MANU/SC/4560/2006

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IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 61, 62, 81, 111, 134, 135, 206, 226, 227, 255, 266, 269, 279, 299, 294, 295, 298, 250, 319, 375, 386, 387, 320, 322, 323, 338, 234, 340, 423, 440, 453, 460, 472, 482, 483, 484, 485, 550, 527 and 640 of 2002, SLP (C) Nos. 4915-4919 of 2003, Writ Petition (Civil) Nos. 153/2003, C.P. (C) No. 404/2004 in Writ Petition (Civil) No. 255/2002, C.P. (C) No. 505/2002 in Writ Petition (Civil) No. 61/2002, C.P. (C) No. 553/2002 in Writ Petition (Civil) No. 266/2002, C.P. (C) No. 570/2002 in Writ Petition (Civil) No. 255/2002, C.P. (C) No. 122/2003 in Writ Petition (Civil) No. 61/2002, C.P. (C) No. 127/2003 in Writ Petition (Civil) No. 61/2002, C.P. (C) No. 85/2003 in Writ Petition (Civil) No. 255/2002, Writ Petition (Civil) Nos. 313 and 381 of 2003, CIVIL APPEAL Nos. 12501-12503/1996, SLP (C) No. 754/1997, Writ Petition (Civil) No. 460 of 2003, CIVIL APPEAL Nos. 7802/2001 and 7803/2001, Writ Petition (Civil) No. 469/2003, SLP (C) No. 19689/1996, Writ Petition (Civil) 2, 515, 519, 562 and 563 of 2004, Writ Petition (Civil) No. 413 of 1997, Writ Petition (Civil) No. 286 of 2004 and SLP (C) No. 14518 of 2004

Decided On: 19.10.2006

M. Nagaraj and Ors. **Vs.** Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
Y.K. Sabharwal, C.J., K.G. Balakrishnan, S.H. Kapadia, C.K. Thakker and P.K. Balasubramanyan, JJ.

Counsels:
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Binu Tamta, Buddy A. Ranganadhan, Advs. for J.B. Dadachanji & Co., Sunil Kumar Jain, S. Borthakur, Ansar Ahmad Chaudhary, Baijoyonta Barooah, Tara Chandra Sharma, Neelam Sharma, Shreekant N. Terdal, Sandhya Goswami, S.K. Kulkarni, M. Gireesh Kumar, Khwairakpam Nobin Singh, Radha Shyam Jena, B.V. Balaram Das, P. Venugopal, E. Venu Kumar, Advs. for K.J. John & Co., Shibashish Misra, Mukesh Kumar Sinha, Arun Kumar Sinha, Rakesh Singh, Advs. for R.S. Suri, M.P. Raju, S.P. Sharma, P. George Giri, G.S. Chatterjee, Naresh K. Sharma, Lalita Kaushik, R.P. Wadhwani, S.K. Nandy, Bishwajit Kumar Shahi, Prakash Shrivastava, V. Mohana, S. Wasim A. Qadri, Shishir Pinaki, Amit Anand Tiwari, Salince Ranjan Fernandes, B.K. Prasad, Pinky Anand, Gopal Prasad, Rajesh Pathak, Vinita Sinha, Gopal Singh, Manish Kumar, Kavita Wadia, Manjit Singh, Harikesh Singh, T.V. George, Ravi Prakash Mehrotra, Amit Sharma, K.G. Gopalakrishnan, Somiran Sharma, Pallav Shishodia, D.N. Mishra, A. Subhashini, K.N. Tripathy, Abhisth Kumar, Tekha Pandey, Anil Katiyar, Pradeep Misra, Vibha Datta Makhija, Mushraf Choudhary, Arjun, Kunal Verma, Sandeep Singh, C.D. Singh, Kiran Suvarna and Dhrupad Kashyap Das, Advs. and S.K. Bandyopadhyay, Party-in-person

Case Overruled/Partly Overruled by:
Jarnail Singh and Ors. vs. Lachhmi Narain Gupta and Ors. MANU/SC/1053/2018

JUDGMENT

S.H. Kapadia, J.

1. 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.

> 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 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 the case of ***Union of India and Ors. v. Virpal Singh Chauhan and Ors., Ajit Singh Januja and Ors. v. State of Punjab and Ors. (Ajit Singh-I), Ajit Singh and Ors. (II) v. State of Punjab and Ors. , Ajit Singh and Ors. (III) v. State of Punjab and Ors., Indra Sawhney and Ors. v. Union of India , and M. G. Badappanavar and Anr. v. State of Karnataka and Ors.*** . Petitioners say that the 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. 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. Petitioners say that the equality in the context of Article 16 connotes "accelerated promotion" so as not to include consequential seniority. Petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). Petitioners further say that by providing reservation in the matter

of promotion with consequential seniority, there is impairment of efficiency. Petitioners say that in the case of ***Indra Sawhney*** 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. Petitioners say that contrary to the said judgment delivered on 16.11.1992, the Parliament enacted the Constitution (Seventy- Seventh Amendment) Act, 1995. By the said amendment, Article 16(4A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-Seventh Amendment) Act, 1995 is also challenged by some of the petitioners. 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 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. 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 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

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 promotion and their application with retrospective effect.

ARGUMENTS:

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

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. 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 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 special and adjudicatory mechanism. That, Article 335 recognizes 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. 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 1, 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(4A) and 16(4B). 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. Petitioners submit 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. and Ors. v. Union of India and Ors. MANU/SC/0075/1980 :*** [1981]1SCR206 . On the question of balancing of fundamental rights vis-Ã¯Â¿Â½-vis directive principles, it is submitted that directive principles 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 (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, M.G. Badaappanavar6, Ajit Singh (II),*** the equality of opportunity in public employment is clarified in order to structure and balance Articles 16(1) and 16(4).

7. In answer to the respondents' contentions that Articles 16(4A) and 16(4B) 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 connection, it is alleged that the basis for 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(4A) has the effect of nullifying the decision in the case of Indra Sawhney; that, the 81st Amendment introducing Article 16(4B) has been brought in to nullify the effect of the decision in ***R.K. Sabharwal and Ors. v. State of Punjab and Ors.***, in which it has been held that carry forward vacancies cannot be filled exceeding 50% of the posts. 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 the case of ***Indra Sawhney*** and a host of other cases, which emphasize the importance of maintaining efficiency in administration. It is submitted that, the 85th Amendment adding the words 'with consequential seniority' in Article 16(4A) has been made to nullify the decision in ***Ajit Singh (II)***.

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 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, 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. 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 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 the 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 in 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. 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.

11. 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 authorized 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 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 do not constitute basic feature of the Constitution. That, the right to consideration for promotion in service matters is not a basic feature.

12. It is lastly submitted that Articles 16(4A) and 16(4B) are only enabling provisions; that, the constitutionality of the enabling power in Articles 16(4A) and 16(4B) 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 inconformity with the judgment in ***Indra Sawhney***, which has confined Article 16(4) only to initial appointments; that Article 16(4A) is a special provision which provides for reservation for promotion only to SCs and STs. It is urged that if SCs/STs and OBCs are lumped together, OBCs will take away all the vacancies and, therefore, Article 16(4A) has been inserted as a special provision. That, in ***Indra Sawhney***, 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(4A), 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*** 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) also cannot constitute reverse discrimination.

13. 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.

14. It is next submitted that the amendment made by Article 16(4B) makes an exception to 50% ceiling-limit imposed by Indra Sawhney, 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(4B) 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(4B) cannot be rendered invalid.

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

KEY ISSUE:

15. It is not necessary for us to deal with the above arguments serially. The arguments are dealt with by us in the following paragraphs subject-wise. The key issue, which arises for determination in this case is - whether by virtue of the impugned constitutional amendments, the power of the Parliament is so enlarged so as to obliterate any or all of the constitutional limitations and requirements?

STANDARDS OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS:

16. 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 crisis of human affairs.

Therefore, a purposive rather 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 constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

17. 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 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 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 the case of ***Sakal Papers (P) Ltd. and Ors. v. Union of India and Ors.*** AIR 1967 SC 305 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 the case of ***A.K. Gopalan v. State of Madras MANU/SC/0012/1950 :*** 1950CriLJ1383 . 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 the 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*** MANU/SC/0012/1950 : 1950CriLJ1383 and held in its landmark judgment in ***Maneka Gandhi v. Union of India and Anr. MANU/SC/0133/1978 :*** [1978]2SCR621 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 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 is 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).

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, interpretive asserts that the way and indeterminate nature of the constitutional text permits a variety of standards and values. Ors. claim that the purpose of a Bill of Rights is to protect the process of decision making.

18. The question which arises before us is regarding 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.

19. In ***S.R. Bommai and Ors. etc. v. Union of India and Ors. etc. MANU/SC/0444/1994 :***[1994]2SCR644 , 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, the Court clearly based its conclusion not so much on violation of particular constitutional provision but on this generalized ground i.e. evidence of a pattern of action directed against the principle of secularism. Therefore, it is important to note that the 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.

20. 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. 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, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of the 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, it can be examined whether it is so fundamental as to bind even the amending power of the 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.

21. 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 the 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. 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.

Under the Indian Constitution, the word 'federalism' does not exist in the preamble. However, its principle (not in the strict sense as in U.S.A.) 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.

22. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a pre-occupation with constitutional identity. In ***Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*** ***MANU/SC/0445/1973 :***AIR1973SC1461 , 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*** MANU/SC/0445/1973 : AIR1973SC1461 , 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*** MANU/SC/0445/1973 : AIR1973SC1461 . 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.

23. 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 constitution. To conclude, as observed by Chandrachud, CJ, in ***Minerva Mills Ltd.***, 'the Constitution is a precious heritage and, therefore, you cannot destroy its identity'.

24. 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.

IS EQUALITY A PART OF THE FUNDAMENTAL FEATURES OR THE BA STRUCTURE OF THE CONSTITUTION?

25. 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 State legislatures involves a limitation on legislative powers and this requires an authority other than Parliament and 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 courts of justice. Judicial review of legislation enacted by the 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 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.

26. In the case of ***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 be rendered nugatory. In the said judgment, the majority took the view that the principles enumerated 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 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 leading it to the legislation to pick and choose favoured areas and favourite classes for preferential treatment.

27. 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 the ***Indira Nehru Gandhi v. Raj Narain MANU/SC/0304/1975 :***[1976]2SCR347 (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. However, there is a difference between formal equality and egalitarian equality which will be discussed later on.

28. 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 BA STRUCTURE:

29. 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 can not be destroyed, the concept of 'express limitation' on the amending power loses its force for a precise formulation of the basic feature of the Constitution and for the courts to pronounce on the validity of a constitutional amendment.

30. A working test has been evolved by Chandrachud, J. in the ***Election Case***, in which the learned Judge has rightly enunciated, with respect, that "for determining whether a particular feature of the Constitution is a part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance."

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:

31. 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 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.

32. 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.

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 Case14.

JUSTICE, SOCIAL, ECONOMIC AND POLITICAL IS PROVIDED NOT ONLY PART-IV (DIRECTIVE PRINCIPLES) BUT ALSO IN PART-III (FUNDAMEN RIGHTS):

33. 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 realized 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 realized. 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.

34. This discussion is important because in the present case, we are concerned with reservation. Balancing a fundamental right to property vis-Ã Â¿Â½-vis Articles 39(b) and 39(c) as in ***Kesavananda Bharati*** and ***Minerva Mills*** cannot be equated with the facts of the present case. In the present case, we are concerned with the right of an individual of equal opportunity on one hand and preferential treatment to an individual belonging to a backward class in order to bring about 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 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 t constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBL 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 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 optimization of these conflicting interests and claims.

EQUITY, JUSTICE AND MERIT:

35. 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 employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are 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 Constitution. Inadequacy in representation and backwardness of Scheduled Caste 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(4A) come in the form of Article 335 of the Constitution.

36. 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 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 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" is not an absolute concept and like merit it is context- specific. The point which we are emphasizing 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 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:

37. 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 level- playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalizing results with respect to various groups. Both the conceptions constitute "equality of opportunity".

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.

38. 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 under-written by a special justification. Equality in Article 16(1) is individual- specific whereas reservation in Article 16(4) and Article 16(4A) 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(4A) 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.

EXTENT OF RESERVATION:

39. 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. 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. 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.

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

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

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?

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 harmonized 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

Word of caution against excess reservation was first pointed out in ***The General Manager, Southern Railway and Anr. v. Rangachari*** 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.

41. However, the question of extent of reservation was not directly involved in ***Rangachari***. It was directly involved in ***M.R. Balaji and Ors.*** **v.** ***The State of Mysore and Ors.*** with reference to Article 15(4). In this case, 60% reservations under Article 15(4) was struck down as excessive and unconstitutional. 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. But in ***State of Kerala and Anr. v. N.M. Thomas and Ors.*** ***MANU/SC/0479/1975 :***(1976)ILLJ376SC Krishna Iyer, J. expressed his concurrence to 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%.

42. However, in ***Indra Sawhney*** the majority held that the rule of 50% laid down in ***Balaji*** was a binding rule and not a mere rule of prudence. Giving the judgment of the Court in Indra Sawhney, Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of backward classes to the total population would certainly be relevant. *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 principle of equality under Article 14.* (emphasis added)

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

43. In ***Indra Sawhney*** Reddy, J. noted that reservation under Article 16(4) do 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*** 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.

Number of vacancies that could be reserved

44. Wanchoo, J. who had given dissenting judgment in Rangachari observed that the requirement of Article 16(4) is only to give adequate representation and since 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.

45. The idea given by Wanchoo, J. in ***Rangachari*** 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 compelled the government to adopt carry-forward rule. This carry-forward rule came in conflict with Balaji 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:

(1) the State may provide for carrying on the unfulfilled vacancies for the next year or next to the next year, or

(2) instead of providing for carrying over the unfulfilled 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.

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 and Anr. MANU/SC/0270/1963 :***(1965)IILLJ560SC , this was the issue. Union Public Service Commission had provided for 17 1/2% reservation for 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 candidate 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*** 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.

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

decision. Subba Rao, J. gave dissenting judgment. He relied on Wanchoo's, J. judgment in ***Rangachari*** and held that Article 16(4) provides for adequate representation taking into consideration 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.

46. In the case of ***Thomas*** under the Kerala State and Subordinate Services Rules, 1950 certain relaxation was given to Scheduled Caste and Scheduled Tribe candidates passing departmental tests for promotions. For promotion to upper division clerks from lower division clerks the criteria 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 Scheduled Caste candidates. It appeared that the 34 members of SC/ST had become senior most 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 is no where near 50% of the total number of the posts. Thus, the majority differed from the ruling of the court in ***Devadasan***19 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.

47. In ***Indra Sawhney***, 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. However, in ***R.K. Sabharwal*** which was a case of promotion and the issue in this case was operation of roster system, the Court stated that entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. With regard to ruling in ***Indra Sawhney case*** 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 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(4B) which in substance gives legislative assent to the judgment in ***R.K. Sabharwal.***

CATCH-UP RULE - IS THE SAID RULE A CONSTITUTIONAL REQUIREM UNDER ARTICLE 16(4):

48. One of the contentions advanced on behalf of the petitioners is that the impugned amendments, particularly, the Constitution (Seventy-Seventh Amendment) and (Eight-Fifth Amendment) Acts, obliterate all constitutional limitations on the amending power of the Parliament. That the width of these impugned amendments is so wide that it violates the basic structure of equality enshrined in the Constitution. 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.

49. The concept of "catch-up" rule appears for the first time in the case of ***Virpal Singh Chauhan***. 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 Gr. '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 SC was 15% and for ST, 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 Railway 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 the 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, 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 SC/ST. They also relied upon the judgment of this Court in ***R.K. Sabharwal.***

50. This Court gave 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 regards 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]. *Thirdly*, this Court did not agree with the view expressed by the tribunal [in ***Virpal Singh Chauhan***] 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, that such catch-up principle cannot be said to be implicit in Clauses (1) to (4) of Article 16. 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.

The point which we need to emphasize is that the Court has categorically ruled in ***Virpal Singh Chauhan*** 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 the Parliament. It is not beyond the amending power of the Parliament.

51. In ***Ajit Singh (I)***, 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 SC/ST 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 basis of seniority. This was challenged in appeal before this Court. The High Court 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 candidate 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 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). 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.

Therefore, in ***Virpal Singh Chauhan***, 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)***, 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.

52. In the case of ***Ajit Singh (II)***, three interlocutory applications were filed by State of Punjab for clarification of the judgment of this Court in ***Ajit Singh (I)***. The limited question was - whether there was any conflict between the judgments of this Court in ***Virpal Singh Chauhan*** and ***Ajit Singh (I)*** on one hand and vis-Ã¯Â¿Â½-vis the judgment of this Court in ***Jagdish Lal and Ors. v. State of Haryana and Ors.*** ***MANU/SC/0596/1997 :***AIR1997SC2366 . The former cases were decided in favour of general candidates whereas 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*** 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)*** 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 the case of ***Jagdish Lal***, 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, 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(4A) were fundamental rights of the reserved candidates and, therefore, the reserved candidates were entitled to the benefit of continuous officiation.

53. Accordingly, in ***Ajit Singh (II)*** , 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-Ã¯Â¿Â½-vis general candidates, who were senior to them in the lower category and who were later promoted to the same level?
>
> (ii) Have ***Virpal*** and ***Ajit Singh (I)*** have been correctly decided and has ***Jagdish Lal*** been correctly decided?
>
> (iii) Whether the catch-up principles are tenable?

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(4A) is valid and is 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(4A) 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(4A) of the Constitution; that, Article 335 is incorporated so that efficiency of administration is not jeopardized 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 of 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(4A) did not confer any fundamental right to reservation. That they are only enabling provisions. Accordingly, in ***Ajit Singh (II)***, the judgment of this Court in ***Jagdish Lal*** case was overruled. However, in the context of balancing of fundamental rights under Article 16(1) and the rights of reserved candidate under Articles 16(4) and 16(4A), this Court opined that Article 16(1) deals with a fundamental right whereas Articles 16(4) and 16(4A) 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.

54. 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 Article 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 the 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' are implicit in Clauses (1) and (4) of Article 16 as correctly held in ***Virpal Singh Chauhan***.

55. Before concluding, we may refer to the judgment of this Court in ***M.G. Badappanavar***. In that case the facts were as follows. Appellants were general candidates. They contended that when they and the reserved candidates were appointed at Level-1 and junior reserved candidates got 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, appellants relied upon the judgment of the Constitution Bench in ***Ajit Singh (II)***. 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 facts that the concerned Service Rule did not contemplate computation of seniority in respect of roster promotions. Placing reliance on the judgment of this Court in ***Ajit Singh (I)*** and in ***Virpal Singh***, 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)***, 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*** 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*** 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(4A) cannot be of any help to the reserved category candidates. This is the only judgment of this Court delivered by 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 part of the basic structure of the Constitution. Accordingly, the judgment of the tribunal was set aside.

56. The judgment in the case of ***M.G. Badappanavar*** was mainly based on the judgment in ***Ajit Singh (I)'*** 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, the question of the validity of the constitutional amendments was involved. ***Ajit Singh (I)', Ajit Singh (II)' and M.G. Badappanavar*** were essentially concerned with the question of 'weightage'. Whether weightage of earlier accelerated promotion with consequential seniority should be given or not to 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

57. Before dealing with the scope of the constitutional amendments we need to recap the judgments in ***Indra Sawhney*** and ***R.K. Sabharwal*** . 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***, 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*** was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensure that the reservation remains within the ceiling-limit of 50%.

58. In our view, 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. With these introductory facts, we may examine the scope of the impugned constitutional amendments.

59. The Supreme Court in its judgment dated 16.11.92 in ***Indra Sawhney*** stated that reservation of 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*** reservation in promotion existed. The Government felt that the judgment of this Court in ***Indra Sawhney*** adversely affected the interests of SCs and STs in services, as they have 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 Statement of Objects and Reasons with the text of the Constitution (Seventy-Seventh Amendment) Act, 1995 introducing Clause (4A) in Article 16of the Constitution:

THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995

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 16th November, 1992 in the case of **Indra Sawhney v. Union of India**, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extent 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 have 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 out this, it is necessary to amend Article 16 of the Constitution by inserting a new Clause (4A) 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.

THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995

[Assented on 17th June, 1995, and came into force on 17.6.1995]

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:

(4A) 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 (4A) was inserted after Clause (4) of Article 16to say that nothing in the said Article shall prevent the State from making any provision for reservation in matters of promotion to any class(s) 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.

Clause (4A) follows the pattern specified in Clauses (3) and (4) of Article 16. Clause (4A) of Article 16 emphasizes 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 (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, Clause (4A) will be governed by the 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)***, 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 by providing for reservation in promotion for SCs and STs.

60. After the Constitution (Seventy-Seventh Amendment) Act, 1995, this Court stepped in to balance the conflicting interests. This was in the case of ***Virpal Singh Chauhan*** 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*** and ***Ajit Singh (I)*** 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. In the circumstances, Clause (4A) 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 (4A) of Article 16. Therefore, the Constitution (Seventy-Seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-Fifth Amendment) Act, 2001.

61. We quote hereinbelow Statement of Objects and Reasons with the text of the Constitution (Eighty-Fifth Amendment) Act, 2001:

THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001

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 MANU/SC/0113/1996 :***AIR1996SC448 and***Ajit Singh Januja (No. 1) v. State of Punjab MANU/SC/0319/1996 :***(1996)IILLJ154SC , which led to the issue of the O.M. dated 30th January, 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.
>
> **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 O.M. dated 30th January 1997 immediately. Mere withdrawal of the O.M. dated 30th 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(4A) 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(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects.

THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001

The following Act of Parliament received the assent of the President on the 4th January, 2002 and is published for general information:

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 (4A), 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.

Reading the Constitution (Seventy-Seventh Amendment) Act, 1995 with the Constitution (Eighty- Fifth Amendment) Act, 2001, Clause (4A) of Article 16 now reads as follows:

(4A) 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.

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

62. In ***R.K. Sabharwal***, 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 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 by that

category candidate alone (replacement theory).

The question which remained in controversy, however, was concerning the rule of 'carry-forward'. In ***Indra Sawhney*** 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%.

However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49 Ã¯Â¿Â½% and if the judgment of this Court in Indra Sawhney 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 (4B) after Clause (4A) in Article 16 vide the Constitution (Eighty-First Amendment) Act, 2000.

63. By Clause (4B) the "carry-forward"/"unfilled vacancies" of a year is 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

(Assented on 9th June, 2000 and came into force 9.6.2000)

STATEMENT OF OBJECTS AND REASONS

Prior to August 29, 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 the Indra Sawhney v. Union of India 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 August 29, 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.

Due to the adverse effect of the aforesaid order dated August 29, 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 (4A) 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 percent, 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 august 29, 1997.

The Bill seeks to achieve the aforesaid object.

THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT, 2000

(Assented on 9th June, 2000 and came into force 9.6.2000)

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 (4A), the following Clause shall be inserted, namely: -

(4B) 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 (4A) 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.

The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in ***R.K. Sabharwal***. 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 do not arise. Therefore, in effect, Article 16(4B) grants legislative assent to the judgment in ***R.K. Sabharwal***. 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.

As stated above, Clause (4A) of Article 16 is carved out of Clause (4) of Article 16. Clause (4A) provides benefit of reservation in promotion only to SCs and STs. In the case of ***S. Vinod Kumar and Anr. v. Union of India and Ors. MANU/SC/1284/1996 :*** (1996)6SCC580 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.***

64. 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:

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.

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*** 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(4A).

INTRODUCTION OF "TIME" FACTOR IN VIEW OF ARTICLE 16(4B):

65. As stated above, Article 16(4B) 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 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 Service Rules in some of the States where the carry- over rule does not extend beyond three years.

WHETHER IMPUGNED CONSTITUTIONAL AMENDMENTS VIOLATES PRINCIPLE OF BASIC STRUCTURE:

66. 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 the Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

67. 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'. 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 do 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 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 concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then 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 (4A) is derived from Clause (4) of Article 16. Clause (4A) 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 - whether the impugned amendments discard the original constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicate that the impugned amendments have been promulgated by the Parliament to overrule the decision 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 Court in ***Virpal Singh, Ajit Singh (I) , Ajit Singh (II)***and ***Indra Sawhney***, were judgments delivered by this Court which enunciated the law of the land. 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 the 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 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 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 sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

68. 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 mode of exercise of the power. Though the amending power in 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 and Ors.*** 1992 Supp. (2) SCC 651].

69. 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, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This

exercise, however, will depend on 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(4A) and Article 16(4B) 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(4A) and 16(4B) are classifications within the principle of equality under Article 16(4).

In conclusion, we may quote the words of Rubenfeld: "ignoring our commitments may make us rationale but not free. It cannot make us maintain our constitutional identity".

ROLE OF ENABLING PROVISIONS IN THE CONTEXT OF ARTICLE 14:

70. 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. 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(4A) and 16(4B). 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-Ã¯Â¿Â½-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 equalizing measures depending upon the fact-situation.

71. 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(4A) and 16(4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State 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 optimize these 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(4A) and 16(4B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4A) and 16(4B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4A) and 16(4B) 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 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 DOCTRINE OF "GUIDED POWER" - ARTICLE 335:

72. 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(4A) and 16(4B). 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 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 insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that "efficiency" is variable factor. It is for the concerned State 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 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.

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.

TESTS TO JUDGE THE VALIDITY OF THE IMPUGNED STATE ACTS:

73. 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.

Are the impugned amendments making an inroad into the balance struck by the judgment of this Court in the *case of Indra Sawhney:*

74. Petitioners submitted that equality has been recognized to be a basic feature of our Constitution. To preserve equality, a balance was struck in ***Indra Sawhney*** 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. Petitioners further submitted that in ***Indra Sawhney***, vide para 829 this Court has held that reservation in promotion was not sustainable in principle. Accordingly, petitioners submitted that the impugned constitutional amendments makes a serious inroad into the said balance struck in the case of ***Indra Sawhney*** which protected equality as a basic feature of our Constitution. We quote hereinbelow paragraph 829 of the majority judgment in the case of ***Indra Sawhney*** which reads as follows:

> **829.** It is true that ***Rangachari*** has been the law for more than 30 years and that attempts to re-open the issue were repelled in ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. MANU/SC/0058/1980 :***(1981)ILLJ209SC . 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***, 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 re-issue 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 do so.
>
> (emphasis supplied)

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.*** 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*** and ***Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors.***

MANU/SC/0498/1980 :(1981)ILLJ103SC , 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***. The words "nothing in this Article" in Article 16(4) represents 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 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.

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

75.. In ***Indra Sawhney*** the equality which was protected by the rule of 50%, was by balancing the rights of the general category vis-Ã¯Â¿Â½-vis the rights of BC en bloc consisting of OBC, SC and ST. 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 SC and ST is in principle constitutionally valid. Article 16(4A) is inspired by the observations in ***Indra Sawhney*** vide para 802 and 803 in which this Court has unequivocally observed that in order to avoid lumping of OBC, SC and ST which would make OBC take away all the vacancies leaving SC and ST high and dry, the concerned State was entitled to categorise and sub- classify SCs and STs on one hand vis-Ã¯Â¿Â½-vis OBC on the other hand. We quote hereinbelow paragraphs 802 and 803 of the judgment in ***Indra Sawhney:***

> **802.** We are of the opinion that there is no constitutional or legal bar to a State categorizing 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., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that gold- smiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitably result would be that gold-smiths 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 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 group 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 MANU/SC/0061/1972 : [1972]3SCR247 . This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

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, O.B.Cs. 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)

Therefore, while judging the width and the ambit of Article 16(4A) we must ascertain whether such sub- classification is permissible under the Constitution. The sub-classification between "OBC" on one hand and "SC and ST" on the other hand is held to be constitutionally permissible in ***Indra Sawhney***. In the said judgment it has been held that the State could make such sub- classification between SCs and STs vis-Ã¯Â¿Â½-vis OBC. It refers to sub-classification within the egalitarian equality (vide paras 802 and 803). Therefore, Article 16(4A) follows the line suggested by this Court in ***Indra Sawhney*** . In ***Indra Sawhney*** 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 BC as "a class apart" vis-Ã¯Â¿Â½-vis GC. Therefore, in our view, equality as a concept is retained even under Article 16(4A) which is carved out of Article 16(4).

76. As stated above, Article 14 enables classification. A classification must be founded on intelligible differential which distinguishes those that are grouped together from others. The differential must have a rational relation to the object sought to be achieved by the law under challenge. In ***Indra Sawhney*** an opinion was expressed by this Court vide para 802 that there is no constitutional or legal bar to making of classification. Article 16(4B) is also an enabling provision. It seeks to make classification on the basis of the differential between current vacancies and carry-forward vacancies. In the case of Article 16(4B) we must keep in mind that following the judgment in ***R.K. Sabharwal*** the concept of post-based roster is introduced. Consequently, specific slots for OBC, SC

and ST as well as GC have to be maintained in the roster. For want of 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(B) a classification is made between current vacancies on one hand and carry-forward/backlog vacancies on the other hand. Article 16(4B) is a direct consequence of the judgment of this Court in ***R.K. Sabharwal*** by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4A) and 16(4B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4A) and 16(4B) together form part of the same scheme. As stated above, Articles 16(4A) and 16(4B) are both inspired by observations of the Supreme Court in ***Indra Sawhney*** and ***R.K. Sabharwal***. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4A) and 16(4B). The impugned constitutional amendments, therefore, do not obliterate equality.

77. The test for judging the width of the power and the test for adjudicating the exercise of power by the concerned State 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 concerned State has identified and valued the circumstances justifying it to make reservation. This question has to be decided case- wise. 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 facts of each case. The judgment in ***Indra Sawhney*** 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 concerned State 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 classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

78. 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, evenhandedly, 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.

79. 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 ***Kesavananda Bharati*** 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, 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 in Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. 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.

80. 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 disadvantaged sections of society within the framework of democratic polity. In ***Indra Sawhney*** 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*** this 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. 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***. 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*** 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:

81. The impugned constitutional amendments by which Articles 16(4A) and 16(4B) 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 OBC on one hand and SCs and STs on the other hand as held in ***Indra Sawhney***, the concept of post-based Roster with in-built concept of replacement as held in ***R.K. Sabharwal.***

82. 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. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State 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 SC/ST in matter 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 of 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. Subject to 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.

83. 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. Reference is answered accordingly.