AKHIL BHARATIYA SOSHIT KARAMCHARI SANGH (RAILWAY) REPRESENTED BY ITS ASSISTANT GENERAL SECRETARY ON BEHALF OF THE ASSOCIATION

v.

UNION OF INDIA AND ORS.

November 14, 1980

[V. R. KRISHNA IYER, R. S. PATHAK AND O. CHINNAPPA REDDY, JJ.]

Constitution of India, 1950—Arts. 16, 46 and 335—Scope of—Reservation of posts under the State in favour of Scheduled Castes and Scheduled Tribes—Carry forward of unfilled posts for three years—validity of—

In so far as the initial recruitment and later promotion to classes II, III and IV are concerned, the Railway Administration provided for reservation of certain percentage of vacancies for candidates belonging to the Scheduled Castes and Scheduled Tribes. Since, despite the special provision the intake of these communities into the Railway Services continued to be negligible further concessions and relaxations were offered from time to time to members belonging to the Scheduled Castes and Scheduled Tribes. Even so, in many cases the vacancies reserved for them remained unfilled. Yet another step taken by the Railway Administration to keep open the reserved vacancies was to adopt a policy of "carry forward" of the unfilled reserved vacancies for at least three years.

In obedience to the policy decision of the Ministry of Home Affairs, the Railway Board issued certain directives designed to protect and promote the interest of members of the Scheduled Castes and Scheduled Tribes in the matter of their employment in the Railway Administration. The policy directive of reserving certain percentage of posts in favour of these communities having not proved effective, the Railway Board altered the rules "with a view to securing increased representation of Scheduled Castes and Scheduled Tribes in the Railway Services" (Annexure D). The Railway Board authorised the recruiting bodies to slur over low places obtained by Scheduled Castes and Scheduled Tribes candidates except where it was found that the minimum standard necessary for the maintenance of efficiency of the administration has not been reached. The appointing authorities were directed to give additional training and coaching to the recruits so that they might come up to the standard of other recruits appointed alongwith them. Likewise where direct recruitment, otherwise than by examination, was provided for, the Railway Board directed the selection of Scheduled Castes and Scheduled Tribes candidates fulfilling a lower standard of suitability than from other communities, so long as the candidates had the prescribed minimum educational and technical qualifications and the appointing authorities were satisfied that the lowering of standards would not unduly affect the maintenance of efficiency of administration.

In the case of selection posts the Railway Board decided that promotions from class IV to class III and from class III to class II were of the nature of direct recruitment and the prescribed quota of reservation for Scheduled Castes and Scheduled Tribes should be provided as in direct recruitment. This reser-

A vation was confined to 'selection posts'. In regard to filling of "general posts" in class III it was stated that they were in the nature of direct recruitment and the reservation for Scheduled Castes and Scheduled Tribes as applicable to direct recruitment should be applied. (Annexure F).

In 1969 the Railway Board further revised their policy in regard to the reservation and other concessions to the Scheduled Castes and Scheduled Tribes B candidates in posts filled by promotion (Annexure H). The circular stated that in promotion by selection from class III to class II, if a member of the Scheduled Castes and Scheduled Tribes was within the zone of eligibility the employee would be given one grading higher than the grading otherwise assignable to him on the basis of his record of service.

C In April, 1970 the percentage of vacancies to be reserved for Scheduled Castes and Scheduled Tribes was raised from 12½% and 5% to 15% and 7½% respectively (Annexure I). By the same order the "carry forward" rule was altered from 2 to 3 years.

In 1973 the Railway Board issued a directive stating that the quota of 15% and 7½% for Scheduled Castes and Scheduled Tribes may be provided in pro- D motion to the categories and posts in classes I, II, III and IV filled on the basis of the seniority-cum-suitability provided the element of direct recruitment to those grades does not exceed 50% (Annexure K).

In August, 1974 the Railway Board further directed that if the requisite number of Scheduled Castes and Scheduled Tribes candidates were not available for being placed on the panel in spite of the various relaxations the best among E them i.e. those who secure highest marks should be earmarked for being placed on the panel to the extent vacancies had been reserved in their favour. The Scheduled Castes and Scheduled Tribes candidates so earmarked might be promoted *ad hoc* for a period of six months against the vacancies reserved for them. During the period of six months the administration was asked to give them all facilities for improving their knowledge and for coming upto the requisite standard. This procedure was required to be applied in cases of pro- F motion to the posts filled on the basis of seniority-cum-suitability (Annexure N).

A further modification to the then existing rules was made by Annexure 'O' which stated that "reservations in posts filled by promotion under the existing scheme would be applicable to all grades or services where the element of direct recruitment, if any, does not exceed 66 2/3% as against 50% as at G present".

It was contended on behalf of the petitioners that Scheduled Castes cannot be a favoured class in the public services because (i) they are "castes" and cannot claim preference qua castes unless specially saved by Article 16(4) which speaks of "class" and not "castes", (ii) that Article 16(4) could not apply to promotional levels and (iii) efficiency of administration envisaged H by Article 335 had been jeopardised by the impugned circulars which fomented frustration among the civil services and produced inefficiency by placing men of lower efficiency and less experience in higher posts.

A preliminary objection was raised that since the first petitioner was an unrecognised union, it was not a "person aggrieved" and so its petition was unsustainable. A

Dismissing the petitions

[Per majority Krishna Iyer and Chinnappa Reddy, JJ, Pathak J. concurring in the result with reservation on certain questions] B

There is nothing illegal or unconstitutional in the impugned orders.

[Per Krishna Iyer, J]

The argument that since the first petitioner was an un-recognised association the petition is not sustainable must be overruled because whether the petitioners belonged to a recognised union or not, the fact remains that a large body of persons with a common grievance exists and they approached this Court under Article 32. Our current processual jurisprudence is broad-based and people-oriented and envisions *access to justice* through "class actions", "public interest litigation" and "representative proceedings". The narrow concept of cause of action and person aggrieved and individual litigation is becoming obsolescent in some jurisdictions. [224 G-H] C

The well settled position in law is that the State may classify, based upon substantial differentia, groups or classes and this process does not necessarily spell violation of Articles 14 to 16. Therefore, in the present case if the Scheduled Castes and Scheduled Tribes stand on a substantially different footing they may be classified groupwise and treated separately. [232 B-C] D

The fundamental right of equality of opportunity has to be read as justifying the categorisation of Scheduled Castes and Scheduled Tribes separately for the purpose of "adequate representation" in the services under the State. The object is constitutionally sanctioned in terms as Article 16(4) and 46 specificate. The classification is just and reasonable. [233 G-H] E

Apart from Article 16(1), Article 16(2) expressly forbids discrimination on the ground of caste and here the question arises as to whether the Scheduled Castes and Tribes are castes within the meaning of Article 16(2). Assuming that there is discrimination, Article 16(2) cannot be invoked unless it is predicated that the Scheduled Castes are "castes". There are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. They may be something less or something more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group. [234 A-C] F

Articles 14 to 16 form a Code by themselves and contain a constitutional fundamental guarantee. The Directive Principles which are fundamental in the governance of the country enjoin upon the State the duty to apply that principle in making laws. Article 46 obligates the State to promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and the Scheduled Tribes. Article 46 read with Article 16(4) makes it clear that the exploited lot of the harijan groups in the past shall be extirpated with special care by the State. [210 E; 211 A-C] G H

A At the same time reservations under Article 16(4) and promotional strategies under Article 46 should not be used to imperil administrative efficiency in the name of concessions to backward classes. The positive accent of Article 335 is that the claims of these communities to equalisation of representation in services under the State shall be taken into consideration. The negative element of this Article is that measures taken by the State pursuant to the mandate of Articles 16(4), 46 and 335 shall be consistent with and not subversive of the B maintenance of efficiency of administration. [211 D-F]

Under Article 341, Scheduled Castes become such only if the President specifies any castes, races or tribes or parts or groups within castes, races or tribes for the purpose of the Constitution. It is the socio-economic backwardness of a social bracket that is decisive and not mere birth in a caste. [212 A]

C Annexure F relates only to selection posts and has been expressly upheld in *Rangachari's case*. The quantum of reservation is not excessive; the field of eligibility is not too unreasonable; the operation of the reservation is limited to selection posts and no relaxation of qualifications is written into the circular except that candidates of the Scheduled Castes and Scheduled Tribes communities should be judged in a sympathetic manner. Moreover administrative efficiency is secure because there is a direction to give such staff additional D training and coaching, to bring them upto the standard of others. [239 F-G]

There is no vice in giving one grade higher than is otherwise assignable to an employee, based on the record of his service rendering the promotional prospects unreasonable because this concession is confined to only 25% of the total number of vacancies in a particular grade or post filled in a year and there is no rampant vice of every harijan jumping over the heads of others. More E importantly, this is only an administrative device of showing a concession or furtherance of prospects of selection. Even as under Articles 15(4) and 16(4) lesser marks are prescribed as sufficient for these communities or extra marks are added to give them an advantage, the regrading is one more method of boosting the chances of selection of these communities. The prescribed minimum qualification and standard of fitness are continued even for Scheduled Castes and Scheduled Tribes under Annexure H. [240 B-D]

F Annexure I is un-exceptionable since all that it does is to readjust the proportion of reservation in conformity with the latest census. [240 E-F]

Similarly "carry forward" raised from two years to three years cannot be struck down. There is no prospect, even if the vacancies are carried forward, of sufficient number of Scheduled Castes and Scheduled Tribes candidates turn- G ing out to fill them. Moreover, there is a provision that if a sufficient number of candidates from these communities are not found, applicants from the unreserved communities would be given appointment provisionally. After three years these vacancies cease to be reserved. [240 G-A]

Even in *Devadasan's case*, this Court has laid down the proposition that under Article 16(4) reservation of a reasonable percentage of posts for members of the Scheduled Castes and Scheduled Tribles is within the competence H of the State. What was struck down was that the reservations should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities. By this rule there is no danger of the total vacancies

being gobbled up by the harijan/girijan groups virtually obliterating Article 16(1). The problem of giving adequate representation to backward classes under Article 16(4) is a matter for the Government to consider, bearing in mind the need for a reasonable balance between the rival claims. [241 B-F] A

Subject to the condition that the carry forward rule shall not result in any given year in the selection or appointment of Scheduled Castes and Scheduled Tribes candidates considerably in excess of 50%, the Annexure I is upheld. [242 E] B

There is nothing unreasonable or wrong in Annexure J. Once the parameters of reservation are within the framework of the fundamental rights, minute scrutiny of every administrative measure is not permissible. [242 F]

Annexure K is beyond reproach. As between selection and non-selection posts the role of merit is functionally more relevant in the former than in the latter. If in selecting top officers, posts could be reserved for Scheduled Castes and Scheduled Tribes with lesser merit it cannot rationally be argued that for the posts of peons, or lower division clerks reservation would spell calamity. The part that efficiency plays is far more in the case of higher posts than in the appointments to the lower posts. [243 D] C

Dilution of efficiency caused by the minimal induction of a small percentage of reserved candidates cannot affect the over-all administrative efficiency significantly. Moreover, care has been taken to give in-service training and coaching to correct the deficiencies. [244 B-C] D

[*Chinnappa Reddy, J concurring*]

The preamble to the Constitution of India proclaims the resolution of the people to secure to all its citizens justice, social, economic and political, equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The right to equality before the law and equality of opportunity in the matter of public employment are guaranteed as fundamental rights. The State is enjoined upon by the Directive Principles to promote the welfare of the people, to endeavour to eliminate inequalities in status, facilities and opportunities and special provisions have been made, in particular, for the protection and advancement of the Scheduled Castes and Scheduled Tribes in recognition of their low social and economic status and their failure to avail themselves of any opportunity of self-advancement. In short the constitutional goal is the establishment of a socialist democracy in which justice—economic, social and political is secure and all men are equal and have equal opportunity. Inequality whether of status, facility or opportunity is to end, privilege is to cease and exploitation is to go. The under-privileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16. [255 A-F] E F G

A Constitution, such as ours, must receive generous interpretation so as to give all its citizens the full measure of justice so proclaimed. While interpreting the Constitution the expositors must concern themselves not so much with words as with the spirit and sense of the Constitution which could be found in the Preamble the Directive Principles and other such provisions. [256 G] H

A At one time it was assumed that because the fundamental rights are enforceable in a court of law while Directive Principles are not, the former were superior to the latter, that way of thinking has become obsolete. The current thinking is that while Fundamental Rights are primarily aimed at assuring political freedom to the citizens against excessive State action, the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Directive Principles are made un-enforceable in a limited sense, B because no Court can compel a Legislature to make laws. But that does not mean that they are less important than Fundamental Rights or that they are not binding on the various organs of the State. They are all the same fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. The Directive Principles should serve the Courts as a Code of Interpretation. Every law attacked on the ground of infringement of Fundamental Right should be examined to see if the impugned C law does not advance one or other of the Directive Principles or if it is not in the discharge of some of the undoubted obligations of the State towards its citizens flowing out of the Preamble, the Directive Principles and other provisions of the Constitution. [257 A-G]

Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and Scheduled Tribes in public services at D all levels are a necessary consequence flowing from the Fundamental Rights guaranteed by Article 16(1). This very idea is emphasized further by Article 16(4) which is not in the nature of an exception to Article 16(1) but a facet of that Article. In the *State of Kerala* v. *N.M. Thomas* the court has repudiated the theory propounded in earlier cases that Article 16(4) is in the nature of an exception to Article 16(1). It is no longer correct to say that laws aimed at achieving equality as permissible exceptions. Such laws are necessary E incidents of equality. [258 D-F]

Minister of Home Affairs v. *Fisher* [1979]3 All E.R. 21, *State of Kerala & Anr.* v. *N.M. Thomas & Ors.* [1976] 1 S.C.R. 906 @ 930-933 and *The General Manager, Southern Railway* v. *Rangachari* [1962]2 S.C.R. 586 referred to.

F The figures quoted from the report of the Commissioner of Scheduled Castes and Scheduled Tribes for the year 1977-78 reveal how slow and insignificant the progress achieved by the members of these communities in the matter of participation in the Railway Administration had been. Far from acquiring any monopolistic or excessive representation over any category of posts these communities are nowhere near being adequately represented. Neither the reservation rule nor the "carry forward" rule for these years has resulted in any such G disastrous consequence. Therefore, the complaint of the petitioners that the circulars had resulted in excessive representation of these communities is without foundation generally or with reference to any particular year. [246 D-G]

There is no substance in the argument that efficiency of administration would suffer if the Railway Board's directives were followed in the matter of reservations and promotions. The Railway Board had stated that minimum H standards were insisted upon for every appointment and in the case of candidates wanting in requisite standards of efficiency those with higher marks were given special intensive training to enable them to come up to the requisite standards. In the case of posts which involved safety of movement of trains there was no

relaxation of standards in favour of candidates belonging to Scheduled Castes and Scheduled Tribes and they were required to pass the same rigid tests as others. [265 A-B] A

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 50% about which there is no rigidity. Every case must be decided on its own facts. [265 E] B

There is nothing illegal or unconstitutional in any one of the impugned orders and circulars. [265 G]

[Pathak J concurring in the result with reservation on certain questions.]

Article 46 of the Constitution enjoins upon the State to treat with special care the educational and economic interest of the weaker sections of the people and in particular the Scheduled Castes and Scheduled Tribes. One of the modes in which the economic interest of these communities can be promoted is by reservation of appointments or posts in their favour in services under the State where they are not adequately represented. By virtue of Article 16(4), when the State intends to make reservation of appointments or posts in favour of these communities in services under it nothing in Article 16 prevents it from doing so. Article 335 provides that claims of the members of these communities shall be taken into consideration in the making of appointments to services and posts in connection with the affairs of the Union or a State. But such consideration must be consistent with the maintenance of efficiency of administration which is regarded as paramount. It is dictated by the common good and not of a mere section of the people. Therefore, whatever is done in considering the claims of Scheduled Castes and Scheduled Tribes must be consistent with the need for maintenance of efficiency of administration. This Article contains a single principle, namely, the advancement of Scheduled Castes and Scheduled Tribes but through modes and avenues which must not detract from the maintenance of an efficient administration. [250 B-H] C D E

For securing an efficient administration the governing criterion in the matter of appointments to posts under the State is excellence and the emphasis is solely on quality. The selection is made regardless of religion, race, caste, sex, descent, place of birth or residence. However, a quota of the posts may be reserved in favour of backward citizens. But the interests of efficient administration require that at least half the total number of posts be kept open to attract the best of the nation's talent. If it was otherwise an excess of the reserved quota would convert the State service into a collective membership predominantly of backward classes. The maintenance of efficiency of administration is bound to be adversely affected if general candidates of high merit are correspondingly excluded from recruitment. Viewed in that light the maximum of 50% for reserved quota appears fair and reasonable, just and equitable violation of which would contravene Article 335. [251 B-D] F G

M. R. Balaji v. *State of Mysore* [1963] Supp. 1 S.C.R. 439, 470, *T. Devadasan* v. *Union of India* [1964]4 S.C.R. 680 and *State of Kerala* v. *N. M. Thomas* [1976]1 S.C.R. 906 referred to. H

A ORIGINAL JURISDICTION : Writ Petition Nos. 1041-1044 of 1980.

(Under Article 32 of the Constitution)

Shanti Bhushan, K. K. Venugopal, A. T. M. Sampath, P. N. Ramalingam and *R. Satish* for the Petitioner.

B *Lal Narain Sinha,* Att. General of India, *M. K. Banerjee,* Addl. Sol. Genl. and *Miss A. Subhashini* for Respondents Nos. 1-5.

P. R. Mridul, P. H. Parekh, C. B. Singh, B. L. Verma, Rajan Karanjawal and *Miss Vineeta Caprihan* for the Intervener.

K. B. Rohtagi and *Praveen Jain* for the Intervener.

C

R. K. Garg and *P. K. Jain* for the Intervener.

S. K. Bagga for the Intervener.

Altaf Ahmed for the Intervener.

S. Balakrishnan for the Intervener.

D

P. H. Parekh for Respondent No. 6 in W.P. No. 1042/79.

The following judgments were delivered :

KRISHNA IYER, J.

E *The Root Thought*

The abolition of slavery has gone on for a long time. Rome abolished slavery, America abolished it, and we did, but only the words were abolished. not the thing.(1)

This agonising gap between hortative hopes and human dupes F *vis a vis* that serf-like sector of Indian society, strangely described as Scheduled Castes and Scheduled Tribes (SCs and STs, for short), and the administrative exercises to bridge this big hiatus by processes like reservations and other concessions in the field of public employment, is the broad issue that demands constitutional examination in the Indian setting of competitive equality before the law and tearful inequality in G life. A fasciculus of directions of the Railway Board has been attacked as *ultra vires* and the court has to pronounce on it, not philosophically but pragmatically. "The philosophers have only interpreted the world in various ways; the point is to change it"(2)—this was the founding fathers' fighting faith and serves as perspective-setter for the judicial censor.

H

(1) Leo N. Tolstoy.

(2) Theses on Feuerbach (1888) xi.

The Backdrop

The social backdrop to the forensic problem raised in this litigation is best projected by lines of poetry quoted in Nehru's Autobiography : (')

> Bowed by the weight of centuries he leans
> Upon his hoe and gazes on the ground,
> The emptiness of ages on his face,
> And on his back the burden of the world.

The Problem

The dynamics and dialectics of social justice *vis a vis* the special provisions of the Constitution calculated to accelerate the prospects of employment of the *harijans* and the *girijans* in the civil services with particular emphasis on promotions of these categories in the Indian Railways—that, in all these cases, is the cynosure of judicial scrutiny, from the angle of constitutionality in the context of the guarantee of caste-free equality to every person.

Petitioners' Challenge

The gravamen of the constitutional accusation levelled in this bunch of quasi-class actions under Art. 32 of the Constitution and argued by a battery of counsel led by Shri Shanti Bhushan, with heat and light, passion and reason, is the heartless discrimination shown against vast numbers of members employed by the Railway Administration, through its policy directives, by bestowal of unconscionably 'pampering' concessions, at promotion levels, on these social brackets belonging to the historically suppressed SCs & STs, heedless of over-all administrative efficiency in the Indian Railways and frustrating the promotional hopes of the larger human segments of economically downtrodden senior members. The fall-out of this 'benign discrimination' of helping out the weakest sections has been to blow up, out of all proportion to the social realities, the 'backwardness' syndrome so as to embrace many politically powerful castes disguised as Backward Classes. This constitutional amulet, rooted largely in caste, the petitioners lament, has been misused and applied in educational and employment fields on an escalating scale. The perverted result is that a caste-riven nation is a spectre that haunts the land, pushing back the patriotic prospect of a homogenised Indian Society of casteless equality and projecting instead the divisive alternative of a heterogeneous caste map of Bharat. The fundamental failure of this sterile scheme of reservation-wise circumvention of the fundamental right to equality, ideologically and pragmatically speaking, has deepened the pathological condition of communalism besetting the Indian polity

(1) Allied Publishers Pvt. Ltd. 1962 Edn., p. 439.

A and split the have-nots into snarling camps—a consummation disastrously contrary to the constitutional design of abolition of socio-economic inequality through activist stratagem of equalisation geared to actual attainment of integrated equality.

Logically, the argument leads to the formulation that each caste B and community is bargaining politically for bigger bites of the educational-and-employment cake so much so merit becomes irrelevant or takes a back seat and 'backward' birth brings a boon. The constitutional stultification of an integrated India through misuse of 'reservation' power provided for in Arts. 15 and 16 meant for the direct 'dalits', the pollution, by the political Executive, of our founding creed of an C egalitarian order by playing casteification politics and the morbid dilution of 'backwardness' marring the dream of a secular republic by the nightmare of a feudal vivisection of the people—if this picture drawn by some counsel be true, even in part, the basic task of transforming the economic order through social justice will be baulked through destructive communal disputes among the masses. Maybe, this may D weaken the social revolution, leave an indelible stain and incurable wound on the body politic and justify the censure by history of the engineers of our political power and electoral processes. Hearing the arguments of the petitioners one wonders, "Is caste the largest political party?" Has protective discrimination, so necessary in an insufferE ably unequal society, created a Frankenstein's monster?

Have we no dynamic measures to drown social, economic and educational backwardness of whole masses except the traditional self-perpetuating quasi-apartheidisation called 'reservation'? Surely, our democratic, secular socialist republic is no wane moon but a creative power rooted in equal manhood, an egalitarian reservoir of vast human F potential, a demographic distribution of talent benumbed by *brahman* centuries of social injustice but now seeking human expression under a new dispensation where 'chill penury' shall no longer 'repress their noble rage'.

Caste, undoubtedly, in a deep-seated pathology to eradicate which G the Constitution took care to forbid discrimination based on caste, especially in the field of education and services under the State. The rulings of this court, interpreting the relevant Articles, have hammered home the point that it is not constitutional to base identification of backward classes on caste alone qua caste. If a large number of castes masquerade as backward classes and perpetuate that division in edu-H cational campuses and public offices, the whole process of a caste-free society will be reversed. We are not directly concerned with backward classes as such, but with the provisions ameliorative of the

Scheduled Castes and the Scheduled Tribes. Nevertheless, we have to consider seriously the social consequences of our interpretation of Art. 16 in the light of the submission of counsel that a vested interest in the caste system is being created and perpetuated by over-indulgent concessions, even at promotional levels, to the Scheduled Castes and the Scheduled Tribes, which are only a species of castes. "Each according to his ability" is being substituted by "each according to his caste", argue the writ petitioners and underscore the unrighteous march of the officials belonging to the SCs & STs over the humiliated heads of their senior and more meritorious brothers in service. The aftermath of the caste-based operation of promotional preferences is stated to be deterioration in the over-all efficiency and frustration in the ranks of members not fortunate enough to be born SCs & STs. Indeed, the 'inefficiency' bogie was so luridly presented that even the railway accidents and other operational calamities and managerial failures were attributed to the only villain of the piece viz., the policy of reservation in promotions. A constitutionally progressive policy of advantage in educational and official career based upon economic rather than social backwardness was commended before us by counsel as more in keeping with the anti-caste, pro-egalitarian tryst with our constitutional destiny. And, Shri Shanti Bhushan, at one stage, helped the court realise the consequences of its verdict if it upheld the pampering package of promotional preferences by warning us of running battles in the streets, a sort of caste-war, against birthbased 'privileges' for the *harijan-girijan* millions.

Our Approach

Of course, judicial independence has one dimension, not fully realised by some friends of freedom. Threats of mob hysteria shall not deflect the court from its true accountability to the Constitution, its spirit and text belighted by all the sanctioned materials The other invisible sacrifice of judicial independence relevant to this case is the unwitting surrender to "the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us (judges) a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties."(1) We quote what the great Justice Cardozo has courageously confessed :(2)

> I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and

(1) Benjamin N. Cardozo, The Nature of the Judicial Process p., 175.
(2) Ibid p. 167, 169, 173-74.

A influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man whether he be litigant or judge.... The great
B tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by .... We shall never be able to flatter ourselves, in any system of judicial interpretation, that we have eliminated altogether the personal measures of the interpreter. In the moral sciences,
C there is no method or procedure which entirely supplants that subjective reason. We may figure the task of the judge, if we please, as the task of a translator, the reading of signs and symbols given from without. None the less, we will not set men to such a task, unless they have absorbed the spirit, and have filled themselves with a love, of the language they
D must read.

The British echo of this judicial weakness is heard in Prof. Griffith's words : (1)

> These judges have by their education and training and the pursuit of their profession as barristers, acquired a strik-
E ingly homogenous collection of attitudes, beliefs and principles, which to them represents the public interest.

The emphasis on the subtle invasions from within upon functional autonomy and forensic objectivity mentioned by Cardozo will be evident when we turn to the pathetic saga of the depressed classes, even today, painted by the other side. The learned Attorney General, less
F militant but not less firm in his submissions, called all this a caricature of the poignant facts of life and called upon us to assess the facts with cold objectivity and warm humanity casting aside possible sympathies suggested by Justice Cardozo and Prof. Griffith.

We, as judges dealing with a socially charged issue of constitutional
G law, must never forget that the Indian Constitution is a National Charter pregnant with social revolution, not a Legal Parchment barren of militant values to usher in a democratic, secular, socialist society which belongs *equally* to the masses including the *harijan-girijan* millions hungering for a humane deal after feudal colonial history's long night.

Granville Austin(2) quotes profusely from the Constituent Assem-
H bly proceedings to prove the goal of the Indian Constitution to be

(1) The Politics of the Judiciary, p. 193.
(2) The Indian Constitution—Cornerstone of a Nation, Granville Austin.

social revolution. Radhakrishnan, representing the broad consensus, said that(1) A

> India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about 'a fundamental change in the structure of Indian society'. B

The Cultural Core of the Constitutional Protection :

Let us get some glimpses of history to get a hang of the problem. 'In thy book record their groans' may be the right quote to begin with. We cannot blink at the agony of the depressed classes over the centuries condemned by all social reformers as rank irreligion and social injustice. Swami Vivekananda, for instance, stung by glaring social injustice, argued(2) : C

> The same power is in every man, to the one manifesting more, the other less. Where is the claim to privilege. All knowledge is in every soul, even in the most ignorant, he has not manifested it, but, perhaps he has not had the opportunity the environments were not, perhaps, suitable to him. When he gets the opportunity he will manifest it. The idea that one man is born superior to another has no meaning in Vedanta; that between two nations one is superior and the other inferior has no meaning whatsoever. .... D E
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> Men will be born differentiated; some will have more power than others. We cannot stop that.... but that on account of this power to acquire wealth they should tyrannise and ride roughshod over those, who cannot acquire so much wealth, is not a part of the law, and the fight has been against that. The enjoyment of advantage over another is privilege, and throughout ages the aim of morality has been its destruction..... F
>
> Our aristocratic ancestors went on treading the common masses of our country under foot till they became helpless, till under this torment the poor, poor people nearly forgot that they were human beings. They have been compelled to be merely hewers of wood and drawers of water for centuries, so much so, that they are made to believe that they are born G

(1) Ibid p. 27. H

(2) Socio-Political Views of Vivekananda by Binoy K. Roy pp. 9, 11, 26, 30-31 and 34.

A as slaves, born as hewers of wood and drawers of water. With all our boasted education of modern times, if anybody says a kind word for them, I often find our men shrink at once from the duty of lifting them up, these poor downtrodden people. Not only so, but I also find that all sorts of most demoniacal and brutal arguments, culled from the crude B ideas of hereditary transmission, and other such gibberish from the western world are brought forward in order to brutalise and tyrannise over the poor, all the more.....

Aye, Brahmins, if the Brahmin has more aptitude for learning on the ground of heredity than the Pariah, spend no more money on the Brahmin's education, but spend all C on the Pariah. Give to the weak, for there all the gift is needed. Our poor people, these down-trodden masses of India, therefore, require to hear and to know what they really are. Aye, let every man and woman and child, without respect of caste or birth, weakness and strength, hear and D learn that behind the strong and the weak, behind the high and the low, behind everyone, there is that Infinite Soul, assuring that infinite possibility and the infinite capacity of all to become great and good. Let us proclaim to every soul—'Arise, awake and stop not till the goal is reached.' Arise, awake! Awake from the hyprotism of weakness. None E is really weak; the soul is infinite, omnipotent and omniscient. Stand up, assert yourself, proclaim the God within you, do not deny Him! Too much of inactivity, too much of weakness, too much of hypnotism has been and is upon our race..... Power will come, glory will come, goodness will come, purity will come, and everything that is excellent F will come, when this sleeping soul is roused to self-conscious activity.....

Our proletariat are doing their duty..... is there no heroism in it? Many turn out to be heroes, when they have some great task to perform. Even a coward easily G gives up his life, and the most selfish man behaves disinterestedly when there is a multitude, to cheer them on but blessed indeed is he who manifests the same unselfishness and devotion to duty in the smallest of acts, unnoticed by all—and it is you who are actually doing this, ye ever-trampled labouring classes of India! I bow to you.

H

There was the Everest presence of Mahatma Gandhi, the Father of the Nation, who staked his life for the *harijan* cause. There was Baba

Saheb Ambedkar—a *mahar* by birth and fighter to his last breath against the *himalayan* injustice to the *harijan* fellow millions stigmatised by their genetic handicap—who was the Chairman of the drafting committee of the Constituent Assembly. There was Nehru, one of the foremost architects of Free India, who stood four square between caste suppression by the upper castes and the socialist egalitarianism implicit in secular democracy.

These forces nurtured the roots of our constitutional values among which must be found the fighting faith in a casteless society, not by obliterating the label but by advancement of the backward, particularly that pathetic segment described colourlessly as Scheduled Castes and Scheduled Tribes. To recognise these poignant realities of social history and so to interpret the Constitution as to fulfil itself, not eruditely to undermine its substance through the tyranny of literality, is the task of judicial patriotism so relevant in Third World conditions to make liberation a living fact.

The learned Attorney General drew our attention to the yawning gap between the legitimate expectations of the socially depressed SC&ST and their utter under representation in the Public Services except in such mean jobs as of scavengers and sweepers where no other caste was forthcoming. Equality of opportunity would be absent so long as equalisation strategy was not put into action, and the State, stage by stage and with great care and experimental eye, took steps to secure the ends of Arts.16(1) and 16(4), read in the light of the Preambular promise of equality, fraternity and dignity, the Part IV directive of promotion of educational and economic interests of the SC&ST and the Special Chapter, especially Art. 336, devoted to better representation of the SC&ST in the services and posts in connection with the affairs of the Union and States. We could not apprehend the social dimension of the stark squalour of SC&ST by viewing Art. 16 (4) through a narrow legal aperture but only by an apercu of the broader demands of social democracy, without which the Republic would cease to be a reality to one-fifth of Indian humanity.

The final address to the Constituent Assembly by Dr. Ambedkar drives home this point, not to interpret but to illumine the scheme of the equality code and the casteless society plea :(1)

> The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy can-

(1) Keer, D. Ambedkar : Life and Mission, Popular Prakashan Bombay Second Edn. p. 412.

A not last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from B the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledg- C ing the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principles of graded inequality which means elevation of some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against D many who live in abject poverty. On the 26th January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In E our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall be continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. *We must remove this* F *contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure or political democracy which this Assembly has so laboriously built up* (emphasis added). Indeed from another angle of vision, Art. 16(4) serves to correct a gross social distortion and denial of human rights to whole groups ostracised by feudal G history. A holistic concept of human rights includes among its components socio-economic rights for, without basic conditions of social justice, survival with human dignity is an impossibility. Thus, a great socio-economic plan to uplift the *harijan-girijan* groups is a must for living equality, proclaimed by Arts. 14 to 16, to become an H active reality. It must be stated that the petitioners did not contest the need for State action to raise the lot of these backward most social sectors but objected, its widespread

erosion of the right to basic equality which belongs to the have-nots in the country. Where do we draw the line ? A

These are the disturbing issues going to the root of progressive nationalism raised by the writ petitioners and turned against them by the State, but we are not inclined or entitled to venture into the political wisdom of governmental policies *vis a vis* 'backward' community, calculus save where constitutionality, falling within the judicial jurisdiction, confronts us. We must therefore confine the forensic focus to the specific issue of profound import projected by the aggrieved petitioners whose chief attack is against being passed over, seniority and superior merit notwithstanding, in favour of alleged neophites or nitwits merely because, by birth, the latter belong to the SC&ST species, trampling underfoot, in the process, the fundamental rights of equal opportunity entrenched in Arts. 14 and 16(1) of the Constitution. B C

The dimensions of the problem, the human numbers involved and the agitational potential said to be simmering in the civil services were vividly drawn at the bar by one side. The tragic tale of die-hard decades of inequality even after Freedom, the socio-economic 'miles to go' and the constitutional 'promises to keep' (over which judges will not legally sleep) before the *dalit* brethren may break their chains and become at least distant neighbours to the less socially handicapped sector, were highlighted pragmatically, statistically, hierarchically, even desperately, by the proponents of the impugned circulars (Annexures F to O covered by Prayers I to X). These submissions serve as poignant background but the decision on the vires of the Railway Board's directives will depend on constitutional interpretation applied to Indian actualities, not to idealised abstractions or theoretical possibilities. True, the politicisation of casteism its infiltration into unsuspected human territories and the injection of caste-consciousness in schools and colleges via backward class reservation are a canker in the rose of secularism. More positive measures of levelling up by constructive strategies may be the developmental needs. But the judicial process while considering constitutional questions, must keep politics and administrative alternatives as out of bounds except to the extent economics, sociology and other disciplines bear scientifically upon the proposition demanding court pronouncement. Here the sole issue, spread out into the validity of the supposed sinful circulars (Annexures F to O covered by Prayers I to X) is whether Art. 16, in its sweep and savings, does permit State action in favour of socially and economically backward classes, especially the constitutionally favoured category called the SC & ST, to the point of liberal concessions slurring over D E F G H

A 'age', 'merit' and the like, not merely at the initial entrance gate but even at the higher promotional docks.

Whether alternative policies should have been chosen by Government or would have served better to remove the handicaps of the SC & STs, whether the advantages conferred on these classes are too B generous and overly compassionate and whether the considerable numbers of the economically destitute receive the same sympathy as social have-nots categorised as SC & ST these and other speculative maybes, are beyond the courts orbit save where Art. 16 is hit by these omissions and commissions. Nor is it the court's province to question the conscionableness or propriety of constitutional provisions which dis- C play ultra concern for members of the SC & ST. The court functions *under* the Constitution, not *over* it, interprets the Constitution, not amends it, implements its provisions, not dilutes it through personal philosophy projected as constitutional construction. Objective tuned to constitutional wavelengths is our function and if—only if—constitutional guarantees have clearly been violated will the court declare D as *non est* such governmental projects as go beyond the mandates of Part III read in harmony with Part IV. If, on a reasonable construction, the Administration's special provisions under Art. 16(4) exceed constitutional limits, it is the duty of the court to strike dead such project. Even so, while viewing the legal issues we must not forget what is elementary that law cannot go it alone but must function as a mem- E ber of the sociological ensemble of disciplines.

If one out of a few reasonably tenable constructions of the constitutional provisions *vis a vis* the impugned executive directives may sustain the latter, the court should and would refrain from using the F judicial guillotine. There is a comity of coordinate constitutional instrumentalities geared to shared constitutional goals which persuades the judicature to sustain rather than slay, save where the breach is brazen, the transgression is plain or the effective co-existence of the fundamental right and the administrative scheme is illusory. This Court has, on former occasions, upheld executive and legislative action G hovering "perilously near" but not plunging into unconstitutionality (see *In re : Kerala Education Bill* (1959 SCR 995 at 1064). It is a constant guideline which we must vigilantly remember, as we have stated earlier, that our Constitution is a dynamic document with destination social revolution. It is not anaemic nor neutral but vigorously purposeful and value-laden as they very descriptive adjectives H of our Republic proclaim. *Where ancient social injustice freezes the 'genial current of the soul'* for whole human segments *our Constitution is not non-aligned. Activist equalisation,* as a realistic strategy of

producing human equality, is not legal anathema for Arts. 14 and 16. To hold otherwise is constitutional obscurantism and legal literalism, allergic to sociologically intelligent interpretation. A

The Preamble which promises justice, liberty and equality of status and opportunity within the framework of Secular, Socialist Republic projects a holistic perspective. Art. 16 which guarantees equal opportunity for all citizens in matters of State Service inherently implies equalisation as a process towards equality but also hastens to harmonize the realistic need to jack up 'depressed' classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes Art. 16(4) for this specific purpose. In a given situation of large social categories being submerged for long, the guarantee of equality with the rest is myth, not reality, unless it is combined with affirmative State action for equalisation geared to promotion of eventual equality. Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Art. 16(1). The prescription of Art. 16(1) needs, in the living conditions of India, the concrete sanction of Art. 16(4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung. To bury this truth is to sloganise Art. 16(1) and sacrifice the facts of life. B C D

This is not mere harmonious statutory construction of Art. 16(1) and (4) but insightful perception of our constitutional culture, reflecting the current of resurgent India bent on making, out of a sick and stratified society of inequality and poverty, a brave new Bharat. If freedom, justice and equal opportunity to unfold one's own personality, belong alike to *bhangi* and *brahmin*, prince and pauper, if the *panchama* proletariat is to *feel* the social transformation Art. 16(4) promises, the State must apply equalising techniques which will enlarge their opportunities and thereby progressively diminish the need for props. 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 everwidening and everlasting operation of an exception [Art. 16(4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its *raison de'etre;* to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Art. 16(1), to costeify 'reservation' even beyond the dismal groups of backward-most people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, *ipso facto,* is not class in a secular State. E F G H

A The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the *pariah,* the *mlecha,* the bonded labour, the hungry, hard-working half-slave, whose liberation was integral to our Independence. To interpret the Constitution rightly we must understand the people for whom it is B made—the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities. This synthesis of ends and means, of life's maladies and law's remedies is a part of the know-how of constitutional interpretation if alienation from the people were not to afflict the justicing process.(1)

C A statute rarely stands alone. Back of Minerva was the brain of Jove, and behind Venus was the spume of the ocean.

These broader observations are necessary to set our sights right, to appreciate that our Constitution lays the gravestone on the old unjust order and the cornerstone of the new humane order. This constiD tutional consciousness is basic to interpretative wisdom. We may now start with the facts of the case and spell out the particular problems demanding our consideration. Constitutional questions cannot be viewed *in vacuuo* but must be answered in the social milieu which gives it living meaning. After all, the world of facts enlivens the world of words. And logomachy is not law but a fatal, though fasciE nating, futility if alienated from the facts of life. So, before pronouncing on the legality of the impugned ten orders we must sketch the social setting in which they were issued and the socio-economic facts which clothe Art. 16(4) with flesh and blood.

F 'The wisest in council, the ablest in debate and the most agreeable companion in the commerce of human life, is that man who has assimilated to his understanding the greatest number of facts.'(2)

The facts

The Indian Railways, with an impressive record of expansion, G employs colossal numbers of servants in various typically hierarchical classes and grades. While the Indian Railways Act, 1890, substantially regulates many of the functions of the railway administration in India, the Railway Board is constituted under the Indian Railway Board Act, 1905, with a view more effectively to control the administration of railways. The Central Government is statutorily empowered

H (1) J. Landis, "A Note on Statutory Interpretation," 43 Harv. L. R. 886, 891 (1930).

(2) Edmund Burke.

to invest the Railway Board with all or any of the powers and functions of the Central Government under the Indian Railways Act, 1890. Power is also given by s. 2 to vest in the Railway Board the capacity to make general rules for railways administered by the Government. Of course, the investment of powers upon the Railway Board is, broadly speaking, subject to the condition that the Central Government retains the ultimate authority in all matters connected with the Railway Administration. The Ministry of Home Affairs, in the Government of India, deals usually with all matters of personnel, conditions of service of the Central Government staff and the like. Policy decisions regarding matters covered by Art. 16(4) apparently originate from the Ministry of Home Affairs and emanate to the various institutions like the Railway Board which responsively implement them. In the present case, ten directives were issued by the Railway Board on different occasions, which disclosed 'benign discrimination' in favour of Scheduled Castes and Scheduled Tribes and are challenged by the petitioners as 'reverse discrimination', if we may use that expression popularised in American legalese. These directives were designed to protect and promote the interests of members of the SC & ST in the matter of their employment under the Indian Railway Administration and they specially related to the softer criteria for promotion. The Railway Board acted, as is discernible from the relevant orders, in obedience to the policy decisions of the Ministry of Home Affairs. Some argument was addressed on the validity of the Railway Board's orders on procedural and other technical grounds. We see no substance in them. The Board was bound to carry out the Central Government's directives under Art. 16(4) and did it. The broader issue of 'benign discrimination' deserves close study.

The meat of the matter, to put it that way, is the gross discrimination *alleged* to be implicit in the several Circulars of the Railway Board and the non-applicability of Art. 16(4) to save these circulars. The focus of this litigation must primarily turn on that issue and the court must navigate towards egalitarian justice at the level of promotion posts in the public services, keeping the land-mark rulings of this Court as mariner's compass. The disturbing perpetuation of socio-economic suppression of a whole fifth of Indian manhood—the *dalits*—and the righteous resistence to prolonged 'reverse casteism' resulting in deepening demoralisation of the economically oppressed—the *soshits*—have been projected by counsel on the forensic screen as a conflict between equalisation and equality. Our founding fathers, familiar with social dialectics and socialist enlightenment, surely would have intended to bring both these have-not categories together as a

A broad brotherhood against the die-hard Establishment and would never have contemplated a fratricidal strategy which would blind and divide brothers in distress—the *dalits* and the *soshits*—and harm the integration of the nation and its developmental march. Unless by dialectical approach sociologists lay bare this false dilema of *dalits versus soshits,* the growing distrust in democracy will deepen, the jurisprudence of constitutional revolution and egalitarian justice will fade in the books and the founding hopes of January 26, 1950, will sour into cynical dupes of the masses, decades after! Wider perspectives must, therefore, inform our study of the equality code (Arts. 14 to 16) to rid it of social contradictions and read into it the need for a *dalit-soshit* partnership in demanding social justice. Felix Frankfurter set the judicial function when he said : (1)

> A Judge should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of the imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.

Be that as it may, the court must go to the constitutional basics for guidance, decode the articles indifferent to agitational portents and ideological speculations, but responsive to the urgent implementation of Art. 38 into the reality of Indian life. Article 38 reads :

> 38(1). The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life.
>
> (2) The State shall in particular, strive to *minimise the inequalities* in income, and endeavour to eliminate inequalities *in status, facilities and opportunities,* not only amongst individuals *but also amongst groups of people* residing in different areas or engaged in different vocations.
>
> (emphasis added)

(1) Felix Frankfurter : Address ; N. Y. Times Magazine, November 28, 1954.

The learned Attorney General, while emphasising the egalitarian commitment of the Constitution over the whole range of public services throughout their career, defended the impugned orders by law and logic, pragmatics and statistics, and countered the hypotheticals of the petitioners by the actuals furnished by official facts and figures. He also relied on a few precedents, in particular, *Rangachari's case*(1) and *Thomas's case*(2) both of which bind this Bench. He also sought to explain away the effect of *Balaji's case*(3) and *Devadason's case*(4) on which the other side had heavily relied to nullify some of the circulars.

The Union of India placed before us its case that notwithstanding measures for bringing the gap in the matter of gross under-representation in the Administration, no adequate improvement had been registered and, and so, more dynamic State action, to fulfil its constitutional tryst with the frustrated fifth of the people described as SC & ST, became necessitous. The raw reality of meagre *harijan* and *girijan* presence in the public services conscientised the Administration into taking a series of cautions steps to catalyse the prospects of these categories entering the many Departments of Government *not merely at the initial stage* but also at promotional points and in appointments to supervisory posts so as to become members of the higher echelons. The learned Attorney General contended that such affirmative action, slurring over fanatical and finical insistence on so-called merit and seniority, was in conformity with Art. 16(1) itself and, in any case, was protected by Art. 16(4). Maybe, the human numbers outside the SC & ST honestly suffer some meyhem in their career especially at the higher notches of promotion after long stagnation and are bitter that the *shudra* or *panchama* steals a march over him *now*, although the poignant pages of earlier history have been a negation of personhood *then* for millions of the dregs of society, desperately driving Dr. Ambedkar to vow "I shall not die a Hindu". But the synthesis of Art. 16, not the antithesis between Art. 16(1) and Art. 16(4), gives the clue to creative constitutional construction.

The learned Attorney General's plea was that in a society of chronic inequality and scarcity of employment, actual equality could never be midwifed without birth pangs, and discriminatory unconstitutionality could not vitiate programmes meant to achieve real-life

(1) General Manager, Southern Railway v. Rangachari [1962] 2 SCR 586.

(2) Kerala v. Thomas [1976] 1 SCR 906.

(3) Balaji v. State of Mysore [1963] Supp. 1 SCR 439.

(4) Devadasan v. Union of India 1964 SC 181.

A equality, unless we took a pragmatic view. This approach is permissible if we follow Chief Justice Warren : (1)

> Our judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and of formB lessness on the other. Our system faces no theoretical dilemma but a single continuous problem : how to apply to ever-changing conditions the never-changing principles of freedom.

Let us draw the precise battle lines to contain the constitutional conflict within the actual limits. Equality of opportunity in matters of C State employment is a constitutional guarantee and no citizen can be discriminated against on the score only of sex, caste, descent, place of birth or residence. So, one point pressed before us is that Scheduled Castes cannot be a favoured class in the public services because they are 'castes' and cannot claim preference *qua* castes unless specially saved by Art. 16(4). And Art. 16(4) speaks of class, not caste and D the two are different, however, politically convenient the confusion may be. Another vital contention put forward by counsel for the petitioners was that Art. 16(4) could not apply to promotional levels. A third basic plea was that efficiency of administration was a constitutional consideration under Art. 335 and could not be a sacrificial E goat to propitiate the backward class *Kali*. The impugned circulars offended against efficiency, both by fomenting frustration among the Civil Services indirectly producing inefficiency and by manning higher posts which demand higher skills with men of lower competitive calibre and less experience in service thus posting 'efficiency risks' in strategic positions violating Art. 335.

F The contentious issue is now clear. Are SC & ST mere castes within the sense of Art. 16(2) ? If so, can Art. 16(4) help these castes through rule of *promotional* partiality ? And, in any case, can Art. 16(4) rescue rules of benign discrimination if the impact thereof is generation of gross inefficiency in administration ? Is not economic 'have notism' a better yardstick of backwardness in secular India ?

G A brief resume of the structure of the Railway Services may help understand the rival arguments in their precise setting. The pyramid begins, at the base, with Class IV posts and rises to the apex, by stages, through Class III, Class II and Class I. True to our hierarchical culture, pervasive in Indian Services, there are further sub-divisions, H consisting of many categories in each class and many grades in each category. The agencies for recruitment are the Union Public Service

(1) Earl Warren : Fortune, November 1955.

Commission, the Railway Service Commission and the top officers authorised by the Railway Board in this behalf. Ordinarily the first entry into each category is filled by direct recruitment, if we may use language loosely. Thereafter, appointments to higher grades/categories are usually by promotion. The promotional processes are traditionally two-fold, viz., (a) by departmental selection based on merit-cum-seniority, and (b) by escalation, in the order of seniority, from the lower to the higher grade/category, subject, of course to being weeded out if found unfit. Candidates belonging to SC&ST receive certain pronounced advantages both at the stage of initial recruitment and later at the promotion stage. The Indian Railway Establishment Manual a compendious collection of rules and directions bearing on the conditions of employment of railway personnel, sets out all the information. Speaking population-wise and in approximate terms, the Scheduled Castes constitute about 15% and the Scheduled Tribes 7½%. Broadly based on the ratio of the strength of SC&ST to the whole population, the Railway Administration provided for reservation for candidates belonging to the SC&ST. This percentage of reservation applied to Class IV, Class III, Class II and, in a limited way, to Class I posts. The reservation is worked out by the method known as 40-point roster. These special provisions notwithstanding the intake of these communities, stagnating at the bottom of the Indian policy, continued to be chronically niggardly. To increase the rate of absorption of SC&ST into the services, further facilities, concessions and relaxations were offered from time to time. Despite these seemingly attractive employment opportunities the dismal backwardness in the matter of representation in administration from among the SC&ST was such that the vacancies reserved for them remained, in many cases, unfilled by SC &ST candidates. Lest the overall representation of the members of the SC&ST should continue deplorably negligible Government adopted a policy of "carry forward", for upto three recruitment years, of reserved vacancies if enough number of candidates from the said groups did not get selected. The "carry forward" rule was calculated to keep open reserved vacancies for at least three years so that the under representation could be made up at least in part. Homogenisation of the *dalits* into the national mainstream was regarded as vital to our democracy by the State and these positive strategies of special opportunities *vis a vis* SC&ST had, as its *raison d'etre,* only the imperative need to exercise the haunting spectre of the socially and economically suppressed species and to abolish the utter squalour of SC& ST so that the community at large could march ahead without haggard groups dragging their feet. Social conscience considers balanced democratic development as the humane justification for selective discrimination.

A B C D E F G H

A With this backdrop, we may epitomise the ten 'tainted' directives and scan them for their unconstitutionality.

Special provisions for depressed classes and even other *castes* have a pre-constitution history. After the Constitution was enacted the legality of old rules based on caste became moot and the Central B Government revised its policy. The post-Constitution re-incarnation of the communal G.O. concentrated not on caste orientation but on elimination of socio-economic suppression and the diverse ways to achieve this objective.

C We must remember, in this context, not merely the four classes of Service but also the broad division of the staff into selection and non-selection posts. The first policy statement of the Union of India on the issue of better representation of SC&ST in Government Service begins with Resolution No. 42/21/49-NG 8 of September 13, 1950. To understand the functional compulsions, purpose, orientation and D constitutional parameters relevant to such a policy formulation we have to refer to a few articles of the Constitution.

Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. E Nevertheless, our founding fathers were realists, and so did not declare the proposition of equality in its bald universality but subjected it to certain special provisions, not contradicting the soul of equality, but adapting that never changing principle to the ever-changing social milieu. That is how Arts. 15(4) and 16(4) have to be read together with Arts. 15(1) and 16(1). The first sub-article F speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination. Article 16(4) imparts to the seemingly static equality embedded in Art. 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Art. 16(1) or as an exception to it. The same G observation will hold good for the sub-articles of Art. 15. Thus we have a constitutional fundamental guarantee in Arts. 14 to 16; but it is a notorious fact of our cultural heritage that the Scheduled Castes and the Scheduled Tribes have been in unfree Indian nearly dehumanised, and a facet of the struggle for Freedom has been the restoration of full personhood to them together with the right to share in the social H and economic development of the country. Article 46 is a Directive Principle contained in Part IV. Every Directive Principle is fundamental in the governance of the country and it shall be the duty of

the State to apply that principle in making law. Article 46, in emphatic terms, obligates the State. A

> "to promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the *Scheduled Castes and the Scheduled Tribes,* and shall protect them from social injustice and all forms of exploitation. B

Reading Art. 46 together with Art. 16(4) the luscent intent of the Constitution-framers emerges that the exploited lot of the *harijan-girijan* groups in the past shall be extirpated with special care by the State. The inferrence is obvious that administrative participation by SC&ST shall be promoted with special care by the State. Of course C reservations under Art. 16(4) and promotional strategies envisaged by Art. 46 may be important but shall not run berserk and imperil administrative efficiency in the name of concessions to backward classes. Article 335 enters a caveat in this behalf :

> 335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. D

The positive accent of this Article is that the claims of SC&ST to E equalisation of representation in services under the State, having regard to their sunken social status and impotence in the power system, shall be taken into consideration. The negative element, which is part of the Article, is that measures taken by the State, pursuant to the mandate of Arts. 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration". F

Within this broad constitutional framework the Central Government worked out its policy, way back in 1950, and made subsequent alterations in keeping with the needs of the situation, the poor progress registered, the militant impatience of the affected SC&ST and the improved tactics to hasten abolition of the depressed status of these G groups by effective equalisation with the rest.

Even here, it may be noticed that the Constitution has given a special position for the Scheduled Castes and the Scheduled Tribes.

Article 341 makes it clear that a 'Scheduled Caste' need not be a 'caste' in the conventional sense and, therefore, may not be a caste H within the meaning of Arts. 15(2) or 16(2). Scheduled Castes become such only if the President specifies any castes, races or tribes or

A *parts* or *groups within castes, races or tribes* for the purpose of the Constitution. So, a group or a section of a group, which need not be a caste and may even be a hotch-potch of many castes or tribes or even races, may still be a Scheduled Caste under Art. 341. Likewise, races or tribal communities or parts thereof or part or parts of groups B within them may still be Scheduled Tribes (Art. 342) for the purpose of the Constitution. Under this definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be. It is the socio-economic backwardness of a social bracket, not mere birth in a caste, that is decisive. Conceptual errors creep in when traditional obsessions obsfuscate the vision.

C This aspect has been referred to in the *State of Kerala* v. *N. M. Thomas* by me, and dealt with at more length by Ray, C.J.:(1)

> Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste. In *Bhaiyalal* v. *Harikishan Singh and Ors.*(2) this Court held that an enquiry D whether the appellant there belonged to the Dohar caste which was not recognised as a Scheduled Caste and his declaration that he belonged to the Chamar caste which was a Scheduled Caste could not be permitted because of the provisions contained in Article 341. No Court can come to a finding that any Caste or any tribe is a Scheduled Caste or Sche- E duled Tribe. Scheduled Caste is a caste as notified under Article 366(25). A notification is issued by the President under Article 361 as a result of an elaborate enquiry. The object of Article 341 is to provide protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer. F

The President notifies Scheduled Castes not with reference to any caste characteristics but their abysmal backwardness, as is evident from the scheme of Part XVI. He appoints, under Art. 338, a Special Officer whose duty is to investigate into all matters relating to safe- G guards for the SC&ST. The Constitution provides not merely for adequate representation of SC&ST to services and posts under the Union and States, but also provides for reservation of seats for SC&ST in the Legislatures. The cursory study of the Articles relating to the status and safeguards of SC&ST puts it beyond doubt that the founding fathers have assigned to them a special place and shown towards them H special concern and charged the State with special mandates to redeem

(1) [1976] 1 SCR 906 at 932.
(2) [1965] 2 SCR 877.

these handicapped human sectors from their grossly retarded situation. Indeed, they are not merely backward, but are the backwardmost and cannot be equated with just any other caste in the Hindu fold. It is, therefore, problematic whether Art. 16(2) when it refers to equality among castes deals with the Scheduled Castes which, as shown above, may even be made of a plurality of castes or groups or races and may vary from State to State. Also, a caste, subjected *qua* caste, to the most humiliating handicaps may be a backward class although the Court will hesitate to equate caste with class except where the degree of dismalness is dreadful. The relevance of this point will be clear when we deal with the legal submissions of counsel.

We will now state, in an abbreviated form, the various measures of the Railway Board (in response to decisions of the Ministry of Home Affairs) for reservation in services of SC&ST.

After noting the policy of communal representation in the Services before the Constitution and the constitutional ban on discrimination by way of reservation on the ground of caste save in the case of SC& ST (and in some cases Anglo-Indians with whom we are unconcerned here) the Home Ministry proceeded to spell out the new stance :

> Pending the determination of the figures of population at the Census of 1951 the Government of India have decided to make the following reservations in recruitment to posts and services under them :
>
> (a) Scheduled Castes :—The existing reservation of 12½% of vacancies filled by direct recruitment in favour of the Scheduled Castes will continue in the case of recruitment of posts and services made, on an all-India basis by open competition, i.e. through the Union Public Service Commission or by means of open competitive test held by any other authority. Where recruitment is made otherwise than by open competition the reservation for Scheduled Castes will be 16-2/3 as at present.
>
> (b) Scheduled Tribes :—Both in recruitment by open competition and in recruitment made otherwise than by open competition there will be a reservation in favour of members of Scheduled Tribes of 5% of the vacancies filled by direct recruitment.
>
> .....Under the Constitution all citizens of India are eligible for consideration for appointment to posts and services under the Central Government irrespective of their

A domicile or place of birth and there can be no recruitment to any Central Service which is confined by rule to the inhabitants of any specified area. In practice however recruitment to class I and II services and posts is likely to attract candidates from all over India and will be on a truly all-India basis, while for the majority of Class III services & posts which are filled otherwise than through the Union Public Service Commission only those residing in the area or locality in which the Office is located are likely to apply. In the latter class of cases the percentages of reservations for Scheduled Castes and Scheduled Tribes will be fixed by Government taking into account the population of the Scheduled Castes and Scheduled Tribes in that area.

Reservations were excluded for promotions and minimum qualifications were a 'must'. But age relaxation by 3 years (from the maximum fixed for others) was allowed. This policy is not challenged as unconstitutional and rightly so.

However, this special provision showed only minimal concessions to SC&ST, being the first cautious, conservative, post-constitutional measure under Art. 16(4). But law *is* what law *does*. Did this reluctant relaxation only on a few grounds work? Constant monitoring of law-in-action, with an eye on the end result, is social engineering. The goal here was to awaken the sleeping soul and harness the *harijan* resource by mainstreaming techniques constitutionally sanctioned. The policy proved non-viable and a change of strategy was called for and by *Annexure D* the Railway Board altered the rules *"with a view to securing increased representation of Scheduled Castes and Scheduled Tribes in the Railway Services"*. At the instance of the Home Ministry the Railway Board decided on 5-10-1955 that more realistic relaxations were needed and authorised recruiting bodies to slur over low places obtained by the SC&ST candidates :

> .....except where such authority considers that the minimum standard necessary for the maintenance of efficiency of the administration has not been reached. Whenever candidates are selected in this manner, the appointing authorities will make necessary arrangements to give additional training and coaching to the recruits so that they might come up to the standard of other recruits appointed along with them.

The anxiety to level up the lowly human layers by special training so as to maintain administrative efficiency is evident in this directive.

Likewise, where direct recruitment, otherwise than by examination was provided for, taking of SC&ST candidates

> '.....fulfilling a lower standard of suitability than from other communities, was permitted so long as the candidates have the prescribed minimum education and technical qualifications and the appointing authorities are satisfied that the lowering of standards will not unduly affect the maintenance of the efficiency of administration.'

Here again, obsession with 'efficiency' is manifest. Then comes what is called the 'carry forward' rule :

> (3)(a) if a sufficient number of candidates considered suitable by the recruiting authorities, are not available for the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course, and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year.
>
> * * * *
>
> (b) In the event of suitable Scheduled Caste candidate not being available, a Scheduled Tribe candidate can be appointed in the subsequent reserved vacancy and *vice versa* subject to adjustment in the subsequent points of the roster.

The quota for two years, if carried forward, would not materially affect the stream of 'merit-worthy' candidates, nor substantially diminish the prospects of non-SC&ST candidates in a given year. So the Railway Board introduced the principle consistently with Art. 335.

Government moved further because real power could be shared by the weakest sections only if the doors of the higher decks were pened to them. The higher echelons are the real controllerates, not the menial levels, hierarchically structured as our society is. Obviously, Art. 16 (4) was not designed to get more *harijans* into Government as scavengers and sweepers but as 'officers' and 'bosses', so that administrative power may become the common property of the high and low, homogenised and integrated into one community. Social stratification,

A the bane of the caste system, could be undone and vertical mobility won not by hortative exercises but by experience of *shared* power.

Viewed thus, the 'open sesame' strategy for entry into superior cadres could only be by extending concessions at higher levels of 'promotions'. Annexure D did not make reservations for SC&ST for pro-
B motion posts, but merely asked for *sympathy* on the part of promoting authorities. Lachrymal exercises, even in government directives, are in practice, little more than skin-deep; and elitist alibis, when the ancient anguish of the lowliest & the lost besieges the citadels of the *status quo,* readily checkmate ameliorative moves. The *harijan* lot, in administrative services at the promotional levels, remained a paper hope, a
C teasing illusion and a promise of unreality. Article 46, whether we like it or not, ordains that the State shall *'with special care'* promote the interests of the SC&ST. And so long as the *harijan-girijan* remained an alien to the Civil Service and the janitors for the higher chambers of Administration were themselves non-*harijan-girijan* gentlemen, he would be a naive sociologist who thought that mere plea for more
D sympathy made in official orders would work magic. Government, on a performance audit of its policy of 'no reservation' for promotion posts, discovered that the *harijan* could hardly reach higher positions. More effective methods were needed.

A radical change in policy was effected by the Railway Board
E through *Annexure F* of April 27, 1959. 'Merit', sanctified by tradition, lost the battle. 'Tradition is a great retarding force, the *vis inertiae* of history;' and so, heroic measures of progressive thrust, the Railway Board realised, alone could effect the break-through and bring the *harijan-girijan* groups into the higher brackets of Administration. *Annexure F* was promulgated providing for reservation in promotions.
F This has been challenged before us.

The tepid provision opening up promotion posts for 'reserved' categories was first confined to Class III and Class II, Class I being too sacrosanct to be soiled by meritless members. *Annexure F* reads :

G Sub : Reservation for members of Scheduled Castes and Scheduled Tribes in posts filled by promotion in Railways.

Reference is invited to Board's letter No. E55CMI/3 dated 5-10-55. The Railway Board have, in partial modi-
H fication of para IV of the above letter, decided as follows :—

(a) *Promotion from Class IV to Class III and from Class III to Class II.*

> The Railway Board have decided that promotions from Class IV to Class III and from Class III to Class II service are of the nature of direct recruitment and the prescribed quota of reservation for Scheduled Castes and Scheduled Tribes should be provided as in direct recruitment. The field of eligibility in the case of Scheduled Castes and Scheduled Tribes candidates should be four times the number of posts reserved without any condition of qualifying period of service in their case, subject to the condition that such consideration should not normally extend to staff beyond two grades immediately below the grade for which the selection is held.

This reservation was confined to *'selection posts'* and the circular was explicit that "there will be no quota for Scheduled Castes and Scheduled Tribes candidates in respect of promotion to "non-selection" posts. For "general posts" of certain types in Class III, it was laid down :

> (c) *"General Posts" in Class III.*
>
> There are certain other types of posts on Railways such as Passenger Guides, Welfare Inspectors, Safety Inspectors Platform Inspectors, Publicity Inspectors, Vigilance Inspectors, etc., which are ex-cadre posts filled by drawing staff from more than one branch. Filling of these posts is in the nature of direct recruitment and the reservation for Scheduled Castes and Scheduled Tribes as applicable to direct recruitment should be applied."

More chances to pass tests, additional training and coaching to raise the standard of the sub-standard were also provided for in the Board's order. Homage was thus paid to the 'administrative efficiency' component of Art. 335.

This departure regarding reservation at the promotion tier for selection posts was challenged before this Court but upheld in *Rangachari's case.*(1) We will dwell at some length on that ruling later but we may merely mention than an appeal was made to us by counsel for the petitioners that we should reconsider, by reference to a larger bench, the ratio of *Rangachari* which has been approvingly referred to for nearly two decades by this Court, acted upon by Government throughout and enjoys, if we may say so with great respect, our full concurrence. Constitutional propositions on which a whole nation directs its destiny are not like Olympic records to be

(1) The General Manager, Southern Railway v. Rangachari [1962] 2 SCR 586.

periodically challenge and broken by fresh exercises in excellence but solemn sanctions, with judicial seal set thereon, for the country to navigate towards the haven of human development for everyone. To play cross-word puzzle with constitutional construction is to profane it, unless, of course, a serious set-back to the progress of human rights or surprise reversal of constitutional fundamentals has happened. We find the question discussed, decided and consistently followed since *Rangachari* and see no reason to open the Pandora's box. So it was that we rejected the plea for reconsideration.

Even so, the alternative method of containing Art. 16(4) within the contours of *Rangachari* was open to counsel and that has been done in argument as will be evident from the discussion on the vires of the subsequent orders of the Board. All the fire was turned by petitioners' counsel on promotion 'excesses' through Railway Board circulars. *Annexure H* of August 27, 1979 is one such :

Annexure H

> The Railway Board have now revised their policy in regard to reservation and other concessions to Scheduled Castes and Scheduled Tribes in posts filled by promotion....
>
> The particular concessions are concretised thus :
>
> (B) Promotion by selection method (i) Class II appointments :
>
> In promotion by selection from Class III to Class II, as a measure of improving representation of Scheduled Castes/ Scheduled Tribes, it has now been decided that, if they are within the zone of eligibility the Scheduled Caste and Scheduled Tribe employees will be given, by the Selection/Departmental promotion Committee, one grading higher than the grading otherwise assignable to them on the basis of their record of service i.e. if any Scheduled Caste or Scheduled Tribe employee has been categorised by the Committee, on the basis of his record of service as "Good", he should be recategorised by the Committee as "Very Good". Likewise, if any Scheduled Caste or Scheduled Tribe employee is grades as "Very Good" on the basis of his record of service, he will be recategorised by the Committee as "Outstanding". Of course, if any Scheduled Caste or Scheduled Tribe employee has already been categorised by the Committee as "Outstanding" on the basis of his record of service, no recategorisation will be needed in his case. This recategorisation will then

form the basis of allotment of marks in respect of 'Record of service'. A

The above concession would be confined to only 25 per cent of the total number of vacancies in a particular grade or post filled in a year.

In the matter of selection to Class III and Class IV posts the concession runs thus : B

There will be reservation of 12½ per cent and 5 per cent of the vacancies for Scheduled Castes and Scheduled Tribes respectively in promotions made by selection in or to Class III and Class IV posts, in grades or services in which the element of direct recruitment, if any, does not exceed 50 per cent. Promotion against reserved vacancies will continue to be subject to the candidates satisfying the prescribed minimum qualifications and standards of fitness. C

II. It has also been decided that in respect of promotions to selection posts in Class III where safety aspect is not involved, the qualifying marks under "Professional ability" in respect of Scheduled Caste and Scheduled Tribe candidates should be 25 out of 50 instead of 30 out of 50 as applicable to the candidates belonging to the unreserved groups. Similarly, qualifying marks in aggregate in respect of Scheduled Castes and Scheduled Tribes should be 50 out of 100 instead of 60 out of 100 for others. D E

It must be noticed that while grading has been modified and qualifying marks reduced as indicated above, for SC&ST, care has also been taken to exclude from these concessions, posts which involve "safety aspects" and not to relax prescribed minima of qualifications and standards of fitness. Article 335 has been honoured, making a margin on merit inevitable when choosing the second best. F

The next Order assailed by counsel is that of 20th April 1970 (Annexure I) and its highlights are revealed by relevant excerpts: G

ANNEXURE I

The policy of the Government of India in regard to reservations for Scheduled Castes and Scheduled Tribes in posts and services under the Government of India was laid down in the Ministry of Home Affairs Resolution No. 42/21/49/NGS dated 13th September, 1950 circulated with Railway Board's letter No. E47CMI/49/3 dated 23rd December, 1950. The question of revising the percentages H

A of reservation for Scheduled Castes and Scheduled Tribes in post and services under the Government of India in the light of the population of these communities as shown in the 1961 census has been under consideration of the Government for some time. It has now been decided in modification of the decisions contained in paras 2 and 4(1) of the
B Ministry of Home Affairs' Resolution dated 13th September 1950, that the following reservations will hereafter be made for the Scheduled Castes and Scheduled Tribes in posts and services which are filled by direct recruitment;

C What are they? 12½% and 5% are raised to 15% and 7½% respectively for SCs and STs, consequent on the census picture and population ratio. Likewise, in local or regional recruitments (presumably, they are inferior posts) the population ratio prevalent in the concerned States was to be the basis for reservation quota for SC&ST.

D By the same order, the "carry forward" rule was carried a little further forward by increasing it, in the absence of suitable candidates from SC&ST, from 2 to 3 years. It was also provided that the reserved vacancies, if candidates were available (and vice versa) could well be filled by them, instead of being thrown open to the general community.

E The Board's letter dated April 29, 1970 made a further change by revising the roster. Positions Nos. 1, 4, 8, 14, 17, 22, 28, 36 were to go to SC/ST candidates. The Note takes care to avoid total deprivation of changes for a particular year for general candidates when the vacancies are few :

F NOTE : If there are only two vacancies to be filled in a particular year, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved. If on this account, a reserved point is treated as unreserved the reservation may be carried forward to the
G subsequent three recruitment years.

Similar provisions, though somewhat different in detail, were made for posts filled by direct recruitment otherwise than by open competition.

A big break with the past was next made by the Board's proceedings of 11-1-1973 (Annexure K) which hurt the lower classes of
H employees whose promotion was regulated by seniority-cum-suitability (i.e., non-selection posts, according to official jargon). That directive states :

ANNEXURE K

> After car[illegible]sideration the Board have now decided that a *quota* [illegible] *and* 7½% for Scheduled Castes and Scheduled Tribes respectively *may also be* provided in *promotion to the categories and posts in Class I, II, III and IV filled on the basis of seniority-cum-suitability* provided the element of direct recruitment to those grades, if any, does not exceed 50%.
>
> The number of reserved vacancies in a recruitment year (viz., financial year on the Railways) should be determined under Board's letter No. E(SCT) 70CM15/10 dated 20-4-70.....
>
> In the case of reserved community candidates equal to the number of reserved vacancies are not found suitable for promotion even with relaxed standard, the reserved vacancies may be dereserved after following the procedure prescribed for dereservation as in the case of selection categories. The quota so dereserved will be carried forward to three subsequent recruitment years; the year in which no panel is formed is not to be taken into account for this purpose.

This order has been fiercely attached as unconstitutional. The order attached in *Rangachari's case* (supra) related to *selection posts* at the promotion level but *Annexure K* (11-1-1973) covers promotion to *non-selection posts*. The whole gamut of promotions in Classes II, III and IV areas thus comes under the reservation formula.

Annexure I extended the principle of reservation to lower ranks of Class I services (i.e. Junior Class I scale). The 'carry forward' project, calculated to ensure adequate representation by broadening the time zone to three years, was applicable to all cases of reservations in promotion posts.

One of the major broadside attacks made on the validity of the Railway Board's circulars was the serious peril to administrative efficiency, a non-negotiable value under Art. 335. The hazards to railway travel, it was urged, would so increase because of the *harijan* component and its sub-standard performance that rail-road accidents would escalate and threaten human life ! We must, by way of antidote to this caricature, notice, however, that provisions for special training and coaching where the recruit was somewhat sub-standard, was specially insisted on and this, at least partially, overcame the

A 'awesome' deficiency. No factual material to blame all the ills of the Indian Railways on the reservation policy was placed before us except a hunch in a Report to be referred to later. If harijans were excluded would railway accidents have a long holiday ? Courts are not credulity in robes !

B A comprehensive programme of balancing administrative competency with adequacy of SC&ST representation was attempted by the Railway Board in *Annexure M* which provided for in-service training for candidates who were below standard. This letter of the Board dated 31st August 1974 recalled the earlier letter of 27-4-1959 which

C provided :

> While filling the posts on promotion, however, candidates of three communities should be judged in a sympathetic manner and arrangements made where necessary to give to such staff additional training and coaching, to bring them upto the standard of others.

D

In the light of actual experience and the complex of considerations implied in Arts. 16(4), 46 and 335 the Board directed, with disturbing concern for the continued exclusion of SC&ST candidates, as follows :

E

> The matter has been further considered by the Board and it has been decided that if, during the selection proceedings it is found, that the requisite number of Scheduled Caste and Scheduled Tribe candidates are not available for being placed on the panel in spite of the various relaxations, already granted, the best among them i.e. who secure highest
>
> F marks, should be earmarked for being placed on the panel to the extent vacancies have been reserved in their favour. The panel excluding the names of such persons may also be declared provisionally. Thereafter the Scheduled Caste and Scheduled Tribe candidates who have been so earmarked may be promoted *ad hoc* for a period of six months against
>
> G the vacancies reserved for them. During the said six months period, the Administration should give them all facilities for improving their knowledge and coming upto the requisite standard, if necessary by organising special coaching classes. At the end of the six months period, a special report should be obtained on the working of these candidates and the case put up by the Department concerned to the General Manager
>
> H through SPO(RP) for a review. The continuance of the Scheduled Caste and Scheduled Tribe candidates in the

higher grades would depend upon this review. If the candidates are found to have come upto the requisite standard, their names would be included in the panel and the vacancies dereserved and filled in the usual manner by candidates from other communities.

The procedure indicated in the preceding para would also apply to promotion to the posts filled on the basis of seniority-cum-suitability, with the only difference that the Review at the end of the six months period would be carried out by the authority competent to approve the Select List.

This directive takes good care of *harijan-girijan* obtuseness, if any.

We move on to Annexure N of February 21, 1976 which relates to carrying forward of reserved vacancies remaining unfilled. We need not go into its details except to state that further facilities are offered to SC&ST promotees, on account of unsatisfactory intake as a fact.

Although on paper what might appear to be pampering concessions were offered to SC&ST candidates, the painful reality, according to the Union of India, was alarming under-representation and utter inadequacy of SC&ST personnel in the Railway Services. Arithmetical manipulations and national concessions incorporated in government proceedings did not impact on the raw life of depressed classes unless activist tactics of upgrading the competence and awareness of those human sectors were fruitfully carried out in a result-oriented manner. The Union of India and the Railway Board apparently pinned their faith on increasing the percentage hoping that thereby more harijans would be attracted. The twin reservations of 15% and 7½% for the SCs and STs to be filled by promotion in Class I, II, III and IV services, whereby seniority-cum-suitability or selection on the strength of competitive examinations, had all along been limited in such manner as *not to exceed* 50%, even on the application of the 'carry forward' formulae. Since this did not ensure fair representation, a change was contemplated by *Annexure O* :

The question of enlarging the scope of the existing scheme of reservation for Scheduled Castes and Scheduled Tribes in the aforesaid cases has been under the consideration of the Government of India for some time past and in partial modification of the instructions contained in the above letters it has now been decided that henceforth the reservations in posts filled by promotion under the existing scheme as indicated above would be applicable to all grades or services where

A the element of direct recruitment, *if any, does not exceed* 66-2/3% *as against* 50 *per cent as at present.*

What was done was to raise the maximum from 50% to 66-2/3% its vice, writ on its face—according to counsel's argument—being promotion of inefficiency along with promotion of SC&ST appointees. B The furious charges of inefficiency in Administration, injected by incompetence imported through SC&ST candidates and by frustration and demoralisation of the non-SC&ST members who were passed over by their less competent juniors, was sought to be supported by reliance on the Report of the Railway Accidents Enquiry Committee, C 1968. There was reference in it to discontent among supervisors *inter alia* on account of the procedure of reservation of posts for SC& ST. It is true that the Report has a slant against the SC&ST promotion policy notwithstanding the assurance given by the Railway Board to the Committee that instructions had been issued not to relax standards in favour of SC&ST members where safety was involved. We D need hardly say that it is straining judicial gullibility to breaking point to go that far. This is an *argumentum an absurdum* though urged by petitioners with hopeful ingenuity. Nor are we concerned with certain newspaper items and representations about frustration and stagnation. On the other hand, the plea, forcefully put forward that economic backwardness should be the touchstone of any reservation policy in a secu- E lar, socialist republic may merit better examination. Surely, extraneous factors, however passionately projected, cannot shake or shape judicial conclusions which must be founded on constitutional criteria and relevant facts only. What then is the defence of the Union to the charge of departure from equal treatment for all citizens alike? What is the principle derivable from the precedents on the points raised?

F

A technical point is taken in the counter affidavit that the 1st petitioner is an unrecognised association and that, therefore, the petitioner to that extent, is not sustainable. It has to be overruled. Whether the petitioners belong to a recognised union or not, the fact remains that a G large body of persons with a common grievance exists and they have approached this Court under Art. 32. Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions *access to justice* through 'class actions', 'public interest litigation', and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts H through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept

of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions. It must fairly be stated that the learned Attorney General has taken no objection to a non-recognised association maintaining the writ petitions.

The case of the Union of India is that Arts. 46, 335, 16(1) and 16(4) must be taken as a constitutional package and not read in isolation. In that view, the policy of reservation is geared to equalisation of opportunities for employment and, therefore, a fulfilment of Art. 16(1). Reading the two sub-articles as complementary to each other and giving a wider connotation to the expression "appointment", the learned Attorney General sought to include in its semantic circle appointments by way of promotion, deputation, transfer and on contract. On this footing, it was urged that Art. 16(4) completely protected the various directives regarding appointments by promotion. It is the case of the Government that SC&ST have all along suffered social and economic deprivation and utter under-representation in the Government service. Naturally, reservation to boost the chances of the SC&ST in Government services had to be resorted to as a pragmatic policy of levelling up. Having regard to administrative efficiency and other social factors, Government had been reviewing the position from time to time and had tailored its reservation policy to fit the needs of a given service or state of affairs. The stand of the State is that—

> ....once the Government have decided after reviewing the overall position of representation of Scheduled Castes/Scheduled Tribes in Government Services that the reservation principles should continue in certain types of appointments, the reservation of a certain number of vacancies have to be provided, irrespective of whether Scheduled Castes/Scheduled Tribes are already duly represented or not in specific cadres of the Services.

Although *Rangachari's case* covered only selection posts, the Union of India took the view that the same principle held good for non-selection posts also. In fact, if at all the prospects of SC&STs in Government Service were to be improved, it had to begin with non-selection posts. They are the lower categories where the members of the SC&ST have a chance. Provision of reservation in Class I services would be theoretically attractive to SC&STs but not so much in practice.

> ....reservation in promotional appointments made by means of seniority-cum-suitability is necessary because the

A Scheduled Castes/Scheduled Tribes who generally occupy the lower positions in the recruitment/promotional panels cannot get further promotion at all or as per the requisite percentage alongwith other employees because of their very low position in the seniority list.....

B The submission of the Central Government is that notwithstanding the extension of the principle of reservation, the presence of *harijans* and *girijans* is sparse.

....In this connection, an extract from the half yearly report of the Ministry of Railways for the period ending 31-3-1978 showing the representation of the Scheduled C Castes and Scheduled Tribes in the various Railway Services presented to the Parliament by the Government is reproduced below....

The table furnished as in 1978 shows that Scheduled Castes have in Class I around 7% representation, in Class II 9.5%, in Class III D 11.1% and even in Class IV (excluding safaiwalas) only 18%. Safaiwalas, who are menials like scavengers and sweepers, are mostly drawn from *harijans* since other communities consider such jobs *infra dig.* So, there is 83% representation of SCs among safaiwalas. This is not because of representation but because no one else is forthcoming for such 'untouchable' jobs. The Scheduled Tribes E have a more pathetic tale to tell. In Class I services they have 1% representation, in Class II, 1.8%, in Class III, 2.2% and in Class IV (excluding safaiwalas) 5.1% and even among safaiwalas only 1.5%. On the basis of these statistics the Railway Board's case is that adequacy of representation for SC&STs even according to their population (forgetting centuries of total exclusion) is a long F way off.

These official figures culled from the Reports of the Commissioner for Scheduled Castes and Scheduled Tribes are for employment in Central Govt. not confirmed to the Railways, and reveal how a square deal to SCs and STs may take centuries, observing the G current snail's pace in the intake.

Social realists will read these pessimistic figures of the last ten years which prove the myth and negate the neurotic rhetoric about the SC&ST communities having cornered all the posts in the Central Government from *Chaprasi* to Secretary, accelerating thereby the H impending calamity of administrative collapse due to the disproportionate presence of the 'inefficient' social components! A mere formula of reservation is not the factum of recruitment. That is

morbid fancy. The truth is that more aggressive policies than paper reservations are the need if equality and excellence are the creed. Reservation is but one strategy and historically has established itself. More must be done by a complex of processes by which harijans/girijans will get boosted in 'capabilities', and mainstreamed to share in the Civil Service cake. The poor annual assimilation into the public employment sector of the weakest social segments makes a tragic mockery of the statistical jugglery of harijan monopoly. Any theory or formula is best tested by how it works, not by how it is worded. Nikita Kruschev once remarked: "...a theory isolated from practice, is dead, and practice which is not illumined by ....theory is blind". The theoretical attack on over-representation flowing from the reservation rule must be tried out in practice, as the figures for the last 10 years show; and the justification for more facilities and higher percentage in public employment must be validated by the thesis of social justice. Assertions either way end in a blind alley. That is why we have been at pains to project the constitutional theory and resultant representation of SC and ST reservations under Art. 16(4).

Percentage of reservations made in favour of Scheduled Castes (SC) and Scheduled Tribes (ST).

As on	Class I		Class II		Class III		Class IV	
	SC	ST	SC	ST	SC	ST	SC	ST
1-1-70	2·36	0·40	3·84	0·37	9·27	1·47	18·09	3·59
1-1-71	2·58	0·41	4·06	0·43	9·89	1·70	18·37	3·65
1-1-72	2·99	0·50	4·13	0·44	9·77	1·72	18·61	3·82
1-1-73	3·14	0·50	4·52	0·49	10·05	1·95	18·37	3·92
1-1-74	3·25	0·57	4·59	0·49	10·33	2·13	18·53	3·84
1-1-75	3·43	0·62	4·98	0·59	10·71	2·27	18·64	3·99
1-1-76	3·46	0·68	5·41	0·74	11·31	2·51	18·75	3·93
1-1-77	4·16	0·77	6·07	0·77	11·84	2·78	19·07	4·35
1-1-78	4·50	0·85	6·44	0·88	12·22	2·86	19·13	4·66
1-1-79	4·75	0·94	7·37	1·03	12·55	3·11	19·32	5·19

The facts, in the statement we have digested from the Reports of the Commissioner for Scheduled Castes and Scheduled Tribes,

A conclusively show the long distance to travel before the SC&ST members in the civil services can be said to have had a fair or at least a proportional deal. Classes II and III for the whole of the central services have a range of 3.84% to 7.37% and 9.27% to 12.55% for Scheduled Castes and 0.37% to 1.03% and 1.47% to 3.11% for Scheduled Tribes while their eligibility is of the order of 15% and B 7½% respectively. What a grievous beeway after 33 long years may be the acid comment of the victim sector (i.e. the harijans and the girijans).

The Central Government has countered the submission of the petitioners, presented persuasively by Shri Venogopal, that reservation C compounded by the carry forward rule has ended up almost in cent per cent reservation to SC&STs (thus wholly excluding others from job opportunities). The counter-affidavit states thus :

> I do not admit that the Government is giving 100% reservation to the Scheduled Castes and Scheduled Tribes. D I submit that normally only 15% and 7½% of the vacancies by means of a roster mechanism are reserved for the Scheduled Castes and Scheduled Tribes respectively. However, in the following cases, it may look as if 100% of the available vacancies are being given to the Scheduled Castes/ Scheduled Tribes....

E Of course, based on *Rangachari* (supra) the State contends that entry even at the promotional points is constitutionally permitted and protected. The grievance that junior *harijans* steal a march over other senior members of service is exceptional rather than general, according to the Railway Board, and, in any case, is inevitable where reservation is permissible. Furthermore, the Ministry of F Railways, having regard to Art. 335 had taken special care to give training, coaching and the like, to prevent inefficiency and to promote competency of SC&ST members in service. The deponent on behalf of the Union of India has explained the position thus :

> I submit that the Ministry of Railways, in 1974 after G reviewing the position of intake of Scheduled Castes and Scheduled Tribes in groups of posts filled by promotion in Railway Services, and on the basis of a recommendation made by the Parliamentary Committee on the Welfare of Scheduled Castes and Scheduled Tribes, introduced a scheme of training of the Scheduled Castes/Scheduled H Tribes employees on the jobs of the posts to which they are to be promoted. According to this scheme, if, during selection proceedings, it is found that the Scheduled Castes/

Scheduled Tribes of requisite standards are not available for being placed on the panel, the best among them numbering to the extent of reserved vacancies i.e. who secure the highest marks, are provided with in-service training. For this purpose, such candidates are promoted on *ad hoc* basis for a period of six months to the grade of the post on the jobs of which they are to receive training. During the said six months' period, the administration give them all facilities for improving their knowledge and coming upto the requisite standard, if necessary by organising special coaching classes. At the end of six months' period, a special report is obtained on the working of such candidate which is reviewed by the General Manager or other competent authority. If, as a result of this review, they are found to have come upto the requisite standard of fitness to hold the post on regular basis, they are included in the panel and are promoted to the grade regularly. If, however, the said review reveals that such candidates, even after receiving the training on the jobs to which they are to be promoted regularly, have not come upto requisite standard of suitability, such candidates are immediately reverted to the grade from which they were given *ad hoc* promotion for the purpose of training.

A further plea is taken that temporary promotions on *ad hoc* basis are sometimes given to SC&ST members purely for short durations "for the purpose of imparting them with in-service training on the jobs of the post to which they aspire for promotion". This had to be treated as a training period rather than an unconstitutional promotion over the heads of seniors. In short, the factual submission of massive infiltration of incompetent *harijans/girijans* into the Railway Service vertically all along the line is refuted by facts and figures. Secondly, the legal contentions of the petitioners have also been contested by the Union of India (given earlier).

In this background, we may formulate the following points round which arguments have ranged and then deal with some mini-submissions and technical objections put forward before us.

(1) Does Art. 16(1) insist on absolute equality or permit realistic and rational classification of unequal classes and treatment of such classes differently?

(2) Do SC&STs stand in a different class from the rest of the Indian community?

A (3) Are SC&ST *castes,* within the scope of Art. 16(2) ? If so, does Art. 16(4) save special provisions in their favour in matters of promotion and allied matters ?

(4) Do the directives under attack impair administrative efficiency to a degree that it is violative of Art. 335 ?

B (5) Do the ten circulars reduce the fundamental right under Art. 16(1) to a husk or cipherise it altogether ?

We must state certain constitutional fundamentals and societal elementals before we make a dialectical study of the basic issues thrown up by these cases. Most of the submissions made by counC sel for petitioners cannot survive *Rangachari and Thomas* (supra) and our task is simplified by abiding by the propositions laid down therein, because these twin rulings bind us being of benches of five and seven judges. Even though we would, we could not and even though we could, we would, not depart from the holdings in these D twin land-mark cases which set the gravestone on many of the contentions.

What are the constitutional fundamentals bearing on egalite *vis a vis* backward classes, especially the SC&STs ? What are the social essentials afflicting the life-style of the SCs&STs ? What is E economic backwardness as distinct from social injustice and how does the Constitution strike the path of remedial jurisprudence harmonising the demands of both categories ?

A luminous preface to the constitutional values nullified by social realities is found in Dr. Ambedkar's address to the Constituent Assembly earlier extracted, which draws poignant attention to the life F of contradictions between the explosive social and economic inequalities and the processes of political democracy. "How long shall we continue to live this life of contradictions ? How long shall we continue to deny equality in our social and economic life?" Was the interrogation before the framers of the Constitution and they wanted to enforce the G principle of 'one man, one value'. This perspective must inform the code of equality contained in Arts. 14 to 16. Equality being a dynamic concept with flexible import this Court has read into Arts. 14 to 16 the pragmatic doctrine of classification and equal treatment to all who fall within each class. But care must be taken to see that classification is not pushed to such an extreme point as to make the H fundamental right to equality cave in and collapse. (See observations in *Triloki Nath Khosa and Ors.* v. *State of Jammu and Kashmir*(1)

(1) [1974] 1 SCR 771.

Ray, C.J. in *Kerala* v. *Thomas* (1) epitomised the position in a few passages :

> Articles 14, 15 and 16 from part of a string of constitutionally guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to be the object to be achieved.
>
> Discrimination is the essence of classification..... Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved....
>
> There is 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. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. *State of Mysore* v. *V. P. Narasinga Rao*(2). This equality of opportunity need not be confused with absolute equality.....
>
> Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class....
>
> The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.... A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. *The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.*

(1) [1976] 1 SCR 906 at 926—29.
(2) [1968] 1 SCR 407.

A The learned Chief Justice relied upon earlier decisions to substantiate this proposition. In *Triloki Nath Khosa v. State of J & K*(1) this Court had held that the State may make rules guided by realities just as the legislature "is free to recognise degrees of harm and it may confine its restrictions to those classes of cases *where the need is deemed to be the clearest.*" Thus we arrive at the constitutional truism B that the State may classify, based upon substantial differentia, groups or classes and this process does not necessarily spell violation of Arts. 14 to 16.

Therefore, in the present case if the SC&STs stand on a substantially different footing they may be classified group-wise and treated C separately since there is a Great Divide between the SC&STs on the one hand and the rest of the Indian community on the other. This is no matter of speculation or investigation because the Constitution itself has recognised the direst socio-economic backward status of these species of humanity. We may quote Ray, C.J. where he D observed : (2)

> The Constitution makes a classification of Scheduled Castes and Scheduled Tribes in numerous provisions and gives a mandate to the State to accord special or favoured treatment to them. Article 46 contains a Directive Principle of State Policy—fundamental in the governance of the country E enjoining the State to promote with special care educational and economic interests of the Scheduled Castes and Scheduled Tribes and to protect them from any special injustice and exploitation. Article 335 enjoins that the claims of the members of the Scheduled Castes and Scheduled Tribes to the services and posts in the Union and F the States shall be taken into consideration. Article 338 provides for appointment by the President of a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters relating to the safeguards provided for them under the Constitution. Article 341 enables the President by public notification to specify castes, races or G tribes which shall be deemed to be Scheduled Castes in the States and the Union Territories. Article 342 contains provision for similar notification in respect of Scheduled Tribes. Article 366(24) and (25) defines Scheduled Castes and Scheduled Tribes. The classification by the impugned rule H and the order is with a view to securing adequate representa-

(1) [1974] 1 SCR 771.
(2) [1976] 1 SCR 906 at 931.

tion to Scheduled Castes and Scheduled Tribes in the services of the State as otherwise they would stagnate in the lowest rung of the State services. A

Article 335 of the Constitution states that claims of members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in the making of appointments to the services and posts in connection with affairs of the State consistent with the maintenance of efficiency of administration. B

I had made similar observations in the same case :(1) C

The Directive Principles of State Policy, fundamental in the governance of the country, enjoin on the State the promotion *'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 protect them from social injustice'. To neglect this obligation is to play truant with Art. 46. Undoubtedly, economic interests of a group—as also social justice to it—are tied up with its place in the services under the State. Our history, unlike that of some other countries, has found a zealous pursuit of government jobs as a mark of share in State power and economic position. Moreover, the biggest—and expanding, with considerable State undertakings, employer is Government, Central and State, so much so appointments in the public services matter increasingly in the prosperity of backward segments. The Scheduled Castes and Scheduled Tribes have earned special mention in Art. 46 and *other 'weaker sections' in this context means not every 'backward class' but those dismally depressed categories comparable economically and educationally to Scheduled Castes and Scheduled Tribes.* D E F

Proceeding on this footing, the fundamental right of equality of opportunity has to be read as justifying the categorisation of SC&STs separately for the purpose of "adequate representation" in the services under the State. The object is constitutionally sanctioned in terms, as Arts. 16(4) and 46 specificate. The classification is just and reasonable. We may, however, have to test whether the means used to reach the end are reasonable and do not outrun the purposes of the classification. Thus the scope of the case is narrowed down. G H

(1) [1976] 1 SCR 906 at 974.

A Of course, apart from Art. 16(1), Art. 16(2) expressly forbids discrimination on the ground of caste and here the question arises as to whether the Scheduled Castes and Tribes are castes within the meaning of Art. 16(2). Even assuming that th re is discrimination, Art. 16(2) cannot be invoked unless it is predicated that the B Scheduled Castes are 'castes'. Te minological similarities are an illusory guide and we cannot go by verbal verisimilitude. It is very doubtful whether the expression caste will apply to Scheduled Castes. At any rate, Scheduled Tribes are identified by their tribal denomination. A tribe cannot be equated with a caste. As stated earlier, there are sufficient indications in the Constitution to suggest that the Scheduled C Castes are not mere castes. They may be something less or some thing more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group. Ray, C.J. in *Kerala* v. *Thomas* (supra) made certain observations which have been extracted earlier to make out that "Scheduled Castes and Scheduled Tribes are not a caste within the D ordinary meaning of caste". Since a contrary view is possible and has been taken by some judges a verdict need not be rested on the view that SCs are not castes. Even assuming they are, classification, if permitted, will validate the differential rules for promotion. Moreover, Art. 16(4) is an exception to Art. 16(2) also.

E The constitutional enquiry is whether the harijan/girijan fold is so sharply marked off from the rest of the Indian human family as to justify classification for considerate treatment in the field of public employment ?

F Let us be sure of the social facts. Mark Twain cynically remarked once : "Get your facts first, and then you can distort them as much as you please." By that token, let us scan the status of the SC&STs, the result of reservations in habilitating them into State services and the depressment impact on efficiency by supersession of meritorious G seniors. It is a fact of our social history and a blot on our cultural heritage that 135 million men and women, described as SC&STs, have been suffering as "suppressed classes", denied human dignity and languishing as *de facto* bonded labour. They still are, in several places, "worse than the serf and the slave" and "their social standard is lower than the social standard of ordinary human beings" H (Ambedkar). Tortured, violated and even murdered, the saga of the SC&STs is not only one of economic exploitation but of social ostracisation. Referring to the sorrows of the suppressed *shudras* (what I

prefer to call the panchama proletariat) Swami Vivekananda demanded *shudra* raj and refuted the incapabilities of the groaning untouchables :

> "Aye, Brahmins, if the Brahmin has more aptitude for learning on the ground of heredity than the Pariah, spend no more money on the Brahmin's education but spend all on the Pariah. Give to the weak, for there all the gift is needed . . . Our poor people, these downtrodden masses of India, therefore, require to hear and to know what they really are. Aye, let every man and woman and child, without respect of caste or birth, weakness and strength, hear and learn that behind the strong and the weak, behind the high and the low, behind everyone, there is that Infinite Soul, assuring that infinite possibility and the infinite capacity of all to become great and good. Let us proclaim to every soul 'Arise, awake and stop not till the goal is reached.' Arise, awake ! (1)

To make democracy functional and the republic real the social and economic personality of these backwardmost sections had to be restored. From this angle, the ancient injustice on the shudras among the *shudras* has to be liquidated by effective equalising measures. Power, material power, is the key to socio-economic salvation and the State being the nidus of power the framers of the Constitution have made provision for representation of these weaker sections both in the legislature and the executive.

More poignant is the fact that all the welfare programmes have been only on paper, not in practical life. With all the 'pampering' complained of, we find that these downtrodden millions remain at the bottom of the socio-economic scale and totter in the administrative services surviving with difficulty and securing some promotion here or there amidst a hostile milieu. If the concessions, reservations, relaxations and other partisan provisions had actually brought into the Services a considerable percentage at least commensurate with their population, maybe, the grievance voiced may ring true. But as late as 1971, a former Minister, B. S. Murthy, in his book "Depressed and Oppressed (Forever in Agony)" has given a sombre picture of the actual plight of the *harijans* of India and the figures of employment in Government Services of Scheduled Castes and Tribes as on 1-1-1970 (20 years after the Constitution) furnished by him (p. 74) are tell tale. In Classs I services percentage-wise these castes which constitute 22.5% of India's population had 0.40% in Class II, 0.40, in

(1) Socio-Political views of Vivekananda, Binoy K. Roy p. 30.

Class III, 1.47 and in Class IV, 3.41. This was socio-economic democracy in reverse gear and a callous picture of under-representation in administration as if *harijans* and *girijans* were still untouchable and unapproachable, *vis-a-vis* Services under the State. Once we realise with John Tyndall that "It is as fatal as it cowardly to blink facts because they are not to our taste", the wind is taken out of the sails of the case of the petitioners. For, in truth and actual life whatever the Railway Board's orders may say the representation of the SC&STs remains substantially below the sanctioned level although fair representation, at least in proportion to their population is what is demographically just, ignoring for the moment the neutralisation of the iniquitions past.

We must remember that Art. 14 speaks of equality before the law and Art. 16 vouchsafes equality of opportunity. The social dynamics of equality involve the strategy of equalisation in a society of stratification through casteification. One of us did observe : (1)

> "In a spacious sense, 'equal opportunity' for members of a hierarchical society makes sense only if a strategy by which the under privileged have environmental facilities for developing their full human potential. This consummation is accomplished only when the utterly depressed groups can claim a fair share in public life and economic activity, including employment under the State, or when a classless and casteless society blossoms as a result of positive State action. To help the lagging social segments, by special care, is a step towards and not against a larger and stabler equality.....
>
> It is a statistically proved social reality in India that the depressed employment position of harijans is the master problem in the battle against generations of retardation, and 'reservation' and other solutions have made no significant impact on their employment in public services. In such an unjust situation, to maintain mechanical equality is to perpetuate actual inequality. A battery of several programmes to fight down this fell backwardness must be tried out by the State."

Subba Rao, J. in *Devadasan's case*(2) brought out the need for equalisation to produce stable equality in society by a telling imagery. Although he was in a minority on one point in that case, that did not detract from the validity or force of the general observations : (3)

(1) [1976] 1 SCR 906 at 979-80 at 983.
(2) *T. Devadasan* v. *The Union of India and Anr.* [1964] 4 SCR 680.
(3) Ibid p. 700.

Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only an utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race—one is a first classrace horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise has been a force of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs.

A strikingly similar strain of justice thinking has been developed in other jurisdictions in the field of equal protection and benign discrimination by Polyvos G. Polyviou in his book "The Equal Protection of the Laws". It may be meaningful to notice the argument : (1)

"....focuses on the concepts of equal treatment and equal opportunity, professes to construe them realistically, and declares that '(t)he minority applicant does not have an opportunity "equal" to the white's because the discriminatory denial of educational, professional and cultural opportunities for generations past has severely handicapped him in any contest of early intellectual attainment'. As Professor Cox has well put the question, '(d)o we achieve

(1) The Equal protection of the laws by G. Polyviou p. 364, 361-63.

A equality by putting each individual on the same starting-line today or by giving minority applicants head-starts designed to offset the probable consequences of past discrimination and injustice against the group with which the applicant is identified ?

B The same author deals with 'reverse discrimination' in school admissions and refers to Prof. Dworkin's socio-jural defense of preferences :

> Nor should it be forgotten in this connection that, at least in terms of traditional theory, rights to equal treatment and to freedom from discrimination, as normally conceived, are personal and individual, and that '(e)qual protection is not achieved through (the) indiscriminate imposition of inequalities for the alleged benefit of groups, however disadvantaged. Benevolent quotas and reverse discrimination on this view, fatally offend fundamental notions of individualism inherrent in the notion of equality. In answer, it may be said that to regard the concept of equality simply from this (traditionally) individualistic point of view is to take an unduly restrictive view of its social function and to ignore its allegedly multifaceted character. Or, to adopt a somewhat different strategy, one may read the right to equal treatment (both the more general right to equality and the right enshrined in the constitutional guarantee of equal protection) in a particularly abstract way and formulate it in such a manner that it is not necessarily violated by the adoption of benign racial classifications. In this way, Professor Dworkin distinguishes between two 'different sorts of rights' which individuals may be said to have. The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource, and the second is the right to treatment as an equal, 'which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else'. For Dworkin it is the right to treatment as an equal that is fundamental, whilst the right to equal treatment is only derivable, and it is the former that, as a general matter, is given 'constitutional standing' by the Equal Protection Clause. In other words, white applicants for admission to Law School who may have been turned away because of the reservation of some places for members of disadvantaged minority groups cannot (in a case like the one set out above) successfully complain, the reason being that they

> do not have a right to equal treatment in the assignment of places, but they do have the right to be treated as equals, that is, with equal respect, concern and sympathy, in the making of decisions as to which admissions standards should be used. More specifically, this right is viewed by Dworkin as meaning that each candidate for admission has a right that his interests should be looked at 'as fully and sympathetically' as the interests of any others when decisions are being taken as to which of the many possible criteria for admission to elevate to the status of the pertinent ones. But if this condition is satisfied, rejected white applicants will fail in their contention that the particular admissions program was unfair and unconstitutional (even if they had been effectively excluded from consideration as a result of the adoption of racial criteria in determining the allocation of some of the available places). The simple question Dworkin would ask in these cases is whether the particular admissions program 'serves a proper policy that respects the right of all members of the community to be treated as equals, but not otherwise.

No debate is needed to uphold reservation in promotions as such. Not only has *Rangachari* sustained it in regard to selection posts, *Thomas's case* decided by a Bench of seven Judges, has expressly approved *Rangachari*. The only question bearing on reservation *vis-a-vis* promotion is as to whether it is unconstitutional if it is extended to non-selection posts while it is constitutional in regard to selection posts.

Anyway, Annexure F, one of the circulars sought to be quashed by the petitioners relates only to selection posts and has been expressly upheld in *Rangachari's* case. The quantum of reservation is not excessive; the field of eligibility is not too unreasonable, the operation of the reservation is limited to selection posts and no relaxation of qualifications is written into the circular except that candidates of the SC&ST communities "should be judged in a sympathetic manner". Moreover, administrative efficiency is secure because there is a direction "to give such staff additional training and coaching, to bring them up to the standard of others". The rejection of the invalidatory contention of the petitioners is inevitable.

Annexure H is bad for unconstitutionality according to the petitioners for many reasons. For one thing, an SC/ST employee gets one grading higher than otherwise assignable to him on the record of his service. So much so, if he is 'good' he will be categorised as 'very

A good'. This fiction or fraud in grading is said to be a vice rendering the promotional prospects unreasonable. We do not agree. Superficially viewed, this clumsy process of reclassifying ability may strike one as disingenuous. Of course, this concession is confined to only 25% of the total number of vacancies in a particular grade or post filled in a year. So there is no rampant vice of *every harijan* or *girijan* jumping B over the heads of others. More importantly, we think this is only an administrative device of showing a concession or furtherance of prospects of selection. Even as under Art. 15(4) and Art. 16(4) lesser marks are prescribed as sufficient for SC&STs or extra marks are added to give them an advantage the re-grading is one more method of boosting the chances of selection of these depressed classes. There is nothing C shady about it. If there is advancement of prospects of SC&ST by addition of marks or prescribing lesser minimum marks or by relaxing other qualifications, I see no particular outrage in re-categorisation which is but a different mode of conferring an advantage for the plain and understandable reason that SC&STs do need some extra help. It D is important to note that the prescribed minimum qualifications and standards of fitness are continued even for SC&STs under Annexure H.

The other vice pointed out against Annexure H is that the qualifying marks in respect of SC&ST candidates is somewhat less than is applicable to candidates of unreserved groups. There is no merit in this objection and no good ground exists which militates against the E constitutionality of Annexure H.

Annexure I is also unexceptionable since all that it does : is to readjust the proportion of reservation in conformity with the latest Census. Posts for which recruitment, realistically speaking, takes place on a regional basis are subjected to reservation taking into account F the percentage of SC&ST population in the concerned State. This is also reasonable. Likewise, the carry forward rule being raised from 2 years to 3 years also cannot be struck down. It must be realised that law is not an abstraction but an actual prescription in action. So what we have to be more careful about is to scrutinise whether the carry forward rule by being increased to 3 years is going to confer a monopoly G upon the SC&ST candidates and deprive others of their opportunity for appointment. From the percentage furnished by the Railway Board we find that even if we carry forward vacancies for any number of years there is no prospect, within the reasonable future, of sufficient number of SC&ST candidates turning up to fill them. There is a provision that if sufficient number of candidates from the SC&ST are not H found, applicants from the unreserved communities will be given the appointment provisionally. After 3 years those vacancies cease to be reserved. Going by the actuals it is clear that no serious infraction of

any individual's fundamental right under Art. 16(1) takes place and no monopoly is conceivably conferred on SC&ST candidates, they are not available in sufficient numbers to reach anywhere near the percentage reserved. A

Even going by the majority, *Devadasan's case*(1) lays down the proposition that under Art. 16(4) "reservation of a reasonable percentage of posts for members of the Scheduled Castes and Tribes is within the competence of the State. What the percentage ought to be must necessarily depend upon the circumstances obtaining from time to time." Madholkar, J. speaking for the majority has struck down only one restriction. "In order to effectuate the guarantee each year of recruitment will have to be 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." (emphasis added). Unlimited reservation of appointments may be impermissible because it renders Art. 16(1) nugatory. At the same time, Art. 16(4), calculated to promote social justice and expressive of the deep concern of the Constitution for the limping bracket of Indians, must be given full play. That is why the only restraint imposed by Mudholkar, J. is that an exercise of power under Art. 16(4) "does not mean that the provision made by the State should have the effect of virtually obliterating the rest of the Article, particularly clauses (1) and (2) thereof."(1) By the three-year 'carry forward' rule one is unable to see how, in practice, the total vacancies will be gobbled up by the *harijan/girijan* groups "virtually obliterating" Art. 16(1). The court has made it very clear that the problem of giving adequate representation to backward classes under Art. 16(4) is a matter for the Government to consider, bearing in mind the need for a reasonable balance between the rival claims as pointed out in *Balaji's case.*(2) B C D E F

It is true that in *Balaji's case* and *Devadasan's case*(1) 'the carry forward' rule for backward classes for exceeded 50% and was struck down. We must remember that the percentage of reservation for backward classes including SC&ST was rather high in both the cases. In *Devadasan's case* the court went into the *actuals,* not into the *hypotheticals.* This is most important. The Court actually verified the degree of deprivation of the 'equal opportunity' right and discovered :(3) G

> In the case before us 45 vacancies have *actually* been filled out of which 29 have gone to members of the Scheduled

(1) [1964] 4 SCR 680 at 695. H
(2) [1963] Supp. 1 SCR 439.
(3) Ibid at 693-94.

A Castes and Tribes on the basis of reservation permitted by the carry forward rule. This comes to about 64.4% of reservation. *Such being the result* of the operation of the carry forward rule we must, on the basis of the decision in *Balaji's case* hold that the rule is bad.

B (emphasis added)

What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right. On that footing, the petitioners have not demonstrated that in any particular year, virtually and C in actual terms of promotion, there has been a substantial excess over 50% in favour of the SC&ST promotees. Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC&ST candidates be actually appointed to substantially D more than 50% of the promotional posts. Some excess will not affect as mathematical precision is different in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule *shall not result,* in any given year, in the selection or appointments of SC&ST candidates considerably in excess of 50%, we uphold Annexure I.

E

Heated arguments about the hurt caused by Annexure 'J' have been addressed to us. It deals with the 40-point roster and the posts allotted to the SC&ST allottees. Once the fundamental premises are accepted there is nothing unreasonable or wrong in Annexures 1 and 2 to Annexure J. It is significant that with a view to prevent total exclusion of F others there is a provision that if there are only two vacancies in a given year, not more than one may be treated as reserved and if there is only one vacancy, it should be treated as unreserved. Implementation of reservations necessarily involves practical steps like evolving a roster system. Once the parameters of reservation are within the framework of the fundamental rights, minute scrutiny of every administrative G measure and hunting for unconstitutionality is not permissible.

Far more serious is the criticism of Annexure 'K' on the basis of which reservations were introduced even to promotion posts filled by the 'seniority-cum-suitability' rule. Some other relaxations and concessions also are granted under it to SC&ST candidates. But the maxi- H mum mayhem inflicted by Annexure K is in the extension of the operation of promotional reservation to non-selection posts. It was urged that *Rangachari* (*supra*) did not cover non-selection posts and, there-

fore, could not be an authority to sustain its validity. There is no force in this submission. A

The sting of the argument against reservation is that it promotes inefficiency in administration by choosing sub-standards candidates in preference to those with better mettle. Competitive skill is more relevant in higher posts, especially those where selection is made by competitive examinations. Lesser classes of posts, where promotion is secured mechanically by virtue of seniority except where the candidate is unfit, do not require a high degree of skill as in the case of selection posts. (See 1968 1 SCR p. 721 at 734). It is obvious that as between selection and non-selection posts the role of merit is functionally more relevant in the former than in the latter. And if in *Rangachari* reservation has been held valid in the case of selection posts, such reservation in non-selection posts is an *afortiori* case. If, in selecting top officers you may reserve posts for SC/ST with lesser merit, how can you rationally argue that for the posts of peons or lower division clerks reservation will spell calamity? The part that efficiency plays is far more in the case of higher posts than in the appointments to the lower posts. On this approach Annexure K is beyond reproach. B C D

One may easily sympathise with holders of non-selection posts. They are many in number in the lower stations of life. They are economically backward and burdened with the drudgery of life. That is why there is a ballyhoo raised by a larger number of people when some categories in far more distressing social situations enter the arena with preferential treatment. Looking at the problem from the point of view of law and logic and the constitutional justification under Art. 16(4) for reservation in favour of the *panchama* proletariat there is nothing to strike down in Annexure K. As between the socially, even economically depressed and the economically backward, the Constitution has emphatically cast its preference for the former. Who are we, as Judges to question the wisdom of provisions made by Government within the parameters of Art. 16(4)? The answer is obvious that the writ of the court cannot quash what is not contrary to the Constitution however tearful the consequences for those who may be adversely affected. The progressive trend must, of course, be to classify on the have-not basis but the SC/ST, category is, generally speaking, not only deplorably poor but also humiliatingly *pariah* in their lot. Maybe, some of the forward lines of the backward classes have the best of both the words and their electoral muscle *qua* caste scares away even radical parties from talking secularism to them. We are not concerned with that dubious brand. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handi- E F G H

caps, social and economic, by constructive projects. All this is in another street and we need not walk that way now.

Trite arguments about efficiency and inefficiency are a trifle phoney because, after all, at the higher levels the *harijan/girijan* appointees are a misroscopic percentage and even in the case of Classes III and II posts they are negligible. The preponderant majority coming from the unreserved communities are presumably efficient and the dilution of efficiency caused by the minimal induction of a small percentage of 'reserved' candidates cannot affect the over-all administrative efficiency significantly. Indeed, it will be gross exaggeration to visualise a collapse of the Administration because 5 to 10% of the total number of officials in the various classes happen to be sub-standard. Moreover, care has been taken to give in-service training and coaching to correct the deficiency.

It is fashionable to say—and there is, perhaps, some truth in it—that from generation to generation there is a deterioration in efficiency in all walks of life from politics to pedagogy to officialdom and other professions. Nevertheless, the world has been going forward and only parties whose personal interest is affected forecast a doom on account of progressive deficiency in efficiency. We are not impressed with the misfortune predicted about governmental personnel being manned by morons merely because a sprinkling of *harijans/girijans* happen to find their way into the Services. Their apathy and backwardness are such that in spite of these favourable provisions, the unfortunates have neither the awareness nor qualified members to take their rightful place in the Administration of the country. The malady of modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes. Nor does the specious plea that because a few harijans are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren.

We have adverted to Annexure M earlier in this judgment which shows the determination of Government to impart in-service training to those SC&ST candidates who are found to be below par. Even temporary promotions on an *ad hoc* basis are limited to six months only to give training and experience than the spoil permanently the efficiency of the system.

The Annexure has come under attack because the reservation quota has been raised thereby from 50 to 66-2/3%. We have earlier dis-

cussed this aspect and pointed out that what is important is not so much the figures mentioned on paper but the facts and circumstances in real life. We have also entered a caveat that in any particular year there shall not, as a fact, be a substantial increase upon 50% of induction of 'reserved' candidates. It is true that Shri Venugopal, counsel for some of the petitioners tried to demonstrate that on account of reservation percentages coupled with the carry forward rule it is perfectly within the realm of possibility that in some years a monopoly may be conferred on the SC&ST candidates for certain categories or classes of posts. The mystic "maybes" do not scare us. The actual "must bes" will alert us. The Constitution deals with social realities, not speculative possibilities. I have limited the physical operation of reservation in any particular year in such a manner that there will be a real opportunity for the exercise of the right under Art. 16(1) for every candidate of the unreserved communities.

Certain minor attacks such as that a candidate of the SC&ST communities who has failed may still be tried if other successful candidates from those communities are not forthcoming. This may seem strange disbelief in examinations as measure of merit. But to read stray provisions in isolation may be unfair to the scheme. Look at the desperate State in which Government is trying to give fair representation to *harijans/girijans* in Administration. These miserables suppressed by centuries of trampling are still slumbering despite inducements to awaken. It is a genetic calumny and unscientific assertion to castigate the SC&ST communities as possessed of less intellectual potential what with *Valmiki* and *Vyasa* to Baba Sahib Ambedkar. The darkening and be numbing environment of ages in which shudras and panchamas have suffered their mental powers to be chained accounts for their seeming retardation. Once brighter atmosphere and better opportunity enliven their talent their contribution to the Indian treasury will raise the human resources and democratic status of Bharat. A democracy of talent is an inarticulate major premise of our culture. The fundamental question arises as to what is "merit" and "suitability". Elitists whose sympathies with the masses have dried up are, from the standards of the Indian people, least *suitable* to run Government and least *meritorious* to handle state business, if we envision a Service State in which the millions are the consumers. A sensitized heart and a vibrant head, tuned to the tears of the people, will speedily quicken the developmental needs of the country, including its rural stretches and slum squalour. Sincere dedication and intellectual integrity—these are some of the major components of "merit" and "suitability"—not degrees from Oxford or Cambridge, Harvard or Stanford or simian, though Indian,

institutions. Unfortunately, the very orientation of our selection process is distorted and those like the candidates from the SC&ST who, from their birth, have had a traumatic understanding of the conditions of agrestic India have, in one sense, more capability than those who have lived under affluent circumstances and are callous to the human lot of the sorrowing masses. Moreover, our examination system makes memory the master of 'merit' and banishes creativity into exile. We need not enter these areas where a fundamental transformation and a radical re-orientation even in the assessment of the qualities needed by the personnel in the Administration and the socialist values to be possessed by the echelons in office is a consummation devoutly to be wished. This may have to be subjected to a national debate. The colonial hangover still clings to our selection processes with superstitious tenacity and narrower concepts of efficiency and merit are readily evolved to push out Gandhis and J.Ps, Ambedkars and Nehrus, to mention but a few who knew the heart-beats of the people. I divagate and make these observations only to debunk the exaggerated argument about *harijans* and *girijans* being sub-standard. We may put aside this angle of vision and approach the problem traditionally because *every new idea* has resistence to encounter before acceptance, every original thought has been branded a hearsy. Be that as it may, the constitutional merits of the various Board Circulars now discussed do not warrant their judicial 'execution'—subject to certain cautionary limitations already indicated.

The argument that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf.

For a comparative thought we may glance at Polyviou's 'The Equal protection of the laws' :(1)

> "A third argument traditionally employed against the use of preferential discrimination is that affirmative measures of the kind discussed here may significantly curtail efficiency. It does indeed stand to reason that the immediate result of benignity in admission and selection process will almost certainly be the selection of those who are not as competent or as able as some of those left out. 'Special admission programmes, almost by definition, operate to insure that students are placed in schools for which they are

(1) The equal protection of the laws by G. Polyviou p. 360.

not qualified! The same objection applies with equal, if not more, force to the area of employment and elsewhere. One possible answer is that the importance of efficiency must be compared with and ultimately set against the significance of integration or the prevention of discrimination, and that integration and the rectification of socially harmful deprivation are the more pressing needs. Or one can fall back on the very different arguments that traditional admission processes are unfair because these are geared to the usual type of applicant and that preferential treatment after all only seeks to counteract such inherent bias.

There is a human problem behind these writ petitions which we clearly appreciate. Most of the Classes II, III and IV employees are economically backward and struggle for survival what with price spirals and other tribulations. They hope, after years of yeomen service, to get some promotion and augment their poor resources in the afternoon of their life. Then they find another class, with which the Constitution shows ultra sympathy, elbowing them out, not on a massive scale, but minimally. Even this marginal push hurts these species living at subsistence level and so they scream. The economically backward and the socio-economically backward truly belong to the 'have-not' camp and must jointly act to bring about a transformation of the economic order by putting sufficient pressure and make Art. 38 a living reality. Estrangement between the two categories weakens the militancy of a joint operation to inject social justice in the current economic order. The truth is that the employment market is distressingly a musical chair business and when starvation faces men their sympathy for their far weaker brethren vanishes. The true solution for the country's problems, as reflected in these writ petitions, is in developmental expansion involving the millions, rather than denial to the weakest sector of Indian life the morsel to which it is justly entitled. Even Administration will do well to remember that Indian despair, after infinite patience, may augur danger unless 'the sorry scheme of things entire' is remoulded nearer to Art. 38. Even these observations are made only to emphasise that the legal content of the contentions put forward by the petitioners is less than presentable although their economic grievance may be agonisingly genuine. The Court has its limitations unlike the Administration and can give justice only *under* the Constitution and *not* over it.

The human pressure behind these writ petitions is the chronic drought of employment opportunities despite talent enough to make

A deserts bloom. So long as this scarcity persists and power goes with office, the jaundiced politics of snatching the jobs going, initially or at promotion level, by hook or crook, is the only 'development' that takes place, whatever the National Plans proclaim. The vast human potential of the *harijans* and *girijans,* on-fifth of the Indian people, goes to thistles and every communal effort to twist the politics of power for promoting chances of getting jobs becomes inevitable caste being a deeprooted pathology in our country. Thus jobbery, politics, casteism and elections make an unholy, though invisible, alliance against national development which alone can liberate Indians from social and economic privation. If democracy itself thus plays into the hands of hostile forces, the jurisprudence of keeping the backward as backward and perpetuation of discrimination as a vested caste right may prevail as a rule of life.

The remedy of 'reservations' to correct inherited imbalances must not be an overkill. Backward classes, outside the Scheduled Castes and Tribes, cannot bypass Art. 16(2) save where very substantial cultural and economic disparity stares at society. The dubious obsession 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. No sociological explanation for the flood of ruinous writ petitions regarding service conditions can be found except on this basis. Behind the writ petitions we deal with now is caste clamour to keep all the jobs safe from being 'robbed' by 'reserved' communities. It is forward caste *versus* backward caste, wearing the casteless caste-marks! And the political process is likewise caste-polluted Gunnar Myrdal writes in his Asian Drama :(1)

> The type of appeal that can be made by politicians has also changed greatly since the liberation movement. They can no longer put the blame for poverty and stagnation on colonial masters, but must explain why there is not great progress now that India is independent.....
>
> Thus a key to the understanding of the power of the political bosses is the inherited social stratification of India and, above all, its caste system. At election times the caste groups function as political vote banks whereby the ballots of their members are joined to the candidate with a party label. For this reason alone the local political bosses have a vested interest in preserving the social and economic *status quo* and exploiting it as a matrix for political action.

(1) Gunnar Myrdal, Asian Drama, Vol. I, pp.

M. N. Srinivas, the noted sociologist is more than right :(1)

> One cannot help wondering whether the drive to political maturity is, after all, a good thing in a country which has still not had a proper social revolution. It may well result in premature old age.

We need now, not stagnation wearing the mask of stability and scrambling acrimoniously over the same shrunkan cake, but progress by the constructive process of explosive rural development and exploitation of the untapped human potential of the Scheduled Castes and Scheduled Tribes. Sterile 'reservations' will not help us go ahead unless, alongside of it, we have heroic national involvement of the masses in actual action, not paper-logged plan exercises. In the last analysis, privation can be banished only by production, discontent by distributive justice and litigation by socially relevant justice. The writ petitions are, regrettably, negative, although the driving force of penury deserves sympathy. This, perhaps, is a materialist interpretation of 'service litigation' and a grim foot-note to these writ petitions.

Before I conclude, I must strike a futuristic note. Excellence and equality may cooperating fruitfully and need not compete destructively. Ultimately *harijan/girijan* militancy must find fulfilment in effective main-streaming and creative contribution. While they have miles to go, they have promises to keep. The poignant words of the Reverend Jesse Jackson come to my mind :(1)

> "I don't see how, we can survive as a people if we don't have a great push for excellence now....A lot of what we've done in the past will be in vain if we don't. We can make one of the most valid contributions to Western civilization, even more of a contribution than slavery. Because slavery was our great contribution against our will. Now it's time for us to make a great contribution as an act of will."

Given the opportunity and the environment, the Indian *dalits* can make India great and give up crutches.

The writ petitions as well as the Special Leave Petitions cannot but be dismissed.

PATHAK, J.—My brothers Krishna Iyer and Chinnappa Reddy are agreed that the writ petitions should be dismissed. They have held against the petitioners on the several contentions raised in the

(1) M. N. Srinivas, "Changing Attitudes in India Today" Yogana, October 1, 1961, p. 26.

A case. With respect, I find myself unable to agree with all that they have said.

I intend to confine myself here to certain aspects of the case which appear to possess a fundamental importance.

B Three provisions of the Constitution relate to reservations for Scheduled Castes and Scheduled Tribes. They are Art. 46, Art. 16(4) and Art. 335. The three form a single frame of reference. Art. 46, a Directive Principle of State Policy, proclaims the principle that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in par-
C ticular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. One of the modes in which the economic interests of the Scheduled Castes and Scheduled Tribes can be promoted is the reservation of appointments or posts in their favour in services under the State where they are not adequately represented. Art. 16(4) declares
D that when the State intends to make such provision nothing in Art. 16 shall prevent it from doing so. The equality of opportunity guaranteed to all citizens in matters relating to employment or appointment to any office under the State will not restrain the State from making such reservation. It is now well accepted that the "equality provisions
E of Part III of the Constitution constitute a single code, illustrating the multi-faceted character of the central concept of equality. Art. 16(4) also is one facet. It enables a backward class of citizens, by the process of reservation in Government service, to move along the road to ultimate equality with the more advanced classes. It is part of the process of equalisation. Then follows Art. 335. It provides
F that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in the making of appointments to services and posts in connection with the affairs of the Union or a State, but—and this is imperative—such consideration must be consistent with the maintenance of efficiency of administration. The paramount need is to maintain the efficiency of administration.
G That is dictated by the common good. It embraces the need of all, the national good, and not of a mere section of the people. To its primacy all else is subordinate. Therefore, whatever is done in considering the claims of the Scheduled Castes and Scheduled Tribes must be consistent with that supreme need, the maintenance of efficiency of administration. Art. 335, it must be clearly stated, does
H not contain a positive principle, the advancement of Scheduled Castes and Scheduled Tribes, and a negative principle, the maintenance of efficiency of administration. This analysis of the article does not

truly comprehend its contents. It contains a single principle, the advancement of Scheduled Castes and Scheduled Tribes, but through modes and avenues which must not detract from the maintenance of an efficient administration. That limitation is imposed as a clear and positive condition.

A generally acknowledged and long established principle for securing an efficient administration is throwing open the doors to general recruitment, either directly or by promotion, where the governing criterion is excellence and the emphasis is solely on quality. The net of selection is spread far and wide, and the competitive best are collected, regardless of religion, race, caste, sex, descent, place of birth or residence. However, a quota of the posts may be reserved in favour of a backward class of citizens, but the interests of an efficient administration require that at least half the total number of posts be kept open to attract the best of the nation's talent and not more than half be made the sum of reserved quotas. If it was otherwise, an excess of reserved quotas would convert the State service into a collective membership predominantly of backward classes. This, it is evident, will be inconsistent with the all-important goal of maintaining the efficiency of administration. In considering the proportion of reserved quotas in the context of college admissions, this Court laid down in *M. R. Balaji* v. *State of Mysore*(1) that broadly a special provision providing for reservation should be less than 50%, and how much less than 50% would depend upon the relevant prevailing circumstances in each case. And, in this connection, Gajendragadkar, J. (as he then was) speaking for the Court, observed :

> ".....when the State makes a special provision for the advancement of the weaker sections of society specified in Art. 15(4), it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; *the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which woud strike a reasonable balance between the several relevant considerations.*"
>
> (Emphasis supplied)

The Court struck down the reservation of 68% as constitutionally invalid.

(1) [1963] Supp. 1 S.C.R. 439, 470.

A The principle that reserved quotas should not together exceed 50% of the vacancies available in a year was affirmed by this Court, by a majority of four learned judges to one, in *T. Devadasan* v. *Union of India*,(1) as the reason for striking down a "carry forward" rule which, for promotions in the Central Secretariat Service, permitted a carry forward for two successive years of the annual reserved quota. B It was found in that case that observance of the rule had resulted in 65% of the vacancies of the year being filled by reserved quotas, current and carried forward. The "carry forward" rule was held constitutionally invalid on the basis that for the purpose of Art. 16(1) each year of recruitment had to be considered as a distinct unit for C applying the 50% rule. Mudholkar, J., on behalf of the majority, said :

> "We would like to emphasize that the guarantee contained in Art. 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every D occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment E or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities."

F

It seems to me that apart from the impact that an excessive reservation in a particular year is bound to have on the general community of citizens, there is the further far-reaching significance this assumes in the context of Art. 335. The maintenance of efficiency of administration is bound to be adversely affected if general candi- G dates of high merit are correspondingly excluded from recruitment because the large bulk of the vacancies, numbering anything over 50%, is allotted to the reserved quota. In view of a maximum age-limit invariably prescribed, some of such meritorious candidates may be lost to the service altogether. Viewed in that light, a maximum of 50% for reserved quotas in their totality is a rule which appears fair H and reasonable, just and equitable, and violation of which would contravene Art. 335.

(1) [1964] 4 S.C.R. 680.

(*Chinnappa Reddy, J.*)

It has been urged by the respondents that *Devadasan* (supra) is no longer good law in view of the 7-Judge decision in *State of Kerala* v. *N. M. Thomas*(1). It does appear from some of the individual judgments delivered in the latter case that although *Devadasan* (supra) has not been expressly overruled by a majority of the Bench there are observations by the majority of Judges which throw doubt on the validity of the principle enunciated by it and ultimately the Court has upheld the promotion of 34 Scheduled Caste and Scheduled Tribe candidates among the total promotion of 51 candidates. It would seem then that there is an apparent conflict between *Devadasan* (supra) and *N. M. Thomas* (supra). The validity of Rule 13AA of the Kerala State and Subordinate Service Rules, 1958 was questioned in *N. M. Thomas* (supra). That Rule permitted the exemption of Scheduled Caste and Scheduled Tribe members from passing the promotion tests for a specified period. That more than 50% of the promotions went to the Scheduled Caste and Scheduled Tribe candidates was a consequence of the operation of Rule 13AA. It is doubtful whether the petitioners' challenge to the "carry forward" rule can avoid what has been said in *N. M. Thomas* (supra) and, therefore, a conclusion in their favour does not seem possible in this case. As the position is not clear, and in any event as my learned brothers have taken a definite view in favour of the "carry forward" rule, I have confined myself to expressing these observations.

The petitioners have challenged other provisions prescribed in favour of members of the Scheduled Castes and Scheduled Tribes and have attempted to support their submissions by reference to data purporting to prove that those measures have resulted in reverse discrimination and are also inconsistent with the maintenance of efficiency of administration. We have been taken through charts and statistics among other documentary material but the material placed before us does not clearly and definitely establish what it seeks to prove. In the circumstances, it is not possible to record a finding in favour of the petitioners on those points.

Accordingly, the writ petitions are dismissed but without any order as to costs.

CHINNAPPA REDDY, J.—In the name of Equality (of opportunity), we are asked to deny Equality (of opportunity), in these Writ Petitions. That we cannot do and that we will not do. If we do that we will be subverting the spirit and the sense of the Constitution. The

(1) [1976] 1 S.C.R. 906.

A petitioners claim that their Fundamental Right to Equality of Opportunity in the matter of public employment, guaranteed by Art. 16(1) of the Constitution has been flouted by a series of orders and circulars issued by the Railway Board reserving posts at several levels and making various concessions in favour of members of the Scheduled Castes and the Scheduled Tribes. This has been done, it is claimed, at the B cost of efficiency, though forbidden by Art. 335 of the Constitution. The plain answer of the respondents is that everyone of the orders and circulars has the backing of Art. 16(1), 16(4) and other special provisions of the Constitution and that the alarm of inefficiency is nothing but a bogey.

C My brother Krishna Iyer, J. has considered the questions raised in his own characteristic, scintillating way and in some depth. Though respect for my brother would ordinarily prevent me from venturing to write a separate opinion, especially when I agree whole heartedly with his conclusions and the route traversed by him, I propose to make, in this case, certain general observations because I expect the D same questions to be raised repeatedly in different situations and in different forms and it is just as well that I project my own prosaic and pedestrian point of view, without going into the detail or depth already explored by my brother.

The class of people known compendiously as 'the Scheduled Castes', recognised and described as such in the Constitution of India E have been treated as 'casteless' outcastes and untouchables and have been oppressed and subjected to every manner of depreviation and discrimination for centuries upon centuries by a unique system of social and economic segregation, a system of "graded inequality" (Dr. B.R. Ambedkar), of "gradation and degradation" (Dr. C.R. Reddy) and of "gigantic cold-blooded repression" (Rabindranath F Tagore). And for centuries they were even prevented from protesting their plight. Nor was any attempt made by the superior and elitist classes to know anything about them. All that a Scheduled Caste parent could do was to lament :

"Hush, my child; do'nt cry, my treasure;
G Weeping is in vain,
For the enemy will never
Understand our pain.
For the ocean has its limits
Prisons have their walls around
But our suffering and our torment
H have no limit and no bound."

Then, in 1950, came the Constitution rousing expectations, raising hopes, making promises and generally heralding a new, a better and

a more decent life for the underprivileged and the oppressed people of India. While the preamble to the Constitution proclaims the resolution of the people to constitute India into a Sovereign (also, 'Socialist, Secular', since the 42nd Amendment) Democratic Republic and to secure to all its citizens, "Justice, Social, economic and political" and "Equality of Status and opportunity" and to promote "Fraternity, assuring the dignity of the individual", while the Right to Equality before the Law (Art. 14) and Equality of Opportunity in the matter of public employment (Art. 16) are guaranteed as Fundamental Rights and while the State is enjoyed by the Directive Principles of State Policy to promote the welfare of the people by securing a social order in which justice, social, economic and political shall inform all the institutions of the national life Art. 38(1), to endeavour to eliminate inequalities in status, facilities and opportunities Art. 38 (2), and, to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good Art. 39(b) and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment Art. 39(c), pursuant to the very preamble and the provisions of the Constitution, special provisions have been made, in particular, for the protection and advancement of the Scheduled Castes and the Scheduled Tribes in recognition of their existing, low social and economic status and the consequent inability and failure on their part to avail themselves of any opportunity for self-advancement. It is recognised that the failure of the State to create a climatic situation and provide the necessary impetus for the increasing participation of the members of the Scheduled Castes and the Scheduled Tribes in the public services would tentamount to a denial to them of equal opportunity in the matter of public employment. Art. 335 which is included in part XVI of the Constitution dealing with 'special provisions relating to certain classes' expressly provides:

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

Art. 46, one of the Directive Principles of State Policy, enjoins:

> "The State shall promote with special care the educational and economic interest of the weaker sections of the

A people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

Art. 16 (1) and 16 (4) which guarantee equality of opportunity in matters of public employment read as follows :

B "16 (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

"16 (4) Nothing in this article shall prevent the State from making any provision for the reservation of appoint-
C ments 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."

Art. 16 (2) which bars discrimination on certain grounds is as follows :

D "16 (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."

Now, it has been said, very rightly, a Constitutional instrument is
E *sui generis* and, obviously and necessarily, its interpretation cannot always run on the same lines as the interpretation of statutes made in exercise of the powers conferred by it. A constitution, like ours, born of an anti-imperialist struggle, influenced by Constitutional instruments, events and revolutions elsewhere, in search of a better world and wedded to the idea of justice, economic, social and political, to all,
F must receive a generous interpretation so as to give all its citizens the full measure of justice so proclaimed instead of 'the austerity of tabulated legalism'(1). And so, when the Constitutional instrument to be expounded is a constitution like the Indian Constitution, the expositors are to concern themselves not with words and mere words only, but, as much, with the philosophy or what we may call 'the
G spirit and the sense' of the Constitution. Here, we do not have to venture upon a voyage of discovery to find the spirit and the sense of the Constitution; we do not have to look to any extraneous sources for inspiration and guidance; they may be sought and found in the Preamble to the Constitution, in the Directive Principles of State
H Policy, and other such provisions.

(1) *See Minister of Home Affairs* v. *Fisher* : [1979] (3) All E.R. 21.

Because Fundamental Rights are justiciable and Directive Principles are not, it was assumed, in the beginning, that Fundamental Rights held a superior position under the Constitution than the Directive Principles, and that the latter were only of secondary importance as compared with the Fundamental Rights. That way of thinking is of the past and has become obsolete. It is now universally recognised that the difference between the Fundamental Rights and Directive Principles lies in this that Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Fundamental Rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to Courts. So they are made justiciable. But, it is also evident that notwithstanding their great importance, the Directive Principles cannot in the very nature of things be enforced in a Court of law. It is unimaginable that any Court can compel a legislature to make a law. If the Court can compel Parliament to make laws then Parliamentary democracy would soon be reduced to an oligarchy of Judges. It is in that sense that the Constitution says that the Directive Principles shall not be enforceable by Courts. It does not mean that Directive Principles are less important than Fundamental Rights or that they are not binding on the various organs of the State. Art. 37 of the Constitution emphatically states that Directive Principles are nevertheless Fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the Courts as a code of interpretation. Fundamental Rights should thus be interpreted in the light of the Directive Principles and the later should, whenever and wherever possible, be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the Directive Principles or if it is not in discharge of some of the undoubted obligations of the State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the Directive Principles and other provisions of the Constitution.

So, we have it that the Constitutional goal is the establishment of a Socialist Democracy in which Justice, economic, social and political

A is secure and all men are equal and have equal opportunity. Inequality, whether of status, facility or opportunity, is to end, privilege is to cease and exploitation is to go. The under-privileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Art. 16 has to be interpreted B when State action is questioned as contravening Art. 16.

Let us now take a look at Art. 16(1) and Art. 16(4). Art. 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. To the class of citizens who are economically and socially backward C this guarantee will be no more than mere wishful thinking, and mere "vanity....wind and confusion", if it is not translated into reality by necessary state action to protect and nurture such class of citizens so as to enable them to shake off the heart-crushing burden of a thousand years' deprivation from their shoulders and to claim a fair proportion of participation in the Administration. Reservation of D posts and all other measures designed to promote the participation of the Scheduled Castes and the Scheduled Tribes in the Public Services at all levels are in our opinion necessary consequences flowing from the Fundamental Right guaranteed by Art. 16(1). This very idea is emphasised further by Art. 16(4). Art. 16(4) is not in the nature E 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 to when *egalite de droit* (formal or legal equality) is not *egalite de fait* (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between *egalite de droit* and *egalite* F *de fait*. It recognises that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. Equality of opportunity must be such as to yield 'Equality of Results' and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when the competition is itself G otherwise equitable. John Rawls in 'A Theory of Justice' demands the priority of equality in a distributive sense and the setting up of the Social System "so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return". His basic principle of social justice is : "All social primary H goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least

favoured". One of the essential elements of his conception of social justice is what he calls the principle of redress : "This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for". Society must, therefore, treat more favourably those with fewer native assets and those born into less favourable social positions. If the statement that 'Equality of opportunity must yield Equality of Results' and if the fulfilment of Articles 16(1) in Art. 16(4) ever needed a philosophical foundation it is furnished by Rawls' Theory of Justice and the Redress Principle.

The interpretation of Arts. 16(1) and 16(4) came up for consideration in several cases before this Court. Perhaps the most important of them is *State of Kerala & Anr.* v. *N. M. Thomas & Ors.*,(1) which was decided by a Bench of seven Judges. The question was whether a certain rule which gave a longer period of exemption to members belonging to Scheduled Castes and Scheduled Tribes than to others from passing certain departmental tests in order to be eligible for promotion from the Post of Lower Division Clerk to that of Upper Division Clerk was not violative of Art. 16(1) of the Constitution. The Court by a majority of five to two upheld the rule as valid. Ray, C. J., observed :

> "The rule of equality within Articles 14 and 16(1) will not be violated by a rule which will ensure equality of representation in the services for unrepresented classes after satisfying the basic needs of efficiency of administration. Article 16(2) rules out some basis of classification including race, caste, descent, place of birth etc. Article 16(4) clarifies and explains that classification on the basis of backwardness does not fall within Article 16(2) and is legitimate for the purposes of Article 16(1). If preference shall be given to a particular under-represented community other than a backward class or under-represented State in an All India Service such a rule will contravene Article 16(2). A similar rule giving preference to an under-represented backward community is valid and will not contravene articles 14, 16(1) and 16(2). Article 16(4) removes any doubt in this respect".

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(1) [1976] 1 SCR 906 @930-933.

A "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."

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"The Constitution makes a classification of Scheduled Castes and Scheduled Tribes in numerous provisions and gives a mandate to the State to accord special or favoured treatment to them."

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"Article 335 of the Constitution states that claims of members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in the making of appointments to the services and posts in connection with affairs of the State consistent with the maintenance of efficiency of administration. The impugned rule and the impugned orders are related to this constitutional mandate."

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"Our constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of backward classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and Tribes, who are said by this Court to be backward classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Articles 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept of equality is equality of opportunity for appointment. *Preferential treatment for members of backward classes* with due regard to administrative efficiency alone can mean *equality of opportunity for all* citizens. Equality under

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Article 16 could not have a different content from equality under Article 14. *Equality of opportunity for unequals can only mean aggravation of inequality.* Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the backward classes in services with due regard to administrative efficiency is permissible object and backward classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality".

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"All legitimate methods are available for equality of opportunity in service under Article 16(1). Article 16(1) is affirmative whereas Article 14 is negative in language. *Article* 16(4) *indicates one of the methods of achieving equality embodied in Article* 16(1)".

Equally illuminating observations were made by Mathew, J., Beg., J., Krishna Iyer, J., and Fazal Ali, J., in their separate concurring opinions but I do not propose to extract them in the interests of space. It is enough to mention that all five learned judges who constituted the majority were emphatic in repudiating the theory (propounded in earlier cases) that Art. 16(4) was in the nature of an exception to Art. 16(1). All were agreed that Art. 16(4) was a facet, an illustration or a method of application of Art. 16(1). So, it is now no longer necessary to apologetically explain laws aimed at achieving equality as permissible exceptions; it can now be boldly claimed that such laws are necessary incidents of equality.

It all began with *The General Manager, Southern Railway* v. *Rangachari*(1). Two circulars issued by the Railway Board reserving selection (promotional) posts in Class III of the Railway Service in favour of the members of the Scheduled Castes and the Scheduled Tribes, were questioned in that case as offending Art. 16. It was contended that Art. 16(4) applied only to reservation of posts at the stage of initial appointment and not to promotional posts. The contention was rejected and it was held that Art. 16(4) applied at the stage of initial appointment as well as at the stage of promotion by selection. It was in this case that observations were made to the

(1) [1962] 2 SCR 586.

effect that Art. 16(4) was in the nature of an exception to Art. 16(1), but, as we have seen such a view is no longer tenable in view of *State of Kerala & Anr. v. N. M. Thomas & Ors.* (supra).

Much of the argument of the learned counsel for the petitioners was anchored to *T. Devodasan* v. *Union of India & Anr.*(1) 17½% of vacancies in an establishment were reserved for members of the Scheduled Castes and Scheduled Tribes. Alongside the reservation rule, there operated what is known as "the carry-forward rule" familiar to all Govt. employees and those connected with 'service problems'. The carry-forward rule so operated in the particular case that out of 45 appointments made by the Government 29 were from among the candidates belonging to the Scheduled Castes and Scheduled Tribes. In other words the reservation came to 65% which was far in excess of the 17½% originally contemplated by the Reservation rule. In those circumstances, a Constitution Bench of this Court (Subba Rao, J. dissenting) declared the carry-forward rule bad. The Court did not strike down the carry-forward rule on the ground that it was inherently vicious or on the hypothetical consideration that it was bound to lead to vicious results in the future if permitted to operate without inhibition. The judgment of the Court was founded upon the viciousness exposed by the actual working of the rule in practice. The learned judges indicated that the repercussions of such a rule would have to be watched from year to year.

Another case upon which the petitioners placed reliance was *M. R. Balaji & Ors.* v. *State of Mysore*(2). In that case the percentage of seats reserved in the Engineering and Medical colleges for the educationally and socially backward classes and Scheduled Castes and Scheduled Tribes came to 68% leaving only 32% of the seats for the merit pool. The Court held that generally and broadly reservation should not exceed 50%. The actual percentage was to depend upon the relevant prevailing circumstances in each case. As the reservation in that case for exceeded what was generally and broadly permissible, the reservation was held to be bad. There again the Court was concerned directly with the immediate, actual, practical result of the Reservation rule.

In *A. Peeriakaruppan, etc.* v. *State of Tamil Nadu & Ors.*,(3) reservation of 41% of the seats in medical colleges in the State of

(1) [1964] 4 SCR 680.

(2) [1963] Suppl. 1 SCR 439.

(3) [1971] 2 SCR 430 @ 441-442.

Tamil Nadu for students coming from socially and educationally backward classes was upheld. Hegde, J., observed (at p. 441-442) :

> "There is no basis for the contention that the reservation made for backward classes is excessive. We were not told why it is excessive. Undoubtedly we should not forget that it is against the immediate interest of the Nation to exclude from the portals of our medical colleges qualified and competent students but then the immediate advantages of the Nation have to be harmonised with its long range interests. It cannot be denied that unaided many sections of the people in this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation's interest will be best served—taking a long range view—if the backward classes are helped to march forward and take their place in line with the advanced sections of the people. That is why in Balaqi's case [1931] Suppl 1 SCR (439), this Court held that the total of reservations for backward classes, scheduled castes and scheduled tribes should not ordinarily exceed 50% of the available seats. In the present case it is 41%. On the material before us we are unable to hold that the said reservation is excessive".

In *State of Punjab* v. *Hiralal & Ors.*,(1) a rule reserving the first out of every ten vacancies to a member of the Scheduled Castes and Scheduled Tribes and providing for 'carry-forward' of the vacancy if suitable candidate was not available was struck down by the High Court by visualising various hypothetical cases which could lead to anomalous situations in which a person getting the benefit of reservation may jump over the heads of several of his seniors not only in his own grade but even in higher grades. This Court reversed the decision of the High Court observing :

> "The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the service to the Scheduled Castes, Scheduled Tribes and Backward Classes".

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(1) [1971] 3 SCR 267 @ 272, 273, 274.

A "The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. *The length of the leap to be provided depends upon the gap to be covered*".

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"There was no material before the High Court and there is no material before us from which we can conclude that the impugned order is violative of Art. 16(1). Reservation of appointments under Art. 16(4) cannot be struck down on hypothetical grounds or on imaginary possibilities. He who C assails the reservation under that Art. must satisfactorily establish that there has been a violation of Art. 16(1)".

The report of the Commissioner for Scheduled Castes and Scheduled Tribes for 1977-78 and the 'Reports on the progress made in the intake of Scheduled Castes and Scheduled Tribes against vacancies D reserved for them in recruitment and promotion categories in the Railways' for the half years ending March 31, 1974, March 31, 1975, September 30, 1976, March 31, 1977 and September 30, 1979 were placed before us. They reveal how painfully slow and woefully insignificant has been progress achieved by the members of the Scheduled Castes and Scheduled Tribes in the matter of their participation E in the Railway administration. My brother Krishna Iyer J has extracted some of the facts and figures. I do not think it is necessary for me to refer to them over again. It is sufficient to say that members of the Scheduled Castes and Scheduled Tribes far from acquiring any monopolistic or excessive representation over any category of posts (other than sweepers) are nowhere near being adequately F represented. Neither the Reservation rule nor the 'carry-forward for three years' rule has resulted in any such 'disastrous' consequences. The complaint of the petitioners that the Circulars and orders had resulted in excessive representation of the Scheduled Castes and Scheduled Tribes is without foundation generally or with reference to any particular year.

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One of the contentions vehemently submitted by the learned counsel for the petitioners was that efficiency of administration would suffer and safety of the travelling public would consequently be jeopardised if reservations were made and promotions affected inthe manner sought to be done by the Railway Board. This is claimed H by the respondents to be no more than a bogey. In the counter-affidavit filed on behalf of the Railway Board it has been pointed out that minimum standards are insisted upon for every appointment

and in the case of candidates wanting in requisite standards, those with the highest marks are given special intensive training to enable them to come up to the requisite standards. In the case of posts which involve the safety of movement of trains there is no relaxation of standards in favour of candidates belonging to Scheduled Castes and Scheduled Tribes and they are required to pass the same rigid tests as other candidates.

Therefore, we see that when posts whether at the stage of initial appointment or at the stage of promotion are reserved or other preferential treatment is accorded to members of the Scheduled Castes, Scheduled Tribes and other socially and economically backward classes, it is not a concession or privilege extended to them; it is in recognition of their undoubted Fundamental Right to Equality of Opportunity and in discharge of the Constitutional obligation imposed upon the state to secure to all its citizens 'Justice, social, economic and political' and 'Equality to status and opportunity', to assure 'the dignity of the individual' among all citizens, to 'promote with special care the educational and economic interests of the weaker section of the people', to ensure their participation on equal basis in the administration of the affairs of the country and generally to foster the ideal of a 'Sovereign, Socialist, Secular, Democratic Republic'. Every lawful method is permissible to secure the due representation of the Scheduled Castes and Scheduled Tribes in the public Services. There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty percent. There is no rigidity about the fifty percent rule which is only a convenient guideline laid down by Judges. Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future. Judged in the light of this discussion I am unable to find anything illegal or unconstitutional in any one of the impugned orders and circulars. Each order and circular has been individually discussed by my brother Krishna Iyer J with whose reasoning and conclusions I agree and to which I wish to add no more.

PBR *Petitions dismissed.*