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Three Concepts of Equality: Compensatory Discrimination in Indian and American Constitutional Law

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THE CONSTITUTIONS of both India and the United States of America are equalitarian documents. The fourteenth amendment of the US constitution guarantees the equal protection of the laws to all, regardless of race, colour, religion, or national origins. Article 14 of the Indian Constitution guarantees equality before the law and equal protection of the laws to all persons. Articles 15 and 16 prohibit discrimination in public employment and other activities of the state against any citizen on grounds only of religion, race, caste, sex, or place of birth.[1] These equalitarian guarantees

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[1] *Constitution of India*, Part III Fundamental Rights, Right to Equality.

Art. 14. *Equality before law* — The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Art. 15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

  (*a*) Access to shops, public restaurants, hotels, and places of public entertainment; or

  (*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. [4 inserted by the Const. (1st Am) Act, 1951, w.e.f. 18.6.1951]

Art. 16. *Equality of opportunity in matters of public employment*

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

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are spelled out in regard to education in Article 29(2) of the Indian constitution, which says:

> No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

In the US racial discrimination in educational and employment programmes funded by the federal government was outlawed by titles VI and VII of the US Civil Rights Act of 1964.

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Yet the Indian and American societies remain stratified into unequal castes and races. Both societies are the historic products of systematic inequality. In the US, the median family income of blacks is only sixty per cent that of whites.[2] Although the blacks represent 11.5 per cent of the population, they are only 1.2 per cent of the lawyers and judges, 2 per cent of the physicians, 2.3 per cent of the dentists, 1.1 per cent of the engineers, and 2.6 per cent of the university professors.[3] Inequality betweens castes in India is pervasive. In the most extensive survey of castes ever done in an Indian state, the Karnataka Backward Classes Commission found that

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(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

[2]U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P—60, No. 107, p. 7(1977) (Table 1).

[3]U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 25, pp. 407-408 (Table 662) (based on 1970 census).

members of the scheduled castes (untouchables) have a per capita income that is only fifty-five per cent of the State average. Though they make up 13.14 per cent of the population, they possess but 8.31 per cent of the class IV and above government jobs. Their literacy rate is one-fifth of the State average. Their rate of graduation from secondary schools is one-third of the State average. Brahmins, in contrast, though only 4.23 per cent of the State population, hold 8.23 per cent of the upper grade State jobs, have a literacy rate of 93.8 per cent compared to the State average of 20.6 per cent, have a secondary school graduation rate more than six times the State average, and hold more than 25 per cent of the seats in the State's medical colleges.[4]

The Indian Government provides preferential treatment to scheduled castes and tribes and other backward classes in many government programmes, in employment, and in education. These preferences have often taken the form of 'reservations'—minimum quotas in government jobs and places in educational institutions that must be filled by members of disadvantaged groups if qualified members of such groups apply for the positions. Since 1961, the US Government has required affirmative action on the part of government agencies and contractors. They must actively recruit black and other minorities and encourage their promotion.[5] Thouands of educational institutions and employers have undertaken such affirmative action programmes.

Whether preferential treatment for disadvantaged individuals or groups can be reconciled with 'equality before the law' and 'equal protection of the

[4]*Report of the Karnataka Backward Classes Commission* (L.G. Havanur, chairman), in five volumes, 1975.

The table below summarises the data for four upper castes compared with the scheduled castes :

Caste	*Per cent of state population* 1972	*Per capita annual income* 1972 *(in rupees)*	*Per cent of state employees above class* IV, 1972	*Per cent literacy* 1951	*Secondary school leaving certificate passes per thousand in caste population*, 1972
Brahmin	4.23	888	18.30	93.8	10.33
Lingayat	14.64	1200	19.90	29.8	2.33
Maratha	3.45	977	3.15	29.3	2.17
Vyshya	0.59	967	0.88	70.8	6.54
State average	—	703	—	20.6	1.69
Scheduled castes	13.14	389 (approx.)	8.31	4.6	0.56

[5]John F. Kennedy was the first President to call for "affirmative action" in Executive Order 10925 (1961) ordering federal contractors to take such steps.

laws' depends on the concept of equality used by those who judge. In this article, I shall define three concepts of equality that are commonly used, and too often confused, by courts in the US and in India. The three concepts have very different consequences when applied to programmes that affect the disadvantaged. I will show how the three concepts have been used in several important decisions concerning compensatory discrimination in India. I will then turn to the US Supreme Court's decision in the Bakke Case for a comparative look at how the three concepts were used in the several opinions in that case. In the comparison, I will show that the word 'equal' has been used in India in subtly but importantly different ways from the American usage, ways adapted to the Indian constitution and culture.

CONCEPTS OF EQUALITY

Three concepts of equality have been used in the Indian and American courts.

Formal, individual equality is the type of equality usually intended as the norm in the civil and criminal courts. Formal equality means that each individual stands before the bar of justice without regard for the substantial differences that may inhabit the common human form. An individual's wealth, intelligence, good looks, athletic ability, race, or caste make no difference to the court. The only standard to be applied is whether the individual fits the classification for which the judgment is being made. Did this individual intentionally and without legal justification kill X? If he did, regardless of whether he is black or white, high or low caste, he committed murder and is to be punished appropriately. Fixed standards of punishment apply formal individual equality to sentencing as well. (The modern trend in sentencing is, however, towards the second type of equality, which will be discussed later.) Formal, individual equality means that all people will be judged by a universal standard. Whether they fit the standard or not is all that will determine the outcome of the decision.

Applied to situations of substantial inequality, formal equality does not take the substantial inequality into consideration. All that decides is the universal standard. If the standard determined for entry into a college is a score of 80 out of 100 on an aptitude examination, whether the individual who has applied is a black or a white, a brahmin or a harijan, will make no difference. If he makes the requisite score, he will be admitted. If he does not make it, he will be rejected. Formal, individual equality is the type of equality usually desired by those who advocate selection by 'merit' alone. It is the standard of those who believe that equal protection of the laws means that the government must be 'colorblind'.

Weighted individual equality or substantial individual equality allows the substantial differences bet ween individuals to be taken into consideration in applying the standards of classification. Again suppose that the score

normally required for admission to a college is 80. Experience has shown that applicants who come from a deprived background will be unlikely to make the requisite score. Therefore a system of handicaps will be used, a system of compensatory preferences. Those from the deprived background need only score a sixty to be admitted. The standard to be applied may thus be particularised to the individual's substantial content. Weighted individual equality nevertheless attempts to take each individual case individually. It does not allow group quotas or reservations. The unit to be dealt with is the individual. If no member of a group meets the standards set, no one from that group will be admitted. A common metaphor for this concept of equality is the handicap horse race. A horse known to be faster than others will be made to carry a handicap weight. If that horse still wins the race, the purse will still be his. There are no quotas or reservations guaranteeing entry into the winner's circle, just weighted advantages accorded to the individual participants in the competition. The important feature of this concept of equality is that although weights assigned to individuals may be determined by their membership in a particular class (race or caste), the competition remains a competition between individuals. As I shall show, it is this concept of equality that was endorsed by Justice Powell in the Bakke decision and it is this concept that is the main rival to the concept of formal individual equality in the United States.

Proportional group equality is the concept of equality that lies behind systems of quotas or reservations. In this concept the key unit is not the individual. It is the group. The individual is granted preferential treatment as a member of a group if the group is shown to be under-represented or systematically unable to compete on a formally equal basis with other groups for the job (or other highly valued thing) being sought. Standards of selection are applied particularistically, not universalistically. An individual only has to compete against other members of his group, not against a universal field. The objective of those who apply the standard of proportional group equality is to equalise the distribution of benefits between groups. It is group-based, rather than individual based, distributive justice. Individuals may benefit, but only as members of groups.

Proponents of proportional group equality often advocate it to rectify unequal distribution of jobs, etc., that is the result of systematic discrimination on a group basis. It is a group approach to a group problem. In America, supporters of this approach point to the long history of systematic discrimination against blacks and argue that the surest way to bring about proportional group equality is to institute quotas in hiring and college admissions until blacks obtain their proportionate share of the society's benefits. In India proponents of reservations argue that distribution of societal benefits has been based on caste membership for millenia, and the best way to rectify the systematic inequality in India is to redistribute the benefits to the poor and the backward on a caste group basis.

JOB RESERVATION UNDER INDIAN CONSTITUTION

The Constituent Assembly that drafted the Indian constitution included Articles 16(4), 46, 330, 332, 335, 340, 341, and 342 to enable the government to grant special preferential treatment to scheduled castes and tribes and other backward classes. Article 16(4) provides that Article sixteen's prohibition on discrimination in employment shall not prevent such preferences. "Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state."[6] In *State of Madras v. Champakam Dorairajan*[7] the Supreme Court held that the provision allowing reservations in employment did not extend to educational institutions. Soon thereafter, Parliament passed the Constitution First Amendment Act adding clause 4 to Article 15. "Nothing in this Article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes."[8] Most of the Indian cases concerning reservations have been concerned with how to reconcile Articles 16(4) and 15(4) with the guarantees of equality and non-discrimination in the rest of Articles 14, 15, 16, and 29.

In Madras, a quota system had been used to select members of all caste groups for public employment. In *Venkataramana v. State of Madras*[9] the Supreme Court struck down the quota system and held that only 'backward classes' (Article 16(4)) could receive reservations. The question remained just who the 'backward classes' are.[10]

Under Article 340 of the constitution, the Central Government appointed a Backward Classes Commission in 1953 to "determine the criteria to be adopted in considering whether any sections of the people... (in addition to the scheduled castes and tribes) should be treated as socially and educationally backward classes; and, in accordance with such criteria, to prepare a list of such classes...."[11] In the parliamentary debates preceding the appointment of the Commission, it seems clear that most people thought the list of backward classes would consist of named castes and communities.[12] The Commission

[6] *Constitution of India*, Article 16(4).

[7] AIR 1951 SC 226. See also AIR 1951 Mad., p. 120.

[8] *Constitution of India*, Article 15 (4).

[9] AIR 1951 SC. p. 229.

[10] For a thorough discussion of this question see Marc Galanter, "Who are the Other Backward Classes", *Economic and Political Weekly*, Vol. XIII, Nos. 43 & 44, October 28, 1978, pp. 1812-1828.

[11] *Report of the Backward Classes Commission*, Vol. I, p. 2, 1955. (Kaka Kalelkar, chairman).

[12] Majumdar, Nabendu Dutta, "The Backward Classes Commission and Its Work" in *Social Welfare in India*, Government of India Planning Commission, 1960, p. 219.

was "eager to avoid caste" but "found it difficult to avoid caste in the present prevailing conditions".[13] The units that the Commission designated as 'backward classes' were for the most part castes and sub-castes. Thus the Commis ion adopted a group approach to backwardness, one well suited to the proportional group concept of equality. Yet the chairman, in his introduction to the Commis ion report, virtually repudiated the group nature of the report's conclusions and said: "It would have been better if we could determine the criteria of backwardness on principles other than caste."[14] He believed that designation by caste would perpetuate caste divisions. He advocated instead universalistic criteria of backwardness based on residential, economic and educational measures of *individuals*. "The nation has decided to establish a classless and casteless society, which also demands that backwardness should be studied from the point of view of the individual and, at the most, that of the family. Any other unit will lead to caste or class aggrandisement. Let us therefore try to find criteria of backwardness that could eschew ideas of caste or class."[15] In contradiction to the Commission's lists of castes, the chairman adopted a weighted individual concept of equality. This contradiction was not lost on the Indian Parliament and the caste based lists of the main body of the report were roundly condemned when they were laid on the table of both the Houses of Parliament. The Home Minister led the criticism of the report.[16] The recommendations of the Commission were never put into effect. The definition of who were the backward classes thereafter fell largely on the State Governments.

The State of Mysore (now Karnataka) had instituted preferential hiring for members of the 'backward communities' as early as 1921. All castes except brahmins were designated 'backward', 95 per cent of the people in the State. Mysore's system of preferences had become a complete system of reservations by 1960, when the High Court of Mysore heard a challenge to the government orders of 14 May, 1959 and 22 July, 1959 reserving 65 per cent of the seats in educational institutions to all castes but brahmins, baniyas, and kayasts. Over 90 per cent of the population was thus classified as backward. Percentages were set for groupings of castes and unfilled places for a grouping could not be competed for by members of other castes. In *Ramakrishna Singh Ram Singh v. State of Mysore*[17] the High Court struck down the government order be cause it was based on no intelligible principle for choosing the castes. The order's designation of over 90 per cent of the population as 'backward' was ruled a 'fraud on the constitution.' Tl e Court was, however, of the opinion that caste was a valid means of

[13]*Report of the Backward Classes Commission*, Vol. 1, p. 41.

[14]*Ibid.*, p. xiv.

[15]*Ibid.*, p. xiv.

[16]Ministry of Home Affairs, Memorandum on the Report of the Backward Classes Commission, Delhi, Government of India Press, 1956, p. 34.

[17]AIR 1960 Mys., p. 338.

classification. S.R. Das Gupta, C.J. wrote "I am also unable to accept the contention of Mr. Venkataranga Iyengar that backward classes cannot be determined on the basis of castes, and that they must always be determined on territorial, economical, occupational or some such basis.... A class may correspond to a body of persons grouped together on the basis of their castes. In my opinion, therefore, the competence of the Government to treat certain castes as backward classes cannot be ruled out."[18] The Court suggested that an intelligible basis for determining the backwardness of a caste would be the percentage of literate members of the caste. It noted that the Mysore Government order included many castes with literacy rates well above the State average of 13 per cent: lingayats (18.8%), Rajputs (33.3%), Muslims (25%), Vaisyas (40%), and Jains (33.3%) for example. The Court observed that the really backward classes did not benefit much from the Government order because they were outcompeted by such groups. Inclusion of such 'forward' groups made their designation as 'backward' under Articles 16 (4) and 15(4)—a fraud on the Constitution.

It should be noted that the word 'caste' can mean two things. It can refer to a corporate group. And it can refer to a rank. In the minds of most Indians, the two meanings always go together. Determining backwardness 'on the basis of caste' (meaning a group rank) however is distinguishable from determining that a caste (a corporate group) is backward. The determination in the latter case could be made by many criteria—literacy, income, land ownership, and representation in government services, for example. The courts in India often confuse the two meanings of caste. The Mysore High Court in *Ramakrishna Singh* seems to use both senses of the word, allowing the determination of backwardness to be made by caste rank and allowing the unit declared backward to be a caste group.[19] Though the Court threw out the Mysore backward classes list, except for the reservations for scheduled castes and scheduled tribes, it did not rule out proportional group equality.

The Court did rule against the compartmentalisation scheme used in Mysore. The castes were arranged in fourteen groups with from two to over 100 castes in each group. A quota was assigned to each group ranging from 1.2 per cent to 8.5 per cent of the seats in the colleges. Each group was allowed to compete for only its quota. The Court held that this compartmentalisation discriminated against backward castes in one group who could not compete for seats in the quota for another group. The Court also observed that the groups were so arranged that one truly forward caste was in each group and that the forward caste would get the lion's share of the seats reserved in its category. The truly backward castes thus did not benefit.

[18] AIR 1960 Mys. 338, p. 345.

[19] For this distinction, I am indebted to Galanter, "Who Are the Other Backward Classes", *Economic and Political Weekly*, Vol. XIII, Nos. 43 & 44, October 28, 1978, p. 1817, and to Havanur, *Report of the Karnataka Backward Classes Commission*, 1975, at Vol. I, p. 71.

The 'lion's share' problem is one of the greatest difficulties with any system of reservations. Even if there are no caste groupings as in *Ramakrishna Singh*, the problem arises with individuals in a caste designated as backward. The most forward of the 'backward caste' are the most likely to take the reserved seats. Thus, reservations do not necessarily help the very poorest and the most needy.

The Mysore Government responded to the *Ramakrishna Singh* judgment by appointing the Mysore Backward Classes Committee with Dr. R. Nagan Gowda as chairman. The Committee was to advise the Government on the criteria for determining the educational and social backwardness of the backward classes. In its interim report, the Committee applied a two pronged test: lower than average literacy and lower than average representation in government service. The units designated as 'backward' continued to be castes (as corporate groups). 168 castes and communities were so designated, comprising 35.34 per cent of the population. The literacy test excluded two politically powerful castes from obtaining the benefits of reservations. In the Government order that followed on June 9, 1960, these groups, the lingayats and vokkaliga bhunts, were omitted from the list of 'backward classes.' When they challenged the order in *S.A. Partha v. State of Mysore*[20] their exclusion was upheld. But the order was quashed because it added unfilled scheduled castes and scheduled tribes seats to the seats reserved for other backward classes, rather than throwing them back into the general 'merit' pool. Such compartmentalisation was held to violate the rights of applicants to the merit pool.

The Nagan Gowda Committee made its final report on May 15, 1961. It shifted its test of educational backwardness from literacy to the number of high school students per thousand in the community's population. The State average was 6.9 per thousand. All castes below this average were declared backward. Those less than half the State average were declared 'more backward'. For social backwardness, the Committee chose to use caste rank as the test of backwardness, but it never seemed to actually apply this test. For government posts they added the test of representation in government service. On all the lists, lingayats and bhunts continued to be excluded, since they were above the State average by every test.

The lingayats and bhunts finally squeezed back onto the list of 'backward classes' in the new government order that followed on 10 July, 1961, even though they were above the averages set by the Nagan Gowda Committee. Fifteen per cent of seats were reserved for scheduled castes, 3 per cent for scheduled tribes, and 30 per cent for other backward classes. The list continued to be drawn with caste groups as the units. The percentage of seats reserved was increased to 50 per cent for other backward classes by a further government order on 31 July, 1962, making a total reservation of 68 per cent.

[20]AIR 1961 Mysore, p. 220.

By including lingayats, bhunts, and ganagas, the Government Order brought the total backward classes to 74 per cent of the population plus 14 per cent for scheduled castes and scheduled tribes. This 88 per cent total came very close to the huge list of backward classes struck down in *Ramakrishna Singh.* The 68 per cent seat reservation was even larger than the 65 per cent in *Ramakrishna Singh.*

Advocate Venkataranga Iyengar (whom I interviewed for this article) filed yet another challenge. The result was that the most important decision of all, *M.R. Balaji v. State of Mysore,*[21] was decided by the Supreme Court on 28 September, 1962.

Six applicants to medical college and seventeen applicants to engineering college filed writ petitions contending that they were not admitted because of the excessive and irrational reservations for backward classes in the government order. Candidates from backward classes with lower scores on their examinations were admitted instead of the petitioners. The petitioners contended, and the Court held, that the order was invalid because 'the basis adopted by the order in specifying and enumerating the socially and educationally backward classes of citizens in the State is unintelligible and irrational and hence outside Article 15(4)." The Court also held that the extent of the reservation was unreasonable and a fraud on the power conferred by Article 15(4). The Court reasoned that 15(4) is an exception to 15(1) and 29(2) and so it must not be interpreted so as to nullify the rights guaranteed to all citizens by those Articles. Reservations for castes at or only slightly below the State average in education (the lingayats, bhunts, and others) could not be considered reservations for truly 'backward classes'. To be a backward class, a social group must be 'in the matter of their backwardness comp arable to scheduled castes and scheduled tribes.'[22] Making reservations to benefit nearly 90 per cent of the population was not what the constitution makers intended by Article 15(4). Similarly, reservation of 68 per cent of the medical and engineering college seats was so excessive as to subvert the purpose of 15(4). Reservations under 15(4) should by and large not be for more than 50 per cent of the seats.[23] Any more would interfere with the equal rights of those competing on merit. Those for whom the reservations may be made must be "classes of citizens whose average is well or substantially below the State average."[24]

The Supreme Court examined the criteria used by the Nagan Gowda Committee for designating classes as backward and criticised the Committee's use of caste (meaning in context, caste rank) as its sole determinant of social backwardness.

[21]AIR 1963 SC, p. 649.
[22]*Ibid.*, p. 658.
[23]*Ibid.*, p. 663.
[24]*Ibid.*, p. 661.

The Court praised a Maharashtra scheme that used income as the criterion for backwardness, but the Maharashtra income test had in fact been adopted for distributing scholarships. (Seats in Maharashtra medical and engineering colleges continued to be reserved for backward classes made up of caste and communal units, a fact not noted by the Court.) The *Balaji* Court left caste rank as one possible measure of backwardness, but the Court held that caste rank could not be used as the *only* measure as it found the Nagan Gowda Committee to have done.

The Court's failure to distinguish the rank meaning of caste and the meaning of caste as a corporate group has probably led to most of the confusion about the opinion. But a careful reading shows that the Court meant only to prohibit the sole use of caste rank as a measure of backwardness. It was dubious about caste groups as units, but did not actually prohibit their use.

> The group of citizens to whom Article 15(4) applies are described as classes of citizens, not as castes of citizens... In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection it is however necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.[25]

It is clear that the Court would prefer a universalistic criterion of backwardness, but it upheld the use of reservations. It pointed out that the quality of educational institutions will suffer if admissions are unduly liberalised, but added: 'that is not to say that reservations should not be adopted. Reservation should and must be adopted to advance the prospects of the weaker sections of society; but in providing for special measures in that behalf care should and must be adopted to advance the prospects of the weaker sections of society; but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities.'[26]

The Court struck down the compartmentalisation of reservations into categories for the 'backward' and the 'more backward' with one group unable to compete for places reserved for the other. The Court's reasoning that this denied equal protection was similar to that in *Ramakrishna Singh.*

[25]AIR 1963 SC 649, p. 659.
[26]*Ibid.*, pp. 662-663.

What concept of equality was used in the *Balaji* judgment? The problem with the judg ment is that several concepts were used simultaneously. In its clear preference for merit based admissions, the Court tended towards formal, individual equality. But it recognised the problem of backwardness and would allow reservations for backward classes, which it distinguished from backward castes.

If the decision is read to allow caste groups to be used as the units designated as backward, then the Court can be said to have tolerated a proportional group equality. But the Court's use of 'caste' generally referred to caste rank and not to caste groups as units. The Court seemed to prefer universalistic criteria of backwardness that would be as applicable to individuals as to groups. The Court left the question of whether a 'class' can be made up of caste groups unresolved. In later judgements it attempted to 'clarify' the *Balaji* decision in such a way as to show its preference for weighted individual equality, thus throwing *Balaji's* toleration of proportional group equality into doubt.

In response to the *Balaji* decision, the Mysore Government abandoned caste in both its group and its rank senses in designating backwardness. A two-fold test was substituted, classifying as backward all individuals whose families earned less than Rs. 1,200 per year (the State average was Rs. 1,330) and whose parents' occupations fell into any of the following categories: (1) actual cultivator; (2) artisan; (3) petty businessman; (4) inferior services (*i.e.*, class IV in government services or below, and corresponding classes or services in private employment, including casual labour); and (5) any other occupation involving manual labour. This two-fold test was upheld by the Mysore High Court in *Viswanath v. State of Mysore*.[27] In dicta, however, the court recommended that 'caste' (apparently in its rank sense) and 'residence' should have been added to the two other tests because the results of the new Mysore classification system showed that the Mysore scheme did not help the 'really backward classes.'[28] Out of a reservation of 142 seats for backward classes, brahmins qualified for 22 and lingayats for 35 engineering college seats as members of the 'backward classes' and in addition brahmins and lingayats continued to receive a disproportionate share of seats in the 'merit pool'. Brahmins obtained 33 per cent of the total seats though they were only 4.28 per cent of the state population.

The Supreme Court of India repudiated the Mysore Court's *Viswanath* dictum in *Chitralekha v. State of Mysore*.[29] Subba Rao, J. wrote :

> We would hasten to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgement of this Court which precludes the authority concerned from

[27]AIR 1964 Mys. 132. L.G. Havanur was one of the advocates for petitioners.
[28]AIR 1964 Mys. 132, p. 139.
[29]AIR 1964 SC 1823. S.K. Venkataranga Iyengar was again the advocate in this case.

> determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances affording a basis for the ascertainment of backwardness of a class.[80]

The Court went on to further 'explain' the meaning of its judgment in *Balaji*. Its explanation indicated that the Court had really not intended to tolerate a proportional group concept of equality at all. What the Court said it had meant was based on a weighted *individual* concept of equality, in which caste *groups* were not to be the relevant units.

The Court based its 'individual' approach to backwardness on the distinction between 'classes' and 'castes'. The Court implied that classes should not be defined by designating certain caste groups as belonging to them. In its 'explanation', the *Chitralekha* Court thus actually went far beyond *Balaji* by repudiating 'caste' in its group sense. *Balaji* had only said that caste *rank* could not be the *sole* measure of backwardness. Subba Rao, J. wrote :

> The important factor to be noticed in Article 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the scheduled castes and the scheduled tribes. Though it may be suggested that the wider expression 'classes' is used as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the constitution to use the expression 'backward classes or castes'. The juxtaposition of the expression 'backward classes' and scheduled castes in Article 15(4) also leads to a reasonable inference that the expression 'classes' is not synonymous with castes. It may be that for ascertaining whether a particular citizen or group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong.
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> This interpretation helps the really backward classes instead of promoting the interests of individuals or groups who, though they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced.
>
> If we interpret the expression 'classes' as 'castes', the object of the constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve.

[80]AIR 1964 SC 1823, *op. cit.*, p. 1833.

> This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire subcaste, by and large, is backward, it may be included in the scheduled castes by following the appropriate procedure laid down by the constitution.
> What we intend to emphasize is that under no circumstance a 'class' can be equated to a 'caste' though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class.[31]

Though the shift in emphasis may seem subtle, the difference between the *Balaji* and *Chitralekha* decisions is very important. In *Chitralekha,* the Court, for the first time, advocated abandonment of the group concept of equality that had been the rule up to that time. In doing so, its reasoning was unhistorical and probably also unsound. The question regarding 'class' and 'caste' is not whether the two terms can be 'equated', but rather whether 'classes' can be composed of 'caste groups'. And eliminating the 'forward' from a caste to be helped can be accomplished as easily through income ceilings as by abolishing the use of caste as a unit.

The word 'class' in the Indian context has historically been inextricably linked with 'caste.' L.G. Havanur in the report of the Karnataka Backward Classes Commission, cites numerous examples of official use of the word 'classes' to include caste groups. The 'depressed classes' for example, were defined in the Government of India Acts of 1919 and 1935 to mean certain castes and communities :

> The 'scheduled castes' means such castes, races, or tribes or parts or groups within castes, races, tribes, parts or groups which appear to the Governor General to correspond to the classes of persons formerly known as the depressed classes as the Governor General may by order specify.[32]

Just before independence, the Lahore High Court noted that 'class' has a special meaning in the Indian context :

> A class or section of His Majesty's subjects is a set of persons all filling one common character and possessing common and exclusive characteristics which may be associated with their origin, race, or religion. The term *class* carries with it the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous

[31]AIR 1964 SC 1823, *op. cit.*, pp. 1833-1834.

[32]Cited in the *Report of the Karnataka Backward Classes Commission* (L.G. Havanur, chairman), Government of Karnataka, 1975, Vol. I, p. 60.

and widespread to be designated a class. It is in this sense that the expression was commonly understood in this country and it is in this sense that ought, in my opinion, be construed.[33]

Numerous other examples are given by Havanur.

The distinction of 'class' and 'caste' by sociologists is probably behind the distinction made by the *Chitralekha* court. André Beteille in *Caste, Class and Power*[34] observes that whereas caste and class once identified the same groups (upper castes were also the upper classes), the homology has come 'unglued', so to speak, with modernisation. Members of upper castes are no longer necessarily also of the upper classes. It is perhaps this process of ungluing (*dècollage*) that has resulted in the Supreme Court's departure from the previous definitions of 'class' in India. At any rate, the Court's radical distinction of 'class' and 'caste' is a departure from previous Indian usage.

The Supreme Court 'explained' another aspect of its *Balaji* ruling in *T. Devadasan v. Union of India*[35] decided August 29, 1963. A reservation of 17½ per cent of the promotions to assistant superintendent had been made for scheduled castes and scheduled tribes in the Central Secretariat Service. When reserved positions went unfilled by members of scheduled castes and tribes, they were carried 'forward' into subsequent years and added to the percentage reserved for each year. The cumulative number of positions reserved had come to 65 per cent of the total to be filled when the case was filed. The petitioner was passed over and members of scheduled castes and tribes were appointed even though on a qualifying examination the petitioner had received a score of 61 and some of those promoted had scored only 35.

The Court held that the *Balaji* decision made 50 per cent the upper limit for reservations. "The ratio of this (Balaji) decision appears to be that reservations of more than half the vacancies is *per se* destructive of the provisions of Art. 15(1)."[36] The *Devadasan* court extended this 'ratio' to apply to government employment under 16(1) as well.

What is most interesting about the *Devadasan* decision is that for once both the majority and a notable dissenter came to grips with the problem of defining equality. Regarding Article 14, Mudholkar, J. for the majority said :

> What is meant by equality in this Article is equality amongst equals. It does not provide that what is aimed at is an absolute equality of

[33]AIR 1947, Lahore 340.

[34]Andre Beteille, *Caste, Class and Power*, 1971 University of California Press, Berkeley, Cal., U.S.A.

[35]AIR 1964 SC, p. 179.

[36]*Ibid.*, p. 185.

> treatment to all persons in utter disregard in every conceivable circumstance of the difference such as age, sex, education and so on and so forth as may be found amongst people in general... Reasonable classification is permissible. Where the object of a rule is to make reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in the public services of the state, what the state would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open then for a member of a more advanced class to complain that he has been denied equality by the state.[37]

The Court went on to make it clear that it is individual, not group, equality that Article 16(1) is intended to protect.

> 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 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....[38]

In ruling out the 'carry forward' provisions of the reservation scheme in the *Devadasan* case, the Court came down squarely against a proportional group concept of equality and for a weighted individual concept. The weighted individual concept of equality was also that applied in the vigorous dissent of Subba Rao, J. who would have upheld the carry forward scheme on grounds of strict judicial restraint. Subba Rao, J. argued that 16(4) left a power "untrammelled by the other provisions of the Article" and therefore open to even a *total* yearly reservation for scheduled castes and scheduled tribes until the percentage reserved for them in a service is attained. He noted the different facts in *Balaji*, a case governed by 15(4) and one in which the reservation list included groups the court found to be non-backward. *Devadasan* depended on 16(4), and concerned scheduled castes and scheduled tribes, whom no one argued were non-backward. Subba Rao noted that the *Balaji* 50 per cent guideline was "intended only to be a workable guide but not an inflexible rule of law even in the case of admissions to colleges."[39]

[37] AIR 1964 SC 179, p. 185.
[38] *Ibid.*, p. 187.
[39] *Ibid.*, p. 193.

Despite the different result he would have reached, Subba Rao's definition of equality was in complete harmony with that of the majority. It was a weighted individual concept.

> 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... 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 a 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. Two horses are set down to run a race—one is a first class 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 have been a farce 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. That is why the makers of the Constitution introduced clause 4 in Article 16.[40]

Although Subba Rao, J. stressed the weighted individual concept of equality, he did not seem to consider it at odds with job reservations. The practical results that reservations may have can be justified as though they were 'handicaps' to forward classes of candidates and thus individual in their effects. But in fact reservations are based on a proportional group concept of equality. Subba Rao, J. only partly addressed the inconsistency of reservation schemes with individual equality.

> This provision (for reservation) certainly caused hardship to the individuals who applied for the second or third selection, as the case may be, though the non-scheduled castes and non-scheduled tribes, taken as one unit, were benefited in the earlier selection or selections. This injustice to individuals, which is inherent in any scheme of reservation,

[40]AIR 1964 SC 179, p. 190.

cannot, in my view make the provision for reservation any the less a provision for reservation.[41]

Subba Rao, J. did recognise much more frankly than most judges the conflict between formal individual equality in a meritocracy and the type of equality found in a reservation system:

> If the provision deals with reservation—which I hold it does—I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad.[42]

The *Balaji* decision has been applied and interpreted in most of the cases since it was handed down. Since *Balaji*, the courts have taken an activist role in passing on the constitutionality of many details of administering reservations. In *Chamaraja v. State of Mysore*,[43] the Mysore High Court upheld a reservation scheme in which the backward class candidates for medical college admitted in the general merit competition were counted towards fulfilment of the backward class reservation quota. An Andhra Pradesh court had struck down an opposite scheme in which backward class candidates who would have been admitted on merit were denied admission because the reservation percentage for backward classes was 'filled'.[44] Thus reservations may be used as minimums but not as maximums.

In *Abdul Latiff v. State of Bihar*[45] a licence was available for a ganja shop. There were 39 applicants, 7 from members of scheduled castes and scheduled tribes. Because of a government order giving preference to scheduled castes and scheduled tribes, the selection was made by drawing lots between the seven scheduled caste/scheduled tribe aplicants. The court held that this procedure violated the rights of the excluded applicants and exceeded the limits of government power under Article 15(4). The court reasoned that 15(4) is only an exception to 15(1) and should not be interpreted to destroy or nullify the meaning of 15(1). The court took a weighted individual or possibly even a formal individual view of equality, and rejected the proportional group concept of equality used in the selection procedure.

In *Triloki Nath Tiku v. The State of Jammu and Kashmir*[46] the proportional group concept of equality was again rejected. In that case two Kashmiri pandits (an elite group) on a high school teachers' seniority list were passed

[41] AIR 1964 SC 179, p. 192.
[42] *Ibid.*, p. 192.
[43] AIR 1967 Mysore, 21.
[44] *Raghuramulu v. State of Andhra Pradesh*, AIR 1958, Andhra Pradesh 129.
[45] AIR 1964 Patna, 393.
[46] AIR 1967 SC 1283.

over for promotion because of a quota system allotting 50 per cent of promotions to Muslims, 30 per cent to Dogras from Jammu and only 20 per cent to Kashmiri pandits. The Supreme Court held that reservations could only be used to benefit classes that were both socially and educationally backward. Mere inadequate representation in State services did not constitute a sufficient test. The Court threw out the reservation scheme because no evidence had been presented that any of the groups for which reservations were made were 'backward'. The Court declared that whether a class is backwa d is a justiciable issue, making explicit the activist role it had adopted in *Balaji.*

The most thorugh and thoughtful discussion of reservations and the concepts of equality was given in the opinions handed down in 1976 in *State of Kerala v. N.M. Thòmas.*[47]

A Kerala Government order allowed members of scheduled castes and scheduled tribes who had been promoted from lower to upper division clerks two years longer than others to pass a qualifying test. Over the years preferential treatment had given members of scheduled castes and tribes seniority over many of their co-workers. The result was that in the promotion challenged by the petitioner, 34 out of 51 posts were given to members of scheduled castes and tribes. Petitioner had passed the qualifying test though he lacked relative seniority, and he challenged the government order allowing members of scheduled castes and tribes to continue in their higher posts (thus accruing yet more seniority) without passing the test. The result of the order was that the petitioner had not been promoted.

The Kerala High Court ruled that giving 34 out of 51 posts to scheduled castes and tribes was excessive. The Supreme Court of India reversed, liberalising its rigid 50 per cent rule from *Devadasan.* The Court noted that the percentage of scheduled castes and tribes in the entire Kerala government service was only 2 per cent for gazetted services and 7 per cent for non-gazetted services. Scheduled castes and tribes made up 10 per cent of the Kerala population. The Court steered around the 50 per cent *Devadasan* rule by pointing out that seniority was the reason for the high percentage of promotions that went to members of scheduled castes and scheduled tribes and that seniority and membership in scheduled castes and tribes were both reasonable classifications for promotion, not violating the equality guaranteed by the Constitution. As long as the classifications did not impair efficiency in administration (a balance mandated by Article 335), they did not contravene Articles 14, 16(1) and 16(2).[48]

In a concurring opinion, Mathew, J. discussed the meaning of the equality guaranteed in the Constitution. He distinguished what he called 'formal' equality from 'proportionate' equality. Formal equality which means absolutely identical treatment for all persons would result in equality in law but

[47]AIR 1976 SC 490.
[48]*Ibid.*, p. 502.

inequality in fact. Equality in fact "may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."[49] Proportionate equality is attained only when equals are treated equally and unequals unequally. "Proportional equality appeals to some criterion in terms of which differential treatment is justified."[50] The criteria must be relevant to the post. As Aristotle said, "claims to political office cannot be based on prowess in athletic contests. Candidates for office should possess those qualities that go to make up an effective use of the office."[51] Article 335 postulates that scheduled castes and tribes have a claim to representation in the public service. Therefore membership in scheduled castes and tribes can be a relevant and constitutional criterion to be used in selection for the public services.

Citing B.I.O. Williams,[52] Mathew, J. gave the example of a hypothetical society where great prestige was attached to being a member of a warrior class recruited only from wealthy families. A reformer opened the recruitment to all with the requisite physical strength. But because only the wealthy had such physical strength due to better nutrition they continued to monopolise the warrior class. "Such equality is quite empty. One knows that there is a causal connection between being poor and being under-nourished and being physically weak .... To give *X* and *Y* equality of opportunity involves regarding their conditions where curable, as themselves part of what is done to *X* and *Y* and not part of *X* and *Y* themselves."[53]

Mathew, J. concluded that the guarantee of equality in the Indian constitution must be for more than formal equality and that it implies differential treatment of persons who are unequal.[54] He cited several American cases in support of such a concept of equality, *Griffen v. Illinois*[55]; *Douglass v. California*[56] and *Harper v. Virginia Board of Elections.*[57] Mathew, J. stated his view of equality most forcefully in his statement that "Whether there is equality of opportunity can be gauged only by the equality attained in the result."[58]

Applying such a concept of equality would mean that 16(4) should not

[49]AIR 1976 SC, 513, citing his opinion in *Ahmedabad St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, p. 1433.

[50]AIR 1976 SC 490, p. 513.

[51]*Ibid.*, p. 513.

[52]B.I.O. Williams, "The Idea of Equality" in Hugh A. Baden (ed.)., *Justice and Equality*, p. 116.

[53]AIR 1976 SC 490, p. 515.

[54]*Ibid.*, p. 516

[55]351 U.S. 12 (1955) (Indigent defendant was unable to appeal because he could not afford to buy the trial transcript, violating equal protection of the laws despite formal 'equality' of law requiring purchase).

[56]372 U.S. 353 (1963).

[57]383 U.S. 663 (1966) (Virginia Poll tax violated equal protection clause).

[58]AIR 1976 SC 490, p. 518.

be interpreted as an exception to 16(1). "If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried, *viz.*, even up to the point of making reservation."[59] Mathew, J. therefore upheld the Kerala scheme as within the State's constitutional powers.

Krishna Iyer, J. in a concurring opinion also interpreted the guarantee of equality to be for a 'real not a formal equality'. He upheld the Kerala reservation scheme but also listed some of the dangers of reservation schemes in general :

1. Benefits are by and large snatched away by the top creamy layer...
2. Claims to backwardness are overplayed as a means to group advancement.
3. They are not a lasting solution to the caste problem. The solution will come only "from improvement of social environment, added educational facilities and cross-fertilization of castes by inter-caste and inter-class marriages sponsored as a massive state programme.[60]

Krishna Iyer, J. nevertheless upheld reservations because "reservation based on classification of backward and forward classes without detriment to administrative standards . . . is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency."[61] Articles 14 to 16 do not dictate mechanical or literal equality but rather the progressive elimination of pronounced inequality.[62]

Fazl Ali, J. in his concurring opinion observed that classification on a rational basis with a close nexus with the object to be achieved is compatible with equality. Article 16(4) then is not an exception to 16(1). Instead it "covers and allows one form of classification among those that can be made under 16(1)."[63] Fazl Ali, J. would liberalise the 50 per cent rule handed down in *Devadasan* and would allow the carry forward rule to be used. He noted the small percentage of scheduled caste and scheduled tribe members in the government services and implied that reservations should be judged by a proportional group equality rather than on the individual basis advocated in *Devadasan*. This reassertion of the proportional group concept of equality may indicate a resurgence of respectability for that approach.

The response to the activist courts has been an increasing use of objective

[59]AIR 1976 SC 490, p. 519.
[60]*Ibid.*, p. 531.
[61]*Ibid.*, p. 536.
[62]*Ibid.*, p. 537.
[63]*Ibid.*, p. 555.

and intelligible criteria for measuring backwardness. But caste groups remain the most common units designated as backward. In the most thorough and scientific study of the problem to date, the Karnataka Backward Classes Commission chaired by L.G. Havanur carried out massive surveys of the caste groups of Karnataka in order to gauge their socio-economic status, educational attainment, political and economic position, and representation in government services. The results of the surveys were used to designate castes and communities to be granted reservations in educational institutions and government services. For educational institutions [under Art. 15(4)] 15 communities, 128 castes, and 62 tribes were designated backward. For government service [under Art. 16(4)], 9 communities, 115 castes, and 61 tribes were designated backward.[64] The Commission recommended reservation of 32 per cent of educational seats and government posts for backward classes, in addition to the 18 per cent reserved for scheduled castes and scheduled tribes. The percentage of reservations was thus kept at 50 per cent.

The Karnataka Government orders that followed in 1977 and 1978 added several groups to the list recommended by the Commission and raised the total reservation to 58 per cent. The orders were challenged in *Dayanandaiah v. State of Karnataka*[65] and decided by the Karnataka High Court on April 9, 1979. According to preliminary reports of that judgement and interviews with L.G. Havanur and Venkataranga Iyengar, (an advocate for Dayanandaiah) the High Court upheld the designation of caste groups by the Backward Classes Commission but struck down the addition of other groups in the government order, thus vindicating the survey approach taken by the Commission and once again rejecting the addition of groups for whose inclusion no intelligible justification was given.

The formal individual concept of equality has never held much sway in Indian cases of compensatory discrimination. The trend in the Indian courts has been towards a weighted individual concept of equality. But the proportional group concept of equality has never completely been displaced largely because of the Indian constitution's explicit permission of reservations. Recent cases such as *Thomas* indicate that the proportional group concept is still permissible in India and may be making a comeback.

TREND IN THE UNITED STATES

In the United States the trend has been away from the formal individual concept of equality to a weighted individual concept of equality. The proportional group concept was rejected by Justice Powell in the *Bakke* decision, though there is room for it in the opinion of Justice Brennan, White, Marshall, and Blackmun. Group concepts of equality are not in harmony

[64] *The Report of the Karnataka Backward Classes Commission* (L.G. Havanur, chairman), Government of Karnataka, 1975, Vol. I, pp. 359-372.

[65] Unreported at the time of writing. See *Deccan Herald*, Bangalore, April 10, 1979, p. 1.

with the individualistic underpinnings of the American constitution and American culture, and there have been very few court decisions supporting them. Preferences for members of groups are nearly always justified as weighted individual treatment. Reservation systems have seldom been upheld.

The US Supreme Court opinions in the case of *The Regents of the University of California v. Allan Bakke*[66] demonstrate the use of all three concepts of equality.

The medical school of the university of California at Davis employed two admissions programmes to fill its entering class of 100 students. Sixteen seats were reserved for members of minority groups (blacks, Chicanos, Asians, and American Indians). These seats were filled by selection from a pool of 'special applicants' to which only minority group members could belong. The special applicants were rated only against each other. Eightyfour seats were filled by competition among all applicants in the 'general pool' including the 'special applicants' who were considered in both pools.

Allan Bakke applied for admission in the general pool twice and was turned down twice. In both years, 'special applicants' with considerably lower test scores and grade averages than *Bakke* were admitted to reserved seats. *Bakke* sued for injunctive and declaratory relief to compel his admission to Davis, alleging that the special admissions programme operated to exclude him on the basis of his race in violation of the equal protection clause of the fourteenth amendment, a provision of the California constitution, and section 601 of title VI of the Civil Rights Act of 1964. The California Supreme Court ruled that the special admissions programme violated the equal protection clause and ordered *Bakke's* admission. It also prohibited Davis from taking race into account as a factor in its admissions decisions.

Justice Powell's judgment for the US Supreme Court upheld the California Court's decision insofar as it ordered *Bakke's* admission and invalidated the Davis admissions programme. But he did so on very different grounds, since he applied a weighted individual concept of equality rather than the formal individual concept of equality used by the California Court. The California Court held that Davis's admissions programme must be completely colourblind. Yet such a colourblind admissions programme had been tried at Davis with the result that almost no minority group members had been admitted. Justice Powell held that race may be taken into account in considering the applications of individual applicants. But because white applicants could compete for only 84 seats out of 100, a 'line' drawn on the basis of race had been used—in effect a system of reservation. He held that racial classifications must be strictly scrutinised to determine if they are necessary to achieve constitutional state interests. Powell noted that "it is settled beyond question

[66] 438 U.S. 265 (June 28, 1978).

that the 'rights' created by the first section of the fourteenth amendment are, by its terms, guaranteed to the individual. They are personal rights not group rights."[67] Powell rejected any group theory of equality including 'two-class theories' of majority and minority rights under the fourteenth amendment. He found that the Davis quota system was not necessary to achieve the state's legitimate interests in ameliorating the disabling effects of identified discrimination, training more minority physicians, and achieving a diverse student body. An individually based admissions programme like Harvard's could achieve these goals just as well without quotas. Powell held that 'the fatal flaw' in Davis's preferential programme is its disregard of individual rights as guaranteed by the fourteenth amendment."[68] Because of the legitimate state interest in rectifying past discrimination, race could be taken into consideration in judging the qualifications of individual applicants. But a system of group reservations (based on a proportional group concept of equality) violated individual rights under the equal protection clause.

Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun in their opinion would have not only allowed race to be taken into consideration on an individual basis but would also have allowed the use of group quotas like Davis's. Therefore *Bakke* would not have to be admitted.

Brennan, White, Marshall, and Blackmun first examined the legislative history of title VI of the Civil Rights Act of 1964 and concluded that its remedial purpose did not bar the use of race conscious programmes to ameliorate historic racial discrimination. They examined prior court decisions and concluded that racial classifications are not *per se* invalid under the fourteenth amendment. They held that the amelioration of past discrimination is a constitutional state interest and noted that Davis's admissions programme was designed to achieve that goal. Strict scrutiny of racial classification meant asking whether the Davis programme 'stigmatised' any discrete group or individual and was reasonably related to its objectives. Concluding that it did not stigmatise, Brennan, White, Marshall and Blackmun judged the Davis programme constitutional. They refused to rule against group approaches to rectifying past discrimination.

> When individual measurement is impossible or extremely impractical, there is nothing to prevent a state from using categorical means to achieve its ends at least where the category is closely related to the goal.[69]

[67] 438 U.S. 265, p. 289, citing *Shelley v. Kraemer*, 334 U.S. 1 at 22 (1948). The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution states: "No state shall... deny to any person within its jurisdiction the equal protection of the laws."

[68] 438 U.S. 265 (1978), p. 320.

[69] *Ibid.*, pp. 377-378.

They judged that the Harvard individual approach to the problem was in effect no different than the Davis approach because it too resulted in preferences for minorities and exclusion of some whites.

Justice Marshall in his separate opinion emphasised the long history of group discrimination against American black people. He examined the history of the fourteenth amendment and the legislation that immediately followed it and opined that the amendment's framers were attempting to remedy the effects of past discrimination, not to ban state action to achieve that end. Barring race-conscious remedial action "would pervert the intent of the framers by substituting abstract equality for the genuine equality the amendment was intended to achieve."[70]

Marshall supported a group approach to equality more directly than did the Brennan opinion. He pointed to previous cases of group based preference that were upheld by the Court and concluded that there is no need to find that those individually benefited were actually victims of past discrimination.[71] In his clearest support for a proportional group concept of equality, Marshall noted that :

> It is more than a little ironic that, after several hundred yearsof class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins.[72]

Marshall therefore would have allowed group based programmes to rectify past group discrimination, a position allowing the state to apply a proportional group definition of equality.

Justice Blackmun's separate opinion upheld the use of race as a factor in medical school admissions and allowed Davis's admissions programme as "within constitutional bounds, though perhaps barely so."[73] But Blackmun's opinion never explicitly endorsed the group quota approach to compensatory discrimination, and he explicitly preferred the Harvard individual approach. Blackmun said, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[74] Blackmun's opinion seems to be predicated on a weighted individual concept of equality rather than on proportional group equality.

Mr. Justice Stevens, Chief Justice Burger, Mr. Justice Stewart, and

[70] 438 U.S. 265 *op. cit.*, p. 398.
[71] *Ibid.*, p. 400.
[72] *Ibid.*, p. 400.
[73] *Ibid.*, p. 406.
[74] *Ibid.*, p. 407.

Mr. Justice Rehnquist adopted a strictly individualistic approach to the case. They refused to rule on the constitutionality of the Davis admissions programme and instead came to their decision of a formal reading of title VI (Section 601) of the Civil Rights Act of 1964.[75] They found that *Bakke* had been excluded from participation in Davis's programme of medical education because of his race. They interpreted title VI as protecting *individuals* and as requiring 'colourblind' application of its provision. They clearly rejected the group approach to equality.

> Both title VI and title VII express Congress's belief that in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a meeting of the minds among all races and a common national purpose. See *City of Los Angeles, Dept. of Power and Water v. Manhart*, 46 U.S.L.W. 4347, 4349 ["the basic policy of the statute (title VII) requires that we focus on fairness to individuals rather than fairness to classes"]. This same principle of individual fairness is embodied in title VI.[76]

Since *Bakke*, the individual, had been excluded because of his race, Stevens, Burger, Stewart, and Rehnquist ordered him admitted and upheld the ruling of the California Supreme Court.[77] Their interpretation of title VI was based on a formal individual view of equality that would not allow race to be considered in deciding on *Bakke's* application.

Powell's opinion became the decision of the Court because he ordered *Bakke* admitted as Stevens, Burger, Stewart, and Rehnquist did, but he also upheld the consideration of race in admissions programmes as Brennan, White, Marshall, and Blackmun did. This middle position was predicated on a weighted individual concept of equality that rejected both the formal individual equality advocated by Stevens *et al.* and also the proportional group equality tolerated by Marshall and perhaps by Brennan, White and Blackmun. Quotas and reservations are out but race as a factor in weighting individuals was accepted.

THE INDIVIDUAL VS. GROUP CONCEPT OF EQUALITY

The weighted individual concept of equality is in harmony with the American constitution's emphasis on individual rights. Group concepts of equality are not. The concept of the individual is one of the key underpinnings of American constitutional law and social theory. The social contract theories of the framers of the American constitution were based on a view

[75] 42 U.S.C. S 2000 d.
[76] 438 U.S. 265 (1978), p. 416.
[77] *Ibid.*, p. 421.

of human beings as free individuals who voluntarily come together to form social institutions. The primary unit in such theory is the individual, not the group. Rights guaranteed by the fourteenth amendment have been interpreted as individual rights, not group rights, and Powell's decision in Bakke upheld that interpretation.

The Indian constitution, on the other hand, was written for the Indian culture. Dumont[78] and others have argued persuasively that the concept of the individual as a unit separable from his social milieu is foreign to traditional Indian culture. The Indian concept of the person according to McKim Marriott,[79] is rather that of the *dividual,* a social being constituted by multitudinous social interactions and group affiliations. The most important status group affiliation in India is that of caste. A human being belongs to his or her caste from birth. A person's caste, both in the group and the rank sense, is inextricably part of his personhood. In India, therefore, a person's caste group membership and the situation of his caste in a total structural hierarchy are among his essential attributes. They are not adventitious qualities added by society.

In the Indian constitution, the caste system is explicitly recognised, though many of the framers did not approve of it. It was recognised because any advocate of equality in India must take the caste system into account. A proportional group concept of equality was sanctioned in the constitution's provisions for reservations. Articles 15(4) and 16(4) allow group membership to be a determinant of a person's treatment by the state. The Indian courts have tended to prefer weighted individual equality, but they have allowed proportional group equality to be implemented in reservation systems.

The Indian constitution embodies the Indian social concept of personhood. Because of the group nature of Indian concepts of the person, it is not surprising that group affiliation has been allowed a much more important role in Indian constitutional law than it has been recently in America. Proportional group equality in India would allow for reservations to achieve caste group equality. Because of the pervasive nature of the Indian caste system, this concept of equality is in harmony with the realities of Indian society and culture. The concept of the individual does certainly play an important role in modern Indian constitutional law but it co-exists with more traditional group concepts of personhood. It is thus understandable that in Indian constitutional law both individual and group concepts of equality co-exist.

American courts have almost universally used individual rather than group concepts of equality. The *Bakke* decision illustrates this American

[78]L. Dumont, *Homo Hierarchicus: Essai surle systeme des Castes,* Paris, Gallimard, 1966.

[79]*Personal Communication* by Prof. McKim Marriott.

predilection, and it is in harmony with America's individualistic culture and with the American constitution. India's history, culture, and constitution differ from America's and it is thus appropriate that in India individual and group concepts of equality have been applied by the courts in different ways, ways well suited to the Indian constitution and culture.

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