EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT AND THE INDIAN SUPREME COURT

The doctrine of equal opportunity in matters of public employment has been embodied in clause (1) of article 16 of the Constitution of India, 1949. This clause enacts that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. This provision is of immense significance to Indian citizens, particularly because the public services in this country were the monopoly of *dominant* and privileged classes in pre-Independence days. Moreover, it is vital to the establishment of an honest and efficient public service which may properly execute the welfare policies of the State. The doctrine does not guarantee employment to each aspirant, but only ensures him an equal chance to compete along with others. Considerations of religion, race, caste, sex, descent, place of birth and residence are prohibited by clause (2) in matters of employment.[1] To make a proper selection, the Public Service Commissions[2] conduct examinations,[3] hold interviews, and advise the Government on the suitability of candidates for the initial appointments or promotions.[4] This system protects public services from political influence and favouritism. Efficient administration depends on the stability of these services. Therefore, a further safeguard against arbitraiy dismissal, removal or reduction in rank of the employees is provided to assure security of tenure.[5]

Special opportunity in public employment may be provided for the backward people. Under clause (4) of article 16, *a* quota of appointments or posts may be reserved for them. This clause provides that nothing in article 16 shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward

1. Art. 16 provides: "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." For exceptions, see art. 16 (3)-(5).

2. Art. 315(1) provides that there shall be Public Service Commissions for the Union and the States. The importance of their formation and proper selection of their members was emphasized in the Constituent Assembly, because these bodies are entrusted with the task of selecting candidates for various posts, "who will be called upon to discharge the responsible and onerous duties of the Government in the various Departments." *Constituent Assembly Debates,* Vol. IX, at p. 576.

3. Art. 320(1).

4. Art. 320 (3) (b).

5. See art. 311.

class of citizens which, in the opinion of the State, is not adequately represented in the State services. Article 335 provides that claims of the Scheduled Classes shall be considered in the services consistently with the maintenance of efficiency of administration.[6] The Public Service Commissions are not to be consulted in respect of the manner in which any provision may be made under article 16(4) or effect may be given to article 335.[7]

The interpretation of article 16 has raised issues of fundamental importance, though there has not been much litigation under it. The purpose of this paper is to present a study of the cases decided by the Supreme Court under this article.

Among the cases on selection, *Banarsidas v. State of Uttar Pradesh*[8] is an important decision. In this case, the petitioners held part-time jobs as *patwaris* under the Government. Certain departmental instructions were issued not to recruit them to the new permanent *cadre* of Lekhpals on the ground that these persons did not have a fair record of service in the past and that they were disloyal to the Government. The Supreme Court decided against the petitioners. It held that their exclusion from the new service of Lekhpals did not deny them equal opportunity *vis-a-vis* those who had excellent records of service and displayed a greater sense of responsibility to their employers. The Government is competent to lay down qualifications for the new recruits and such prerequisite conditions of appointment as are conducive to the maintenance of discipline among the employees. The candidates who tried to paralyse the administration had no claim to be re-employed on the reorganization of the same service on a permanent and full-time basis with better prospects.[9]

In *Banarsidas's* case it was evident that the rejected candidates had a poor record of past service; therefore, their exclusion from reappointment was justified by the Supreme Court. But in *Krishan Chander Nayar* v. *Chairman, Central Tractor Organization,*[10] the Court resented the exclusion of the petitioner from the Government service as there was nothing on the record to support the Government action. The service of the petitioner was terminated in pursuance of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, by reason of his antecedents. Thereafter, a ban was imposed on his being further taken into Government service. The Court found that the nature of the ban was not explained; the petitioner had no opportunity to show cause against its imposition; it was not shown that the ban had a just relation to the question of his suitability for employment. It was held that the Government action was arbitrary and amounted to a denial of equality of

6. See also art. 336(1) which had made special provision for reservations in certain services of the Union for the Anglo-Indians for ten years only, that is, upto the 25th January, 1960.

7. Art. 320(4).

8. A.I.R. 1956 S.C. 520.

9. *Ibid*., at pp. 521, 522.

10. A.I.R. 1962 S.C. 602.

opportunity. The ban on the petitioner's future employment was against his being considered on merit.[11]

Gazula Dasarath Rama Rao v. *State of Andhra Pradesh,*[12] a case of selection, involved the application of clause (2) of article 16. Section 6(1) of the Madras Hereditary Village-Offices Act, 1895, provided that in choosing the persons to fill the new offices, the Collector should select the persons whom he might consider to be the best qualified from among the families of the last holders of the abolished offices. Accordingly, the son of the last Village *Munsif* in a certain village was appointed to the new office of the Village *Munsif.* The petitioner, a candidate for the same office, got a favourable response from the Supreme Court which did not approve of the hereditary principle as a basis of selection. The Court held that the impunged section was discriminating since it based the selection on the prohibited ground of descent. In setting aside the section as unconstitutional and void, it decided that the office of Village *Munsif* was an office under the State. The Collector exercised control over the *Munsif,* the State paid emoluments to him, and the Board of Revenue laid down his qualifications for appointment. Further, the *Munsif* aided the work of revenue collection, acted as a Magistrate and civil judge in petty cases, and performed certain police duties.[13]

It is submitted that even if the State had not paid emoluments to the Village *Munsif,* his office would have still been an office under the State. Emphasis has to be laid on the nature of the duties he has to perform, and this is what the Supreme Court did. The mere fact of the payment of emoluments would not have weighed with the Court as a relevant criterion for deciding the issue. The payment of emoluments or fees is not the determining factor that an office is an office under the State. Articles 102(1) (a) and 191(1) (a) contain the expression 'office of profit';[14] article 16 mentions the word 'office' only. This indicates that article 16 is not confined to office of profit but may be applied to an honorary office. If the office-holder performs some public duty, his office is an office under the State. The duty may be of an exalted character or may be humble; but the person in office has, in some degree delegated to him, some function of government.[15]

An important aspect of this case is the rejection by the Supreme Court of the State's argument that the expression 'office under the State' referred to a post in a civil service and an *ex-cadre* post under a contract of service, mentioned in Chapter I of Part XIV of the Constitution. This

11. *Ibid.*, p. 604.

12. A.I.R. 1961 S.C. 564.

13. *Ibid.*, p. 569.

14. Art. 102(1) (a) provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or that of any State, other than an office declared by Parliament by law not to disqualify its holder. Art. 191(1) (a) makes a similar provision in respect of a member of the Legislative Council or Assembly of a State.

15. *G. A. Monterio* v. *State of Ajmer* A.I.R. 1957 S.C. 13 at p. 16.

Chapter relates to the services under the Union and the States.[16] The Court refused to take a restricted view of clauses (1) and (2) of article 16, placed in Part III of the Constitution which deals with fundamental rights and in which the word 'State' has a different cannotation. It included, *inter alia,* all local authorities.[17] Therefore, the scope of clauses (1) and (2) of article 16 could not be limited by the Chapter dealing with services exclusively. Service provisions do not enshrine any fundamental right of citizens. Their scope and ambit is different from that of the fundamental rights.[18] Clause (5) of article 16 also supports this view. In that clause, the incumbent of an office in connection with the affairs of any religious or denominational institution need not necessarily be a member of the civil service.[19]

The cases of promotion are likewise not too numerous. In *High Court, Calcutta v. Amal Kumar,*[20] the respondent, being the senior-most *Munsif,* was not considered fit for promotion to the post of Subordinate Judge, while those who were junior to him were preferred. The Supreme Court approved the relative fitness as a valid test to promote the candidates to higher position. The Court held that so long as the respondent was considered along with others by the promoting authority, he could not complain of any violation of article 16(1). Seniority of a candidate would not help his promotion if he was not otherwise fit in comparison with other candidates, though junior to him. The fact that the choice was made in a particular way would not amount to discrimination against the respondent.[21]

In the context, the words 'particular way' mean a reasonable way, not an arbitrary way. So far as appropriate criteria have been used in classifying the candidates into 'fit' and 'unfit', the question of discrimina-

16. Art. 310 of Chapter I of Part XIV of the Constitution provides that except as expressly provided by the Constitution, every person who is a member of a defence service or a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State. It is further provided that notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or the Governor, as the case may be, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under the Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post. See also art. 309.

17. Art. 12. See also art. 308.

18. A.I.R. 1961 S.C. 564, at pp. 569-570.

19. *Ibid*., at p. 573.

20. A.I.R. 1962 S.C. 1704. It seems that in this case the Supreme Court, assumed that the matters of promotion were covered by the expression 'matters relating to employment' of clause (1) of art. 16. See further n. 24, *infra.*

21. *Ibid*., at p. 1711.

tion would not arise.

The principle of classification was applied by the Supreme Court to those cases of promotion where the employees of one class of service claimed equal opportunity along with those who belonged to a different class. The Court observed that equality of opportunity in the cases of promotion means equality as between members of the same class of employees, and not between those of separate, independent, classes. The reason was explained thus:

> So multifarious are the activities of the State that employment of men for the purpose of these activities has by the very nature of things to be in different departments of the State and inside each department, in many different classes. For each such class there are separate rules fixing the number of personnel of each class, posts to which the men in that class will be appointed, questions of seniority, pay of different posts, the manner in which promotion will be effected from the lower grades of pay to the higher grades, *e.g.,* whether on the result of periodical examination or by seniority, or by selection or on some other basis and other cognate matters. Each such class can be reasonably considered to be a separate and in many matters independent entity with its own rules of recruitment, pay and prospects and other conditions of service which may vary considerably between one class and another." [22]

Therefore, the concept of equal opportunity would not apply to variations in provisions as between members of different classes of employees under the State.[23]

In *All India Station Masters' and Assistant Station Masters' Association v. General Manager, Central Railway,*[24] the Road-side Station Masters challenged the channel of promotion for Guards to higher grade Station Masters' posts. Guards could be promoted faster than the Road-side Station Masters. This was said to have amounted to a denial of equal opportunity to the latter. The Supreme Court, negativing the contention, observed that equal opportunity in matters of employment including promotion could be predicated only as between persons who are in the same employment or seeking the same employment. The Road-side Station Masters and Guards did not obtain the same employment. They were recruited and trained separately and had separate avenues of promotion. Therefore, they formed two separate and distinct classes as between whom there was no scope for predicating equality or inequality of opportunity. The fact that the qualifications necessary for recruitment as Guards or Road-side Station Masters were approximately or even wholly the same could in no way affect the position that they belonged to different classes.[25]

22. *All India Station Masters' and Assistant Station Masters' Associaton v. General Manager, Central Railway* A.I.R. 1960 S.C. 384 at p. 386.

23. *Ibid.*

24. A.I.R. 1960 S.C. 384. In this case the question whether promotion to a post was covered by the expression 'matters relating to employment' was left undecided. The Supreme Court proceeded on the assumption that matters of promotion fell under the said expression, *(ibid.*, at p. 386). It is only in a latter case, *viz., General Manager, Southern Railway* v. *V. K. Rangachari* A.I.R. 1962 S.C. 36 at p. 41, that the Supreme Court held that the above expression covers the cases of promotion.

25. *Ibid.*, at p. 386.

The judgment in this case has been criticized by Professor L. A. Sheridan. In his opinion both the Road-side Station Masters and Guards were seeking the same employment; therefore, according to the principle laid down by the Supreme Court, they were entitled to equal opportunity in the matter of promotion.[26] The Court says that equality of opportunity in matters of employment is available to those (a) who have obtained the same employment or (b) who are seeking the same employment. It is submitted that part (b) is not applicable here; it applies to those persons who have not yet entered the service but are candidates for the same. The expression used is 'in matters of employment', which includes both the initial appointments and promotions. If Professor Sheridan's view were accepted, the expression would be limited to the cases of promotion, which is obviously a wrong interpretation.

Another criticism is that the Road-side Station Masters and Guards, having possessed the same initial qualifications when recruited, ought to have equal opportunity of promotion to the higher positions, other factors not counting. A different view could be taken only on the plea that the training and experience of Guards made them better qualified than the Road-side Station Masters'.[27] It is submitted that the view taken by Professor Sheridan appears to be incorrect. The fact of the same initial qualifications does not help in administration. There are services and classes of service where the minimum qualifications prescribed are the same, yet in vital matters they are different.[28]

A similar question of promotion was decided in *Kiskori Mohanlal Bakshi* v. *Union of India*.[29] In this case the Supreme Court held that the Income-tax Officers of Class II could not claim equal opportunity along with the Income-tax Officers of Class I in the matter of promotion to higher posts. As provided, the former had first to acquire the status of the latter to be raised to higher positions. It was observed that article 16 does not forbid the creation of different grades. Inequality of opportunity for promotion as between citizens holding different posts in the same grade may infringe the article; but as between citizens holding posts in different grades in the Government service, no question of equality of opportunity can be raised.[30]

The case of *State of Punjab* v. *Joginder Singh*[31] was decided on the same principles. The "Provincialised" *cadre* of teachers was initiated by the Punjab Government by taking over the schools run by the Municipal and District Boards. The state *cadre* of teachers was already in existence. Ayyangar J., speaking for the majority of the judges of the Supreme Court, held that both the *cadres* were different; different qualifications were prescribed for entry into each; the method and machinery

26. "Equal Opportunity of Public Employment", (1962) 11 I.C.L.Q. 782 at p. 793.

27. *Ibid.*

28. *E.g.,* Indian Administrative Services and States' Civil Services.

29. A.I.R. 1962 S.C. 1139.

30. *Ibid.*, at pp. 1140-1141.

31. A.I.R. 1963 S.C. 913.

of recruitment were likewise different; the general qualifications possessed by the members of each class were different; above all, the 'Provincialised' *cadre* was a diminishing class. Therefore, there was no question of comparison between the two in the matter of promotion.[32]

There is no specific ruling of the Supreme Court to the effect that article 16 covers the cases of termination of service. In *Union of India* v. *Pandurang Kashinath More,*[33] the Court proceeded on the assumption that article 16 might be violated by an arbitrary and discriminatory termination of service. "The arbitrary and discriminatory nature of the termination of service must however first be established before the article can have any application."[34] In this case, the Court decided against the respondent on the ground that discrimination was neither admitted nor proved.[35] However, the question of discrimination was still considered. The respondent was detained under the Bombay Public Security Measures Act, thereby depriving the appellant of his services. He was dismissed from the service after due notice was served on him in pursuance of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949. Those who were junior to him were retained. It was held that he could be treated as a separate class and the question of discrimination would not arise.[36] The employer would not wait for the release of the employee and allow the work to suffer. The only alternative was to terminate the service and fill the place.

In *General Manager, Southern Railway* v. *V. K. Rangachari,*[37] the Supreme Court avoided a restrictive interpretation of article 16 and made it applicable throughout the employment. Though promotion and other matters were specifically said to be governed by the article, termination of employment was not so specified.[38] It is submitted that an extensive construction given to article 16 covers the cases of termination.[39] The mere fact that article 311 provides safeguards against an arbitrary dismissal or removal of persons employed in civil capacities under the Union or a State would not restrict the scope of article 16.[40]

Among the cases of reservation, *B. Venkataraman* v. *State of Madras*[41] was the first to be decided by the Supreme Court after the commencement of the Constitution. In this case the constitutionality of

32. *Ibid.*, at p. 922.

33. A.I.R. 1962 S.C. 630.

34. *Ibid.*, at p. 632.

35. *Ibid.*, at p. 633.

36. *Ibid.*, at p. 632.

37. A.I.R. 1962 S.C. 36.

38. *Ibid.*, at pp. 40-41.

39. See Sheridan, *op. (At.* n. 26 *supra,* at p. 801.

40. See *Gazula Dasaratha Rama Rao* v. *State of Andhra Pradesh* A.I.R. 1961 S.C. 564 at pp. 569-570.

41. A.I.R. 1951 S.C. 229.

a communal 'Government Order' was at stake. Seats were reserved in the Judicial Service for Harijans, Backward Hindus, Muslims, Christians, Non-Brahmin Hindus and Brahmins. The petitioner, a Brahmin, was not selected though he possessed the requisite qualifications. The Court justified the Order so far as it related to Harijans and Backward Hindus, the rest being condemned as violating clauses (1) and (2) of article 16. In classifying various communities as beneficiaries under the Order, the Government adopted the prohibited criteria, *viz.,* race, caste and religion. As regards the petitioner, the Court said that he was discriminated against on the ground of caste. His ineligibility for any of the posts reserved for the communities other than backward ones was brought about because of his being a Brahmin and because the seats reserved for Brahmins were already filled up.[42]

In permitting the classification of Backward Hindus as a backward class of citizens, the Supreme Court committed an error in tacitly approving caste and religion as valid criteria of classification permitted by clause (4) of article 16, without pronouncing upon their propriety of so being used. Caste has been discarded as a basis of sorting out backward people.[43] Religion, as a criterion, is worse than caste. The question still remained, who were Backward Hindus? In fact Hindus are a wide community and the use of the word 'backward' does not make them backward. It is no classification.

A decade later, the Supreme Court made an important pronouncement in regard to the scope and application of clause (4). The facts of *General Manager, Southern Railway* v. *V. K. Rangachari*[44] were as follows. In the railway services, among the four grades of the posts of Court Inspectors, the latter three were classified as the selection posts to be filled by promotion. The Railway Board issued a circular in 1959, reserving a quota of the selection posts for candidates belonging to the Scheduled Classes, *viz.* the Scheduled Castes and the Scheduled Tribes. The circular was to operate retrospectively with effect from 1957. The result was that the posts which should have been made available to those candidates in 1957 and 1958 were to be carried forward so as to be filled in 1959. The respondent sought to impugn the Circular on the ground that direct promotion to selection posts by reservation was not permitted by clause (4), and further, that the reservation must work from the bottom and could not be permitted to allow direct appointment to selection posts. The Supreme Court in a three to two decision did not agree with the respondent and endorsed the action of the Railway Board.

The controversy centred round the question whether clause (4) of article 16 empowered the State to reserve selection posts for direct promotion. The answer to this question depended on the meaning of the word 'posts'. If it meant posts in the services and not *ex-cadre* posts, *i.e.,* posts outside the services, the answer would be in the affirmative.

42. *Ibid*., at p. 230.

43. *M. R. Balaji* v. State *of Mysore* A.I.R. 1963 S.C. 649 at p. 663.

44. A.I.R. 1962 S.C. 36.

Gajendragadkar J., as he then was, representing the majority, held that the 'posts' in clause (4) meant posts in the services. The legislative history of the word 'posts', which might justify the conclusion that it meant *ex-cadre* posts, would be of no avail in the case of clause (4) which has no such history. Likewise, articles 309 to 311, 335 and 336 and the relevant provisions of the Government of India Act, 1935, in which the word 'posts' carries different meanings, would not help. It is the context in which this word is used in clause (4), which would determine its denotation.[45] The framers embodied this clause in the Constitution for historical reasons. They considered the advancement of backward classes of people as a matter of paramount importance.[46] Therefore, they enabled the State to make reservation for them in the services if State thought that their representation in the services was inadequate. It is the opinion of the State about the inadequacy of representation, which constitutes the condition precedent to exercising the power conferred by clause (4). That being the position, both 'appointments' and 'posts' in the clause must necessarily be appointments and posts in the services. "It would be illogical and unreasonable to assume that for making the representation adequate in the services under the State a power should be given to the State to reserve posts outside the *cadre* of services. If the word 'posts' means *ex-cadre* posts, reservation of such posts cannot possibly cure the imbalance which according to the State is disclosed in the representation in services under it." [47]

The learned Judge said that the advancement of the weaker sections requires that they should have representation in the lowest rung of services, as well as in selection posts in the services. The adequacy of representation should be judged by the numerical as well as a qualitative test. The adequacy of representation is not necessarily to be cured only by reserving a proportionately higher percentage of appointments at the initial stage. The State may consider the adequacy of representation qualitatively and reserve a certain percentage of selection posts to make the representation of the backward people in the services adequate. The word 'posts' is not used to expedite the reservation of 'appointments' themselves, and it is not confined to initial posts. Reservation can be made not only in respect of the initial appointments but also in respect of the selection posts which might be filled by employees after their employment. This interpretation takes the words 'appointments' and 'posts' in their broad and liberal sense and has the merit of giving effect to the policy which is the basis of the incorporation of clause (4) in the Constitution.[48]

As regards the retrospective effect of the Circular, the learned Judge observed that the Court was not concerned with policy matters. The selection posts could be filled either prospectively or retrospectively.[49]

45. *Ibid.*, at pp. 42-43.

46. *Ibid.*, at p. 42.

47. *Ibid.*, at p. 43.

48. *Ibid.*, at p. 44.

49. *Ibid.*, at pp. 43-44.

Wanchoo J. disagreed with the majority of the Judges. In his opinion reservation was not permitted in various grades of a particular service. The expression 'adequately represented' used in clause (4) conveyed the idea of adequate numerical representation in a service as a whole and exclude the concept of quality. Reservation of appointments meant reservation of a percentage of initial appointments to the service. The word 'posts' referred to the total number of posts in the service. The method of reservation of appointments would necessitate a long time for achieving adequate representation. In order that the aim might be achieved in a shorter period of time, the method of reservation of posts was adopted.[50] Then, keeping in view the provisions of article 335, the reservation could not be made so as to impair the efficiency of administration.[51] The learned Judge held that reservation must inevitably result in the impairment of efficiency.[52]

Ayyangar J., another minority Judge, observed that the word 'posts' meant *ex-cadre* posts. Even if this view was wrong, inadequacy of representation would mean quantitative deficiency in the service as a whole and nothing else. If the word 'posts' meant the posts in the services, interpreting clause (4) in the light of article 335, reservation could only be made in respect of appointments to services at the initial stage and not at each stage after the appointment. As regards the retrospective operation of the Circular, the learned Judge observed that it was not permitted by clause (4) which contemplated action in relation to, and having effect in, the future.[53]

Dr. M. P. Jain thinks that the minority view in the present case is correct, and he visualizes some dangers inherent in the minority approach, According to him, article 335 contains an explicit directive favouring the narrow interpretation of clause (4), and further that a broad view of this clause will make clause (1) illusory.[54]

The interpretation of the word 'posts' by the minority Judges, if accepted, would make its incorporation in clause (4) superfluous and frustrate the purpose of the clause itself. If reservation of appointment at the initial stage can be made, and, as tacitly accepted by the minority, does not make clause (1) illusory, it is difficult to understand how reservation of selection posts will make it illusory.

Conceding that any reservation as contemplated by clause (4) inevitably deteriorates the efficiency of administration, it is no ground to refuse or drastically curtail the reservation so long as clause (4) is not repealed. Article 335 does not control this clause whose phraseology, purpose and place are entirely different from those of the former. The word 'posts' in article 335 refers to the *ex-cadre* posts, which is obviously

50. *Ibid*., at p. 46.

51. *Ibid*., at p. 47.

52. *Ibid*., at p. 46.

53. *Ibid*., at p. 49.

54. (1961) 3 *Journal of the Indian Law Institute,* at p. 371.

not the case with clause (4).[55] 'Backward class of citizens' in the clause is a wide expression which includes the Scheduled Classes, as mentioned in article 335. Clause (4) is an enabling provision,[56] whereas article 335 is mandatory in character. The former does not compel the State to make reservation, the latter does by saying that the claims of the Scheduled Classes 'shall be taken into consideration...'. Article 335 has, therefore, no bearing in the matter of interpreting clause (4) .[57] The mere fact that both clause (4) and article 335 have been mentioned together in article 320(4) which precludes the Public Service Commissions from being consulted in respect of any matter relating to the clause or the relevant article, does not create any relationship between the two.

It should not be forgotten that the problem of the backward classes is still vital. Therefore, a provision meant for their welfare needs a liberal interpretation. This does not mean that clause (1) of article 16 should be made redundant. In fact, not a single hint in the majority judgment amounts to this. On the other hand, it was maintained that the reservation under clause (4) is intended to give adequate representation to backward people; it cannot be used for creating monopolies or for unduly disturbing the legitimate interests of other employees. A reasonable balance has to be struck between the claims of backward classes and those of other employees as well as the efficiency of administration. But in the present case, the challenge to the validity of the circular was based on the assumption that the Circular fell outside the scope of clause (4). This assumption was not well founded.[58]

Objection can be taken to the opinion of the majority endorsing the retrospective operation of the Circular. This has. however, lost its importance in view of the pronouncement of the Supreme Court in *T. Devadasan* v. *Union of India*[59] where the scope and effect of clause (4) of article 16 was again a subject of judicial scrutiny. The petitioner was an Assistant in the Central Secretariat Service. In a competitive examination for promotion to a higher post, he secured 61% marks, whereas the percentage obtained by candidates belonging to Scheduled Classes was as low as 35%. 17½% of the vacancies were reserved for these Classes, but the Government made 29 appointments out of 45 for the members of the Scheduled Classes. This raised the percentage of reservations to about 65%, and consequently the petitioner lost the higher post. He objected to the validity of the Government action on the ground that had the quota of 17½% reservations been adhered to, he would have been selected in view of his higher percentage of marks.

The Government justified its action as being taken in pursuance of its policy disclosed by the 'carry forward rule' which empowered it to

55. A.I.R. 1962 S.C. 36 at p. 42.

56. *M. R. Balaji* v. *State of Mysore* A.I.R. 1963 S.C. 649 at p. 664.

57. *T. Devadasan* v. *Union of India* A.I.R. 1964 S.C. 179 at p. 189 (dissenting opinion of Rao J.).

58. A.I.R. 1962 S.C. 36 at p. 45.

59. A.I.R. 1964 S.C. 179.

carry the unfilled reserved posts in a certain year to the next year and so on. For example, if in two successive years no candidate of the backward class was found eligible to fill the reserved posts and the number of vacancies in each year was 100, the reserved vacancies in each year would be 18. Thus 36 vacancies would be carried forward to the third year when the sum total of the reserved posts would be 45 out of 50, that is, 90%.

The Supreme Court in a four to one decision sustained the objection raised by the petitioner. Mudholkar J., speaking for the majority, observed that the rule permitted, in effect, 'a perpetual carry forward' of unfilled reserved posts in the two years preceding the year of recruitment and provided an addition to them of 17½% of the total posts to be filled in the year of recruitment.[60] This was not permitted by clause (4). A reservation of vacancies in excess of 50% would not be constitutional.[61]

The learned Judge said that the problem of giving adequate representation to members of backward classes enjoined by clause (4) could not be solved by laying down a general *formula* without bearing in mind its repercussions from year to year. The Government could evolve any method for this purpose, but it must aim at maintaining a reasonable balance between the interests of the backward classes and those of other citizens. In order to give effect to the right guaranteed in clause (1), each year of recruitment would have to be considered by itself, and the reservation should not be so excessive as to create a monopoly or unduly hamper the ligitimate claims of others.[62]

Subba Rao J., disagreeing with the majority, supported the 'carry forward rule'. He said that the power conferred by clause (4) could not be trammelled by other provisions of article 16, and that the word 'any' in the clause was of the widest amplitude.[63] According to him, the effect of the operation of the rule was practically the same. Reservation made in one selection or spread over many selections was only a 'convenient method' of implementing the provision of reservation. Unless the reservation was 'unreasonably disproportionate', it would not override the fundamental right guaranteed in clause (1). In the present case, there was neither an allegation nor evidence to that effect.[64]

It is submitted that Rao J. could not appreciate the true meaning and scope of clauses (1) and (4) of article 16, and the facts of the case. No doubt clause (4) is an exception to clause (1) but in a sense both are mutually helpful and need a balanced view.

It is interesting that *Rangachari's* case and the present case present

60. *Ibid*., at p. 186.

61. *Ibid*., at p. 188; see also at p. 187.

62. *Ibid*., at p. 187.

63. *Ibid*., at p. 190.

64. *Ibid*., at p. 192.

two extreme views of the minority. In the former the minority treated clause (4) as subservient to clause (1), whereas in the latter as a complete exception to it.

An objectionable feature of the majority judgment may, however, be pointed out. They said that a reservation in excess of 50% would be unconstitutional. This view as based on the following observations of the Supreme Court made in *M.R. Balaji* v. *State of Mysore*:[65]

> Speaking generally and in a broad way a special provision should be less than 50 per cent; how much less . . . would depend upon the relevant prevailing circumstances in each case.[66]

The majority thought that the ration of *Balaji's* case was that "reservation of more than half the vacancies is *per se* destructive of the provisions of Art. 15(1) ..."[67] It is submitted that this does not seem to be the *ratio* of that case which was decided on the grounds that reservation to the extent of 68% was excessive and not permitted by clause (4), and that the classification of backward classes was mainly based on the ground of caste. The observations from *Balaji's* case, as quoted above, "were intended only to be a workable guide but not an inflexible rule of law . . ."[68] To fix a limit of reservation at 50% as done by the majority in the present case, is dangerous, likely to be exploited by any party in power to its own ends.

A question arises here, did the majority condemn the 'carry forward rule' in principle? This was not specifically pointed out by them. They, on the basis of *Balaji's* case, set it aside as making reservation beyond the limit of 50%. But it may be noted that it was the 'carry forward' aspect of the rule which was responsible for making excessive reservation of vacancies in a certain year and was mainly hit in the Court. The majority reacted to it by saying that "each year of recruitment will have to be considered by itself".[69] It shows that the 'carry forward rule' was rejected in principle. It means that even if there is a rule reserving 5% vacancies instead of 17½% each year and providing for their being carried forward, it will be declared unconstitutional.

Apart from the cases of selection, promotion and reservation, as discussed above, two more cases involving important issues are worthy of consideration. In *Satish Chandra Anand* v. *Union of India*,[70] the petitioner challenged the Government action terminating his service after due notice was served on him in pursuance of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949. He was temporarily engaged on special contractual terms. The Supreme Court rejected the conten-

65. A.I.R. 1963 S.C. 649 at p. 663.

66. A.I.R. 1964 S.C. 179 at p. 186.

67. *Ibid*., at p. 186.

68. Dissenting opinion of Rao J., *ibid*., at p. 193.

69. *Ibid.,* at p. 187.

70. A.I.R. 1953 S.C. 250.

tion that article 16(1) was violated. It held that the whole matter was related to contract. The petitioner was treated just like any other person to whom an offer of temporary employment under these conditions was made. His grievance, when analysed, was not that of personal differentiation but was against an offer of temporary employment on special terms as opposed to permanent employment. Like any other employer, the Government can make special contracts of service with temporary employees. The Government as well as those who accept special contractual terms are bound by them.[71]

In *C. K. Achutan* v. *State of Kerala.*[72] the Supreme Court rejected the contention of the petitioner, whose contract to supply milk to a Government hospital was cancelled, that article 16(1) was infringed. It observed that he was not employed as a servant to collect milk on behalf of the institution, but he was supplying goods as a contractor on payment of a price. A breach of the contract to supply goods to the Government involves no violation of the fundamental right. The word 'employment' connotes employment in service under the State to the exclusion of contractor.[73] Therefore, to attract the application of clause (1), there must be a relationship of master and servant between the Government and the person working for it. An element of subordination to the State is needed.[74]

It follows from the above discussion of cases that the Supreme Court has taken, on the whole, a realistic and balanced view in the interpretation of article 16. The small number of cases under this article and the decisions of the Court indicate a trend of non-discrimination in public employment.[75]

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71. *Ibid*., at p. 252.

72. A.I.R. 1959 S.C. 490.

73. *Ibid*., at p. 492.

74. See *Dattatraya Motiram More* v. *State of Bombay* A.I.R. 1953 Bom. 311 at p. 312.

75. See also Sheridan, *op. cit.* n. 26 *supra,* at p. 805.

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