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(BEFORE Y.K. SABHARWAL, C.J. AND K.G. BALAKRISHNAN, S.H.
KAPADIA, C.K. THAKKER AND P.K. BALASUBRAMANYAN, JJ.)

M. NAGARAJ AND OTHERS

.. Petitioners;

Versus

UNION OF INDIA AND OTHERS

.. Respondents.

Writ Petition (C) No. 61 of 2002[†] with Nos. 62, 81, 111, 134-35, 206, 226-27, 255, 266, 269, 279, 299, 294-95, 298, 250, 319, 375, 386-87, 320, 322-23, 338, 234, 340, 423, 440, 453, 460, 472, 482-85, 550, 527 and 640 of 2002, SLPs (C) Nos. 4915-19 of 2003, WP (C) No. 153 of 2003, CP (C) No. 404 of 2004 in WP (C) No. 255 of 2002, CP (C) No. 505 of 2002 in WP (C) No. 61 of 2002, CP (C) No. 553 of 2002 in WP (C) No. 266 of 2002, CP (C) No. 570 of 2002 in WP (C) No. 255 of 2002, CPs (C) Nos. 122 and 127 of 2003 in WP (C) No. 61 of 2002, CP (C) No. 85 of 2003 in WP (C) No. 255 of 2002, WPs (C) Nos. 313 and 381 of 2003, CAs Nos. 12501-03 of 1996, SLP (C) No. 754 of 1997, WP No. 460 of 2003, CAs Nos. 7802 and 7803 of 2001, WP (C) No. 469 of 2003, SLP (C) No. 19689 of 1996, WPs (C) Nos. 563, 2 of 2003, 515, 519 and 562 of 2004, 413 of 1997, 286 of 2004 and SLP (C) No. 14518 of 2004, decided on October 19, 2006

A. Constitution of India — Arts. 16(4-A) & (4-B), 16(4) and 335 — Exercise of power of the State under, to make reservations in promotions — Mandatory requirements of — Extent of reservation permissible — Need for quantifiable data — Held, States have to identify and collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency in administration — If the State concerned fails to identify and measure the same, then provision for reservation would be invalid — Supreme Court will have to examine individual cases and decide the matter in accordance with law — Extent of reservation has to be decided on facts of each case — In each case Court has got to be satisfied that State has exercised its discretion properly, for which State concerned will have to place before Court the requisite quantifiable data in each case and satisfy the Court that the reservations became necessary on account of inadequacy of representation of SCs/STs in particular class(es) of posts, without affecting general efficiency of service as mandated under Art. 335

B. Constitution of India — Arts. 16(4-A) & (4-B), 16(4) and 335 — Limitations on power available to the State under Arts. 16(4-A) & (4-B) — Held, the same are (1) the ceiling limit of a maximum of 50% reservation (quantitative limitation), (2) the principle of creamy layer (qualitative exclusion), (3) the compelling reasons for exercise of power under, namely, backwardness and inadequacy of representation, and (4) the overall administrative efficiency as required by Art. 335 — Arts. 16(4-A) & (4-B) are applicable to SCs and STs only, and are to be applied only on the basis of post-based roster with inbuilt concept of replacement (see also *Shortnote R* and *S*, below) — If appropriate Government enacts a law providing for reservation without keeping in mind these parameters then Supreme Court will certainly set aside and strike down such legislation

[†] Under Article 32 of the Constitution of India

C. Constitution of India — Arts. 16(4-A), (4-B) & (4) — Nature of — Held, are enabling in nature — The State is not bound to make reservations for SCs/STs in matters of promotion — Arts. 16(4-A) & (4-B) leave it to the appropriate Government to provide for reservation — How best the conflicting claims of efficiency of administration and backwardness and inadequacy of representation are to be optimised can only be done by the administration, in the context of prevailing local conditions in public employment

D. Constitution of India — Arts. 16(4), (4-A) & (4-B), 17 and 46 — Interrelationship between — Explained in detail

E. Constitution of India — Art. 368 — Application of basic structure doctrine in testing validity of constitutional amendment — Tests to be applied — Held, the “width test” and the test of “identity” are to be applied — Also, test for adjudicating width of the power and test for adjudicating exercise of the power by the State concerned are two different tests which warrant two different judicial approaches — Constitutional Law — Basic structure doctrine — Application of

F. Constitution of India — Arts. 16(4-A) & (4-B) and 368 — Constitutional amendments inserting and amending — Validity of — Held, subject to the limitations introduced/reaffirmed by this judgment (see *Shortnotes A, B, K, L, M, N* and *S, T* herein) Constitution (Seventy-seventh Amendment) Act, 1995, Constitution (Eighty-first Amendment) Act, 2000, Constitution (Eighty-second Amendment) Act, 2000 and Constitution (Eighty-fifth Amendment) Act, 2001, are valid — They do not infringe either the width of the Constitution amending power or alter the identity of the Constitution or its basic structure — Service Law — Promotion — Reservation in — Validity of

G. Constitution of India — Art. 14 — Non-arbitrariness/Discretionary power — Theory of “guided power” — Reiterated and explained

H. Constitution of India — Arts. 16(4), (4-A), (4-B), 14 and 15 — Classification of Backward Classes into SCs/STs and OBCs — Validity of, reaffirmed

I. Constitutional Law — Nature of — Constitutional law is the law of evolving concepts — Some of them are generic, others have to be identified and valued — Constitution of India — Arts. 16(4-A) & (4-B) — Nature of

J. Constitution of India — Art. 14 — Negative and positive limbs of, distinguished and applied

The broad issues that arose for determination in this reference to a Constitution Bench related to the:

- A. (i) validity, (ii) interpretation, and (iii) implementation of the 77th, 81st, 82nd and 85th Constitution Amendment Acts; and,**
- B. action taken in pursuance thereof which sought to reverse decisions of the Supreme Court in matters relating to promotion in public employment and their application with retrospective effect.**

The key issue which arose for determination was whether by virtue of the impugned constitutional amendments, the power of Parliament was so enlarged so as to obliterate any or all of the constitutional limitations and requirements.

Answering the reference in the terms below, the Supreme Court

Held:

In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the “width test” and the test of “identity”. (Para 102) a

Also, the test for judging the width of the power and the test for adjudicating the exercise of power by the State concerned are two different tests which warrant two different judicial approaches. (Para 117)

Firstly, it is the width of the power under the impugned amendments introducing and amending Articles 16(4-A) and 16(4-B) that has to be tested. Therefore the “width test” has to be applied. The boundaries of the “width” of the power, namely, (1) the ceiling limit of 50% (quantitative limitation), (2) the principle of creamy layer (qualitative exclusion), (3) the compelling reasons, namely, backwardness, inadequacy of representation, and (4) the overall administrative efficiency are not obliterated by the impugned amendments. The constitutional limitation under Article 335 is relaxed and not obliterated. These impugned amendments are confined only to SCs and STs and the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, 1992 Supp (3) SCC 217, and the concept of post-based roster with inbuilt concept of replacement [see under Shortnote S, below] as held in *R.K. Sabharwal*, (1995) 2 SCC 745, have also not been obliterated. b

(Paras 117, 86, 102 to 103, 107, 112, 115, 116, 119 and 121)

Secondly, applying the test of “identity” there is no alteration in the existing structure of the equality code (Articles 14, 15 and 16) in the Constitution by the impugned amendments. Equity, justice and efficiency are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. None of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. There is no violation of the basic structure of the Constitution by any of the impugned amendments. (Paras 102 to 104) c

The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). Articles 16(4-A) and 16(4-B) form a composite part of the scheme envisaged and fall in the pattern of Article 16(4), and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. They are curative by nature. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. Articles 16(4-A) and 16(4-B) are both inspired by observations of the Supreme Court in *Indra Sawhney*, 1992 Supp (3) SCC 217 and *R.K. Sabharwal*, (1995) 2 SCC 745. They have nexus with Articles 17 and 46 of the Constitution. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4). Therefore the classification envisaged by Articles 16(4-A) and 16(4-B) is upheld. d

(Paras 121, 86, 103, 107, 109 and 116)

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481, followed e

Thirdly, every discretionary power is not necessarily discriminatory. Equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of “guided power”. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, the same would be corrected by the courts. This is the basic principle behind the enabling provisions which f

- are incorporated in Articles 16(4-A) and 16(4-B). These enabling provisions are permissive in nature. They leave it to the States to provide for reservation. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then the Supreme Court will certainly set aside and strike down such legislation. The field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because merit, efficiency, backwardness and inadequacy cannot be identified and measured in a vacuum. Articles 16(4-A) and 16(4-B) are enacted to balance equality with positive discrimination. Be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. The constitutional law is the law of evolving concepts. Some of them are generic, others have to be identified and valued. The enabling provisions of Articles 16(4-A) and 16(4-B) deal with the concept, which has to be identified and valued as in the case of access vis-à-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalising measures depending upon the fact situation. (Paras 106, 107, 102 and 103)

- The impugned provisions are enabling provisions. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make reservations in promotions, the States have to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency, as indicated by Article 335. The concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of prevailing local conditions in public employment. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. Furthermore, it is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer exclusion requirement or extend the reservation indefinitely. Ultimately the present controversy is regarding the exercise of the power by the State Government, as to whether the State concerned has identified and valued the circumstances justifying it to make reservation. When the State fails to identify and implement the controlling factors then excessiveness comes in, and this has to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination the Supreme Court has to examine individual cases and decide the matter in accordance with law. There are numerous petitions pending in the Supreme Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on the facts of each case. In each case the Court has got to be satisfied that the State has exercised its discretion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary

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on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution. (Paras 46, 102, 107, 117, 123)

Subject to the limitations introduced by this judgment, the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001 is upheld. (Para 124)

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, held, legislatively superseded on this point

Seervai, H.M.: *Constitutional Law of India*, 4th Edn., p. 546; Darity, William: *Affirmative Action*, referred to

K. Constitution of India — Arts. 16(4) and 335 — Limitations on power of the State available under Art. 16(4) — Held, (1) the ceiling limit of a maximum of 50% reservation (quantitative limitation), (2) the concept of creamy layer (qualitative exclusion), (3) the compelling reasons, namely, backwardness and inadequacy of representation, and (4) overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse — In *Indra Sawhney*, 1992 Supp (3) SCC 217, Supreme Court has accepted caste as determinant of backwardness and yet it has struck a balance with principle of secularism, which is a basic feature of the Constitution, by bringing in the concept of creamy layer — Art. 16(4) enables a State to provide for reservation in cases where it is satisfied on basis of quantifiable data that there exists backwardness of a class and inadequacy of representation in employment — Backwardness has to be based on objective factors whereas inadequacy has to factually exist — This is where judicial review comes in — However, whether reservation in a given case is desirable or not, as a policy, is not for Court to decide as long as the parameters mentioned in Articles 16(4) are maintained

L. Constitution of India — Arts. 16(4), (4-A) & (4-B), 15(4) and 335 — Extent of reservation permissible — Need for quantifiable data — Held, reservation is necessary for transcending caste and not for perpetuating it — Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country — Extent of reservation depends on facts of each case — In this regard State concerned will have to show in each case the existence of backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation — If in a given case Court finds excessive reservation under the State enactment, then such an enactment would be liable to be struck down — Need to balance the context specific independent variable requirements of equity, justice, and merit (Art. 335)/efficiency on the basis of quantifiable data in each case, stressed — Conflicting claim of individual rights under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced — Therefore, in each case a contextual case has to be made out depending on different circumstances which may exist Statewise, and the problem has to be examined on the facts of each case — What needs to be found is a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system

M. Constitution of India — Arts. 16(4), (4-A) & (4-B), 15(4) and 335 — Balancing claims of merit and affirmative action — Necessity of empirical basis for — Context specific nature of merit and “extent of reservation”,

explained in detail — Role of State in defining and measuring merit in respect of public employment — Words and phrases — “Merit”

a N. Constitution of India — Arts. 16(4), (4-A) & (4-B), 15(4) and 335 — Entitlement of a particular class to reservation — Success of considerable numbers of members of a Backward Class in General Category — Effect — Held, such fact may be a relevant factor for State to review question of continuing reservation for such a class

b O. Constitution of India — Arts. 16(1) & (4) — Interrelationship between, explained — Held, Art. 16(4) is not an exception to Art. 16(1) rather the two operate in different fields — Words “nothing in this Article” in Art. 16(4) represent a legal device allowing positive discrimination in favour of a class

c P. Constitution of India — Preamble, Pts. III and IV — Social justice — Attainment of — Role of State — Held, State has got role of ensuring that no class prospers at the cost of another class and no person suffers because of drawbacks which are not his, but social

Q. Constitution of India — Pts. III, IV and Preamble — Justice — Realisation of ideal of — Relevant provisions in Constitution — Provisions in Pt. III that pertain to realisation of justice, social and political, held, include Arts. 14, 17 and 25

d Article 38 in Part IV is the only article which refers to justice, social, economic and political. However, the concept of justice is not limited only to directive principles. There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. Great social injustice resulted from treating sections of the Hindu community as “untouchable” and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part III also provide for political and social justice. (Para 42)

e At one point of time Article 16(4) was read by the Supreme Court as an exception to Article 16(1). That controversy got settled in *Indra Sawhney*, 1992 Supp (3) SCC 217. Article 16(1) cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Articles 16(1) and (4) are restatements of the principle of equality under Article 14. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and

f Article 16(4-A) is enabling. Article 16(4) refers to affirmative action by way of reservation. The words “nothing in this Article” in Article 16(4) represent a legal device allowing positive discrimination in favour of a class. Therefore, Article 16(4) relates to “a class apart”. Article 16(4), therefore, creates a field which enables a State to provide for reservation in cases where it is satisfied on the basis of quantifiable data that there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons.

g They do not exist in Article 16(1). Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for the Court to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. Therefore,

h Article 16(1) and Article 16(4) operate in different fields. (Paras 49, 102 and 112)

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Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, followed

Article 16(4) has to be construed in the light of Article 335. Therefore further limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335. (Para 44)

To sum up, (1) the ceiling limit of 50% (quantitative limitation), (2) the concept of creamy layer (qualitative exclusion), (3) the compelling reasons, namely, backwardness and inadequacy of representation, and (4) overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse. In *Indra Sawhney*, 1992 Supp (3) SCC 217, all the Judges except Pandian, J. held that the “means test” should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In *Indra Sawhney* the Supreme Court has, therefore, accepted caste as determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution, by bringing in the concept of creamy layer. (Paras 120 to 122)

Rly. *G.M. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36; *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439 : AIR 1963 SC 649; *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *T. Devadasan v. Union of India*, (1964) 4 SCR 680 : AIR 1964 SC 179, discussed

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, followed

Reservation is not in issue in the present case. What is in issue is the extent of reservation. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. If the extent of reservation is excessive then it makes an inroad into the principle of equality in Article 16(1). The extent of reservation will depend on the facts of each case. In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. If in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements. (Paras 49 and 119)

When construing Article 16(4) it is equality in fact which plays the dominant role. It is the equality “in fact” which has to be decided looking at the ground reality. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination. (Paras 44 and 48)

Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which are not his, but social. (Para 52)

Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. This is the reality of life. In the present case, we are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a Backward Class in order to bring about an equal level playing field in the

a matter of public employment on the other hand. The concept of “equality of opportunity” in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual rights under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims. Therefore, in the present case, we are concerned with conflicting claims within the concept of “justice, social, economic and political”, which concept exists both in Part III and Part IV of the Constitution. (Para 43)

b Equity, justice and merit (Article 335)/efficiency are independent variables which can only be identified and measured by the State. These factors are context specific. There is no fixed yardstick to identify and measure these three factors and it will depend on the facts and circumstances of each case. The application of these concepts in public employment depends upon quantifiable data in each case. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise. Backward
c Classes seek justice. The general class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, what needs to be found is a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard problems. However, efficiency is added to equity and justice, the problem arises in the
d context of reservation. This problem has to be examined, therefore, on the facts of each case. (Paras 44, 49 and 102)

Merit is not a fixed absolute concept. Merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of “merit” independent of our value system. The content of merit is context specific. It derives its meaning from particular conditions and purposes. The
e impact of any affirmative action policy on “merit” depends on how that policy is designed. Unfortunately, in the present case, the debate before the Supreme Court on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways they consider it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of “extent of reservation”
f is not an absolute concept and like merit it is context specific. (Para 45)

Sen, Amartya: *Meritocracy and Economic Inequality*, edited by Kenneth Arrow, *relied on*

The fact that considerable number of members of Backward Class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class. (Para 59)

g **R. Constitution of India — Art. 16(4-A) [as amended by Constitution (Eighty-fifth Amendment) Act, 2001] — Validity of said amendment eliminating “catch-up” rule and enshrining consequential seniority based on reservation enabled accelerated promotion — Nature of said concepts — Held, said amendment is valid and does not offend basic structure of the Constitution and therefore does not bind the amending power of Parliament**
h **under Art. 368 — “Catch-up” rule and “consequential seniority” are merely judicially evolved concepts to control extent of reservation, derived from service jurisprudence, and cannot be elevated to status of basic or essential**

features of Constitution — However, whether weightage of earlier accelerated promotion with consequential seniority should be given or not is within the discretion of appropriate Government, keeping in mind backwardness, inadequacy of representation in public employment and overall efficiency of the services (for parameters the Govt. must adhere to see *Shortnotes A, B, K, L, M, N, S and T*) — Service Law — Promotion — Reservation in — Manner and mode permissible

The so-called “catch-up” rule[†] is that a reserved category candidate promoted on the basis of reservation earlier than his senior general category candidates in the feeder grade, shall necessarily be junior in the promoted category to such general category candidates. The “catch-up” rule is not implicit in Articles 16(1) to (4). The concept of the “catch-up” rule and “consequential seniority” are not constitutional requirements or limitations. They are judicially evolved concepts to control the extent of reservation, derived from service jurisprudence. They are not constitutional principles so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. They are not axioms like, secularism, federalism, etc. Nor can these concepts be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of “consequential seniority” the structure of Article 16(1) stands destroyed or abrogated. Obliteration of these concepts or insertion of these concepts do not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Hence, the same cannot bind the amending power of Parliament and is not beyond the amending power of Parliament. However, whether weightage of earlier accelerated promotion with consequential seniority should be given or not are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy and representation in public employment and overall efficiency of services.

(Paras 72, 73, 79, 81 and 102)

Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813, *explained and affirmed*

(*Ajit Singh-I*) *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189, *explained and held, legislatively superseded*

Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239; *M.G. Badappanavar v. State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489, *relied on*

Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550, *impliedly held, legislatively affirmed*

Ajit Singh (III) v. State of Punjab, (2000) 1 SCC 430 : 2000 SCC (L&S) 204; *Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246 : 1981 SCC (L&S) 50, *cited*

S. Constitution of India — Arts. 16(4), (4-A) & (4-B) and 335 — Ceiling limit of 50% for reservation quota — Determination of whether said limit has been reached — Basis for — Exclusion of “carry-forward” vacancies in calculation of 50% ceiling limit by Art. 16(4-B) — Validity of — Necessity of imposition of time-scale for which carry-forward vacancies would survive — Held, appropriate Government has to apply the cadre strength as a unit in operation of the roster, which has to be post-specific and not vacancy based

[†] **Ed.:** For a detailed explanation of the “catch-up” rule see para 26 of *Virpal Singh Chauhan case*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1.

- A time-scale has to be imposed in the interest of efficiency in administration as mandated by Art. 335 — If a time-scale is not imposed then posts will continue to remain vacant for years, which would be detrimental to the administration — Therefore, in each case, appropriate Government will now have to introduce a time-cap depending upon the fact situation — Constitution (Eighty-first Amendment) Act, 2000 — Validity of**

- a** The operation of the roster for filling the cadre strength, by itself ensures that the reservation remains within the ceiling limit of 50%. In applying the 50% rule to determine whether reservation up to the quota limit has been reached, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based. (Paras 82 and 83)

- c** Article 16(4-B) is also an enabling provision. It seeks to make classification on the basis of the differentia between current vacancies and carry-forward vacancies. In the case of Article 16(4-B) it must be kept in mind that following the judgment in *R.K. Sabharwal*, (1995) 2 SCC 745, the concept of post-based roster is introduced. Consequently, specific slots for OBCs, SCs and STs as well as the General Category have to be maintained in the roster. For want of a candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category. [Ed.: It would seem that this is the “replacement theory”, enunciated in *R.K. Sabharwal case*.] (Para 116)

- d** Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it, and any subsequent vacancy has to be filled by that category candidate alone, then the question of clubbing the unfilled vacancies with current vacancies does not arise. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to the replacement theory and within the limitations of a time-scale, as indicated below. (Para 96)

R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481, held, legislatively affirmed

- f** Article 16(4-B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling limit of 50% on current vacancies continues to remain. In working out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. At one end of the spectrum, there are unfilled vacancies; at the other end, there is a time-spread over a number of years over which unfilled vacancies are sought to be carried over. These two are alternating factors and, therefore, if the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative, the time factor comes in and in that event, a time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If a time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration.[§] Therefore, in each case, the appropriate Government will now have to introduce a time-cap depending upon the fact situation. This conclusion

- h** [§] Ed.: Another reason given in *Indra Sawhney*, para 814 is that thereby members of the general category would become age-barred and ineligible, making equality of opportunity in their case a mirage. This observation, though made in the context of initial appointment, would, it is submitted, apply also to promotions which are nothing but appointments to higher post.

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is also borne out by the service rules in some of the States where the carry-over rule does not extend beyond three years. (Para 100)

T. Constitution of India — Art. 335 proviso [as inserted by Constitution (Eighty-second Amendment) Act, 2000] and Art. 46 — Validity of Art. 335 proviso — Exercise of power under — Considerations involved — Need for quantifiable data — Effect of said proviso on the limitation contained in the main provision — Held, even after insertion of this proviso, the limitation of overall efficiency in Art. 335 is not obliterated — It is for State concerned to decide in a given case, whether overall efficiency of the system is affected by the relaxation under Art. 335 proviso — If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards — In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated — Moreover, Art. 335 has to be read with Art. 46 — However, before exercising power under Art. 335 proviso, the compelling interests of backwardness and inadequacy of representation in the services, permitting such exercise, have to be identified by weighty and comparable data

Once a separate category is carved out of Article 16(4) then that category is being given relaxation in matters of reservation in promotion. Article 335 proviso is confined to SCs and STs alone. The said proviso has a nexus with Articles 16(4-A) and 16(4-B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. The reason is that “efficiency” is a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests, however, have to be identified by weighty and comparable data. (Paras 99 and 108)

S. Vinod Kumar v. Union of India, (1996) 6 SCC 580 : 1996 SCC (L&S) 1480, *held, legislatively superseded*

U. Constitution of India — Arts. 368 and 32 — Standard for judicial review of constitutional amendments — Basic features/structure of the Constitution — Identification of essential features — Concept of “overarching principles” — Held, for a constitutional principle to qualify as an essential feature, firstly, it must be established that it is a part of the constitutional law binding on the legislature — Next it must be so fundamental as to bind the amending power of Parliament that is, it forms part of the basic structure — There are constitutional principles which are beyond the words of particular provisions — They are systematic principles underlying and connecting the provisions of the Constitution — These principles give coherence to the Constitution and make it an organic whole — These principles are part of constitutional law even if they are not expressly stated in the form of rules — Some of these principles may be so

important and fundamental, as to qualify as “essential features” or part of the “basic structure” of the Constitution — It is only by linking specific provisions of the Constitution to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution — Working test in this regard laid down by Chandrachud, J. in *Election case*, 1975 Supp SCC 1, at SCC p. 252, para 663, relied on

V. Constitution of India — Preamble, Pt. III and Art. 368 — Overarching principles of basic structure of Constitution — Instances of, given — Held, secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Arts. 14, 19 and 21 — They pervade all enacted laws and stand at the pinnacle of the hierarchy of constitutional values and are beyond the amending power of Parliament under the Constitution

W. Constitution of India — Art. 368 — Substantive limitations on power to amend the Constitution — Doctrine of basic structure — Basis of, in the concept of constitutional identity — Principle of constitutional sovereignty, explained — Concept of “express limitation” on amending power — Tenability of — Held, theory of basic structure is the only theory by which validity of constitutional amendments is to be judged — Theory of basic structure is based on the concept of constitutional identity — It is based on the principle that a change in a thing does not involve its destruction, and destruction of a thing is a matter of substance and not form — Main object behind theory of constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day

X. Constitution of India — Art. 368 — Word “amendment” in — Connotation — Identity principle — Held, said word postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration — This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*, (1973) 4 SCC 225 — Words and phrases — “Amendment”

Y. Constitution of India — Art. 368 — Origin, source and development of basic structure doctrine in German and Indian constitutionalism, traced — Basic features of Indian and German Constitutions, discussed — Held, concept of a basic structure giving coherence and durability to a constitution has a certain intrinsic force — Development of basic structure doctrine is the emergence of constitutional principles in their own right — It is not based on literal wordings — Strength of written constitutionalism over unwritten constitutionalism in this regard, posited — Constitutional Law — Written and unwritten constitutions — Relative merits

Z. Constitution of India — Art. 368 — Power to amend Constitution — Nature of — Source for limitations on — Power to amend is an enumerated power in Constitution — Hence its limitations, if any, must be found in the Constitution itself — Existence of substantive and procedural limitations, explained

ZA. Constitution of India — Preamble, Pt. III and Art. 368 — Secularism — Importance and role of, in basic structure of Constitution, explained and emphasised — Observed, secularism in India has acted as a balance between socio-economic reforms which limit religious options and communal developments

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ZB. Constitution of India — Pt. III and Preamble — Fundamental rights — Nature and purpose of, discussed extensively — Held, they are inherent — They are not a gift from the State to its citizens — Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race — Pt. III does not confer fundamental rights — It confirms their existence and gives them protection — Furthermore, rights conferred on individuals are not merely individual or personal rights — They have a large social and political content since objectives of the State and Constitution can be realised only in and through individuals — The purpose of a fundamental rights chapter is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts — Jurisprudence — Human and Civil Rights — Jurisprudence — Conceptual Jurisprudence — Nature of the State and Individual

ZC. Constitution of India — Pt. III — Fundamental rights and restrictions thereon — Nature of — Held, fundamental rights represent claims of the individual and the restrictions thereon are the claims of society

ZD. Constitution of India — Pt. III — Fundamental rights — Duties on State in respect of — Facilitation of attainment of rights — Held, a fundamental right is a limitation on the power of the State — However, rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it — There is a positive duty on State to ensure their attainment as far as practicable — Human and Civil Rights

ZE. Constitution of India — Art. 21 — Right to dignity — Existence of — Duty on State in respect of — “Human dignity” — Meaning of — Held, right to life includes right to live with human dignity — It is duty of State not only to protect human dignity but to facilitate it by taking positive steps in that direction — Words and phrases — “Human dignity”, “dignity” — Constitution of Germany, Art. 1

ZF. Constitutional Law — Sources of constitutional law — Principles beyond the literal words — Instances of such principles, given

Existence of power cannot be denied on the ground that it is likely to be abused. Where the nature of the power granted by the Constitution is in doubt then the court has to take into account the consequences that might ensue by interpreting the same as an unlimited power. However, in the present case there is neither any dispute about the existence of the power nor is there any dispute about the nature of the power of amendment of the Constitution. The issue involved in the present case is concerning the width of the power. The power to amend is an enumerated power in the Constitution and, therefore, its limitations, if any, must be found in the Constitution itself. (Para 119)

The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power. Though the amending power in the Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending

power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise. (Para 103)

a

The doctrine of basic structure has essentially emanated from the German Constitution. Therefore it may be useful to look at common constitutional provisions under German law which deal with rights, such as, freedom of press or religion, which are not mere values, they are justiciable and capable of interpretation. The values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. They are to be informed. Overarching and informing of these rights and values is the principle of human dignity under the German basic law.

b

Similarly, secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Secularism in India has acted as a balance between socio-economic reforms which limit religious options and communal developments. Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values. For example, under the German constitutional law, human dignity under

c

Article 1 is inviolable. The expression "life" in Article 21 of the Indian Constitution does not connote merely physical or animal existence. The right to life includes right to live with human dignity. It is the duty of the State not only to protect human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot be given. It simply is. Every human being has dignity by virtue of his existence. The constitutional courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by the interpretation given to the concept by the constitutional courts.

d

(Paras 22, 20, 26 and 28)

e

It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

f

Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated. A fundamental right is a limitation on the power of the State. (Para 20)

g

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation and to secure to the citizens certain rights. This is because the objectives

h

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of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised. Fundamental rights represent the claims of the individual and the restrictions thereon are the claims of society.

(Para 42)

The theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati*, (1973) 4 SCC 225, it has been observed that “one cannot legally use the Constitution to destroy itself”. It is further observed that “the personality of the Constitution must remain unchanged”. Therefore, the Supreme Court in *Kesavananda Bharati*, while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word “amendment” postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.

(Para 28)

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, explained, followed and reaffirmed

Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision-making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution. The Constitution is a precious heritage and, therefore, you cannot destroy its identity.

(Para 29)

The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

(Para 35)

Once it is held that fundamental rights could be abridged but not destroyed and once it is further held that several features of the Constitution cannot be destroyed, the concept of “express limitation” on the amending power loses its force for a precise formulation of the basic features of the Constitution and for the courts to pronounce on the validity of a constitutional amendment.

(Para 36)

The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings. There are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of constitutional law even if they are not expressly stated in

- a the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as “essential features” or part of the “basic structure” of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution. This test is very important. Free and fair elections per se may not constitute a basic feature of the Constitution. On their own, they do not constitute a basic feature. However, free and fair election as a part of representative democracy is an essential feature. (Paras 22, 23 and 33)

- b Principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules. Under the Indian Constitution, the word “federalism” does not exist in the Preamble. Federalism is an important principle of constitutional law. However, its principle (not in the strict sense as in USA) is delineated over various provisions of the Constitution. (Paras 24, 27 and 33)

- c In order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. The basic structure concept accordingly limits the amending power of Parliament. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure. (Para 25)

- d To determine whether a particular feature of the Constitution is a part of its basic structure, the working test evolved by Chandrachud, J. (as he then was) in *Election case*, 1975 Supp SCC 1, at SCC p. 252, para 663, is to be applied. The said test is as follows, “one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country’s governance”. (Para 37)

- e *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918; *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 : (1981) 1 SCR 206; *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651, *relied on*

- f **ZG. Constitution of India — Arts. 368 and 141 — Law declared by Supreme Court — Constitutional amendments seeking to change the same — Permissibility**

- g It was contended that that the impugned constitutional amendments have been promulgated by Parliament to overrule the decisions of the Supreme Court. There is no merit in this argument. Under Article 141 of the Constitution the pronouncement of the Supreme Court is the law of the land. The judgments of the Supreme Court in question were judgments delivered by the Supreme Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. (Para 102)

- h **ZH. Constitution of India — Arts. 32, 226 & 136 and 245, 246 & 368 — Content of rights — Authority that provides — Role of Judiciary — Preservation and protection of Constitution and in law-making — Safeguards as judicial power — Held, content of a right is defined by courts**

— Final word on content of a right is of Supreme Court — Parliament while enacting a law does not provide content to a right — The content is provided by judgments of Supreme Court — Therefore constitutional adjudication plays a very important role in this exercise — Language of the text is not necessarily a controlling factor — The Constitution works because of its generalities, and because of the good sense of the judges when interpreting it — It is that informed freedom of action of the judges that helps to preserve and protect the Constitution — Jurisprudence — Conceptual Jurisprudence — Role of judges in law-making — Courts — Judiciary

ZI. Constitution of India — Part III — Unenumerated fundamental rights — Subsistence of — Held, certain unarticulated rights are implicit in the enumerated guarantees — It is on this principle that Supreme Court has in numerous cases deduced fundamental features not specifically mentioned in Pt. III

ZJ. Constitution of India — Arts. 19(1)(a) and 21 — Right to know and access information — Existence of, reaffirmed

ZK. Constitution of India — Art. 21 — “Procedure established by law” — Justiciability of — Reiterated, procedure established by law contemplated in Art. 21 must answer test of reasonableness, and should be in conformity with principles of natural justice

ZL. Constitutional Interpretation — Basic Rules — Purposive construction — Justification and rationale for wide, liberal and purposive construction of Constitution, as against strict literal construction, explained — This principle is particularly apposite to interpretation of fundamental rights

ZM. Constitution of India — Nature of Constitution — Permanence with temporal adaptability, discussed

The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges. This principle of interpretation is particularly apposite to the interpretation of fundamental rights.

(Paras 19 and 20)

A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. (Para 20)

An instance of an expansive interpretation of a fundamental right is the interpretation given to the “procedure established by law” contemplated in Article 21 in *Maneka Gandhi case*, (1978) 1 SCC 248, that the procedure contemplated by Article 21 must answer the test of reasonableness and that the procedure should also be in conformity with the principles of natural justice.

(Para 20)

Maneka Gandhi case, (1978) 1 SCC 248 : AIR 1978 SC 597, *impliedly affirmed*

The Supreme Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees. For example,

a freedom of information has been held to be implicit in the guarantee of freedom of speech and expression. In India, till recently, there is no legislation securing freedom of information. However, the Supreme Court by a liberal interpretation deduced the right to know and right to access information on the reasoning that the concept of an open Government is the direct result from the right to know which is implicit in the right of free speech and expression guaranteed under Article 19(1)(a). (Para 20)

Reliance Petrochemicals Ltd. v. Indian Express Newspapers, Bombay (P) Ltd., (1988) 4 SCC 592; *Dinesh Trivedi v. Union of India*, (1997) 4 SCC 306; *Union of India v. Assn. for Democratic Reforms*, (2002) 5 SCC 294; *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399, impliedly affirmed

b The content of a right is defined by the courts. The final word on the content of the right is of the Supreme Court. Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. Therefore, constitutional adjudication plays a very important role in this exercise. The nature of constitutional adjudication has been a subject-matter of several debates. At one extreme, it is argued that judicial review of legislation should be confined to the language of the Constitution and its original intent. At the other end, non-interpretivism asserts that vague and indeterminate nature of the constitutional text permits a variety of standards and values. Others claim that the purpose of a Bill of Rights is to protect the process of decision-making. (Paras 21 and 102)

d Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance. (Para 30)

e *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305, relied on *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597, discussed *A.K. Gopalan v. State of Madras*, 1950 SCR 88 : AIR 1950 SC 27, held overruled

ZN. Constitution of India — Arts. 14, 15, 16, Preamble and Art. 368 — Right to equality — Nature of — Held, is the essence of democracy and, accordingly a basic feature of the Constitution

f **ZO. Constitution of India — Arts. 14, 15, 16 and Preamble — Right to equality of opportunity — Facets of, discussed — Non-discrimination principle distinguished from affirmative action — Formal equality (equality in law) distinguished from proportional equality/egalitarian equality (equality in fact)**

ZP. Constitution of India — Preamble, Arts. 14, 15 and 16 — Social justice — Nature and scope of, discussed — Criteria by which it might be judged, enumerated, being rights, deserts or need

g Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be rendered nugatory. "Equality" is the essence of democracy and, accordingly a basic feature of the Constitution. (Paras 32 and 33)

h Applying the working test [set out in para 37 herein] evolved by Chandrachud, J. in *Election case*, 1975 Supp SCC 1, at SCC p. 252, para 663 to determine whether equality is a part of the basic structure of the Constitution, it

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is relevant to note that the concept of “equality” like the concept of “representative democracy” or “secularism” is delineated over various articles. Basically, Part III of the Constitution consists of the equality code, the freedom code and the right to move the courts. It is true that equality has several facets. However, each case has to be seen in the context of the placement of an article which embodies the foundational value of equality. (Paras 37 and 38)

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, *applied and explicated*

Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625 : (1981) 1 SCR 206, *relied on*

Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide a level playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalising results with respect to various groups. Both the conceptions constitute “equality of opportunity”.

(Para 47)

Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions: property systems, public organisations, etc. There are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality: “formal equality” and “proportional equality”. There is a difference between formal equality and egalitarian equality. “Formal equality” means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of “proportional equality” expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. Proportional equality is equality “in fact” whereas formal equality is equality “in law”. Egalitarian equality is proportional equality.

(Paras 34, 50, 51, 102 and 120)

ZQ. Constitution of India — Arts. 16(4), 15(4), 330, 332 and 335 — Reservation — Meaning and scope — Relationship with affirmative action, discussed — Whether part of basic structure of Constitution — Held, word “reservation” as a subject in Art. 16(4) is different from the word “reservation” as a general concept

Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is an anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action. (Para 39)

Our Constitution has, however, incorporated the word “reservation” in Article 16(4) which word is not there in Article 15(4). Therefore, the word “reservation” as a subject of Article 16(4) is different from the word “reservation” as a general concept. (Para 40)

Applying the working test [set out in para 37 herein] evolved by Chandrachud, J. in *Election case*, 1975 Supp SCC 1, at SCC p. 252, para 663 the word “reservation” has to be considered in the context of Article 16(4) and it is in that context that Article 335 of the Constitution has to be seen. The guiding principle must be what the Constitution-framers intended originally and not

general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in *Election case*. (Paras 37 and 41)

a

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, *applied and explicated*

ZR. Constitution of India — Arts. 14, 15, 16 and Preamble — Principle of equality — Nature and scope — Chief concern of equality — Held, the gravamen of Art. 14 is equality of treatment — Its primary concern is not with the content of the law but with its enforcement and application — Rule of Law — Requirement of — Held, rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction

b

ZS. Constitutional Law — Equality, rule of law, judicial review and separation of powers — Interrelationship, discussed and explained — Rule of Law — Judicial review — Constitutional Law — Separation of powers — Constitution of India — Arts. 14, 15, 16, 32, 226, 136 and 50

c

The rule of law and equality before the law are designed to secure among other things, justice both social and economic. Equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. (Para 31)

d

The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. (Para 106)

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The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on a case-to-case basis. (Para 118)

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[Ed.: See also Art. 14, (c)(1)(iv) Object of classification, if justiciable', pp. 845 et seq. in Vol. 4, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

ZT. Constitution of India — Arts. 32, 226 & 136 and 245, 246 & 368 — Judicial review of legislation — Nature of — Held, the same is an essential/basic feature of the Constitution — Reasons for, discussed

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A federal constitution with its distribution of legislative powers between Parliament and State Legislatures involves a limitation on legislative powers and this requires an authority other than Parliament and the State Legislatures to ascertain whether the limits are transgressed and to prevent such violation and transgression. The duty to decide whether the limits are transgressed must be discharged by the courts of justice. Judicial review of legislation enacted by Parliament within limited powers under the controlled Constitution which we

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have, has been a feature of our law and this is on the ground that any law passed by a legislature with limited powers is ultra vires if the limits are transgressed. The Constitution-framers conferred on the Supreme Court the power to issue writs for the speedy enforcement of those rights and made the right to approach the Supreme Court for such enforcement itself a fundamental right. Thus, judicial review is an essential feature of our Constitution because it is necessary to give effect to the distribution of legislative power between Parliament and the State Legislatures, and is also necessary to give practicable content to the objectives of the Constitution embodied in Part III and in several other articles of our Constitution. (Para 31)

ZU. Constitution of India — Art. 14 — Content of — Evolution of, traced

Equality is the basic feature of the Constitution. The content of Article 14 was originally interpreted by the Supreme Court as a concept of equality confined to the aspects of discrimination and classification. The content of Article 14 got expanded conceptually so as to comprehend the doctrine of promissory estoppel, non-arbitrariness, compliance with rules of natural justice, eschewing irrationality, etc. (Para 112)

Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597; *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258, referred to

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The Judgment of the Court was delivered by

S.H. KAPADIA, J.— The width and amplitude of the right to equal opportunity in public employment, in the context of reservation, broadly falls for consideration in these writ petitions under Article 32 of the Constitution.

Facts in Writ Petition (Civil) No. 61 of 2002

2. The facts in the above writ petition, which is the lead petition, are as follows:

The petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-fifth Amendment) Act, 2001 inserting Article 16(4-A) of the Constitution retrospectively from 17-6-1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in *Union of India v. Virpal Singh Chauhan*¹, *Ajit Singh Januja v. State of Punjab*² (*Ajit Singh-I*), *Ajit Singh (II) v. State of Punjab*³, *Ajit Singh (III) v. State of Punjab*⁴, *Indra Sawhney v. Union of India*⁵ and *M.G. Badappanavar v. State of Karnataka*⁶. The petitioners say that Parliament has appropriated the judicial power to itself and has acted as an Appellate Authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside. The petitioners have further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution. The petitioners say that the equality in the context of Article 16(1) connotes “accelerated promotion” so as not to include consequential seniority. The petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read

1 (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

2 (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189

3 (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

4 (2000) 1 SCC 430 : 2000 SCC (L&S) 204

5 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

6 (2001) 2 SCC 666 : 2001 SCC (L&S) 489

- a with Article 16(1). The petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency. The petitioners say that in *Indra Sawhney*⁵ decided on 16-11-1992, this Court has held that under Article 16(4), reservation to the Backward Classes is permissible only at the time of initial recruitment and not in promotion. The petitioners say that contrary to the said judgment delivered on 16-11-1992, Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By the said amendment, Article 16(4-A) was
- b inserted, which reintroduced reservation in promotion. The Constitution (Seventy-seventh Amendment) Act, 1995 is also challenged by some of the petitioners. The petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous. A roster-point promotee in the graduate stream would reach the 4th level by the time he attains the age of 45 years. At the age of 49, he would reach the highest level
- c and stay there for nine years. On the other hand, the general merit promotee would reach the 3rd level out of 6 levels at the age of 56 and by the time, he gets eligibility to the 4th level, he would have retired from service. The petitioners say that the consequences of the impugned 85th Amendment which provides for reservation in promotion, with consequential seniority, would result in reverse discrimination in the percentage of representation of
- d the reserved category officers in the higher cadre.

Broad issues in Writ Petition No. 527 of 2002

3. The broad issues that arise for determination in this case relate to the:

1. Validity
 2. Interpretation
 - e 3. Implementation
- of (i) the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001; and, (ii) action taken in pursuance thereof which seek to reverse decisions of the Supreme Court in matters relating to
- f promotion and their application with retrospective effect.

Arguments

4. The substance of the arguments advanced on behalf of the petitioners, briefly is as follows:

- g Equality is a part of the basic structure and it is impossible to conceive of the Constitution without equality as one of its central components. That, equality is the basic feature referred to in the Preamble to our Constitution. The petitioners further submit that Article 16 is integral to equality; that, Article 16 has to be read with Article 14 and with several articles in Part IV. According to the petitioners, the Constitution places an important significance on public employment and the rule of equality, inasmuch as, a

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⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

specific guarantee is given under Article 16 protecting equality principles in public employment. In this connection, reliance is also placed on the provisions of Part XIV to show that the Constitution-makers had given importance to public employment by making a special provision in the form of Part XIV providing certain rights and protection to the office-holders in the services of the Union and the States. These provisions are Articles 309, 311, 315, 316, 317 and 318 to 323. Special provisions have also been made in Article 323-A which permits establishment of tribunals as a special and adjudicatory mechanism. That, Article 335 recognises the importance of efficiency in administration and the various provisions of the Constitution indicate that public employment was and is even today of central concern to the Constitution. It is urged that equality in matters of public employment cannot be considered as merely an abstract concept. The petitioners say that over the years, this Court has delivered many decisions laying down that principles of “equality” and “affirmative action” are the pillars of our Constitution. These judgments also provide conclusions based on principles which gave meaning to equality both as an individual right and as group expectations. It is submitted that clause (4) of Article 16 is an instance of the classification implicit and permitted by Article 16(1) and that this view of equality did not dilute the importance of Article 16(1) or Article 16(2) but merely treated Article 16(4) as an instance of the classification; that this relationship of sub-clauses within Article 16 is not an invitation for reverse discrimination and that, equality of opportunity cannot be overruled by affirmative action. It is submitted that “equality in employment” consists of equality of opportunity [Article 16(1)], anti-discrimination [Article 16(2)], special classification [Article 16(3)], affirmative action [Article 16(4)] which does not obliterate equality but which stands for classification within equality, and lastly, efficiency [Article 335]. As regards the words “nothing in this article” in Article 16(4), it is urged that these words cannot wipe out Article 16(1) and, therefore, they have a limited meaning. It is urged that the said words also occur in Articles 16(4-A) and 16(4-B). It is urged that equality in the Constitution conceives the individual right to be treated fairly without discrimination in the matter of equality of opportunity. It also conceives of affirmative action in Article 15(4) and Article 16(4). It enables classification as a basis for enabling preferences and benefits for specific beneficiary groups and that neither classification nor affirmative action can obliterate the individual right to equal opportunity. Therefore, a balance has to be evolved to promote equal opportunities while protecting individual rights. It is urged that as an individual right in Article 16(1), enforceability is provided for whereas “group expectation” in Article 16(4) is not a fundamental right but it is an enabling power which is not coupled with duty. It is submitted that if the structural balance of equality in the light of the efficiency is disturbed and if the individual right is encroached upon by excessive support for group expectations, it would amount to reverse discrimination.

5. On the question of power of amendment, it is submitted that the limited power of amendment cannot become an unlimited one. A limited

amendment power is one of the basic features of our Constitution and, therefore, limits on that power cannot be destroyed. The petitioners submit
a that Parliament cannot under Article 368 expand its amending power so as to acquire for itself the right to abrogate the Constitution and if the width of the amendment invites abrogation of the basic structure then such amendment must fail. Reliance is placed in this connection on the judgment in *Minerva Mills Ltd. v. Union of India*⁷. On the question of balancing of fundamental rights *vis-à-vis* directive principles, it is submitted that directive principles
b cannot be used to undermine the basic structure principles underlying fundamental rights including principles of equality, fundamental freedoms, due process, religious freedom and judicial enforcement.

6. On the question of balancing and structuring of equality in employment, it is urged that quotas are subject to quantitative limits and qualitative exclusions; that, there is a distinction between quota limits
c (example 15% to SCs) and ceiling limits/maximum permissible reservation limits (example 50%) which comes under the category of quantitative limits. However, quotas are also subject to qualitative exclusions like creamy layer. It is urged that in numerous judgments and in particular in *Indra Sawhney*⁵, *M.G. Badappanavar*⁶, *Ajit Singh (II)*³ the equality of opportunity in public employment is clarified in order to structure and balance Articles 16(1) and
d 16(4).

7. In answer to the respondents' contentions that Articles 16(4-A) and 16(4-B) and the changes to Article 335 are merely enabling provisions and that in a given case if the exercise undertaken by the appropriate Government is found to be arbitrary, this Court will set it right, it is contended that ingressing the basic structure is a *per se* violation of the Constitution. In this
e connection, it is alleged that the basis for the impugned amendments is to overrule judicial decisions based on holistic interpretation of the Constitution and its basic values, concepts and structure. In this connection, it is urged that the 77th Amendment introducing Article 16(4-A) has the effect of nullifying the decision in *Indra Sawhney*⁵; that, the 81st Amendment introducing Article 16(4-B) has been brought in to nullify the effect of the decision in *R.K. Sabharwal v. State of Punjab*⁸, in which it has been held that carry-forward
f vacancies cannot be filled exceeding 50% of the posts. The petitioners say that similarly the Constitution (Eighty-second Amendment) Act, 2000 introducing the proviso to Article 335 has been introduced to nullify the effect of the decision in *Indra Sawhney*⁵ and a host of other cases, which emphasise the importance of maintaining efficiency in administration. It is submitted that, the effect of the 85th Amendment adding the words "with consequential seniority" in Article 16(4-A) has been made to nullify the
g decision in *Ajit Singh (II)*³.

7 (1980) 3 SCC 625 : (1981) 1 SCR 206

5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

h 6 *M.G. Badappanavar v. State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489

3 *Ajit Singh (II) v. State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

8 (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

8. Accordingly, it is urged that the impugned amendments are violative of the basic structure and the fundamental values of the Constitution articulated in the Preamble and encapsulated in Articles 14, 16 and 19; that, they violate the fundamental postulates of equality, justice, rule of law and secularism as enshrined in the Constitution and that they violate the fundamental role of the Supreme Court as interpreter of the Constitution. That, the impugned amendments create an untrammelled, unrestrained and unconstitutional regime of reservations which destroys the judicial power and which undermines the efficacy of judicial review which is an integral part of the rule of law. It is argued that, Articles 14 and 16 have to be read with Article 335 as originally promulgated; that, the impugned amendments invade the twin principles of efficiency, merit and the morale of public services and the foundation of good governance. It is urged vehemently that the impugned amendments open the floodgates of disunity, disharmony and disintegration.

9. On behalf of the respondents, the following arguments were advanced. The power of amendment under Article 368 is a “constituent” power and not a “constituted power”; that, that there are no implied limitations on the constituent power under Article 368; that, the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure. In such process of amendment, if it destroys the basic feature of the Constitution, the amendment will be unconstitutional. The Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368. Such change of the law so declared by the Supreme Court will not merely for that reason alone violate the basic structure of the Constitution or amount to usurpation of judicial power. This is how the Constitution becomes dynamic. Law has to change. It requires amendments to the Constitution according to the needs of time and needs of society. It is an ongoing process of judicial and constituent powers, both contributing to change of law with the final say in the judiciary to pronounce on the validity of such change of law effected by the constituent power by examining whether such amendments violate the basic structure of the Constitution. On every occasion when a constitutional matter comes before the Court, the meaning of the provisions of the Constitution will call for interpretation, but every interpretation of the article does not become a basic feature of the Constitution. That, there are no implied limitations on the power of Parliament under Article 368 when it seeks to amend the Constitution. However, an amendment will be invalid, if it interferes with or undermines the basic structure. The validity of the amendment is not to be decided on the touchstone of Article 13 but only on the basis of violation of the basic features of the Constitution.

- 10.** It is further submitted that amendments for giving effect to the directive principles cannot offend the basic structure of the Constitution. On the contrary, the amendments which may abrogate individual rights but which promote constitutional ideal of “justice, social, economic and political” and the ideal of “equality of status” are not liable to be struck down under Article 14 or Article 16(1) and consequently, such amendments cannot violate the basic structure of the Constitution. That, the amendments to the Constitution which are aimed at removing social and economic disparities cannot offend the basic structure. It is urged that the concepts flowing from the Preamble to the Constitution constitute the basic structure; that, basic structure is not found in a particular article of the Constitution; and except the fundamental right to live under Article 21 read with Article 14, no particular article in Part III is a basic feature. Therefore, it is submitted that equality mentioned in Articles 14 and 16 is not to be equated to the equality which is a basic feature of the Constitution.

- 11.** It is submitted that the principle of balancing of rights of the general category and reserved category in the context of Article 16 has no nexus to the basic feature of the Constitution. It is submitted that basic feature consists of constitutional axioms like constitutional supremacy, and democratic form of Government, secularism, separation of powers, etc.

- 12.** The respondents contend that Article 16(4) is a part of the Constitution as originally enacted. The exercise of the power by the delegate under Article 16(4) will override Article 16(1). It is not by virtue of the power of the delegate, but it is by virtue of constituent power itself having authorised such exercise by the delegate under Article 16(4), that Article 16(1) shall stand overruled. The only limitation on the power of delegate is that it should act within the four corners of Article 16(4), namely, Backward Classes, which in the opinion of the State are not adequately represented in public employment. If this condition precedent is satisfied, a reservation will override Article 16(1) on account of the words “nothing in this article shall prevent the State”. It is urged that jurisprudence relating to public services does not constitute the basic feature of the Constitution. That, the right to consideration for promotion in service matters is not a basic feature.

- 13.** It is lastly submitted that Articles 16(4-A) and 16(4-B) are only enabling provisions; that, the constitutionality of the enabling power in Articles 16(4-A) and 16(4-B) is not to be tested with reference to the exercise of the power or manner of exercise of such power and that the impugned amendments have maintained the structure of Articles 16(1) to 16(4) intact. In this connection, it is submitted that the impugned amendments have retained reservations at the recruitment level in conformity with the judgment in *Indra Sawhney*⁵, which has confined Article 16(4) only to initial appointments; that Article 16(4-A) is a special provision which provides for reservation for promotion only to SCs and STs. It is urged that if SCs/STs and

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⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

OBCs are lumped together, OBCs will take away all the vacancies and, therefore, Article 16(4-A) has been inserted as a special provision. That, in *Indra Sawhney*⁵, the focus was on Backward Classes and not on SCs/STs and, therefore, there was no balancing of rights of three groups, namely, general category, Other Backward Classes and Scheduled Castes/Scheduled Tribes. It is, therefore, contended that under Article 16(4-A), reservation is limited. It is not to the extent of 50% but it is restricted only to SCs and STs, and, therefore, the “risk element” pointed out in *Indra Sawhney*⁵ stands reduced. To carve out SCs/STs and make a separate classification is not only constitutional, but it is a constitutional obligation to do so under Article 46. That, Article 16(4) is an overriding provision over Article 16(1) and if Article 16(4) cannot be said to constitute reverse discrimination then Article 16(4-A) also cannot constitute reverse discrimination.

14. It is next submitted that this Court has taken care of the interests of the general category by placing a ceiling on filling-up of vacancies only to a maximum of 50% for reservation. The said 50% permitted by this Court can be reserved in such manner as the appropriate Government may deem fit. It is urged that if it is valid to make reservation at higher levels by direct recruitment, it can also be done for promotion after taking into account the mandate of Article 335.

15. It is next submitted that the amendment made by Article 16(4-B) makes an exception to 50% ceiling limit imposed by *Indra Sawhney*⁵ by providing that the vacancies of previous years will not be considered with the current year’s vacancies. In this connection, it was urged that Article 16(4-B) applies to reservations under Article 16(4) and, therefore, if reservation is found to be within reasonable limits, the Court would uphold such reservations depending upon the facts of the case and if reservation suffers from excessiveness, it may be invalidated. Therefore, the enabling power under Article 16(4-B) cannot be rendered invalid.

16. For the above reasons, the respondents submit that there is no infirmity in the impugned constitutional amendments.

Key issue

17. It is not necessary for us to deal with the above arguments serially. The arguments are dealt with by us in the following paragraphs subjectwise.

18. The key issue, which arises for determination in this case is — whether by virtue of the impugned constitutional amendments, the power of Parliament is so enlarged so as to obliterate any or all of the constitutional limitations and requirements?

Standards of judicial review of constitutional amendments

19. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.

- 20.** This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In *Sakal Papers (P) Ltd. v. Union of India*⁹ this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras*¹⁰. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that “procedure established by law” means any procedure established by law made by Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in *A.K. Gopalan*¹⁰ and held in its landmark judgment in *Maneka Gandhi v. Union of India*¹¹ that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance

⁹ (1962) 3 SCR 842 : AIR 1962 SC 305
¹⁰ 1950 SCR 88 : AIR 1950 SC 27
¹¹ (1978) 1 SCC 248 : AIR 1978 SC 597

of expansive interpretation of a fundamental right. The expression “life” in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees. For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression. In India, till recently, there was no legislation securing freedom of information. However, this Court by a liberal interpretation deduced the right to know and right to access information on the reasoning that the concept of an open Government is the direct result from the right to know which is implicit in the right of free speech and expression guaranteed under Article 19(1)(a).

21. The important point to be noted is that the content of a right is defined by the courts. The final word on the content of the right is of this Court. Therefore, constitutional adjudication plays a very important role in this exercise. The nature of constitutional adjudication has been a subject-matter of several debates. At one extreme, it is argued that judicial review of legislation should be confined to the language of the Constitution and its original intent. At the other end, non-interpretivism asserts that the way (*sic* vague) and indeterminate nature of the constitutional text permits a variety of standards and values. Others claim that the purpose of a Bill of Rights is to protect the process of decision-making.

22. The question which arises before us is regarding the nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure. The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings.

23. In *S.R. Bommai v. Union of India*¹² the basic structure concept was resorted to although no question of constitutional amendment was involved in that case. But this Court held that policies of a State Government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the Central power under Article 356, that is, imposition of the President’s rule. In that case, secularism was held to be an essential feature of the Constitution and part of its basic structure. A State Government may be dismissed not because it violates any particular provision of the Constitution but because it acts against a vital principle enacting and giving coherence to a number of particular provisions, example: Articles 14, 15 and 25. In *S.R. Bommai*¹² the Court clearly based its conclusion not so much on violation of particular constitutional provisions but on this generalised ground i.e. evidence of a pattern of action directed against the principle of secularism. Therefore, it is important to note that the

12 (1994) 3 SCC 1 : AIR 1994 SC 1918

recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as “essential features” or part of the “basic structure” of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

26. As stated above, the doctrine of basic structure has essentially emanated from the German Constitution. Therefore, we may have a look at common constitutional provisions under German law which deal with rights, such as, freedom of press or religion which are not mere values, they are justiciable and capable of interpretation. The values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. They are to be informed. Overarching and informing of these rights and values is the principle of human dignity under the German basic law. Similarly, secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They

pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values. For example, under the German constitutional law, human dignity under Article 1 is inviolable. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (*sic* be given). It simply is. Every human being has dignity by virtue of his existence. The constitutional courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by interpretation given to the concept by the constitutional courts. a
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27. Under the Indian Constitution, the word “federalism” does not exist in the Preamble. However, its principle (not in the strict sense as in USA) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the Seventh Schedule to the Constitution. c

28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati v. State of Kerala*¹³ it has been observed that “one cannot legally use the Constitution to destroy itself”. It is further observed “the personality of the Constitution must remain unchanged”. Therefore, this Court in *Kesavananda Bharati*¹³ while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word “amendment” postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*¹³. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. Secularism in India has acted as a balance between socio-economic reforms which limits religious options and communal developments. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day. d
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29. Lastly, constitutionalism is about limits and aspirations. According to Justice Brennan, interpretation of the Constitution as a written text is concerned with aspirations and fundamental principles. In his article titled “Challenge to the Living Constitution” by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision-making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living g
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Constitution. To conclude, as observed by Chandrachud, C.J., in *Minerva Mills Ltd.*⁷ “the Constitution is a precious heritage and, therefore, you cannot destroy its identity”.

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30. Constitutional adjudication is like no other decision-making. There is a moral dimension to every *major constitutional* case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the *good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance.*

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Is equality a part of the fundamental features or the basic structure of the Constitution?

31. At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things, justice both social and economic. Secondly, a federal Constitution with its distribution of legislative powers between Parliament and the State Legislatures involves a limitation on legislative powers and this requires an authority other than Parliament and the State Legislatures to ascertain whether the limits are transgressed and to prevent such violation and transgression. As far back as 1872, Lord Selbourne said that the duty to decide whether the limits are transgressed must be discharged by the courts of justice. Judicial review of legislation enacted by Parliament within limited powers under the controlled Constitution which we have, has been a feature of our law and this is on the ground that any law passed by a legislature with limited powers is *ultra vires* if the limits are transgressed. The framers conferred on the Supreme Court the power to issue writs for the speedy enforcement of those rights and made the right to approach the Supreme Court for such enforcement itself a fundamental right. Thus, judicial review is an essential feature of our Constitution because it is necessary to give effect to the distribution of legislative power between Parliament and the State Legislatures, and is also necessary to give practicable content to the objectives of the Constitution embodied in Part III and in several other articles of our Constitution.

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32. In *Minerva Mills*⁷ Chandrachud, C.J., speaking for the majority, observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will

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⁷ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 : (1981) 1 SCR 206

be rendered nugatory. In the said judgment, the majority took the view that: (SCC p. 657, para 63)

“The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and [every State] claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in [the fact] that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like [Articles 14 and 19. Without these freedoms, democracy is impossible. If Article 14 is withdrawn,] the political pressures exercised by numerically large groups can tear the country [apart] by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment.”

33. From these observations, which are binding on us, the principle which emerges is that “equality” is the essence of democracy and, accordingly a basic feature of the Constitution. This test is very important. Free and fair elections *per se* may not constitute a basic feature of the Constitution. On their own, they do not constitute basic feature. However, free and fair election as a part of representative democracy is an essential feature as held in *Indira Nehru Gandhi v. Raj Narain*¹⁴ (*Election case*). Similarly, federalism is an important principle of constitutional law. The word “federalism” is not in the Preamble. However, as stated above, its features are delineated over various provisions of the Constitution like Articles 245, 246 and 301 and the three lists in the Seventh Schedule to the Constitution.

34. However, there is a difference between formal equality and egalitarian equality which will be discussed later on.

35. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

Working test in the matter of application of the doctrine of basic structure:

36. Once it is held that fundamental rights could be abridged but not destroyed and once it is further held that several features of the Constitution cannot be destroyed, the concept of “express limitation” on the amending power loses its force for a precise formulation of the basic features of the Constitution and for the courts to pronounce on the validity of a constitutional amendment.

¹⁴ 1975 Supp SCC 1 : (1976) 2 SCR 347

37. A working test has been evolved by Chandrachud, J. (as he then was) in the *Election case*¹⁴ in which the learned Judge has rightly enunciated, with respect, that: (SCC p. 252, para 663)

“For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country’s governance.”

38. Applying the above test to the facts of the present case, it is relevant to note that the concept of “equality” like the concept of “representative democracy” or “secularism” is delineated over various articles. Basically, Part III of the Constitution consists of the equality code, the freedom code and the right to move the courts. It is true that equality has several facets. However, each case has to be seen in the context of the placement of an article which embodies the foundational value of equality.

Concept of reservation

39. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is an anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.

40. Our Constitution has, however, incorporated the word “reservation” in Article 16(4) which word is not there in Article 15(4). Therefore, the word “reservation” as a subject of Article 16(4) is different from the word “reservation” as a general concept.

41. Applying the above test, we have to consider the word “reservation” in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution-framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in the *Election case*¹⁴.

Justice, social, economic and political is provided not only in Part IV (directive principles) but also in Part III (fundamental rights)

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and

¹⁴ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised. Fundamental rights represent the claims of the individual and the restrictions thereon are the claims of the society. Article 38 in Part IV is the only article which refers to justice, social, economic and political. However, the concept of justice is not limited only to directive principles. There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. Great social injustice resulted from treating sections of the Hindu community as “untouchable” and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part III also provide for political and social justice. a

43. This discussion is important because in the present case, we are concerned with reservation. Balancing a fundamental right to property *vis-à-vis* Articles 39(b) and 39(c) as in *Kesavananda Bharati*¹³ and *Minerva Mills*⁷ cannot be equated with the facts of the present case. In the present case, we are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a Backward Class in order to bring about an equal level-playing field in the matter of public employment. Therefore, in the present case, we are concerned with conflicting claims within the concept of “justice, social, economic and political”, which concept as stated above exists both in Part III and Part IV of the Constitution. Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. This is reality of life. The concept of “public employment” unlike the right to property is socialistic and, therefore, falls within the Preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the Preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of “equality of opportunity” in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims. b

Equity, justice and merit

44. The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward Classes seek justice. General class in public c

13 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

7 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 : (1981) 1 SCR 206

- employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are
- a being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the
- b Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution.
- c **45.** Merit is not a fixed absolute concept. Amartya Sen, in a book *Meritocracy and Economic Inequality*, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of “merit” independent of our value system. The content of merit is context-specific. It derives its
- d meaning from particular conditions and purposes. The impact of any affirmative action policy on “merit” depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it consider it to be relevant to public employment
- e because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of “extent of reservation” is not an absolute concept and like merit it is context-specific.
- 46.** The point which we are emphasising is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact situation in each case. Therefore, “vesting of the
- f power” by an enabling provision may be constitutionally valid and yet “exercise of the power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.
- Reservation and affirmative action**
- g **47.** Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide a level-playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalising results
- h with respect to various groups. Both the conceptions constitute “equality of opportunity”.

48. It is the equality “in fact” which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination. a

49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of “backwardness” and “inadequacy of representation” in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise. b
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Extent of reservation

50. Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions— property systems, public organisations, etc. e

51. The problem is—what should be the basis of distribution? Writers like Raphael, Mill and Hume define “social justice” in terms of rights. Other writers like Hayek and Spencer define “social justice” in terms of deserts. Socialist writers define “social justice” in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality— “formal equality” and “proportional equality”. “Formal equality” means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of “proportional equality” expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. f
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52. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social.

53. The question of extent of reservation involves two questions:

1. Whether there is any upper-limit beyond which reservation is not permissible? h

- a 2. Whether there is any limit to which seats can be reserved in a particular year; in other words the issue is whether the percentage limit applies only on the total number of posts in the cadre or to the percentage of posts advertised every year as well?

- b 54. The question of extent of reservation is closely linked to the issue whether Article 16(4) is an exception to Article 16(1) or is Article 16(4) an application of Article 16(1). If Article 16(4) is an exception to Article 16(1) then it needs to be given a limited application so as not to eclipse the general rule in Article 16(1). But if Article 16(4) is taken as an application of Article 16(1) then the two articles have to be harmonised keeping in view the interests of certain sections of the society as against the interest of the individual citizens of the society.

Maximum limit of reservation possible

- c 55. Word of caution against excess reservation was first pointed out in *G.M., S. Rly. v. Rangachari*¹⁵. Gajendragadkar, J. giving the majority judgment said that reservation under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. A reasonable balance must be struck between the claims of Backward Classes and claims of other employees as well as the requirement of efficiency of administration.

- d 56. However, the question of extent of reservation was not directly involved in *Rangachari*¹⁵. It was directly involved in *M.R. Balaji v. State of Mysore*¹⁶ with reference to Article 15(4). In this case, 60% reservation under Article 15(4) was struck down as excessive and unconstitutional.
- e Gajendragadkar, J. observed that special provision should be less than 50 per cent, how much less would depend on the relevant prevailing circumstances of each case.

- f 57. But in *State of Kerala v. N.M. Thomas*¹⁷ Krishna Iyer, J. expressed his concurrence with the views of Fazal Ali, J. who said that although reservation cannot be so excessive as to destroy the principle of equality of opportunity under clause (1) of Article 16, yet it should be noted that the Constitution itself does not put any bar on the power of the Government under Article 16(4). If a State has 80% population which is backward then it would be meaningless to say that reservation should not cross 50%.

58. However, in *Indra Sawhney*⁵ the majority held that the rule of 50% laid down in *Balaji*¹⁶ was a binding rule and not a mere rule of prudence.

- g 59. Giving the judgment of the Court in *Indra Sawhney*⁵ Jeevan Reddy, J.^{17a} stated that Article 16(4) speaks of adequate representation not

15 (1962) 2 SCR 586 : AIR 1962 SC 36

16 1963 Supp (1) SCR 439 : AIR 1963 SC 649

17 (1976) 2 SCC 310 : 1976 SCC (L&S) 227

h 5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

17a Speaking on behalf of Kania, C.J. and Venkatachaliah and Ahmadi, JJ. as they then were.

proportionate representation although proportion of population of Backward Classes to the total population would certainly be relevant.^{17b} *He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.*^{17c} (emphasis added) a

Are reserved category candidates free to contest for vacancies in general category? b

60. In *Indra Sawhney*⁵ Jeevan Reddy, J. noted^{17d} that reservation under Article 16(4) does not operate on communal ground. Therefore, if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in *R.K. Sabharwal*⁸ the Supreme Court held that while general category candidates are not entitled to fill the reserved posts, reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of Backward Class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class. c

Number of vacancies that could be reserved d

61. Wanchoo, J. who had given dissenting judgment in *Rangachari*¹⁵ observed that the requirement of Article 16(4) is only to give adequate representation and since the Constitution-makers intended it to be a short-term measure it may happen that all the posts in a year may be reserved. He opined that reserving a fixed percentage of seats every year may take a long time before inadequacy of representation is overcome. Therefore, the Government can decide to reserve the posts. After having reserved a fixed number of posts the Government may decide that till those posts are filled up by the Backward Classes all appointments will go to them if they fulfil the minimum qualification. Once this number is reached the Government is deprived of its power to make further reservations. Thus, according to Wanchoo, J. the adequacy of representation has to be judged considering the total number of posts even if in a single year or for few years all seats are reserved, provided the scheme is short-term. e

62. The idea given by Wanchoo, J. in *Rangachari*¹⁵ did not work out in practice because most of the time even for limited number of reservations, every year qualified Backward Class candidates were not available. This f

^{17b} Ed.: SCC para 807 g

^{17c} Ed.: SCC para 808

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

^{17d} Ed.: SCC para 811

⁸ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481 h

¹⁵ *G.M., S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

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compelled the Government to adopt carry-forward rule. This carry-forward rule came in conflict with the *Balaji*¹⁶ ruling. In cases where the availability of reserved category candidates is less than the vacancies set aside for them, the Government has to adopt either of the two alternatives:

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(1) the State may provide for carrying over the unfilled vacancies for the next year or next to the next year, or

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(2) instead of providing for carrying over the unfilled vacancies to the coming years, it may provide for filling of the vacancies from the general quota candidates and carry forward the unfilled posts by Backward Classes to the next year quota.

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63. But the problem arises when in a particular year due to carry-forward rule more than 50% of vacancies are reserved. In *T. Devadasan v. Union of India*¹⁸ this was the issue. The Union Public Service Commission had provided for 17½% reservation for the Scheduled Castes and Scheduled Tribes. In case of non-availability of reserved category candidates in a particular year the posts had to be filled by general category candidates and the number of such vacancies were to be carried forward to be filled by the reserved category candidates next year. Due to this, the rule of carry-forward reservation in a particular year amounted to 65% of the total vacancies. The petitioner contended that reservation was excessive which destroyed his right under Article 16(1) and Article 14. The Court on the basis of decision in *Balaji*¹⁶ held the reservation excessive and, therefore, unconstitutional. It further stated that the guarantee of equality under Article 16(1) is to each individual citizen and to appointments to any office under the State. It means that on every occasion for recruitment the State should see that all citizens are treated equally. In order to effectuate the guarantee, each year of recruitment will have to be considered by itself.

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64. Thus, the majority differed from Wanchoo, J.'s decision in *Rangachari*¹⁵ holding that a cent per cent reservation in a particular year would be unconstitutional in view of *Balaji*¹⁶ decision.

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65. Subba Rao, J. gave a dissenting judgment. He relied on Wanchoo, J.'s judgment in *Rangachari*¹⁵ and held that Article 16(4) provides for adequate representation taking into consideration the entire cadre strength. According to him, if it is within the power of the State to make reservations then reservation made in one selection or spread over many selections is only a convenient method of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the said Castes and Tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right.

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66. In *Thomas*¹⁷ under the Kerala State and Subordinate Services Rules, 1950 certain relaxation was given to the Scheduled Caste and Scheduled

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16 *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439 : AIR 1963 SC 649

18 (1964) 4 SCR 680 : AIR 1964 SC 179

15 *G.M., S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

17 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

Tribe candidates passing departmental tests for promotions. For promotion to Upper Division Clerks from Lower Division Clerks the criterion of seniority-cum-merit was adopted. Due to relaxation in merit qualification in 1972, 34 out of 51 vacancies in Upper Division Clerks went to the Scheduled Caste candidates. It appeared that the 34 members of SC/ST had become seniormost in the lower grade. The High Court quashed the promotions on the ground that it was excessive. The Supreme Court upheld the promotions. Ray, C.J. held that the promotions made in services as a whole were nowhere near 50% of the total number of the posts. Thus, the majority differed from the ruling of the Court in *Devadasan*¹⁸ basically on the ground that the strength of the cadre as a whole should be taken into account. Khanna, J. in his dissenting opinion made a reference to it on the ground that such excessive concession would impair efficiency in administration.

67. In *Indra Sawhney*⁵ the majority held that 50% rule should be applied to each year otherwise it may happen that (if entire cadre strength is taken as a unit) the open competition channel gets choked for some years and meanwhile the general category candidates may become age-barred and ineligible. The equality of opportunity under Article 16(1) is for each individual citizen while special provision under Article 16(4) is for socially disadvantaged classes. Both should be balanced and neither should be allowed to eclipse the other.

68. However, in *R.K. Sabharwal*⁸ which was a case of promotion and the issue in this case was operation of roster system, the Court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit had been reached. With regard to ruling in *Indra Sawhney case*⁵ that reservation in a year should not go beyond 50% the Court held that it applied to initial appointments. The operation of a roster, for filling the cadre strength, by itself ensures that the reservation remains within the 50% limit. In substance the Court said that presuming that 100% of the vacancies have been filled, each post gets marked for the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate. The Court was concerned with the possibility that reservation in the entire cadre may exceed 50% limit if every year half of the seats are reserved. The Constitution (Eighty-first Amendment) Act, 2000 added Article 16(4-B) which in substance gives legislative assent to the judgment in *R.K. Sabharwal*⁸.

Catch-up rule—Is the said rule a constitutional requirement under Article 16(4)?

69. One of the contentions advanced on behalf of the petitioners is that the impugned amendments, particularly, the Constitution (Seventy-seventh Amendment) and (Eighty-fifth Amendment) Acts, obliterate all constitutional

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

5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

8 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

limitations on the amending power of Parliament. That the width of these impugned amendments is so wide that it violates the basic structure of equality enshrined in the Constitution.

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70. The key issue which arises for determination is—whether the above “catch-up” rule and the concept of “consequential seniority” are constitutional requirements of Article 16 and of equality, so as to be beyond the constitutional amendatory process. In other words, whether obliteration of the “catch-up” rule or insertion of the concept of “consequential seniority code”, would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16.

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71. The concept of “catch-up” rule[†] appears for the first time in *Virpal Singh Chauhan*¹. In the category of Guards in the Railways, there were four categories, namely, Grade C, Grade B, Grade A and Grade A Special. The initial recruitment was made to Grade C. Promotion from one grade to another was by seniority-cum-suitability. The rule of reservation was applied not only at the initial stage of appointment to Grade C but at every stage of promotion. The *percentage* reserved for SCs was 15% and for STs, it was 7.5%. To give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for SCs and STs respectively. Subsequently, a hundred-point roster was prepared reflecting the same *percentages*. In 1986, general candidates and members of SCs/STs came within Grade A in Northern Railway. On 1-8-1986, the Chief Controller promoted certain general candidates on *ad hoc* basis to Grade A Special. Within three months, they were reverted and SCs and STs were promoted. This action was challenged by general candidates as arbitrary and unconstitutional before the Tribunal. The general candidates asked for three reliefs, namely, (a) to restrain the Railways from filling up the posts in higher grades in the category of Guards by applying the rule of reservation; (b) to restrain the Railways from acting upon the seniority list prepared by them; and (c) to declare that the general candidates were alone entitled to be promoted and confirmed in Grade A Special on the strength of their seniority earlier to the reserved category employees. The contention of the general candidates was that once the quota prescribed for the reserved group is satisfied, the forty-point roster cannot be applied because that roster was prepared to give effect to the rule of reservation. *It was contended by the general candidates that accelerated promotion may be given but the Railways cannot give consequential seniority to reserved category candidates in the promoted category.* (emphasis added) In this connection, the general category candidates relied upon decisions of the Allahabad and Madhya Pradesh High Courts. It was contended by the general candidates that giving consequential seniority in addition to accelerated promotion constituted conferment of double benefit upon the members of the reserved category and,

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[†] **Ed.:** For a detailed explanation of the “catch-up” rule see para 26 of *Virpal Singh Chauhan case*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1

¹ *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

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therefore, violated the rule of equality in Article 16(1). It was further urged that accelerated promotion-cum-accelerated seniority is destructive of the efficiency of administration inasmuch as by this means the higher echelons of administration would be occupied entirely by members of reserved categories. This was opposed by the reserved category candidates who submitted that for the purposes of promotion to Grade A Special, the seniority list pertaining to Grade A alone should be followed that, the administration should not follow the seniority lists maintained by the administration pertaining to Grade C as urged by the general candidates and since SCs and STs were senior to the general candidates in Grade A, the seniority in Grade A alone should apply. In short, the general candidates relied upon the “catch-up” rule, which was opposed by the members of SCs/STs. They also relied upon the judgment of this Court in *R.K. Sabharwal*⁸.

72. This Court gave the following reasons for upholding the decision of the Tribunal. *Firstly*, it was held that a rule of reservation as such does not violate Article 16(4). *Secondly*, this Court opined that there is no uniform method of providing reservation. The extent and nature of reservation is a matter for the State to decide having regard to the facts and requirements of each case. It is open to the State, if so advised, to say that while the rule of reservation shall be applied, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over seniors in the feeder category and that it is open to the State to interpret the “catch-up” rule in the service conditions governing the promotions [*see* para 24 of SCC]. *Thirdly*, this Court did not agree with the view expressed by the Tribunal (in *Virpal Singh Chauhan*¹) that a harmonious reading of clauses (1) to (4) of Article 16 should mean that a reserved category candidate promoted earlier than his senior general category candidates in the feeder grade shall necessarily be junior in the promoted category to such general category. *This Court categorically ruled, vide para 27 (of SCC), that such catch-up principle cannot be said to be implicit in clauses (1) to (4) of Article 16.* (emphasis supplied) Lastly, this Court found on facts that for 11 vacancies, 33 candidates were considered and they were all SC/ST candidates. Not a single candidate belonged to general category. It was argued on behalf of the general candidates that all top grades stood occupied exclusively by the reserved category members, which violated the rule of equality underlying Articles 16(1), 16(4) and 14. This Court opined that the above situation arose on account of faulty implementation of the rule of reservation, as the Railways did not observe the principle that reservation must be in relation to “posts” and not “vacancies” and also for applying the roster even after the attainment of the requisite percentage reserved for SCs/STs. In other words, this Court based its decision only on the faulty implementation of the rule by the Railways which the Court ordered to be rectified.

8 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

1 *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

a 73. The point which we need to emphasise is that the Court has categorically ruled in *Virpal Singh Chauhan*¹ that the “catch-up” rule is not implicit in clauses (1) to (4) of Article 16. Hence, the said rule cannot bind the amending power of Parliament. It is not beyond the amending power of Parliament.

b 74. In *Ajit Singh (I)*² the controversy which arose for determination was—whether after the members of SCs/STs for whom specific percentage of posts stood reserved having been promoted against those posts, was it open to the administration to grant consequential seniority against general category posts in the higher grade. The appellant took a clear stand that he had no objection if members of SCs/STs get accelerated promotions. The appellant objected only to the grant of consequential seniority. Relying on the circulars issued by the administration dated 19-7-1969 and 8-9-1969, the High Court held that the members of SCs/STs can be promoted against general category posts on the basis of seniority. This was challenged in appeal before this Court. The High Court’s ruling was set aside by this Court on the ground that if the “catch-up” rule is not applied then the equality principle embodied in Article 16(1) would stand violated. This Court observed that the “catch-up” rule was a process adopted while making appointments through direct recruitment or promotion because merit cannot be ignored. This Court held that for attracting meritorious candidates a balance has to be struck while making provisions for reservation. It was held that the *promotion is an incident of service*. It was observed that seniority is one of the important factors in making promotion. It was held that the right to equality is to be preserved by preventing reverse discrimination. Further, it was held that the *equality principle requires exclusion of extra weightage of roster-point promotion to a reserved category candidate*. (emphasis supplied)

c This Court opined that without “catch-up” rule, giving weightage to earlier promotion secured by roster-point promotee would result in reverse discrimination and would violate equality under Articles 14, 15 and 16. Accordingly, this Court took the view that the seniority between the reserved category candidates and general candidates in the promoted category shall be governed by their panel position. Therefore, this Court set aside the factor of extra weightage of earlier promotion to a reserved category candidate as violative of Articles 14 and 16(1) of the Constitution.

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g 75. Therefore, in *Virpal Singh Chauhan*¹ this Court has said that the “catch-up” rule *insisted upon* by the Railways though not implicit in Articles 16(1) and 16(4), is constitutionally valid as the said practice/process was made to maintain efficiency. On the other hand, in *Ajit Singh (I)*² this Court has held that the equality principle excludes the extra weightage given by the Government to roster-point promotees as such weightage is against merit and efficiency of the administration and that the Punjab Government had erred in not taking into account the said merit and efficiency factors.

h 1 *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

2 *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189

76. In *Ajit Singh (II)*³ three interlocutory applications were filed by the State of Punjab for clarification of the judgment of this Court in *Ajit Singh (I)*². The limited question was—whether there was any conflict between the judgments of this Court in *Virpal Singh Chauhan*¹ and *Ajit Singh (I)*² on one hand and *vis-à-vis* the judgment of this Court in *Jagdish Lal v. State of Haryana*¹⁹. The former cases were decided in favour of general candidates whereas the latter was a decision against the general candidates. Briefly, the facts for moving the interlocutory applications were as follows: the Indian Railways following the law laid down in *Virpal Singh Chauhan*¹ issued a circular on 28-2-1997 to the effect that the reserved candidates promoted on roster-points could not claim seniority over the senior general candidates promoted later on. The State of Punjab after following *Ajit Singh (I)*² revised their seniority list and made further promotions of the senior general candidates following the “catch-up” rule. Therefore, both the judgments were against the reserved candidates. However, in the later judgment of this Court in *Jagdish Lal*¹⁹ another three-Judge Bench took the view that under the general rule of service jurisprudence relating to seniority, the date of continuous officiation has to be taken into account and if so, the roster-point promotees were entitled to the benefit of continuous officiation. In *Jagdish Lal*¹⁹ the Bench observed that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4-A) were fundamental rights of the reserved candidates and, therefore, the reserved candidates were entitled to the benefit of continuous officiation.

77. Accordingly, in *Ajit Singh (II)*³ three points arose for consideration:

(i) Can the roster-point promotees count their seniority in the promoted category from the date of their continuous officiation *vis-à-vis* general candidates, who were senior to them in the lower category and who were later promoted to the same level?

(ii) Have *Virpal*¹ and *Ajit Singh (I)*² been correctly decided and has *Jagdish Lal*¹⁹ been correctly decided?

(iii) Whether the catch-up principles are tenable?

78. At the outset, this Court stated that it was not concerned with the validity of constitutional amendments and, therefore, it proceeded on the assumption that Article 16(4-A) is valid and not unconstitutional. Basically, the question decided was whether the “catch-up” principle was tenable in the context of Article 16(4). It was held that the primary purpose of Article 16(4) and Article 16(4-A) is to give due representation to certain classes in certain posts keeping in mind Articles 14, 16(1) and 335; that, Articles 14 and 16(1) have prescribed permissive limits to affirmative action by way of reservation under Articles 16(4) and 16(4-A) of the Constitution; that, Article 335 is

³ *Ajit Singh (II) v. State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

² *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189

¹ *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

¹⁹ (1997) 6 SCC 538 : 1997 SCC (L&S) 1550

- incorporated so that efficiency of administration is not jeopardised and that Articles 14 and 16(1) are closely connected as they deal with individual rights of the persons. They give a positive command to the State that there shall be equality of opportunity to all citizens in public employment. It was further held that Article 16(1) flows from Article 14. It was held that the word “employment” in Article 16(1) is wide enough to include promotions to posts at the stage of initial level of recruitment. It was observed that Article 16(1) provides to every employee otherwise eligible for promotion fundamental right to be considered for promotion. It was held that equal opportunity means the right to be considered for promotion. The right to be considered for promotion was not a statutory right. It was held that Articles 16(4) and 16(4-A) did not confer any fundamental right to reservation. That they are only enabling provisions. Accordingly, in *Ajit Singh (II)*³ the judgment of this Court in *Jagdish Lal case*¹⁹ was overruled. However, in the context of balancing of fundamental rights under Article 16(1) and the rights of reserved candidates under Articles 16(4) and 16(4-A), this Court opined that Article 16(1) deals with a fundamental right whereas Articles 16(4) and 16(4-A) are only enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. As a remedial measure, the Court held that in matters relating to affirmative action by the State, the rights under Articles 14 and 16 are required to be protected and a reasonable balance should be struck so that the affirmative action by the State does not lead to reverse discrimination.

79. Reading the above judgments, we are of the view that the concept of “catch-up” rule and “consequential seniority” are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of “consequential seniority” the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that “equality code” under Articles 14, 15 and 16 is violated by deletion of the “catch-up” rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the “catch-up” rule nor the concept of “consequential seniority” is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*¹.

80. Before concluding, we may refer to the judgment of this Court in *M.G. Badappanavar*⁶. In that case the facts were as follows: the appellants were general candidates. They contended that when they and the reserved candidates were appointed at Level 1 and junior reserved candidates got

³ *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

¹⁹ *Jagdish Lal* v. *State of Haryana*, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550

¹ *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

⁶ *M.G. Badappanavar* v. *State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489

promoted earlier on the basis of roster points to Level 2 and again by way of roster points to Level 3, and when the senior general candidate got promoted to Level 3, then the general candidate would become senior to the reserved candidate at Level 3. At Level 3, the reserved candidate should have been considered along with the senior general candidate for promotion to Level 4. In support of their contention, the appellants relied upon the judgment of the Constitution Bench in *Ajit Singh (II)*³. The above contentions raised by the appellants were rejected by the Tribunal. Therefore, the general candidates came to this Court in appeal. This Court found on the facts that the service rule concerned did not contemplate computation of seniority in respect of roster promotions. Placing reliance on the judgments of this Court in *Ajit Singh (I)*² and in *Virpal Singh*¹ this Court held that roster promotions were meant only for the limited purpose of due representation of Backward Classes at various levels of service and, therefore, such roster promotions did not confer consequential seniority to the roster-point promotee. In *Ajit Singh (II)*³ the circular which gave seniority to the roster-point promotees was held to be violative of Articles 14 and 16. It was further held in *M.G. Badappanavar*⁶ that equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution. For this proposition, this Court placed reliance on the judgment in *Indra Sawhney*⁵ while holding that if creamy layer among Backward Classes were given some benefits as Backward Classes, it will amount to equals being treated unequals. Applying the creamy layer test, this Court held that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution and in which event, even Article 16(4-A) cannot be of any help to the reserved category candidates. This is the only judgment of this Court delivered by a three-Judge Bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is a part of the basic structure of the Constitution. Accordingly, the judgment of the Tribunal was set aside.

81. The judgment in *M.G. Badappanavar*⁶ was mainly based on the judgment in *Ajit Singh (I)*² which had taken the view that the departmental circular which gave consequential seniority to the “roster-point promotee”, violated Articles 14 and 16 of the Constitution. In none of the above cases, was the question of the validity of the constitutional amendments involved. *Ajit Singh (I)*², *Ajit Singh (II)*³ and *M.G. Badappanavar*⁶ were essentially concerned with the question of “weightage”. Whether weightage of earlier accelerated promotion with consequential seniority should be given or not to

³ *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

² *Ajit Singh Januja* v. *State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189

¹ *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

⁶ *M.G. Badappanavar* v. *State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489

⁵ *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

- a be given are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy and representation in public employment and overall efficiency of services. The above judgments, therefore, did not touch the questions which are involved in the present case.

Scope of the impugned amendments

- b **82.** Before dealing with the scope of the constitutional amendments we need to recap the judgments in *Indra Sawhney*⁵ and *R.K. Sabharwal*⁸. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in *R.K. Sabharwal*⁸ this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached. It was clarified that the judgment in *Indra Sawhney*⁵ was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%.

- d **83.** In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

84. With these introductory facts, we may examine the scope of the impugned constitutional amendments.

- e **85.** The Supreme Court in its judgment dated 16-11-1992 in *Indra Sawhney*⁵ stated that reservation in appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion. Prior to the judgment in *Indra Sawhney*⁵ reservation in promotion existed. The Government felt that the judgment of this Court in *Indra Sawhney*⁵ adversely affected the interests of SCs and STs in services, as they had not reached the required level. Therefore, the Government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone. We quote hereinbelow the Statement of Objects and Reasons with the text of the Constitution (Seventy-seventh Amendment) Act, 1995 introducing clause (4-A) in Article 16 of the Constitution:

“THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995^{††}

- g *Statement of Objects and Reasons.*—The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16-11-1992 in the case

5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

h 8 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

^{††} Assented on 17-6-1995 and came into force on 17-6-1995

of *Indra Sawhney v. Union of India*⁵, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States has not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry this out, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.

2. The Bill seeks to achieve the aforesaid object.

An Act further to amend the Constitution of India

Be it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows—

1. *Short title.*—This Act may be called the Constitution (Seventy-seventh Amendment) Act, 1995.

2. *Amendment of Article 16.*—In Article 16 of the Constitution, after clause (4), the following clause shall be *inserted*, namely—

‘(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.’ ”

The said clause (4-A) was inserted after clause (4) of Article 16 to say that nothing in the said article shall prevent the State from making any provision for reservation in matters of promotion to any class(es) of posts in the services under the State in favour of SCs and STs which, in the opinion of the States, are not adequately represented in the services under the State.

86. Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the

⁵ 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

a two compelling reasons— “backwardness” and “inadequacy of representation”, as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II)*³ this Court has held that apart from “backwardness” and “inadequacy of representation” the State shall also keep in mind “overall efficiency” (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.

b **87.** After the Constitution (Seventy-seventh Amendment) Act, 1995 this Court stepped in to balance the conflicting interests. This was in *Virpal Singh Chauhan*¹ in which it was held that a roster-point promotee getting the benefit of accelerated promotion would not get consequential seniority. As such, consequential seniority constituted additional benefit and, therefore, his seniority will be governed by the panel position. According to the Government, the decisions in *Virpal Singh*¹ and *Ajit Singh (I)*² bringing in the concept of “catch-up” rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade.

c **88.** In the circumstances, clause (4-A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Suffice it to state that the Constitution (Eighty-fifth Amendment) Act, 2001 was an extension of clause (4-A) of Article 16. Therefore, the Constitution (Seventy-seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-fifth Amendment) Act, 2001.

d **89.** We quote hereinbelow the Statement of Objects and Reasons with the text of the Constitution (Eighty-fifth Amendment) Act, 2001:

e **“THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001[#]**

f *Statement of Objects and Reasons.*—The government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. The judgments of the Supreme Court in the case of *Union of India v. Virpal Singh Chauhan*¹ and *Ajit Singh Januja v. State of Punjab*², which led to the issue of the OM dated 30-1-1997, have adversely affected the interest of the government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the government servants belonging to Scheduled Castes and Scheduled Tribes.

g ³ *Ajit Singh (II) v. State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

¹ *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

h ² *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189

[#] Received the assent of the President on 4-1-2002

2. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of OM dated 30-1-1997 immediately. Mere withdrawal of the OM dated 30-1-1997 will not meet the desired purpose and review or revision of seniority of the government servants and grant of consequential benefits to such government servants will also be necessary. This will require amendment to Article 16(4-A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4-A) with effect from the date of coming into force of Article 16(4-A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects.

Received the assent of the President on 4-1-2002

An Act further to amend the Constitution of India

Be it enacted by Parliament in the Fifty-second Year of the Republic of India as follows—

1. *Short title and commencement.*—(1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June, 1995.

2. *Amendment of Article 16.*—In Article 16 of the Constitution, in clause (4-A), for the words ‘in matters of promotion to any class’, the words ‘in matters of promotion, with consequential seniority, to any class’ shall be substituted.”

90. Reading the Constitution (Seventy-seventh Amendment) Act, 1995 with the Constitution (Eighty-fifth Amendment) Act, 2001, clause (4-A) of Article 16 now reads as follows:

“16. (4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.”

91. The question in the present case concerns the width of the amending powers of Parliament. The key issue is—whether any constitutional limitation mentioned in Article 16(4) and Article 335 stands obliterated by the above constitutional amendments.

92. In *R.K. Sabharwal*⁸ the issue was concerning operation of roster system. This Court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. It was held that if the roster is prepared on the basis of the cadre strength, that by itself would ensure that the reservation would remain within

⁸ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

the ceiling limit of 50%. In substance, the Court said that in the case of hundred-point roster each post gets marked for the category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone (replacement theory).

93. The question which remained in controversy, however, was concerning the rule of “carry-forward”. In *Indra Sawhney*⁵ this Court held that the number of vacancies to be filled up on the basis of reservation in a year including the “carry-forward” reservations should in no case exceed the ceiling limit of 50%.

94. However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49½% and if the judgment of this Court in *Indra Sawhney*⁵ had to be applied it became difficult to fill “backlog vacancies”. According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling limit of 50%. Therefore, the Government inserted clause (4-B) after clause (4-A) in Article 16 vide the Constitution (Eighty-first Amendment) Act, 2000.

95. By clause (4-B) the “carry-forward”/“unfilled vacancies” of a year are kept out and excluded from the overall ceiling limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-first Amendment) Act, 2000. Quoted hereinbelow is the Statement of Objects and Reasons with the text of the Constitution (Eighty-first Amendment) Act, 2000:

“THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT, 2000§§

Statement of Objects and Reasons.—Prior to 29-8-1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non-availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as ‘backlog vacancies’. These vacancies were treated as a distinct group and were excluded from the ceiling of fifty per cent reservation. The Supreme Court of India in its judgment in *Indra Sawhney v. Union of India*⁵ held that the number of vacancies to be filled up on the basis of reservations in a year including carried-forward reservations should in no case exceed the limit of fifty per cent. As total reservations in a year for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes combined together had already reached forty-nine and a half per cent and the total number of vacancies to be filled up in a year could not exceed fifty per cent, it became difficult to fill the ‘backlog vacancies’ and to hold special recruitment drives. Therefore, to implement the judgment of the Supreme Court, an official memorandum dated 29-8-1997 was issued to provide that the fifty per cent limit shall apply to current as well as ‘backlog vacancies’ and for discontinuation of the special recruitment drive.

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

§§ Assented on 9-6-2000 and came into force on 9-6-2000

2. Due to the adverse effect of the aforesaid order dated 29-8-1997, various organisations including the Members of Parliament represented to the Central Government for protecting the interest of the Scheduled Castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make amendment in the Constitution so that the unfilled vacancies of a year, which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) of Article 16 of the Constitution, shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before 29-8-1997.

3. The Bill seeks to achieve the aforesaid object.

An Act further to amend the Constitution of India

Be it enacted by Parliament in the Fifty-first Year of the Republic of India as follows—

1. *Short title.*—This Act may be called the Constitution (Eighty-first Amendment) Act, 2000.

2. *Amendment of Article 16.*—In Article 16 of the Constitution, after clause (4-A), the following clause shall be *inserted*, namely—

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

96. The Constitution (Eighty-first Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in *R.K. Sabharwal*⁸. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled up by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies does not arise. Therefore, in effect, Article 16(4-B) grants legislative assent to the judgment in *R.K. Sabharwal*⁸. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory[‡] and within the limitations indicated hereinafter.

⁸ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

[‡] **Ed.:** For the “replacement theory”, see *R.K. Sabharwal case*, (1995) 2 SCC 745, in general, and para 118, below.

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a **97.** As stated above, clause (4-A) of Article 16 is carved out of clause (4) of Article 16. Clause (4-A) provides benefit of reservation in promotion only to SCs and STs. In *S. Vinod Kumar v. Union of India*²⁰ this Court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in *Indra Sawhney*⁵.

b **98.** By the Constitution (Eighty-second Amendment) Act, 2000 a proviso was inserted at the end of Article 335 of the Constitution which reads as under:

c “Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”

d **99.** This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this Court in *Vinod Kumar*²⁰ which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4-A).

Introduction of “time” factor in view of Article 16(4-B)

e **100.** As stated above, Article 16(4-B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling limit of 50% on current vacancies continues to remain. In working out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained. On one hand of the spectrum, we have unfilled vacancies; on the other hand, we have a time spread over a number of years over which unfilled vacancies are sought to be carried over. These two are alternating factors and, therefore, if the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact situation. What is stated hereinabove is borne out by the service rules in some of the States where the carry-over rule does not extend beyond three years.

h ²⁰ (1996) 6 SCC 580 : 1996 SCC (L&S) 1480

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

Whether the impugned constitutional amendments violate the principle of basic structure?

101. The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is—whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution. a

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the “width test” and the test of “identity”. b
As stated hereinabove, the concept of the “catch-up” rule and “consequential seniority” are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”. As stated above, equity, justice and efficiency are variable c
factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then d
in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word “amendment” connotes change. The question is— e
whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this f
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Court in *Virpal Singh*¹, *Ajit Singh (I)*², *Ajit Singh (II)*³ and *Indra Sawhney*⁵ were judgments delivered by this Court which enunciated the law of the land.

- a It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the “right”. The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without
- b keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the “width test”, we do not find obliteration of any of the constitutional limitations. Applying the test of “identity”, we do not find any alteration in the existing structure of the equality code. As stated above, none of the
- c axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets— “formal equality” and “proportional equality”. Proportional equality is equality “in fact” whereas formal equality is equality “in law”. Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged
- d sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

103. The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power. Though the amending power in the Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise. (See *Kihoto Hollohan v. Zachillhu*²¹.)

104. Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above,

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- 1 *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813
- 2 *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189
- 3 *Ajit Singh (II) v. State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239
- h 5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385
- 21 1992 Supp (2) SCC 651

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be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

105. In conclusion, we may quote the words of Rubinfeld:

“ignoring our commitments may make us rational but not free. It cannot make us maintain our constitutional identity”.

Role of enabling provisions in the context of Article 14

106. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons *under like circumstances*. (emphasis added) Every discretionary power is not necessarily discriminatory. According to the *Constitutional Law of India*, by H.M. Seervai, 4th Edn., p. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of “guided power”. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4-A) and 16(4-B). Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic, others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-à-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalising measures depending upon the fact situation.

107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State

- a can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these
- b conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between “equality in law” and “equality in fact” (see *Affirmative Action* by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as
- c the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where
- d excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of “guided power”. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

Application of the doctrine of “guided power”—Article 335

- e **108.** Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-second Amendment) Act, 2000 we find that the said proviso has a nexus with Articles 16(4-A) and 16(4-B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent
- f the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is—whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after
- g insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that “efficiency” is a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may
- h evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with

Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data. a

109. In conclusion, we reiterate that the object behind the impugned constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotions subject to the circumstances and the constitutional limitations indicated above. b

Tests to judge the validity of the impugned State Acts

110. As stated above, the boundaries of the width of the power, namely, the ceiling limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside. c

Are the impugned amendments making an inroad into the balance struck by the judgment of this Court in Indra Sawhney⁵? d

111. The petitioners submitted that equality has been recognised to be a basic feature of our Constitution. To preserve equality, a balance was struck in *Indra Sawhney*⁵ so as to ensure that the basic structure of Articles 14, 15 and 16 remains intact and at the same time social upliftment, as envisaged by the Constitution, stood achieved. In order to balance and structure the equality, a ceiling limit on reservation was fixed at 50% of the cadre strength, reservation was confined to initial recruitment and was not extended to promotion. The petitioners further submitted that in *Indra Sawhney*⁵ vide para 829 (of SCC) this Court has held that reservation in promotion was not sustainable in principle. Accordingly, the petitioners submitted that the impugned constitutional amendments make a serious inroad into the said balance struck in *Indra Sawhney*⁵ which protected equality as a basic feature of our Constitution. We quote hereinbelow para 829 of the majority judgment in *Indra Sawhney*⁵ which reads as follows: (SCC p. 747) e

“829. It is true that *Rangachari*¹⁵ has been the law for more than 30 years and that attempts to reopen the issue were repelled in *Akhil* f

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 g

¹⁵ *G.M., S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36 h

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- Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*²². It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in *Rangachari*¹⁵ to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, *is not sustainable in principle and ought to be departed from*. However, taking into consideration all the circumstances, we direct that *our decision on this question shall operate only prospectively and shall not affect promotions already made*, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion—be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of ‘State’ in Article 12—such *reservations shall continue in operation for a period of five years from this day*. Within this period, it would be open to the appropriate authorities to revise, modify or reissue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of ‘backward class of citizens’ in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so.” (emphasis supplied)
- 112.** What are the outer boundaries of the amendment process in the context of Article 16 is the question which needs to be answered. Equality is the basic feature of the Constitution as held in *Indra Sawhney*⁵. The content of Article 14 was originally interpreted by this Court as a concept of equality confined to the aspects of discrimination and classification. It is only after the rulings of this Court in *Maneka Gandhi*¹¹ and *Ajay Hasia v. Khalid Mujib Sehravardi*²³ that the content of Article 14 got expanded conceptually so as to comprehend the doctrine of promissory estoppel, non-arbitrariness, compliance with rules of natural justice, eschewing irrationality, etc. There is a difference between “formal equality” and “egalitarian equality”. At one point of time Article 16(4) was read by the Supreme Court as an exception to Article 16(1). That controversy got settled in *Indra Sawhney*⁵. The words “nothing in this article” in Article 16(4) represent a legal device allowing positive discrimination in favour of a class. Therefore, Article 16(4) relates to “a class apart”. Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a Class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in matters of employment. Therefore, Article 16(1) and Article 16(4) operate in different

22 (1981) 1 SCC 246 : 1981 SCC (L&S) 50

15 *G.M., S. Rly. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36

5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

11 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597

23 (1981) 1 SCC 722 : 1981 SCC (L&S) 258

fields. Backwardness and inadequacy of representation, therefore, operate as justifications in the sense that the State gets the power to make reservation only if backwardness and inadequacy of representation exist. These factors are not obliterated by the impugned amendments. a

113. The question still remains as to whether any of the constitutional limitations are obliterated by way of the impugned constitutional amendments. Articles 16(4-A) and 16(4-B) have been introduced by way of the impugned amendments.

114. In *Indra Sawhney*⁵ the equality which was protected by the rule of 50%, was by balancing the rights of the general category vis-à-vis the rights of BCs *en bloc* consisting of OBCs, SCs and STs. On the other hand, in the present case the question which we are required to answer is: whether within the egalitarian equality, indicated by Article 16(4), the sub-classification in favour of SCs and STs is in principle constitutionally valid. Article 16(4-A) is inspired by the observations in *Indra Sawhney*⁵ vide paras 802 and 803 (of SCC) in which this Court has unequivocally observed that in order to avoid lumping of OBCs, SCs and STs which would make OBCs take away all the vacancies leaving SCs and STs high and dry, the State concerned was entitled to categorise and sub-classify SCs and STs on one hand vis-à-vis OBCs on the other hand. We quote hereinbelow paras 802 and 803 of the judgment in *Indra Sawhney*⁵: (SCC pp. 729-31) b

“802. We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a Backward Class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz. goldsmiths and vaddes (traditional stonecutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State—and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to d

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⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

a the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises ‘Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes, etc.’ Group B comprises professional groups like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins, etc. Group C pertains to ‘Scheduled Castes converts to Christianity and their progeny’, while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and C. The 25% vacancies reserved for Backward Classes are sub-divided between them in proportion to their respective population. This categorisation was justified in *Balram case*²⁴ SCR at p. 286. This is merely to show that even among Backward Classes, there can be a sub-classification on a reasonable basis.

b 803. There is another way of looking at this issue. Article 16(4) recognises only one class viz. ‘backward class of citizens’. It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that *Scheduled Castes and Scheduled Tribes are also included in the expression ‘Backward Class of Citizens’ and that separate reservations can be provided in their favour*. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say—we may reiterate—that this should be done. *We are only saying that if a State chooses to do it, it is not impermissible in law.* (emphasis supplied)

c 115. Therefore, while judging the width and the ambit of Article 16(4-A) we must ascertain whether such sub-classification is permissible under the Constitution. The sub-classification between “OBCs” on one hand and “SCs and STs” on the other hand is held to be constitutionally permissible in *Indra Sawhney*⁵. In the said judgment it has been held that the State could make such sub-classification between SCs and STs vis-à-vis OBCs. It refers to sub-classification within the egalitarian equality (vide paras 802 and 803). Therefore, Article 16(4-A) follows the line suggested by this Court in *Indra Sawhney*⁵. In *Indra Sawhney*⁵ on the other hand vide para 829 this Court has struck a balance between formal equality and egalitarian equality by laying down the rule of 50% (ceiling limit) for the entire BCs as “a class apart” vis-à-vis GC. Therefore, in our view, equality as a concept is retained even under Article 16(4-A) which is carved out of Article 16(4).

d 116. As stated above, Article 14 enables classification. A classification must be founded on intelligible differentia which distinguishes those that are grouped together from others. The differentia must have a rational relation to the object sought to be achieved by the law under challenge. In *Indra Sawhney*⁵ an opinion was expressed by this Court vide para 802 that there is

h 24 *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660 : (1972) 3 SCR 247

5 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

no constitutional or legal bar to the making of classification. Article 16(4-B) is also an enabling provision. It seeks to make classification on the basis of the differentia between current vacancies and carry-forward vacancies. In the case of Article 16(4-B) we must keep in mind that following the judgment in *R.K. Sabharwal*⁸, the concept of post-based roster is introduced. Consequently, specific slots for OBCs, SCs and STs as well as GC have to be maintained in the roster. For want of a candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category^{‡‡}. Therefore, by Article 16(4-B) a classification is made between current vacancies on one hand and carry-forward/backlog vacancies on the other hand. Article 16(4-B) is a direct consequence of the judgment of this Court in *R.K. Sabharwal*⁸ by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4-A) and 16(4-B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4-A) and 16(4-B) together form part of the same scheme. As stated above, Articles 16(4-A) and 16(4-B) are both inspired by observations of the Supreme Court in *Indra Sawhney*⁵ and *R.K. Sabharwal*⁸. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4-A) and 16(4-B). The impugned constitutional amendments, therefore, do not obliterate equality.

117. The test for judging the width of the power and the test for adjudicating the exercise of power by the State concerned are two different tests which warrant two different judicial approaches. In the present case, as stated above, we are required to test the width of the power under the impugned amendments. Therefore, we have to apply “the width test”. In applying “the width test” we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representation. As stated above, these limitations are not obliterated by the impugned amendments. However, the question still remains whether the State concerned has identified and valued the circumstances justifying it to make reservation. This question has to be decided casewise. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on the facts of each case. The judgment in *Indra Sawhney*⁵ does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or

⁸ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

^{‡‡} **Ed.:** It would seem that this is the “replacement theory”.

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

- a **118.** The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis.
- b **119.** Existence of power cannot be denied on the ground that it is likely to be abused. As against this, it has been held vide para 650 (of SCC) of *Kesavananda Bharati*¹³ that where the nature of the power granted by the Constitution is in doubt then the Court has to take into account the consequences that might ensue by interpreting the same as an unlimited power. However, in the present case there is neither any dispute about the existence of the power nor is there any dispute about the nature of the power of amendment. The issue involved in the present case is concerning the width of the power. The power to amend is an enumerated power in the Constitution and, therefore, its limitations, if any, must be found in the Constitution itself. The concept of reservation in Article 16(4) is hedged by three constitutional requirements, namely, backwardness of a class,
- c inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. Reservation is not in issue. What is in issue is the extent of reservation. If the extent of reservation is excessive then it makes an inroad into the principle of equality under Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case.
- d Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements.
- e **120.** At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, “formal equality” and “proportional equality”. Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of
- f disadvantaged sections of society within the framework of democratic polity. In *Indra Sawhney*⁵ all the Judges except Pandian, J. held that the “means test” should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In *Indra Sawhney*⁵ this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a
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h ¹³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney*⁵. The question as to the “determinant” of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney*⁵ has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

Conclusion

121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*⁵, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*⁸.

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the “extent of reservation”. In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

⁵ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

⁸ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481

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124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case.

126. Reference is answered accordingly.

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(BEFORE S.B. SINHA AND DALVEER BHANDARI, JJ.)

BSNL AND OTHERS

.. Appellants;

Versus

SUBASH CHANDRA KANCHAN
AND ANOTHER

.. Respondents.

Civil Appeal No. 4109 of 2006[†], decided on September 13, 2006

A. Arbitration — Appointment of arbitrator — Waiver of right of — Effect — Appellants who were required under arbitration clause to communicate appointment of arbitrator by them failed to do so within the time specified under S. 11 of Arbitration and Conciliation Act — Application filed by respondent under S. 11 of the Act before High Court — Appellants consenting before High Court to appointment of one of the persons named by respondent as arbitrator — Accordingly, High Court appointing that person as arbitrator on consent — However, subsequently application under S. 151 CPC made by appellant before High Court for modification of its order on ground that no such consent had been given — High Court refused to recall its order — Held, appellants by consenting to appointment of arbitrator, waived their rights to make appointment and it was not open to them to subsequently contend that no consent was given by them — Contention that counsel who gave the consent before High Court had no instructions in that behalf, held, cannot be accepted when no such statement was made before High Court — Arbitration and Conciliation Act, 1996, S. 11 — Waiver
(Paras 15 and 17 to 20)

Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd., (2006) 6 SCC 204, distinguished

Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, (2006) 8 SCC 726 : (2006) 8 Scale 631, relied on

Indu Shekhar Singh v. State of U.P., (2006) 8 SCC 129 : (2006) 5 Scale 107, cited

[†] Arising out of SLP (C) No. 9242 of 2006. From the Judgment and Order dated 20-1-2006 and 3-3-2006 of the High Court of Orissa at Cuttack in MJCP No. 31 of 2002 and MC No. 4 of 2006