).[34]

Notwithstanding that the practice of backward class monopolization of available positions departs from legislative intent, the draftsmen of the Constitution failed to provide any express warrant for judicial review of the extent of reservation. Nonetheless, as will be seen, such review has not been uncommon. The courts have developed guidelines indicating the permissible extent of reservations in recognition of and, presumably, deriving authority from, in the absence of an express mandate, the General Right of Equality found in articles 15(1) and 16(1). In the words of Gajendragadkar J.:

> It would be extremely unreasonable to assume that in enacting Art. 15(4) the Constitution intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored.[35]

That is, when utilised, articles 15(4) and 16(4) occupy a place of equal importance to articles 15(1) and 16(1). Thus, articles 15(1) and 16(1), being the general provisions, continue to apply so as to restrain measures under the exceptions provided by articles 15(4) and 16(4), to a reasonable level.[36]

In a dissenting judgment in *Devadasan*[37], Subba Rao J. adopted a contrary position relying on the phrase 'nothing in the article',[38] in article 16(4), as indicating that the provision was to prevail over the principle of equality in law embodied in article 16(1). It is submitted though, that as article 16(4) is an exception to article 16(1),[39] it cannot be so construed as to render the guarantee in the latter 'illusory'.[40] Consequently, the phrase should be limited in application to article 16(2).[41] This would allow any of the prohibited indicia contained therein to be used as the criteria for determining backwardness for the purpose of

[30] [1956] A.I.R. Mysore 20 (D.B.).

[31] *Ibid.* 24. Emphasis added.

[32] Padmanabhiah J. said that: 'For ten appointments to be filled up, if there are candidates belonging to ten backward classes of citizens who, in the opinion of the State are inadequately represented in the service, it will not be wrong for the State to allot all the appointments to the ten communities coming under the heading "backward classes of citizens"': *Ibid.*

[33] 7 Constituent Assembly Debates 702 (1949).

[34] *Ibid.* 701. Presumably, the same would be true of art. 15(4) which was included in the Constitution at a later stage: *supra* n. 14.

[35] *Balaji v. State of Mysore* [1963] A.I.R. (S.C.) 649, 662. To similar effect re art. 16(4) see p. 664. See also *Devadasan v. Union of India* [1964] A.I.R. (S.C.) 179.

[36] Imam, M., 'Reservation of Seats for Backward Classes in Public Services and Educational Institutions' (1966) 8 *Journal of the Indian Law Institute* 441, 447.

[37] [1964] A.I.R. (S.C.) 179.

[38] An identical phrase is found in art. 15(4) and the same analysis would apply.

[39] *Supra* p. 129.

[40] Seervai, H. M., *Constitutional Law of India* (1975) Vol. 1, 316.

[41] *Supra* n. 6.

granting privileges under article 16(4), whilst preserving the integrity of article 16(1).[42]

Returning to the question of the extent of reservation, a balance must be struck between the principles in clauses (1) and (4) of articles 15 and 16. The Supreme Court in *Balaji v. State of Mysore*[43] established that special provisions for backward groups must be within reasonable limits. The case involved a reservation of 68 per cent of seats at a technical institution and therefore the case came to be considered under article 15. In holding such a measure not to be reasonable as involving a constitutional fraud on the power conferred by article 15(4),[44] the Court said that '[s]peaking generally and in a broad way, a special provision should be less than 50 per cent'.[45] Not being within the exception provided by clause (4), the reservation in question was void as being in contravention of clause (1) of article 15.[46] In *dicta* it was stated that the same numerical limitation would apply to article 16(4).[47]

A year later the Supreme Court considered the issue again,[48] this time in the context of article 16 as the reservation was of posts in a state owned instrumentality. The Court applied the principles it had developed in *Balaji* so that a reservation of 64.4 per cent of total vacancies for members of the Scheduled Castes and Tribes was held to be void. The Court went further, however, and said that what was designed as a *guideline* in *Balaji*, was now a definite formula the exceeding of which led to automatic invalidity.[49]

Whilst such a rule seems inflexible, two points need to be noted which, in effect, allow the requirement to be avoided. First, the numerical limitation applies only to reservations made under articles 15(4) and 16(4). Classifications based on other constitutional criteria, in conjunction with reservations under the former provisions, may validly lead to the setting aside of more than 50 per cent of positions. What is anticipated is, for example, reservations of positions for children of defence personnel.[50] Secondly, and more importantly, articles 15(4) and 16(4) authorize the abridgement of the General Right of Equality but cannot be used to curtail the rights of *backward classes*.[51] Thus, a rule reserving seats for backward classes ought not to be worded so as to prevent members of backward classes competing with the general public on their merits and thereby

42 Even in the expansive *Kerala v. Thomas*, the phrase 'nothing in this Article', in art. 16(4), was used by all members of the Court only to exempt compensatory discrimination measures from cl. (2) prohibitions.

43 [1963] A.I.R. (S.C.) 649.

44 Agrawala, S. K., 'Protective Discrimination and Backward Classes in India', in Imam, M., (ed.) *Minorities and the Law* (1972) 199, 212.

45 [1963] A.I.R. (S.C.) 649, 663.

46 The order also failed as being a classification based only on caste without regard to other relevant factors: *infra*, text accompanying nn. 93 to 97.

47 [1963] A.I.R. (S.C.) 649, 664.

48 *Devadasan v. Union of India* [1964] A.I.R. (S.C.) 179.

49 *Ibid.* 186. In a dissenting judgment, Subba Rao J. argued that the constitutionality of employment reservations should be judged by reference to the proportion of the total number of positions in a section held by members of backward classes, rather than the level of reservations in a particular year. This is the position adopted in *Kerala v. Thomas infra* n. 63, p. 133 and accompanying text.

50 *Chanchala v. State of Mysore* [1971] A.I.R. (S.C.) 1762. See Witten, *op. cit.* 364, n. 71.

51 Galanter, *op. cit.* 49. Although after *Thomas* arts 15(4) and 16(4) may no longer be exceptions to the general right of equality, the same analysis would be applicable.

obtaining a larger number of seats/appointments than had been originally reserved.[52] However, whilst backward class candidates may obtain additional seats by merit, they 'cannot require that reservation operate as a guarantee of seats over and above those acquired by merit'.[53] Thus, in *Sudarsan v. State of Andhra Pradesh*,[54] an argument by an unsuccessful backward candidate that a higher ranking backward class candidate should be given a seat from the general pool (for which he would qualify on a merit basis), in order to make a reserved seat available for the petitioner, was rejected.

In light of the Supreme Court's sharp delineation between valid and invalid reservations, the question arises as to whether such a ceiling is warranted and, if so, at what level it should be set. There are two arguments in support of the method adopted by the Supreme Court.

First, it has been asserted that reservations exceeding 50 per cent will materially affect the efficiency of public services and lead to a decline in the quality of candidates accepted into educational institutions.[55] It is to be expected that the admission of those with lesser qualifications than would be required for admittance based on merits, will result in a fall off in efficiency commensurate with the level of reservations. The Supreme Court in *Balaji* considered inefficiency to be a relevant consideration.[56] In the absence of any direct evidence indicating the opposite to what must be the inevitable consequence of reservation, it is submitted that the justification is logically supportive of some limit on reservation, although not necessarily 50 per cent. Secondly, a 50 per cent rule has the advantage of definiteness and states can act in confidence that their schemes are constitutionally valid.

It is submitted that both rationales lend support to a fixed percentage rule below which constitutionality will be *presumed*.[57] What is questioned is the setting of this rule at a level of 50 per cent. It will be remembered that in *Balaji* and *Devadasan* the Supreme Court laid down a rule of 'reasonableness' when balancing the objectives of clause (1) from articles 15 and 16 against clause (4). Fifty per cent was decided upon as meeting this requirement. The writer agrees with Agrawala who, relying on the absence of any scientific foundations in *Balaji* or *Devadasan* which would support a 50 per cent rule, states that the figure is arbitrary.[58]

Subba Rao J., in a dissenting judgment in *Devadasan*,[59] argued that in determining the reasonableness of reservations, reference should be made to the proportion of places already held by members of backward classes. From this

52 *Raghuramulu v. State of Andhra Pradesh* [1958] A.I.R. (A.P.) 129 (D.B.).

53 Galanter, *op. cit.* 50.

54 [1958] A.I.R. (A.P.) 569 (D.B.).

55 *E.g. Akhil Bharatiya Soshit Karamchari Sangh (Ry.) v. Union of India* [1981] A.I.R. (S.C.) 298, 333: 'The maintenance of efficiency of administration is bound to be adversely affected if general candidates of high merit are correspondingly excluded from recruitment because the large bulk of the vacancies, numbering anything over 50%, is allocated to the reserved quota'. Quoted in Witten, *op. cit.* 368, n. 101.

56 [1963] A.I.R. (S.C.) 649, 662.

57 The Supreme Court in *Balaji* and *Devadasan* did not rule out judicial review of reservations below 50%.

58 Agrawala, *op. cit.* 214.

59 [1964] A.I.R. (S.C.) 179, 189-193.

point, any method of reservation, even of 100 per cent of available posts, would be reasonable until the desired level of representation was reached. This method would be in place of a fixed formula applicable to all occasions. It is submitted though, that the reasoning of the majority in *Devadasan* is to be preferred and the clause (4) exception is not to be interpreted in such a way as to destroy the guarantee of equality given by clause (1) of articles 15 and 16. To allow 100 per cent reservations would have this effect.

Thus, as a 100 per cent reservation is unacceptable and a 50 per cent level can only be described as arbitrary, it is submitted that reservations for backward classes should be set at a level which represents the percentage they bear to the total population. This would lead to fixed reservation levels which are consistent with demographic characteristics.

As Agrawala recognizes, a figure of 50 per cent can only be derived by taking into account other factors in addition to population.[60] Presumably, where the population ratio of backward classes exceeds 50 per cent, these are arguments of efficiency in administration and maintenance of standards in educational institutions. Where the ratio of backward classes is less than 50 per cent, a set 50 per cent rule can only be in recognition of the superior claims of the backward communities — in direct contradiction to the holding of the Court in *Devadasan* and *Balaji* that compensatory discrimination programs under clause (4) of articles 15 and 16 should not prevail over the General Right of Equality.[61] Thus, it is respectfully argued that the rulings of the Supreme Court in *Balaji* and *Devadasan* in support of a 50 per cent rule on the one hand, and an insistence that clause (4) is not to prevail over clause (1) on the other, are contradictory, at least where the demographic proportion of backward classes is actually less than 50 per cent.

In conclusion, it is argued that fixed reservations under articles 15(4) and 16(4) should be based on population proportions.[62] The Supreme Court in *Kerala v. Thomas* circumvented the whole question of the balance between the backward classes and the General Right of Equality, arriving at the writer's preferred rule, although in the context of clause (1). The Court held that compensatory discrimination measures were valid under clause (1) of article 16 and reservations for classes commensurate with their ratio of the population were said to be acceptable.[63]

Galanter argues that balancing the interests of the backward classes and the general public lies in the realm of politics rather than law.[64] The writer is of the view, however, that the availability of judicial review acts as an important restraint on the excesses of legislatures which decide to ignore the constitutional balance of interests in favour of political expediency.

60 Agrawala, *op. cit.* 214.

61 *Supra* p. 130.

62 With possibly some downward adjustment where the ratio of backward classes is high, to ensure the maintenance of efficiency in administration and standards of education.

63 [1976] A.I.R. (S.C.) 490, *per* Ray C.J., 501; Fazl Ali J., 555; Krishna Iyer J., 537.

64 Galanter, M., 'Equality and Preferential Treatment: Constitutional Limits and Judicial Control' (1965) 14 *Indian Year Book of International Affairs* 258, 268.

Before leaving the topic of reservations, there are two specific areas where the constitutionality of compensatory discrimination via reservations, warrants examination.

(i) *'Carrying forward' of reserved posts under articles 15(4) and 16(4)*

A further refinement of the *Devadasan*[65] case is that the reservation level of 64.4 per cent was the result not of deliberate determination, but of a 'carry forward' rule which led to the accumulation of non-utilised reservations. The rule was held to be invalid on the basis that 'on every occasion for recruitment the state should see that all citizens are treated equally.[66] It is submitted that this rule should be subject to two limitations. First, 'a carry forward' clause should, at the very least, remain valid until its cumulative effect has led to a reservation level in excess of 50 per cent. Any figure below 50 per cent will usually be reasonable (*per Balaji*) having regard to the interaction between the General Right of Equality and compensatory discrimination. Secondly, the Court seems momentarily to have lost sight of the above mentioned dichotomy; the Constitution does not require that on every occasion of recruitment citizens be treated equally but, rather, that compensatory measures for backward classes be reasonable.

On the other hand, it is submitted that the motive of the Court is valid; what is to be avoided is an otherwise valid reservation level resulting in *de facto* monopolization of available vacancies in a particular year through carry forward provisions.[67] The writer does not agree with Agrawala[68] who says that in view of the centuries of abject backwardness of certain classes, even a 100 per cent reservation resulting from an accumulation, should be valid. Such a view is reminiscent of the now discredited *Kesava Iyenger* case[69] where reservation of all positions was said, by way of *obiter*, to be acceptable. It is clear that the article 15(4) and 16(4) exceptions are not to occupy an overriding position but, rather, a place of equal importance with the General Right of Equality.[70]

It is apparent that a compromise must be established between the strict formulation against 'carry forward' provisions in *Devadasan* and the risk of temporary monopolization. Consistent with the position adopted previously,[71] and that laid down by the Supreme Court in *Kerala v. Thomas*, it is argued that a 'carry forward' provision may be effective even though it results in appointment of backward class candidates to more than 50 per cent of available posts. However, having regard to the General Right of Equality, such reservation should extend only to a level which reflects the backward classes' proportion to the total population, and not to complete monopolization.

65 [1964] A.I.R. (S.C.) 179.

66 *Ibid.* 187.

67 Subba Rao J.'s dissent, *supra* 13-14, necessarily extends to criticism of the rule against 'carry forward' provisions, as he says that it is the proportion of the cadre strength actually composed of backward classes which is important.

68 Agrawala, *op. cit.* 218-219.

69 *Supra* p. 129-130.

70 *Balaji v. State of Mysore* [1963] A.I.R. (S.C.) 649.

71 *Supra* p. 133.

(ii) *Preferential promotions within government service under article 16(4)*

The power of reservation conferred by article 16(4) can be exercised by the State providing for reservation of selected posts so as to give preference to backward classes in promotion as distinct from original appointment.[72] In the view of the writer, Ramachandran's argument that initial preference cannot become 'permanent patronage',[73] fails to recognise that the extension of reservations into the area of promotions is designed to give effect to the intention of the drafters of the Constitution. Article 16(4) was designed to facilitate the advancement of backward classes and to secure their adequate representation at all levels in the services.[74] If 'permanent patronage' is necessary for this end it would appear to be a small price to pay for the achievement of the desired end. It is noted though that such reservations will have to be subject to the same judicial review as applies to privileges granted for *admission* into the public service in order to avoid undue loss of efficiency and erosion of the General Right of Equality.

C. *DESIGNATION OF BACKWARD CLASSES*

Any policy of compensatory discrimination necessitates the identification of the legitimate recipients of the beneficial schemes. Articles 15(4)[75] and 16(4)[76] permit preferences for three categories of groups[77]: (a) Scheduled Castes; (b) Scheduled Tribes; (c) other backward classes.

Article 16(4) uses the expression 'any backward class of citizens' omitting the words 'Scheduled Castes and Scheduled Tribes'. The Supreme Court has held, however, that these groups are included in the term 'backward class of citizens' in article 16(4).[78] In addition, whereas article 16(4) refers to 'any backward class', article 15(4) uses the phrase 'socially *and* educationally backward'. Whilst possibly indicating that article 15(4) is designed to cover a narrower field, the Supreme Court has read article 16(4) as if prefixed with the qualifying phrase found in the former provision.[79] Thus, it can be seen that the clauses are of equal scope.

It is a condition precedent to the application of article 16(4)[80] that the backward class of citizens not be adequately represented in government services. Such inadequate representation may be quantitative or qualitative.[81] It is submitted that, although article 15(4) does not contain a similar requirement, the same condition would apply so that reservation of places at a university would be

72 *General Manager, Sth. Ry. v. Rangachari* [1962] A.I.R. (S.C.) 36.
73 Ramachandran, V. G., 'Untouchability and Protective Discrimination', in Imam, M., (ed.) *op. cit.* 182, 195.
74 *General Manager, Sth. Ry. v. Rangachari* [1962] A.I.R. (S.C.) 36, 44.
75 *Supra* n. 4.
76 *Supra* n. 6.
77 Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) 3 *Journal of the Indian Law Institute* 39, 50.
78 *General Manager, Sth. Ry. v. Rangachari* [1962] A.I.R. (S,C,) 36.
79 *Janki Prasad Parimoo v. States of Jammu and Kashmir* [1973] A.I.R. (S.C.) 930, 936.
80 *Supra* n. 6.
81 *General Manager, Sth. Ry. v. Rangachari* [1962] A.I.R. (S.C.) 36.

dependent upon under-representation. If this were not the position, 'the reservation for backward communities . . . [could] be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.[82]

'Backward classes' has two different meanings: first, it may be used as a generic term encompassing Scheduled Castes and Tribes and all other backward classes, or, secondly, to refer to only those backward classes not included within the lists of Castes and Tribes.[83] It is in its narrower application that the term is used here.

The Constitution does not designate the Scheduled Castes and Tribes, nor does it define the term 'backward classes' or provide any method by which they may be identified. The Scheduled Castes and Tribes are specified by the President, after consultation with the Governor of a State, pursuant to articles 341(1) and 342(1) respectively. Presidential orders made under these articles are not subject to judicial review[84] and will stand until amended by Parliament.[85] The question as to whether a particular individual is a member of a prescribed Caste or Tribe is, however, subject to review by the courts.[86]

With respect to backward classes there is no appointed agency to make designations, but article 340 provides for the establishment of a 'Commission to investigate the conditions of backward classes'. Such a Commission was appointed in 1953 and its report, tabled in 1956, placed heavy reliance on caste as a criteria for determining backwardness.[87] Consequently, the report, which was recommendatory only,[88] was rejected by the government. The state and central governments are therefore free to determine which groups will receive preferences, an argument that provisions for the advancement of backward classes were to be based on the report of the Commission, having been rejected in *Balaji*.[89]

The question now becomes what criteria are to be used by the Government in making the classification. As a preliminary point, the unit to which reference is made when assessing whether the article 15/16(4) requirement of backwardness is satisfied, must be a 'class'; individuals may not be regarded as 'socially and educationally backward'. An amendment to substitute the word 'citizens' for 'classes' in article 15(4) was specifically rejected.[90] Further, all individuals listed as backward would form only one class and it is evident from the word 'classes' that benefits to a number of different classes were intended.

Returning to the issue of acceptable criteria, a finding that 'caste' is an acceptable *indicium* would be significant due to the tendency of governments to use it when determining backwardness. Witten identifies two reasons for government

82 *Devadasan v. Union of India* [1964] A.I.R. (S.C.) 179, 187.
83 Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) *Journal of the Indian Law Institute* 39, 51.
84 *Siddappa v. Chandappa* [1968] A.I.R. (S.C.) 929, 932.
85 Arts 341(2), 342(2).
86 Agrawala, *op. cit.* 200, n. 7.
87 See generally, Galanter, M., 'Who Are the Other Backward Classes?' (1978) 13 *Economic and Political Weekly* 1812, 1816-9.
88 *Desu Rayudu v. Andhra Pradesh Public Service Commission* [1967] A.I.R. (A.P.) 353, 362.
89 [1963] A.I.R. (S.C.) 649, 657-8.
90 India, Parliamentry Debates, 1951, Third Session, Part II, Vol. XII, col. 9641, 9821.

preference of caste when making classifications.[91] First, 'social and educational backwardness' is often directly related to membership of an 'inferior' caste. Secondly, as mentioned previously, the preferences are given to classes, not to individuals, and castes are the epitome of a class. A further reason which leads to the promotion of caste as a means of classification, is the lack of statistical data which would allow a more scientific determination of backwardness;[92] in some cases governments are forced back on to caste through sheer necessity.

The question of criteria came to be considered by the Supreme Court in *Balaji v. State of Mysore*.[93] In a landmark decision, the order of the Mysore Government classifying the socially and educationally backward classes under article 15(4), (to enable reservation of places in educational institutions), was invalidated. The classification identified classes almost solely by reference to caste with only incidental consideration to the economic status of the groups in question.[94] The Court held that whilst social backwardness could include considerations of caste, this must not be the sole, or even dominant, determinant.[95] It is clear that there are strong policy motivations behind the decision of the Court to proscribe caste oriented classification. The Court was of the opinion that the granting of preferences to castes *per se* might perpetuate existing caste-based divisions in society.[96] On a more immediate and practical level, there was the consideration that the use of a sole test of 'caste' for all situations would falter in its application outside the Hindu sections of Indian society where caste division is strongest.[97]

In giving its judgment, the court in *Balaji* made three other important rulings relevant to the test of backwardness:

(i) backwardness must be *both* social *and* educational.[98] Consequently, as only the test for educational backwardness was upheld, the deficient social backwardness test could not be severed and the whole order was impugned.

(ii) The concept of backwardness is not relative so that classes which are backward only in comparison with the most advanced classes should not be included in it.[99] This was another ground for invalidating the order which had reserved seats in an educational institution on the following basis: backward classes — 28 per cent; *more backward classes* — 22 per cent; Scheduled Castes — 15 per cent; and Scheduled Tribes — 3 per cent.[1] Galanter[2] and Agrawala[3]

91 Witten, *op. cit.* 372.

92 Agrawala, *op. cit.* 202.

93 [1963] A.I.R. (S.C.) 649. In this case the Supreme Court established the 50% guideline with respect to the extent of reservations.

94 *Ibid.* 657. See also, Mittal, *op. cit.* 450, where he refers to a 'virtual equating' of caste and economic backwardness.

95 *Ibid.* 659-60. The test for educational backwardness used by the government was upheld as valid. Educational backwardness existed where the level of education in a community was below the state average. The Court noted, however, that classes of citizens just below the average could not be classed as educationally backward.

96 *Ibid.* 656.

97 Mittal, *op. cit.* 451.

98 *Balaji v. State of Mysore* [1963] A.I.R. (S.C.) 649, 658.

99 *Ibid.*

1 The total reservation of 68 per cent of seats was by itself invalid as exceeding the 50 per cent guideline, irrespective of considerations of relative backwardness.

2 Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) 3 *Journal of the Indian Law Institute* 39, 45.

3 Agrawala, *op. cit.* 216.

argue that there is nothing in the Constitution which prohibits such a sub-classification so long as its purpose is to promote the advancement of the backward classes. It is submitted that this reasoning is correct and, further, that the graduating of preferences according to relative backwardness may be necessary to avoid the comparatively advanced groups among the backward classes acquiring the majority of benefits from a single, uncompartmented reservation.[4]

An alternative means of avoiding the interception of preferences by the relatively well-off backward classes[5] is to impose income ceilings preventing the receipt of preferences by affluent citizens who otherwise would be eligible as falling by other standards into favoured groups of citizens.[6]

(iii) 'Caste' may have some relevance in determining the backwardness of a class.[7] Subba Rao J. in *Chitralekha v. State of Mysore*,[8] delivering the judgment of the majority of the Court, explicitly agreed with this finding.[9] The Supreme Court went further, however, than it had previously in *Balaji* and held that under no circumstances were 'caste' and 'class' to be equated.[10] By so ruling, the Court is maintaining that caste may not be taken as a *unit* (*cf.* criteria) of social and educational backwardness. In support of this contention, Subba Rao J. advanced three arguments.[11]

The first one was that because article 15(4) refers only to 'backward classes' as distinct from 'backward classes or castes', this evinced a legislative intention to exclude preferences to groups which form a caste rather than a class.[12] A study of parliamentary debates, however, reveals that the two terms were thought to be synonymous,[13] at least in those areas of Indian society where castes are prevalent. The addition of the words 'or castes' would have been superfluous.

The second argument was that the juxtaposition of the expressions 'backward *classes*' and 'Scheduled *Castes*' in article 15(4), rebuts the prior proposition that 'classes' and 'castes' are interchangeable terms.[14] However, Radhakrishnan, correctly it is submitted, argues that the presence of the word 'any' before the expression 'socially and educationally backward clases' in article 15(4) reinforces the notion that 'classes' is inclusive of 'castes' and that the word was included to avoid the very argument which Subba Rao J. has made.[15] Further, his Honour's argument is inapplicable to article 16(4) wherein the words 'Scheduled Castes and Scheduled Tribes' are absent and, therefore, no inference can be

4 Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) 3 *Journal of the Indian Law Institute* 39, 44-5.

5 'It is no secret that reservation has . . . promoted what is called the brahmanization of a small elite in each target group, while making no difference to the majority's living standards.': 'Consensus on Quotas', *The Statesman Weekly*, 25 May 1985.

6 Witten, *op. cit.* 380.

7 *Balaji v. State of Mysore* [1963] A.I.R. (S.C.) 649, 659.

8 [1964] A.I.R. (S.C.) 1823.

9 *Ibid.* 1833.

10 *Ibid.* 1834.

11 The same analysis would apply to art. 16(4).

12 *Chitralekha v. State of Mysore* [1964] A.I.R. (S.C.) 1823, 1833.

13 India, *Parliamentary Debates*, 1951, Third Session, Part II, Vol. XII, col. 9007; see also, Radhakrishnan, N., 'Units of Social, Economic and Educational Backwardness: Caste and Individual' (1965) 7 *Journal of the Indian Law Institute* 262, 266.

14 *Chitralekha v. State of Mysore* [1964] A.I.R. (S.C.) 1823, 1833.

15 Radhakrishnan, *op. cit.* 267.

drawn from their presence alongside the expression 'any backward class of citizens'.

Finally, Subba Rao J. alludes to the problem discussed previously that preferences in favour of particular castes may benefit the relatively well-off of that group to the detriment of other members.[16] This is a valid argument for disallowing 'caste' as a unit for the distribution of preferences under articles 15(4) and 16(4). A '*class*' could be formulated to exclude those members of a caste who are socially and educationally advanced, whereas a reference to a *caste*, *per se*, would include those people. However, despite this, use of caste as a unit of reference will be shown to be acceptable and it is submitted that the associated administrative convenience overcomes the third argument of his Honour. Further, the difficulty can be dealt with by imposing income ceilings on the grant of preferences to castes, rather than banning their use as a reference point altogether.

Accordingly, it is submitted that caste may be used as a consideration (but not the dominant one) in ascertaining the backwardness of a class of citizens[17] and, further, that its use as a descriptor to enable the allocation of preferences will be valid.[18] In subsequent cases, the Supreme Court has accepted the idea that social and educational backwardness could be specified by caste, subject to one significant proviso. The caste identified in a state order must in fact be socially and educationally backward; a caste designation without evidence of social and educational backwardness will be in contravention of the principle enunciated by the Court in *Balaji* that caste must never be the sole or dominant consideration. Thus, in *Rajendran v. State of Madras*,[19] a list of backward classes prepared by the Madras Government consisted of castes. The reservations were valid as the Government was able to provide evidence that the recipient castes were in fact 'socially and educationally backward'. This development is significant in view of the fact that designation of classes by caste is probably the most convenient method of allotting preferences under articles 15(4) and 16(4).

In those cases where class lists are comprised of castes, the burden of proof is placed on the government to establish that criterion other than caste (for example, economic consideration), were applied in drawing up the lists. This is a reflection of the fact that caste designations are a *prima facie* violation of the guaranteed fundamental right found in articles 15(1)[20] and 16(1) and (2)[21] and the onus is on the government to bring itself within the exception to this prohibition.[22] Agrawala argues that determination of backwardness on the criterion of caste is not, *prima facie*, an infringement of the fundamental right in articles 15(1) and 16(1) and that, therefore, the burden should be on the petitioner to show that no criterion other than caste was applied.[23] It is submitted though, that,

16 *Chitralekha v. State of Mysore* [1964] A.I.R. (S.C.) 1823, 1834.
17 *Per Balaji v. State of Mysore* [1963] A.I.R. (S.C.) 649, 659.
18 *Contra Chitralekha v. State of Mysore* [1964] A.I.R. (S.C.) 1823, 1834.
19 [1968] A.I.R. (S.C.) 1012.
20 *Supra* n. 4, p. 126.
21 *Supra* n. 6, p. 127.
22 *I.e.* arts 15(4) and 16(4). *State of Andhra Pradesh v. Sagar* [1968] A.I.R. (S.C.) 1379, 1384.
23 Agrawala, *op. cit.* 210.

on the simple wording of the provision, such a claim cannot be correct as discrimination on the basis of caste is expressly proscribed. Article 15(1) states:

> The State shall not discriminate against any citizen on grounds only of religion, race, *caste* . . . .[24]

It is noted, however, that with the Supreme Court in *Kerala v. Thomas* holding that compensatory discrimination was valid under article 16(1), the above analysis may have to be reversed so that Agrawala's assertion is correct, the government no longer having to bring itself within an exception as understood by the Supreme Court in its earlier decision of *State of Andhra Pradesh v. Sagar*.[25]

To examine the constitutionality of another possible approach to classification, although caste may be a relevant criterion, a compensatory scheme which *ignores* caste when determining backwardness, will be valid if it is based on other relevant criteria.[26]

As a result of the foregoing discussion it is submitted that it is clear that caste may be a relevant criterion in ascertaining backwardness (as well as a mode of description) or, alternatively, does not have to be considered at all. In those areas of Indian society where caste has no application the latter method will, of course, be the means adopted. The question arises as to what other criteria will be acceptable. The Supreme Court in *Balaji*[27] suggested poverty, place of habitation, and occupation as indicia of *social* backwardness.[28] There was no suggestion as to possible criteria for determining *educational* backwardness presumably because the relevant criteria adopted by the Mysore Government was held to be acceptable.[29]

Even if criteria for ascertaining backwardness are valid under articles 15(4) and 16(4) they are still subject to the general requirement of equal protection embodied in article 14.[30] Will a criterion based on caste be permissible under article 14? To be valid the classification must be (1) based on 'intelligible differentia which distinguishes the persons . . . that are grouped together from others left out'; and (2) 'the differentia must have a rational relation to the object sought to be achieved.'[31]

Regarding the requirement that the criteria must amount to an intelligible differentia, the use of caste may cause some difficulties,[32] however, these cannot be insurmountable in view of the standards evolved by the courts in dealing with petitions as to claims for membership of Scheduled Castes and Tribes.[33] Further, it is submitted that there is clearly a rational relation between the use of caste as

24 Emphasis added.

25 [1968] A.I.R. (S.C.) 1379, 1384.

26 *Chitralekha v. State of Mysore* [1964] A.I.R. (S.C.) 1823.

27 *Balaji v. State of Mysore* [1963] A.I.R. (S.C.) 649, 659.

28 See Witten, *op. cit.* 378-9 for a discussion regarding the application of these criteria.

29 *Supra* n. 95.

30 *Supra* p. 126.

31 *Budhan Choudhry v. State of Bihar* [1955] S.C.R. 1045, 1049. See also, Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) *Journal of the Indian Law Institute* 39, 60.

32 Galanter, M., '"Protective Discrimination" for Backward Classes in India' (1961) 3 *Journal of the Indian Law Institute* 39, 60.

33 *Ibid.* 61.

the differentia and the goal of eradication of the social and backward characteristics of those castes.[34]

It has been seen that caste, among other criteria, is an acceptable *indicium* of social backwardness and that the description of classes by caste is valid. The convenience of caste as the denominating factor has been verified as '[c]aste and communal units remain the predominant "classes" that are deemed backward.'[35]

D. *COMPENSATORY DISCRIMINATION OUTSIDE ARTICLES 15(4) AND 16(4)*

The position prior to 1976 was that articles 14, 15(1), 16(1) and (2) represented the doctrine of equality in law and the doctrine of equality in fact, or compensatory discrimination, embodied in articles 15(4) and 16(4) was the exception to this broader principle.[36] Consequently, to be valid, preferences granted had to be within the scope of those exceptions. As Witten notes,[37] the prior situation is clearly demonstrated by the need to amend the Constitution to include article 15(4), as article 15(1) did not permit the making of reservations in favour of backward classes.[38]

In *State of Kerala v. Thomas*[39] the question arose as to whether the power to grant preferences was limited to articles 15(4) and 16(4), or could be justified as a measure to further the purpose of the equality guarantee in articles 15(1) and 16(1).

The preferential treatment granted by the order of the State of Kerala involved a temporary waiver of examination requirements for promotion for members of Scheduled Castes and Tribes. Consequently, the measure was not within the ambit of article 16(4) which only permits 'the reservation of appointments or posts'.[40]

The Supreme Court, by a majority of five out of seven, upheld the order. Of the majority, Ray C.J. and Mathew, Krishna Iyer and Fazal Ali JJ.,[41] upheld the plan as valid under article 16(1) as a means of achieving ultimate equality. Beg J., on the other hand justified the rule under article 16(4) as constituting a partial reservation,[42] and so must be numbered among the members of the minority[43] who argued that clause (4) provides the only avenue for compensatory discrimination under article 16.

[34] These characteristics must be present in the first place otherwise 'caste' would not be a valid differentia under articles 15(4) or 16(4).

[35] Galanter, M., 'Who Are the Other Backward Classes?' (1978) 13 *Economic and Political Weekly* 1812, 1820.

[36] See *supra* p. 127.

[37] Witten, *op. cit.* 382, n. 212.

[38] See *supra* n. 14, p. 128.

[39] [1976] A.I.R. (S.C.) 490. The decision of the Supreme Court was unprecedented and its implications have only been the subject of academic conjecture, there having been no subsequent case which has addressed the issues raised. Further, derivation of *rationes* leading to the ultimate decision is hindered by the multiplicity of opinions arising out of the seven individual judgments. The opinions expressed herein are based largely on the writer's interpretation of the judgments and rely on the views of academic writers only to the extent indicated.

[40] The measure could not be justified under article 15(4) despite the wider nature of that provision.

[41] Hereinafter, references to the majority are to be taken as references to these four members of the Court.

[42] See *supra* n. 17, p. 128.

[43] Khanna and Gupta JJ.

The majority held that article 16(1) permits reasonable classification based on the same principles as article 14[44] — the two provisions being emanations of the General Right of Equality. On this occasion the object was the advancement of the Scheduled Castes and Tribes, consistent with the maintenance of administrative efficiency. This object is constitutionally sanctioned by articles 46[45] and 335[46] and was acceptable. Further, '[t]he differentia, so loudly obtrusive, is the dismal social milieu of harijans,'[47,48] which clearly has a rational relation to the object set out above. Accordingly, the plan was valid as a reasonable classification.

The majority rejected the well established principle that article 16(4) was an exception to a requirement of equality *in law* in article 16(1).[49] Instead, article 16(1) was seen as promoting equality *in fact* and article 16(4) was not an exception to this, but, 'only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation'.[50]

The minority judgments of Khanna, Gupta and Beg JJ. revolve around the argument that article 16(1) enshrines equality in law and that any measures directed at securing the advancement of backward classes must be founded in clause (4). Khanna J. argued that if preferential treatment can be justified under clause (1) of article 16, then clause (4) is rendered redundant.[51] The majority were, however, quick to meet this challenge and by upholding the continued applicability of clause (4), placed a limit on those occasions when a compensatory discriminatory measure will be eligible for justification under clause (1), (note, however, the methodology of Ray C.J.).

Before examining this limitation to the operation of article 16(1), the preliminary issue of article 16(2)[52] must be addressed. The existence of the prohibition in clause (2) of article 16 means that a classification under article 16(1) based on caste may be invalid. This difficulty was avoided by the majority in the present case via two different approaches.

(i) Mathew J. pointed out that the waiver of examination requirements was only for Scheduled Castes and Tribes and not for other backward classes. Further, the 'word "caste" in Art. 16(2) does not include "Scheduled Caste"';[53] therefore, the order did not violate this prohibition. Krishna Iyer and Fazal Ali JJ. adopted a similar analysis.[54]

(ii) Ray C.J. impliedly disagrees with the other members of the majority. Rather than avoiding the application of article 16(2) by excluding Scheduled Castes from the definition of 'caste', he reads clause (2) as subject to clause (4) so that a classification under clause (1) based on caste is outside the prohibition

44 See *supra* p. 127 for a discussion of the requirements of reasonable classification.

45 *Supra* n. 18, p. 128.

46 *Supra* n. 29, p. 129.

47 *Harijans*, the 'Untouchables', comprise the majority of the Scheduled Castes in whose favour the order of the State of Kerala in question, was directed. See Witten, *op. cit.* 354-5.

48 *Per* Krishna Iyer J., *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, 537. Ray C.J., and Fazl Ali and Mathew JJ., adopt similar reasoning at 500, 551 and 519, respectively.

49 See *supra* p. 127.

50 *Per* Mathew J., *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, 519.

51 *Ibid.* 510.

52 *Supra* n. 6, p. 127.

53 *Per* Mathew J., *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, 519.

54 *Ibid.* 535 and 552, respectively.

of clause (2), presumably due to the *non obstante* clause in article 16(4). This reasoning is reflected in the following statement of the Chief Justice:

> Article 16(2) rules out some basis of classification including race, caste . . . Article 16(4) clarifies and explains that classification on the basis of backwardness [*e.g.* caste] does not fall within Article 16(2) and is legitimate for the purposes of Article 16(1).[55]

It is respectfully submitted that the approach of Ray C.J. is to be preferred as not requiring an unrealistic definition of the term 'Scheduled Caste'. Singh asserts, 'the scheduled castes are nothing but castes'.[56] Further, Gupta J. (dissenting), also described the Scheduled Castes as nothing more than a conglomerate of existing social castes.[57]

Returning to the discussion of the limitation placed on article 16(1), it is submitted that the application of Mathew J.'s reasoning means that in order to be valid, any scheme which uses caste (but not Scheduled Caste), race, or other factors mentioned in article 16(2), to classify groups, will have to be in exercise of the power conferred by article 16(4).[58] To attempt justification of caste classification under article 16(1) would lead to invalidity pursuant to article 16(2).[59] Because article 16(4) contains a *non obstante* clause, clause (2) will not act to prevent the use of caste to designate classes under that clause. As discussed in the previous section, such an order will be valid so long as the designated castes are in fact socially and educationally backward.[60] Of course, consonant with the decision in *Thomas*, if the recipients of the preferences under the scheme are *Scheduled Castes* (or Tribes), the measure will be upheld under article 16(1). Thus, following the reasoning of Mathew, Krishna Iyer and Fazal Ali JJ., article 16(1) is limited in its operations to schemes which assign benefits to Scheduled Castes and Tribes.

Alternatively, the approach of the Chief Justice involves no restriction on the application of article 16(1). Article 16(4) serves to prevent the intrusion of article 16(2) so that a classification based on caste (either Scheduled or otherwise) will be valid under article 16(1) as a 'reasonable classification'.[61]

State of Kerala v. Thomas is 'an unprecedented validation of compensatory discrimination' in that it establishes that preferences to Scheduled Castes and Tribes are compatible with the constitutional guarantee of equal opportunity.[62] Various factors mean, however, that the case may be of limited value as precedent.

55 *Ibid.* 499.

56 Singh, P., 'Social Justice for the Harijans: Some Socio-Legal Problems of Identification, Conversion and Judicial Review' (1978) 20 *Journal of the Indian Law Institute* 355, 366.

57 *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, 542. Consequently, as he was not willing to rely on art. 16(1), he struck down the scheme as violating art. 16(2).

58 *Contra* Singh, P., '"Equal Opportunity" and "Compensatory Discrimination": Constitutional Policy and Judicial Control' (1976) 18 *Journal of the Indian Law Institute* 300, 312 where he quotes Mathew J. out of context to support an argument that his Honour's judgment provides for the application of article 16(1) to *all* weaker sections of society. The relevant statement, 'the law-maker should have the liberty to strike the evil where it is felt most' (at 519), is supportive of the proposition that schemes under art. 16 as a whole may be directed towards the Scheduled Castes and Tribes only, to the exclusion of other backward classes. The range of potential beneficiaries will be relevant of course, under the Mathew J. analysis, to whether the measure is justified under clause (1) or (4).

59 Thus, Krishna Iyer J. states that 'no class other than Harijans [*i.e.* Scheduled Caste members] can jump the gauntlet of "equal opportunity". Their [*i.e.* other backward class members] only hope is in article 16(4)': *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, 537.

60 *Supra* p. 139.

61 See *supra* p. 142.

62 This is true based either on the view of Ray C.J. or Mathew J.

First, it will be remembered that questions relating to article 16(1) only arose because the waiver of exam requirements did not come within the ambit of clause (4).[63] Many cases involve reservations, at which clause (4) is specifically directed, and reliance on clause (1) will not be necessary. Various statements by members of the majority support this analysis by implying that article 16(4) continues to have a separate operation, even though it no longer acts as an exception. Krishna Iyer J. stated that:

> [Article 16(4)] serves not as an exception but as an emphatic statement, *one mode* of reconciling the claims of the backward people and the opportunity for free competition the forward sections are ordinarily entitled to.[64]

Ray C.J. reasons that:

> The power to make *reservation*, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts . . . . The present case is not one of reservation of posts by promotion.[65]

It is submitted that a reservation within article 16 will be an exercise of the power conferred by clause (4) and not clause (1).[66]

Secondly, outside the realm of public employment, preferences are governed by article 15(4). This clause permits 'any special provisions' so that there would be no question of a waiver of examination requirements having to be justified under article 15(1) and the traditional analysis would, it is submitted, apply.[67]

The decision by the Supreme Court in *State of Kerala v. Thomas* has profound doctrinal implications in its upholding of compensatory discriminative measures as consistent with the General Right of Equality. The practical impact is perhaps less significant as it may only apply to preferences in favour of Scheduled Castes and Tribes.[68] Further, outside article 16 and state employment, it would appear not to permit any form of preference that was not already acceptable under article 15(4). Finally, the permissibility of 'caste' as a 'reasonable classification' under article 16(1) involves no extension of the law under articles 15(4) and 16(4), as previously interpreted, which allowed such measures.[69]

The consequences of the Supreme Court's decision will remain the subject of conjecture, however, until developed further by the courts in future decisions.[70]

63 *Contra* Beg J., *supra* n. 17, p. 128.

64 *State of Kerala v. Thomas* [1976] A.I.R. (S.C.) 490, 535. Emphasis added.

65 *Ibid.* 498. Emphasis added.

66 This will be so whether a reservation for Scheduled Castes and Tribes or other backward classes is involved.

67 See *supra* pp. 129-134. See also, Witten, *op. cit.* 386.

68 Mathew J. *cf.* Ray C.J., *supra* pp. 142-43.

69 Under art. 15(4) or art. 16(4) a classification based on caste would have to reflect *actual* social and educational backwardness. The situation remains the same under art. 16(1) as a caste designation without evidence of such backwardness would not be a 'reasonable classification' as the object would not be constitutionally sanctioned.

70 The writer is not aware of any subsequent case which has addressed the question of whether art. 16(1) gives plenary power to make provision for compensatory discrimination and has discussed the issue with Professor Galanter who is of a similar mind. Telephone interview with Professor Marc Galanter, University of Wisconsin Law School (31 July 1985).

E. *CONCLUSION*

The Indian Constitution expressly authorizes special preferential treatment for the relief of backward classes. Nevertheless, genuine equality can be achieved through those general provisions of the Constitution which create a General Right of Equality, as this right has been interpreted as requiring equality in fact rather than equality in law.

These policies are implemented through a broad discretion vested in the State subject to judicial review to prevent what is intended to establish equality of opportunity, creating instead, institutional discrimination in reverse.

In such a structured society, however, the implementation of policies which favour those traditionally seen as less worthy, even 'untouchable', to the detriment of previously entrenched upper classes, has not been easily accepted. The resultant religious and social pressures, outside the scope of this paper, are themselves worthy of careful consideration.