REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO. 55 OF 2019

JANHIT ABHIYAN …PETITIONER(S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

WITH

T.C.(C) No. 8/2021, W.P.(C) No. 596/2019, W.P.(C) No. 446/2019, W.P.(C) No. 427/2019, W.P. (C) No. 331/2019, W.P.(C) No. 343/2019, W.P.(C) No. 798/2019, W.P. (C) No. 732/2019, W.P. (C) No. 854/2019, T.C. (C) No. 12/2021, T.C.(C) No. 10/2021, T.C. (C) No. 9/2021, W.P.(C) No. 73/2019, W.P. (C) No. 72/2019, W.P. (C) No. 76/2019, W.P.(C) No. 80/2019, W.P. (C) No. 222/2019, W.P. (C) NO. 249/2019, W.P.(C) No. 341/2019, T.P.(C) No. 1245/2019, T.P. (C) No. 2715/2019, T.P.(C) No. 122/2020, SLP(C) No. 8699/2020, T.C.(C) No. 7/2021, T.C.(C) No. 11/2021, W.P.(C) No. 69/2019, W.P.(C) No. 122/2019, W.P. (C) No. 106/2019, W.P.(C) No. 95/2019, W.P.(C) No. 133/2019, W.P. (C) No. 178/2019, W.P.(C) No. 182/2019, W.P.(C) No. 146/2019, W.P. (C) No. 168/2019, W.P.(C) No. 212/2019, W.P.(C) No. 162/2019, W.P.(C) No. 419/2019, W.P.(C) No. 473/2020, W.P.(C) No. 493/2019

O R D E R

These matters have been disposed of today by pronouncement of four separate judgments rendered by Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Mr. Justice S. Ravindra Bhat, for himself and on behalf of the Hon'ble the Chief Justice; Hon'ble Ms. Justice Bela M. Trivedi; and, Hon'ble Mr. Justice J.B. Pardiwala.

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Date: 2021.11.07
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Reason:

In view of the decision rendered by the majority consisting of Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Ms. Justice Bela M. Trivedi and Hon'ble Mr. Justice J.B. Pardiwala, the challenge raised to 103rd Amendment to the Constitution fails and the decision rendered by Hon'ble Mr. Justice S. Ravindra Bhat remains in minority.

Consequently, the Writ Petitions and other proceedings stand disposed of.

……..……CJI.
(UDAY UMESH LALIT)

……..……J.
(DINESH MAHESHWARI)

……..……J.
(S. RAVINDRA BHAT)

……..……J.
(BELA M. TRIVEDI)

……..……J.
(J.B. PARDIWALA)

NEW DELHI;
NOVEMBER 07, 2022.

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JUDGMENT

DINESH MAHESHWARI, J.

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Preliminary and Brief Outline

1. In this batch of transferred cases, transfer petitions, writ petitions and the petition for special leave to appeal, the challenge is to the Constitution (One Hundred and Third Amendment) Act, 2019[1], which came into effect on 14.01.2019, whereby the parliament has amended Articles 15 and 16 of the Constitution of India by adding two new clauses viz., clause (6) to Article 15 with *Explanation* and clause (6) to Article 16; and thereby, the State has been empowered, *inter alia*, to provide for a maximum of ten per cent. reservation for "the economically weaker sections"[2] of citizens other than "the Scheduled Castes"[3], "the Scheduled Tribes"[4] and the non-creamy layer of "the Other Backward Classes"[5]. At the outset, it needs to be stated that the amendment in question does not mandate but enables reservation for EWS and prescribes a ceiling limit of ten per cent.

2. In a very brief outline of the forthcoming discussion, it could be noticed that the challenge to the amendment in question is premised essentially on three-fold grounds: first, that making of special provisions including reservation in education and employment on the basis of economic criteria is entirely impermissible and offends the basic structure of the Constitution; second, that in any case, exclusion

[1] Hereinafter also referred to as 'the amendment in question' or 'the 103rd Constitution Amendment' or simply 'the 103rd Amendment'.
[2] 'EWS', for short.
[3] 'SC', for short.
[4] 'ST', for short.
[5] 'OBC', for short.

of socially and educationally backward classes[6] i.e., SCs, STs and non-creamy layer OBCs from the benefit of these special provisions for EWS is inexplicably discriminatory and destroys the basic structure of the Constitution; and third, that providing for ten per cent. additional reservation directly breaches the fifty per cent. ceiling of reservations already settled by the decisions of this Court and hence, results in unacceptable abrogation of the Equality Code which, again, destroys the basic structure of the Constitution. *Per contra*, it is maintained on behalf of the sides opposing this challenge that the amendment in question, empowering the State to make special provisions for the economically weaker sections of citizens, is squarely within the four corners of the Constitution of India; rather making of such provisions is necessary to achieve the Preambular goal of '*JUSTICE, social, economic and political*' in real sense of terms. It is also asserted that there is no discrimination in relation to the classes that are excluded from EWS for the simple reason that the existing special provisions of affirmative action in their relation continue to remain in operation. As regards the breach of fifty per cent. ceiling of reservations, the contention is that the said ceiling is not inflexible or inviolable and in the context of the object sought to be achieved, ten per cent. has been provided as the maximum by way of the enabling provision.

[6] 'SEBC', for short.

3. With the foregoing outline, we may usefully take note of the reference made to the Constitution Bench for determination of the substantial questions of interpretation of the Constitution, as are involved in these matters and the questions formulated while commencing the hearing.

The Referral and the Questions Formulated

4. By an order dated 05.08.2020, a 3-Judge Bench of this Court took note of the issues arising in these matters and referred the same for determination by a Constitution Bench while observing, *inter alia*, as under: -

> "…..By virtue of the impugned amendments, very Constitution is amended by inserting new clauses in Articles 15 and 16 thereof, which empower the State to make reservations by way of affirmative action to the extent of 10% to economically weaker sections. It is the case of the petitioners, that the very amendments run contrary to the constitutional scheme, and no segment of available seats/posts can be reserved, only on the basis of economic criterion. As such, we are of the view that such questions do constitute substantial questions of law to be considered by a Bench of five Judges. It is clear from the language of Article 145(3) of the Constitution and Order XXXVIII Rule 1(1) of the Supreme Court Rules, 2013, the matters which involve substantial questions of law as to interpretation of constitutional provisions they are required to be heard a Bench of five Judges. Whether the impugned Amendment Act violates basic structure of the Constitution, by applying the tests of 'width' and 'identity' with reference to equality provisions of the Constitution, is a matter which constitutes substantial question of law within the meaning of the provisions as referred above. Further, on the plea of ceiling of 50% for affirmative action, it is the case of the respondent-Union of India that though ordinarily 50% is the rule but same will not prevent to amend the Constitution itself in view of the existing special circumstances to uplift the members of the society belonging to economically weaker sections. Even such questions also constitute as substantial questions of law to be examined by a Bench of five Judges…."

5. Pursuant to the order aforesaid, this batch of matters has been referred to this Constitution Bench for determination of the issues arising from the challenge to the 103rd Amendment. On 08.09.2022, after perusing the issues suggested by learned counsel for the respective parties, this Court noted, amongst others, the issues suggested by the learned Attorney General for India as follows: -

> "(1) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria?
>
> (2) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions?
>
> (3) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation?
>
> (4) Whether the cap of 50% referred to in earlier decisions of the Supreme Court can be considered to be a part of the basic structure of the Constitution? if so, can the 103rd Constitution Amendment be said to breach the basic structure of the Constitution?"

5.1. Having taken note of the relevant facets of the matter, this Court found that the first three issues suggested by the learned Attorney General were the main issues arising in the matter while the other issues were essentially in the nature of supplementing and substantiating the propositions emerging from the said three issues. Accordingly, this Court proceeded with the hearing with respect to the first three issues aforesaid, while leaving it open to the learned counsel appearing for the respective

parties to advance their submissions touching upon other facets in aid of the said three issues.

6. We have heard learned counsel for the petitioners, the respondents, and the interveners at substantial length and have also permitted them to submit written notes on their respective submissions. The principal and material submissions advanced in these matters could be usefully summarised, while avoiding unnecessary repetition of the same line of arguments.

Rival Submissions

In challenge to the amendment in question

7. Prof. (Dr.) G. Mohan Gopal led the arguments on the side of the petitioners challenging the amendment in question and also wrapped up the submissions in rejoinder.

7.1. The learned counsel has, while extensively relying on the Constituent Assembly Debates, Preamble, and Article 38 of the Constitution which enjoins the State to secure and protect "*a social order in which justice, social, economic and political shall inform the institutions of the national life*", stressed that it was to ensure this social justice and the ethos of the Constitution that special provisions were envisioned under Article 15(4) and reservations in employment were provided under Article 16(4). He argued that it was due to certain primordial practices that a section of population was marginalised and was deprived of material resources and educational opportunities. The people in the lowest strand

of social hierarchy were ostracised and stigmatised from public life and were deprived of basic liberties and equality. It was to address these historical inequalities that, as a vehicle of positive discrimination, the socially oppressed sections were provided reservations and special provisions so as to give them a voice in administration, access to resources such as education and public employment. Therefore, the idea of ensuring social equality and justice was a congenital feature of the Constitution shaping its basic structure.

7.2. The learned counsel has argued that this basic structure has been violated by the amendment in question which seeks to empower the privileged sections of society, who are neither socially and educationally backward nor inadequately represented. He also submitted that the amendment in question has introduced those section of people as economically weaker who were never subjected to any discrimination, whether historically or otherwise; and were not backward, socially and educationally. The learned counsel quoted Dr. B.R. Ambedkar, Mr. V.I. Muniswamy Pillai and Mr. Sardar Nagappa, from the Constituent Assembly Debates, to support his contention that reservation should not be used by the forward class as a self-perpetuating mechanism depriving the disadvantaged. The equation of the victims of social discrimination with those responsible for their victimisation, for the purpose of conferring benefits, was a contortion of the Constitution and no less than playing a fraud on it. He relied on decisions of this Court in ***T. Devadasan v. Union***

***of India and Anr.*: (1964) 4 SCR 680**, ***State of Kerala and Anr. v. N.M. Thomas and Ors.*: (1976) 2 SCC 310**[7] and ***Indra Sawhney and Ors. v. Union of India and Ors.*: 1992 Supp (3) SCC 217**[8] to submit that this Court has discerned reservations and special provisions as an effective affirmative action to mitigate inequalities and ensure social justice and equality of opportunity. The learned counsel has further relied on the decision of this Court in ***M.R. Balaji and Ors. v. State of Mysore and Ors.*: 1963 Supp (1) SCR 439**[9], which held that latent or covert transgression of the Constitution by abusing an ostensible power granted by it will amount to 'fraud on the Constitution'.

7.3. The learned counsel has further submitted that the non obstante clause in Articles 15(6) and 16(6), while granting reservation to already privileged and adequately represented class of citizens, has vetoed the pre-requisite of being socially and educationally backward or inadequately represented, which was the kernel to philosophy of reservation. The Constitution puts forth social '*and*' educational backwardness and not social '*or*' educational backwardness as a criterion to determine positive discrimination in favour of a class. This foundation of social justice for historically marginalised and disadvantaged people is completely obliterated by the amendment in question, which removes that criterion. He argued that backward class included those classes from the forward class that were socially and educationally backward, hence making them

[7] Hereinafter also referred to as '***N.M. Thomas***'.
[8] Hereinafter also referred to as '***Indra Sawhney***'.
[9] Hereinafter also referred to as '***M.R. Balaji***'.

eligible for benefits of reservation. He exemplified this by stating that there were numerous communities, traditionally belonging to the so-called 'forward' class, in several States and several of those are not professing any religion, but are recognised as OBC on the ground that they are socially and educationally backward.

7.4. On the point of exclusion of SCs, STs and OBCs, the learned counsel has argued that the concept of Fraternity, as envisaged in the Constitution, informs Articles 15 and 17, giving shape to equality while prohibiting discrimination and discriminatory practices prevalent in our society. Inclusion of forward class and exclusion of disadvantaged class from the protection and benefit of reservation violate the basic structure of the Constitution. Learned counsel has relied on the decision of this Court in ***Prathvi Raj Chauhan v. Union of India and Ors.*****: (2020) 4 SCC 727** to highlight the place and role of Fraternity in the scheme of polity and society. Further he has stated that such exclusion of SCs, STs and OBCs was primarily based on caste because it is indeed undisputed that a large chunk of population so excluded are also economically backward along with being socially and educationally backward. Hence, he would submit that the basic principle of equality forming the basic structure of the Constitution stands abrogated by excluding those who are socially and educationally backward and also are part of systemic poverty/labour under abject poverty.

7.5. The learned counsel has yet further argued that the purpose of positive discrimination was to put an end to monopoly of certain classes and create an inclusive society so as to ensure equality of opportunity to the marginalised sections. However, the amendment in question creates a perpetual monopoly by providing reservation to that section of population whose identification is imprecise and is based on their individual traits more so, when these classes have been enjoying and are still enjoying control over resources and public employment.

7.6. Lastly, the learned counsel would submit that the amendment in question is not based on economic condition, which is multi-dimensional, but on financial incapacity which is transient in nature, rewarding poor financial behaviours and is, therefore, not a reliable criterion for giving reservation. There are two wings of reservation - social and educational backwardness, which cover the people who are economically weaker but not those who are financially incapable. Economic weakness goes hand-in-hand with social and educational backwardness. EWS is individual-centric in contrast to Article 38(2) of the Constitution, which talks about inter-group inequalities. Thus, the learned counsel has submitted that the 103rd Amendment deserves to be set aside, being violative of the principle of equality, which is the basic structure of the Constitution.

8. The learned senior counsel, Ms. Meenakshi Arora, elucidating on the twin objectives of Equality Code enshrined under Articles 14 to 17 of the Constitution as to the formal equality and substantive equality, has

submitted that these provisions are to ensure that those sections of society who have been kept out of any meaningful opportunity, participation in public life and decision making, on the grounds enumerated under Article 15(1), be uplifted through positive discrimination, giving flesh and blood to the Equality Code, and essentially enabling the substantive equality. Emphasizing on the efficiency in services as under Article 335, she would submit that the positive discrimination has to be read alongwith other guardrails provided by the Constitution, ensuring identification of the protected group by constitutionally sanctioned bodies. The absence of these guardrails and safeguards in the newly created class of EWS through the amendment in question strikes at the core of the Equality Code, violating the basic structure of Constitution.

8.1. Stressing further on the argument of social and educational backwardness and inadequacy in representation being the bedrock for grant of reservations, the learned counsel has submitted that the communities, whom the amendment in question aims to protect, are duly represented in all walks of life and hence, even from the angle of adequacy in representation, they are not eligible to avail benefit of reservation under Articles 15 and 16. She has placed reliance on decisions of this Court in ***M.R. Balaji*** and ***Indra Sawhney*** to submit that it is social '*and*' educational backwardness and not social '*or*' educational backwardness that is to be considered by the legislature to grant the

benefit of reservation. Furthermore, she has submitted that backwardness is *sine qua non* and the lynchpin for special provision or reservation; and as stated by Dr. B.R. Ambedkar, backwardness was designed as a qualifying phrase to ensure that the '*exception does not eat the rule*'.

8.2. Moving on and while relying on the decisions of this Court in ***Indra Sawhney***, ***N.M. Thomas***, ***M.R. Balaji*** and ***B.K. Pavitra and Ors. v. Union of India and Ors.*****: (2019) 16 SCC 129**, the learned counsel has submitted that the purpose of reservation was to enable the backward classes to have a level playing field with the forward class so that they can participate in public life with them on an equal basis. Also, this Court has held that no one criterion such as caste could be the sole basis for grant of reservation. In the amendment in question, the economic criteria is the sole basis for grant of reservation without considering the concept of representation; and this prescription is not only against the judicial pronouncements but also against the Preambular vision of casteless society, hitting the basic structure of the Constitution.

8.3. The learned counsel has further contended that for classes that are socially and educationally backward, there are constitutionally devised commissions and guardrails to ensure that the benefits are extended only to the deserving sections, who are actually socially and educationally backward but the amendment in question is bereft of any such guardrails or safeguards. The amendment is limited to those classes

that are neither identifiable nor have any constitutionally devised mechanism for their identification.

8.4. The learned counsel would further submit that economic status is transient in nature and would keep on changing unlike the status of backwardness, which is based on age-old caste practices and oppressions that are immutable. The newly protected class under the amendment in question lacks historic and continuing lack of adequate representation caused by structural or institutional barriers, so as to be eligible for positive discrimination. Further, the reservation is intended to be operative only until there is inadequacy in representation of those classes and not in perpetuity. However, the present amendment prescribes essentially no end to reservation as there would always be people poorer than others. Since the need for reservation has been delinked from inadequacy of representation and the need to show backwardness, there is no natural guardrail or end point to reservations connected with poverty. This constitutes a clear violation of the Equality Code and of the basic structure of the Constitution.

8.5. In the alternative, the learned counsel has argued that even if this Court were to accept poverty and income as valid criteria for the grant of reservation then too, the amendment to the extent of '*other than the class mentioned in clause (4) [and (5)]'* should be severed from Articles 15(6) and 16(6) so as to include the poor of all classes without any exclusion or discrimination.

9. Learned senior counsel, Mr. Sanjay Parikh, has relied extensively on the Constituent Assembly Debates to contend that the Assembly was of the clear opinion that the word ‘backward’ should precede ‘class of people'. Therefore, despite being aware of the rampant poverty in the country, the focus of reservations was predominantly on the social stigma attached to the group. Reservation in public employment was given because the framers wanted the backward classes to share State power and for that matter, they had to be provided equal opportunity. The Assembly intended to extend the benefits of affirmative action to only those socially and educationally backward groups who had been excluded from mainstream national life due to historic injustice, stigma and discrimination and thus, bringing in any other criteria, excluding the communities who have suffered such stigmatisation, would be a blatant violation of not only the Equality Code but also the very principles of democracy (sharing of power being necessary to sustain democracy), both of which form part of the basic structure of the Constitution.

9.1. The learned counsel would submit that the criteria for ‘backwardness’ was always ‘social’ in nature and ‘economic’ backwardness was never accepted as the sole criteria. Placing reliance on the decision of this Court in ***Indra Sawhney***, he has contended that by the majority of 8:1, it was held that economic criteria cannot be the sole basis to grant reservation under Article 16. Drawing attention to the theory of ‘Substantive Equality’ propounded by Prof. Sandra Fredman, the

learned counsel has submitted that reservation solely on economic criteria would violate the principles of substantive equality ingrained in the Constitution, which was directed against identity-based historic marginalisation.

9.2. Learned counsel has further placed reliance on ***Indra Sawhney*** to draw distinction between backward class and weaker sections discussed under Articles 16(4) and 46, respectively. It has been argued that the latter has no limitations and thus, Article 46 cannot be the basis for providing reservation. He has also urged that exceeding fifty per cent. limit would violate the twin tests of width and identity, as propounded by this Court in ***M. Nagaraj and Ors. v. Union of India and Ors.*****: (2006) 8 SCC 212**[10] and result in disturbance of equality; and that fifty per cent. limit cannot be breached under any circumstance except if a law is protected under the Ninth Schedule to the Constitution, which the amendment in question is not. He supported his argument citing ***Indra Sawhney*** and ***Dr. Jaishri Laxmanrao Patil v. Chief Minister and Ors.*****: (2021) 8 SCC 1**[11], wherein it was held that reservation under Article 16(4) should not exceed fifty per cent.

10. Traversing through the history of reservation policy since the year 1872 and the decision of this Court in ***State of Madras v. Champakam Dorairajan*****: AIR 1951 SC 226**[12], Prof. Ravivarma Kumar, learned senior counsel, has submitted that the ratio of decision of this Court in

[10] Hereinafter also referred to as **'*M. Nagaraj***'.
[11] Hereinafter also referred to as '***Dr. Jaishri Patil***'.
[12] Hereinafter also referred to as '***Champakam***'.

Champakam, that classification on the basis of religion, race, caste, language or any of them was against the ethos of Constitution, has been followed unanimously and consistently by this Court in ***M.R. Balaji*** and ***Ashoka Kumar Thakur v. Union of India and Ors.*****: (2008) 6 SCC 1**[13]. However, the 103rd Amendment reinstates the communal Government Order set aside in ***Champakam***.

10.1. Elucidating further on formal and substantive equality, the learned counsel has submitted that despite ensuring equal opportunity to all, it was still felt necessary to prohibit discrimination specifically on the grounds of religion, race, caste, sex, place of birth so as to halt all inequality and create a more egalitarian society, protecting the interests of every individual through Articles 15, 16, 17, 23, 24 and 35. In order to highlight the intensity of caste-based discrimination in India, he exemplified the prejudices and discriminations faced by Dr. B.R. Ambedkar and M.K. Gandhi and submitted that unless caste is destroyed in the country, equality cannot be attained in true sense of the term.

10.2. The learned counsel has further contended that the term "socially *and* educationally" backward has been employed in Article 15(4) and the expressions employed are not "socially *or* educationally" or "socially *or* economically". The intention behind this was to protect those classes of population who have been historically disadvantaged by birth and not by loss of wealth or by accident. Further, the substantive equality enshrined through Articles 15 and 16 not only makes the provisions to bridge the

[13] Hereinafter also referred to as '***Ashoka Kumar Thakur***'.

gap but it also provides the means by which this gap can be bridged. Likewise, under Article 340, the first Backward Classes Commission laid down 22 parameters for the identification of a backward class. The amendment in question does not have any such machinery employed within its ambit for the identification of population who would fall under the EWS category. Relying upon the census report, he has submitted that the population who would fall under the EWS would be around five per cent., and providing ten per cent. of reservation for such a small population, more so to the forward class, is manifestly arbitrary and fraud on the Constitution. Further, this positive discrimination is taking away the rights from rest of the population.

10.3. The learned counsel has further argued that as per the grounds of discrimination in Article 15, the Constitution has provided a bridge for all the grounds but there, economic deprivation is not mentioned, which clarifies that it was not considered as a basis for discrimination. Applying the principle of *ejusdem generis* to Article 46, he contended that the measures contemplated in the Statement of Objects and Reasons of the amendment in question are in favour of SCs and STs and those weaker sections who are similarly circumstanced to SCs and STs; and definitely is not meant for those castes and sections which are at the other end of the pendulum in the society.

10.4. Relying on the decision of this Court in ***Indra Sawhney***, the learned counsel has posited that economic criteria cannot be the sole

basis to provide reservation. He would further submit that a class should be homogenous, have a common origin, and have the numerical strength. The EWS created by the amendment in question does not fulfill any of the criteria and hence, cannot be called a class for any State action, particularly the affirmative action. He further emphasised on this argument by intensively reading the opinion of Justice Sahai in ***Indra Sawhney***.

10.5. The learned counsel has further submitted that the amendment in question fails on all the anvils of Equality Code because, if poverty is the rationale behind it and it aims at providing jobs for the poor by way of reservation then, the amendment fails to address as to how the poverty of the forward class is different from that of the SCs, STs and OBCs. Hence, the amendment in question fails the twin test of rationality and nexus, and violates the basic structure of Constitution.

11. Learned senior counsel, Mr. Salman Khurshid, has submitted that in India, reservation formed a special part of affirmative action. It is within the larger affirmative action circle that reservation finds its place. Drawing analogy with countries like U.S.A., Israel and Germany, the learned counsel has submitted that indeed affirmative action can be an answer, but it is not the only answer. There are, therefore, many ways of addressing the issue of economic disadvantage other than reservation, as has been done by these countries. He would further submit that the limit for such reservation cannot exceed fifty per cent. except in cases where

compelling reasons arise. Arguing on the Equality Code, learned counsel has relied on the classification laid down by this Court in ***E.P. Royappa v. State of Tamil Nadu and Anr.*****: (1974) 4 SCC 3**, to submit that the present amendment neither has any reasonable classification nor such classification has any nexus with the object to be achieved, hence is violative of Article 14. Entire list of reserved categories of citizens is caste-based and the amendment did not include any metric or indicator, ignoring the marginalisation criteria entirely while granting reservation. He has also quoted the works of *John Rawls* to submit that each person has the same indefeasible right over every claim.

12. "*One law for lion and ox is oppression*", Mr. P. Wilson, learned senior counsel, quoting William Blake, has contested the amendment in question on four grounds. First, granting reservation to upper caste is violation of the basic structure of Constitution as the basis of reservation must be rooted in identified past discrimination which impeded access to public administration and education opportunities. Relying on the decision of this Court in ***Indra Sawhney*** and judgment of the Gujarat High Court in ***Dayaram Khemkaran Verma v. State of Gujarat*****: 2016 SCC Online Guj 1821** wherein similar reservations on the basis of economic criteria were quashed by this Court and the High Court respectively, he has submitted that economic criteria cannot be the sole basis for providing reservation, and the reservation cannot exceed fifty per cent. limit. Second, he submitted that reservation in the favour of forward class violates the basic

structure of the Constitution and is, therefore, unconstitutional. Third, classification of EWS is neither reasonable nor valid. The reason for providing reservation to SC, ST and OBC communities was historical and perpetual discrimination and stigmatisation. It was the structural barrier that kept them from the mainstream. Reservation cannot be used as a poverty alleviation scheme. Hence, such classification violates the Equality Code under Article 14. Fourth, the amendment in question fails the width test laid down by this Court in ***M. Nagaraj*** as there are no limitations or indicators that have been devised to identify the people falling under the EWS. Whereas, for each category, be it SC, ST or OBC, the Constitution is overseeing the reservation by virtue of Articles 366(24), 366(25), 338, 340, 341 etc. Hence, the amendment in question fails the guided power test.

13. Learned senior counsel, Mr. K.S. Chauhan, while placing reliance on Constituent Assembly Debates and decision of this Court in ***Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.*****: (1973) 4 SCC 225**[14], has argued that the 103rd Amendment violates the basic structure of the Constitution as it changes the identity of the Constitution. He would again submit that providing reservation solely on economic criteria is against the decision of this Court in ***Indra Sawhney*** and also against the facet of democracy, as democracy ought to be representative. The learned counsel would argue that economic criteria is transient in nature whereas the inclusion of backward classes under

[14] Hereinafter also referred to as '***Kesavananda***'.

Article 16(4) was on the ground of historical exclusion. In our society, discrimination finds its root in caste, religion, race, etc. and not in economic condition of a person. The classification under Article 14 has to have reasonable nexus and intelligible differentia which the amendment in question, because of all the aforesaid reasons, fails to achieve. He has also submitted that indeed forward class must have faced some discrimination, but the intensity of discrimination is not enough to justify reservation. To support his submission, he has relied on the judgment of this Court in ***Madhav Rao Scindia Bahadur etc. v. Union of India*****: (1971) 1 SCC 85** wherein it was held that constitutional philosophy is the obligation of the executive; if a particular class is eligible for identification in a category and it is not identified as such, the constitutional scheme will be destroyed; and if under the constitutional scheme, an obligation is given to a wing and if that wing is not discharging the function, it is a fraud on the Constitution.

14. Learned counsel, Mr. Yadav Narender Singh, while referring to Sinho Commission Report, has submitted that the report, on the basis of which the amendment was enacted, itself stated that economic criteria would not result in homogenous class. Learned counsel has argued that in the absence of quantifiable data, one could not create a class for which protective measures are to be taken. The said Report concluded that if poverty is kept as a base-line for reservation, then it should have in its ambit all, irrespective of their class, more so because the poor of SCs,

STs and OBCs are worse-off than those of general category. He has further argued that the condition precedent for a protective clause is existence of discrimination. Hence, protective action for a class that is neither a homogenous class nor is discriminated against, is violative of the basic structure of the Constitution. Learned counsel has relied upon the decision of this Court in ***Indra Sawhney***, to submit that economic criteria cannot be the sole basis for classification. He has further argued, in the alternative, that even if reservation on grounds of economic criteria is to be given, EWS ought to include those who are living below the poverty line (BPL).

15. Learned counsel, Mr. Shadan Farasat, while adding on to the submissions already advanced by the preceding counsel for petitioners, posited that the originalist understanding of reservation is that it can solely be granted as an anti-discriminatory measure and not as an anti-deprivation measure. Hence, the amendment in question cannot sustain itself, as it addresses the deprivation faced by an individual and not discrimination.

15.1. The learned counsel would further argue that even if it is assumed that reservation can be granted as an anti-deprivation measure, still the amendment violates the Equality Code as it excludes the SCs, STs and OBCs, who are poorer than the poor of forward class, without any intelligible differentia and its nexus with the object sought to be achieved. Opposing the justification that these classes are already protected by way

of Articles 15(4) and 16(4), he has submitted that the purpose of Articles 15(4) and 16(4) is to protect a ‘group’ and to counter the historical wrong/oppression done to them. Whereas, the amendment in question deals with situational deprivation, mainly economic criteria, and is intended to protect an individual. Purposes and entities of both the protections being different, inclusion of SCs, STs and OBCs in one cannot mean their exclusion from the other.

15.2. The learned counsel has re-emphasised on the submissions that statistically, the backward class poor are worse off than forward class poor and their poverty is deeper, more intense and likely to be stickier and persistent. He has relied on Sinho Commission Report, NITI Aayog Multi-dimensional Poverty Index, along with other reports; and has argued that the question before the Sinho Commission was whether there could be reservation for general category people not covered in any other category. The Report itself stated that the backward class poor are poorer than the upper-class poor. He would underscore the point that poverty is deeply linked to the caste of an individual and the perception surrounding that status.

15.3. The learned counsel has further submitted that grant of reservation as a measure of affirmative action is a way for reparation and does not lead to economic upliftment. The object of economic upliftment of deprived sections of society can be achieved through other measures of poverty alleviation but reservation is not the answer. While contending

that Articles 15(1) and 16(1) are part of the basic structure of Constitution and that it is only in furtherance of substantive equality that formal equality can be breached, he has submitted that exclusion on the basis of caste straightaway breaches formal equality. Further, exclusion of those who are arguably more impacted by this criterion violates substantive equality too, hitting the Equality Code, and resultantly violating the basic structure of the Constitution.

15.4. In another line of arguments, the learned counsel has put forth the proposition that the words "other than" in Articles 15(6) and 16(6) should be read as "in addition to", thereby including SCs, STs and OBCs within them and furthering the basic structure. He has placed reliance on the decision of this Court in ***State (NCT of Delhi) v. Union of India and Anr.*: (2018) 8 SCC 501** to submit that if two interpretations are possible - one which destroys the basic structure and the other which enhances it - then purposive approach enhancing the basic structure of the Constitution is to be taken and not the literal approach. He has concluded the submissions while quoting from the judgment of this Court in ***K.C. Vasanth Kumar and Anr. v. State of Karnataka*: 1985 Supp SCC 714**[15] that lower the caste, the poorer are its members.

16. Learned counsel, Ms. Diya Kapoor, while stressing upon the Equality Code and it being part of the basic structure, has argued on two facets. First, as to whether the inclusion of new class of reservation solely on the basis of economic criteria was constitutionally permissible; and

[15] Hereinafter also referred to as '***Vasanth Kumar***'.

second, as to whether the exclusion of SCs, STs and OBCs from this newly created class, was constitutionally permissible. She mapped the historical background of reservations for backward classes since 1917 until the Constituent Assembly Debates, where Dr. B.R. Ambedkar and Mr. K.M. Munshi supported the use of the term 'backward' so as to grant special benefits to the classes qualifying that criterion and to neutralize the oppression faced by them. She would submit that such classification was based on long continuing historical oppression faced by these classes. Thus, to ensure their representation, reservations were provided as a means to foster the equality and fraternity of the country, with various checks and safeguards.

16.1. The learned counsel has further argued that reservation is for participation and representation and cannot be used for poverty alleviation. Reservation in public employment is to reverse discrimination and to equalize representation. Providing government jobs cannot pave a way for economic upliftment whereas, other ways of providing subsidies etc., is a kind of affirmative action to eliminate poverty. Indeed, poverty alleviation is a goal for the State to strive for as per Directive Principles of State Policy[16] but, reservation is not a way to alleviate poverty, as is evident from the statistics that despite decades of reservation in favour of SCs, STs and OBCs, they are still poor. Relying on the decision of this Court in ***Minerva Mills Ltd. and Ors. v. Union of India and Ors.*****: (1980)**

[16] 'DPSP', for short.

3 SCC 625[17], she would submit that alleviation of poverty has to be done without trampling on Fundamental Rights. Welfare steps can be taken under DPSP but it cannot be done under Article 15 unless there has been discrimination on the grounds mentioned in Article 15(1), as otherwise, the character of Article 15 is changed and results in abrogating the Fundamental Rights. As iterated by this Court in ***Indra Sawhney***, Article 16(4) has to be in consonance with and in furtherance to Article 16(1). Similarly, Article 16(6) also has to be in furtherance of equality of opportunity under Article 16(1). So, if Article 16(6) is violative of Article 16(1), it cannot sustain itself in the scheme of the Constitution.

16.2. Further relying upon 3-Judge bench decision of this Court in ***Indra Sawhney v. Union of India*****: (2000) 1 SCC 168**, the learned counsel has submitted that by providing reservation to forward class, the identity of backward class is erased and therefore, such reservation is illegal, hitting at the roots of the Constitution. Moreover, if the forward class becomes backward, it can come under OBC so as to benefit from reservation. She would reason that the 103rd Constitution Amendment is discriminatory to SCs and STs as the people falling in EWS are approximately five per cent. and for these five per cent. of people ten per cent. of reservation is provided. The learned counsel would further submit that the amendment in question is arbitrary too, for there is no mechanism/procedure laid down for it, as under Article 340, for identification of genuine EWS.

[17] Hereinafter also referred to as '***Minerva Mills***'.

17. Learned counsel, Dr. M.P. Raju, has based his submission on the ground that the amendment in question is a caste-based reservation that excludes the historically oppressed groups (SC/ST/OBC) from its coverage and is thus, destructive to the aim of 'casteless society', which is the Preambular vision forming the basic structure of the Constitution. Learned counsel has submitted that this amendment has created two levels of classification - first, between the classes already covered under Articles 15(4) and 16(4) (socially and educationally backward classes) and those who were not (forward class/non-reserved), which has resulted in caste-based classification; second, within the forward class between those who were economically weaker and those who were not. Such classification, in his opinion, not only defeats the goal of casteless society, as envisaged by the Constituent Assembly, but also attempts to create vertical reservation inside a vertical reservation, which is not permitted under the Constitution.

17.1. The learned counsel has further submitted that, as held by this Court in ***Indra Sawhney***, if castelessness is an ideal of the Constitution, and if this ideal goes into the basic identity of the Constitution, then the constitutional amendment, even if passes the test of equality, violates the basic structure. He has also urged that the condition of 'adequate representation' that controlled Article 16(4) is intentionally excluded from Articles 15(6) and 16(6). Reservation, once starts, has to end. It cannot be in perpetuity. He has further argued that the amendment in question is

violative of the Constitution inasmuch as grant of reservation to already sufficiently represented classes while excluding those who were inadequately represented (SC/ST/OBC) offends not only the Equality Code but also the principle of Fraternity, as recognised in the Preamble to the Constitution. He has supported his contentions while relying upon decisions of this Court in ***T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.*****: (2002) 8 SCC 481** and ***V.V. Giri v. D.S. Dora*****: (1960) 1 SCR 246**.

18. Learned counsel, Mr. Kaleeswaram Raj, has based his submissions on modern jurisprudence citing academic scholarship[18] to submit that two things are to be considered while dealing with discrimination law. First, the immutability and second, it should constitute fundamental choice. Relativity of poverty is antithetical to immutability. He has further submitted that the 103rd Amendment in the context of exclusion, made the forward communities as protected group and the backward class as cognate group, which is impermissible. The amendment in question strips off the right of backward class candidates to contest the seats kept in open category, to which they are entitled to. The learned counsel has argued that this amendment fails the preference test by giving preferential treatment to forward class and taking it away from backward class who are inadequately represented. He has further submitted that the 'living tree' approach should be applied to interpret the Constitution as per the changing circumstances of the society.

[18] '*A Theory of Discrimination Law*' by Tarunabh Khaitan, Oxford University Press 2015.

18.1. Learned counsel has also argued that Fundamental Rights are individualistic in nature; and while relying on the decision of this Court in ***Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*****: (2017) 10 SCC 1**, he would submit that the individual is the focal point because it is only in the realization of individual rights, that the collective well-being of the group can be determined and hence, it remains baseless to say that collective rights have been provided to the SC/ST/OBC as a group.

19. Learned counsel, Mr. Pratik Bombarde, has submitted that the amendment in question changes the identity of Fundamental Rights while omitting to take into account the crucial factor that social backwardness was a 'cause' of economic backwardness and not its 'consequence'. While relying on the decision in ***Saurav Yadav and Ors. v. State of Uttar Pradesh and Ors.*****: (2021) 4 SCC 542** which held that open category is open to all and horizontal and vertical reservations are methods of ensuring representation in public places, he has argued that the right to equality of the persons belonging to SC, ST and OBC communities is impacted by reducing their seats in open category. He would reiterate that rule of *ejusdem generis* shall apply while reading Article 46. Lastly, he has submitted that confining each social category to its extent of reservation would result in communal reservation, which, in turn, would result in breach of Equality Code and thereby, damage the basic structure of the Constitution.

20. Learned counsel, Mr. Akash Kakade referred to the phraseology of the provisions under consideration and submitted that while Articles 15(4) and 15(5) refer to socially and educationally backward classes, Article 16(4) is directed towards backwardness and inadequate representation. According to him, the impugned provisions of Articles 15(6) and 16(6) have left aside the key elements of "social backwardness" and "inadequate representation" while providing for EWS reservation. These provisions, therefore, are rather antithetical to the spirit of the existing provisions. The learned counsel has again urged that Article 46 should be read under the rule of *ejusdem generis* and by excluding SC, ST and OBC communities, the said rule is violated. According to the learned counsel, keeping SC, ST and OBC communities outside of its scope and bringing in economically weaker sections within it was never the idea of Article 46. He has also submitted that no constitutionally recognised commission has been set up for determination of the financial incapacity/capacity of a candidate, as in the case of OBCs.

21. Learned senior counsel, Mr. Shekhar Naphade, has argued that there was no dimension of equality, other than what was rooted in Articles 14 to 16 of the Constitution. Relying on passages of judgments of A.N. Ray, C.J. and P. Jaganmohan Reddy, J. in ***Kesavananda***, which indicated that new dimensions of equality could be discerned having regard to new challenges, he has submitted that those observations were

not endorsed by other judges. As a result, the amendment cannot sustain itself on the ground that it gives shape to another facet or dimension of equality. Learned counsel has further contended that economic criteria cannot be the sole criteria for the basis of classification, and if it is to be taken as a sole criterion, ***Indra Sawhney*** has to be revisited, which cannot be done by this Bench of 5 Judges.

22. Learned senior counsel, Mr. Jayant Muthuraj, in addition to the arguments already advanced, would submit that ten per cent. reservation in open category in favour of forward class reduces the availability of seats in open category for other classes and communities, in particular the persons belonging to the creamy layer category in SEBCs/OBCs. This, according to him, would damage the basic structure of the Constitution.

23. Learned senior counsel, Mr. Ravi K. Deshpande, and the learned counsel, Mr. Sachin Patil, Mr. Shashank Ratnoo, Mr. Varun Thakur, Mr. P.A. Noor Muhammad and Mr. A. Selvin Raja have also made their submissions as interveners. All of their submissions, which are akin to the submissions already noticed above, need not be elaborated. However, in sum and substance, their additional submissions had been that the amendment in question, which states '*not more than ten per cent. of the total seats in each category*' has to be interpreted as providing ten per cent. reservation for EWS in each category. One of the interveners provided the statistics as to the percentage of people working in each

category to submit that the exclusion of SCs, STs and OBCs is invalid as they are still inadequately represented in State services. Further they submitted that the current strength of Bench is not competent to overrule ***Indra Sawhney*** wherein it was explicitly held that reservation cannot be based solely on economic criteria. Yet further, discussing the power of Parliament under Article 368, it was posited that the Parliament has the power to amend the Constitution by way of 'addition, variation or repeal' and not by breaking down the basic structure of the Constitution.

In part challenge to the amendment in question

24. Learned senior counsel, Mr. Gopal Sankaranarayanan has taken a stance different than other petitioners, and has contended that the amendment in question is violative of basic structure of the Constitution only to the extent of the words '*in addition to the existing reservation and'* which need to be severed and that the rest of the part, which provides classification on the economic criteria for extension of special provisions for the advancement of economically weaker sections excluding classes already covered under Articles 15(4) and 16(4), was permissible.

24.1. The learned counsel has, otherwise, supported the amendment in question on two grounds. First, that the insertion of the Economically Weaker Sections is perfectly valid as a class for the extension of special provisions for their advancement, admissions and for reservations in posts. He has submitted that the classification on the basis of economic criteria has been recognised in plethora of measures introduced by the

State from providing housing, admission in schools or hospitals, to several statutes for their upliftment. Further, this Court in ***M.R. Balaji***, ***R. Chitralekha and Anr. v. State of Mysore and Ors.*****: (1964) 6 SCR 368** and ***Vasanth Kumar*** has accepted poverty as an indicator of backwardness, while considering reservation. It has been argued that the present constitutional amendment has removed the basis of ***Indra Sawhney*** (bar on using economic criteria as a sole determinative of backwardness); and in fact, such an amendment would further the goal of economic justice, thus strengthening the basic structure of the Constitution. The learned counsel has supported his submission with reference to the decision in ***Waman Rao and Ors. v. Union of India and Ors.*****: (1981) 2 SCC 362**[19].

24.2. Second, at divergence from other submissions regarding exclusion of SC, ST and OBC communities, he has argued that such an exclusion is permissible as the exclusion is not of 'castes' but of 'classes' who are already receiving the benefit of special provisions. Further, the SCs, STs and OBCs receive political reservations as well without having any ceiling limits as such whereas, EWS reservation is capped at ten per cent. and is not extended to political reservation, thereby providing a balance with sufficient guardrails and safeguards. Therefore, this amendment was long due, stepping away from caste-based reservation to provide reservation for that class of persons who had hitherto been overlooked.

[19] Hereinafter also referred to as '***Waman Rao***'.

24.3. Advancing his submission that the amendment in question, to the extent of '*in addition to existing reservation*', is violative of the basic structure of the Constitution, the learned counsel has given three-fold reasoning. First, the expression '*in addition to*' cements reservation, perpetuating the existing reservations within the Constitution as a permanent feature which violates basic structure of the Constitution as laid down in various decisions including those in ***Champakam***, ***M.R. Balaji***, ***Indra Sawhney***, ***Ashoka Kumar Thakur v. State of Bihar and Ors.*****: (1995) 5 SCC 403** and ***Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors.*****: (2009) 15 SCC 458**. Secondly, the amendment in question inserts enabling provision "*in addition to*", making EWS reservation reliant on those of SCs, STs and/or OBCs, which effectively converts enabling provisions in Articles 15(4), 15(5) and 16(4) into enabled provisions, inconsistent with the ethos and guiding principles of the Constitution. Lastly, on the extent of reservation, he would submit that the amendment providing reservation "*in addition to existing reservation*" breaches the fifty per cent. ceiling limit, which is now not only a part of constitutional interpretation of reservation provisions but is also a part of basic structure of the Constitution. He has further emphasised that in more than 54 judgments of this Court in over 60 years, it has been repeatedly stated that fifty per cent. ceiling limit must be maintained when reservations are activated while interpreting Articles 15 and 16. This, as per his contention, lends enough strength for fifty per

cent. ceiling limit to be a basic feature of the Constitution. In support of his submission on the extent of reservations, learned counsel has relied upon the decisions in ***Bhim Singhji v. Union of India and Ors.*****: (1981) 1 SCC 166**[20], ***M. Nagaraj*** and ***Dr. Jaishri Patil***.

In support of the amendment in question

25. Learned Attorney General for India, Mr. K.K. Venugopal, has posited that the 103rd Amendment does not violate the basic structure of the Constitution, rather fosters it. Second, the exclusion of those classes already covered under Articles 15(4) and 16(4) from the proposed reservation did not breach the Equality Code. Third, the fifty per cent. limit is not a sacrosanct rule. Lastly, the benefit to EWS with respect to admission in private aided or unaided educational institutions does not violate Article 14, as has been settled by this Court.

25.1. While quoting from ***Bhim Singhji***, the learned Attorney General has submitted that a mere violation of Article 14 does not violate the basic structure of the Constitution unless '*the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice*'. Relying on ***M. Nagaraj***, he has submitted that a constitutional amendment can be struck down only when it changes the identity of the Constitution. In support of his submissions, he has also relied on the

[20] Hereinafter also referred to as '***Bhim Singhji***'.

decisions of this Court in ***Raghunathrao Ganpatrao v. Union of India*****: 1994 Supp (1) SCC 191**[21], ***Ashoka Kumar Thakur*** and ***Minerva Mills***.

25.2. Learned Attorney General has placed reliance on the decision of this Court in ***M. Nagaraj***, as to dynamic interpretation of the Constitution to strengthen its Preambular vision; and has submitted that Articles 38 and 46 along with Preamble to the Constitution enjoin a duty on the State to eliminate social, economic and political inequalities and to promote justice. He has further argued that this Court has, over the years, repeatedly recognised that it was desirable to use poverty as the only basis for affirmative action and that it is poverty or economic deprivation that results in social and educational backwardness. He has relied on the decisions of this Court in ***Vasanth Kumar*** and ***Ashoka Kumar Thakur*** to support his contention. He has further submitted that the creation of new class fosters the vision of 'Economic Justice', as set out in the Preamble, hence strengthening the basic structure of the Constitution.

25.3. Learned Attorney General has further contended that the exclusion of already covered classes does not violate Equality Code as the EWS among the SC, ST and OBC communities are already enjoying the benefit of affirmative action in their favour by way of reservations in educational institutions and public employment, seats in Legislature, etc., to attain an equal status - socially and educationally. However, the EWS among the classes not covered under any of provisions preceding Articles 15(6) and 16(6) do not have any special provision made in their favour

[21] Hereinafter also referred to as '***Raghunathrao***'.

except for reservation by way of the present amendment. Further, this ten per cent. carved out for EWS is in addition to the existing reservation in favour of SEBCs; meaning thereby that it does not in any way affect the reservation upto fifty per cent. for the SEBCs/OBCs/SCs/STs.

25.4. As to the extent of reservation, learned Attorney General has submitted that the fifty per cent. cap as laid down in ***Indra Sawhney*** is for the classes covered under Articles 15(4), 15(5) and 16(4). Therefore, extending the benefit of ten per cent. to these classes would exceed the reservation made for them beyond fifty per cent. and that would be violative of ***Indra Sawhney***. He has also contended that this fifty per cent. rule could be breached in extraordinary situation, as held by ***Indra Sawhney***; and is, therefore, not an inviolable rule or part of the basic structure of the Constitution.

25.5. On the question of private unaided educational institutions, learned Attorney General has relied on the decision in ***Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.*****: (2012) 6 SCC 1** which upheld twenty-five per cent. reservation in favour of EWS under the Right of Children to Free and Compulsory Education Act, 2009, which was further affirmed the by 5-Judge Bench in ***Pramati Educational and Cultural Trust (Registered) and Ors. v. Union of India and Ors.*****: (2014) 8 SCC 1**[22].

26. Learned Solicitor General of India, Mr. Tushar Mehta, has submitted that to set aside a constitutional amendment, very high judicial

[22] Hereinafter also referred to as '***Pramati Trust***'.

threshold is needed. He would submit that a constitutional amendment may even touch upon the basic structure but unless it is shown that it fundamentally alters the basic structure or basic features of the Constitution, it cannot be struck down under judicial review. In support of his contentions, learned Solicitor General has placed reliance on the said decisions in ***Raghunathrao***, ***Bhim Singhji*** and ***Kesavananda*** as also on the decision in ***Indira Nehru Gandhi v. Raj Narain and Anr.*****: 1975 Supp SCC 1**[23]. He has further argued that the amendment in question, instead of hitting or disturbing the basic structure, rather strengthens the Preambular vision of the Constitution i.e., of providing economic justice to its people along with social and political justice.

26.1. Learned Solicitor General has further argued that the exclusion of classes already covered under Articles 15(4) and 16(4) does not violate the Equality Code; and that from the time of the decision in ***Champakam*** to the recent decision in ***Dr. Jaishri Patil***, the understanding and concept of equality and reservation have changed and evolved with time, and the reservation itself has been treated as a part and parcel of the Equality Code that furthers substantive equality. The Constitution has recognised different zones of affirmative action, whereby it extends reservation and special provisions as to the needs of each section of the society. For instance, all SEBCs do not have any reservation in Parliament, however, SCs and STs have been given a secured representation in Parliament. Learned Solicitor General has also submitted that except for the open

[23] Hereinafter also referred to as '***Indira Nehru Gandhi***'.

category, the SCs, STs and OBCs are not permitted to migrate to the other vertical reservations; and similarly, the Constitution has created another vertical zone for EWS category, which exists outside the fold of pre-existing reservations. Further, he would submit that ten per cent. reservation in favour of EWS would result in miniscule delimitation of the available seats in favour of SC, ST and OBC communities (SC: reduces from 65 per cent. to 55 per cent.; ST: reduces from 57.5 per cent. to 47.5 per cent.; and OBC: reduces from 77 per cent. to 67 per cent.).

26.2. On the question of fifty per cent. ceiling limit, learned Solicitor General has again submitted that this percentage could be exceeded in exceptional circumstances for, being neither a fundamental tenet of the Constitution nor a part of its basic structure. He lastly contended that the validity of a constitutional amendment cannot be tested on possible apprehensions or absence of guardrails.

26.3. Mr. Kanu Agrawal, learned counsel, has supplemented the submissions of learned Solicitor General that the amendment in question has guardrails inbuilt in it by having the upper limit of reservation fixed at ten per cent. unlike Articles 15(4), 15(5) and 16(4). He further submitted that exclusion of other classes is inherent in the concept of reservation and therefore, the exclusion of SC, ST and OBC communities already covered under preceding provisions is not violative of Equality Code. Thus, the exclusion clause '*other than*' is an "opportunity cost" which does not violate the basic structure of the Constitution. Further, he has

submitted that ***Pramati Trust*** is squarely applicable to Article 15(6) as well as to making of special provisions in relation to admission to the private unaided institutions.

27. Learned senior counsel, Mr. Mahesh Jethmalani, has submitted that the amendment in question takes into account the changing conditions of society as iterated in ***M. Nagaraj*** and hence, purposive interpretation of the Constitution has to be resorted to. He has further submitted that, as held in ***Dr. Jaishri Patil***, there must be harmony between Fundamental Rights and DPSP, which the amendment seeks to strike. Further, learned counsel would submit that the challenge in ***Indra Sawhney*** was to an Office Memorandum and the view of the Court that economic criteria cannot be the sole basis ran contrary to its own view of excluding creamy layer from OBCs on economic basis. Further, ***Indra Sawhney*** tested the Office Memorandum on the tenets of Article 16 alone. Here, the amendment in question, being a constitutional amendment, has to be tested on the threshold of violation of basic structure to an extent that it changes the identity of the Constitution.

28. Learned senior counsel, Mr. Niranjan Reddy, has submitted that neither the entitlement to reservation nor exclusion therefrom is part of the basic structure of the Constitution; and that reservations are enabling provisions, temporary in nature and do not hold within them the feature of permanence, so as to form part of the basic structure of the Constitution. ***Indra Sawhney***, staged 30 years ago, dealt with 'schematic

interpretation' of Articles 16(4) and 15(4). He further emphasized on the balance to be maintained between the competing claims that keeps on changing with the needs of the society. He based his argument principally on the premise that economic criteria by itself can be a determinative factor for backwardness. He has supported his contention by quoting ***Indra Sawhney***, which mentioned ***R. Chitralekha*** (supra), where occupation-cum-means test was employed so as to determine social backwardness. On the issue of exclusion of SCs, STs and OBCs, he has submitted that there is already an affirmative action in the form of reservation and special provisions operating in their favour. Their "opportunity quotient" including the reserved and open category exceeds fifty per cent. Hence, the ten per cent. in favour of EWS, in no way violates the Equality Code. According to the learned counsel, in fact, exclusion of SCs, STs and OBCs perfectly fits the constitutional scheme so as to avoid double benefit to them; and thus, exclusion is a part of reasonable classification.

29. Learned senior counsel, Ms. Vibha Dutta Makhija, has submitted that the 'Living Tree' approach has to be applied while interpreting the Constitution so as to further a more inclusive and progressive society. Learned counsel has argued that right of the EWS category arises from Article 21 of the Constitution, which provides for the right of dignity; and poverty affects dignity. She has also emphasised on various international obligations namely Universal Declaration of Human Rights and

International Covenant on Economic, Social and Cultural Rights, which the Constitution caters under Articles 46, 51(c) and 253, so as to submit that it is the duty of the State to eradicate poverty in order to ensure economic justice; and in that context too, the amendment in question becomes an empowering measure for those who are in systemic poverty. She has further referred to the works of economist Mr. Amartya Sen, to elucidate upon the concept and effect of poverty.

29.1. Learned counsel has further argued that the Constitution does not impede the Parliament to protect a new section of people in order to further the Preambular vision of economic justice, different from the traditional approach of caste-based affirmative action. Learned counsel has further exemplified, by referring to U.P. Constables, teachers and Shiksha-Mitra recruitments, that OBCs are already in good position now, earning seats in meritorious category as well as in reserved category and it is the EWS who are suffering and being deprived of the seats. She lastly contended that the basis of classification in the amendment in question is 'intersecting disadvantages' if not 'generational disadvantages'; and there is no bar or violation of basic structure of the Constitution in addressing these intersecting disadvantages.

30. Learned counsel, Mr. V.K. Biju, on the basis of various reports and statistical data, has argued that reservation on the basis of economic criteria is the need of the hour and the stepping stone to achieve economic and social justice, moving away from caste-based reservations,

as also vocalised by Dr. B.R. Ambedkar in Constituent Assembly Debates. He has further argued that even in ***Indra Sawhney***, the Court took a conscious note that there may be a group or class of people, who can qualify for benefits of reservation irrespective of caste.

Points for Determination

31. Three major issues to be answered in these matters by this Bench have been noticed at the outset. In order to answer those issues and in view of the variety of submissions urged as also the subject-matter, following principal points arise for determination:

(a) As to whether reservation is an instrument for inclusion of socially and educationally backward classes to the mainstream of society and, therefore, reservation structured singularly on economic criteria violates the basic structure of the Constitution of India?

(b) As to whether the exclusion of classes covered under Articles 15(4), 15(5) and 16(4) from getting benefit of reservation as economically weaker sections violates the Equality Code and thereby, the basic structure doctrine?

(c) As to whether reservation for economically weaker sections of citizens up to ten per cent. in addition to the existing reservations results in violation of basic structure on account of breaching the ceiling limit of fifty per cent.?

31.1. All these points are essentially structured on three important components namely, (i) the general rule of equality enshrined in Article 14 of the Constitution; (ii) the reservations enabled in Articles 15 and 16 as exception to the general rule of equality; and (iii) the doctrine of basic structure that defines and limits the power of the Parliament to amend the Constitution.

Relevant Constitutional Provisions

32. Any process of determination of the points aforesaid would invariably require an insight of the constitutional provisions. The relevant provisions could be usefully reproduced as follows:

32.1. Preamble to the Constitution of India, in its present form, reads as under: -

> **"WE, THE PEOPLE OF INDIA,** having solemnly resolved to constitute India into a **SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC** and to secure to all its citizens:
> **JUSTICE**, social, economic and political;
> **LIBERTY** of thought, expression, belief, faith and worship;
> **EQUALITY** of status and of opportunity;
> and to promote among them all
> **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the Nation;
> **IN OUR CONSTITUENT ASSEMBLY** this twenty-sixth day of November, 1949, do **HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."**

32.2. The underlying attribute of all the points and questions arising in these matters is as to whether the 103rd Amendment violates the basic structure of the Constitution. The discussion, therefore, revolves around the power of the Parliament to amend the Constitution and for this

purpose, we need to have a close look at the provisions contained in Article 368 of the Constitution.

32.2.1. Article 368, as originally adopted, read as under: -

> "**368. Procedure for amendment of the Constitution.-**
>
> An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any change in—
>
> (a) article 54, article 55, article 73, article 162 or article 241, or
>
> (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
>
> (c) any of the Lists in the Seventh Schedule, or
>
> (d) the representation of States in Parliament, or
>
> (e) the provisions of this article,
>
> the amendment shall also require to be ratified by the Legislature of not less than one-half of the States specified in Parts A and B of the First Schedule by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

32.2.2. Article 368 has undergone several amendments, some of which had been the subject matter of debates in this Court, including the cases of ***Kesavananda*** and ***Minerva Mills***. Leaving aside other details, we may reproduce the relevant of the provisions now contained in Article 368 as under: -

> "**368. Power of Parliament to amend the Constitution and procedure therefor.—**(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this

Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162, article 241 or article 279-A, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

*** *** *** "[24]

32.2.3. After the amendments approved in ***Kesavananda***, Article 368 starts with a non obstante clause and further to that, sub-clause (3) thereof re-emphasises that nothing in Article 13 would apply to any amendment made under Article 368. In this context, a look at Article 13 of

[24] Clauses (4) and (5) inserted by the Constitution (Forty-second Amendment) Act, 1976 were declared invalid by this Court in ***Minerva Mills***. They read as under: -

"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any Court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

the Constitution is apposite, which otherwise declares void every law which is inconsistent with or is in derogation of Fundamental Rights but, the inserted sub-clause (4) keeps its operation away from the amendment made under Article 368. Article 13 reads as under: -

> "**13. Laws inconsistent with or in derogation of the fundamental rights**.—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires,—
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
>
> (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
>
> (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

32.3. By way of the amendment in question, sub-clause (6) and *Explanation* have been added to Article 15 and sub-clause (6) has been added to Article 16 of the Constitution of India. These two Articles, 15 and 16, being the subject of the amendment in question and forming the core of controversy before us, need a closer look. For the purpose, it is relevant to indicate at this stage itself that these Articles have undergone several changes from time to time. For the purpose of the present discussion, worthwhile it would be to take note of these Articles as

originally adopted and as now existing after various amendments, including the 103rd Constitution Amendment[25].

32.3.1. Articles 15 and 16, in their original form were as under: -

> "**15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**. — (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

[25] As noticed, the provisions in question have been inserted to Articles 15 and 16 of the Constitution of India by way of the Constitution (One Hundred and Third Amendment) Act, 2019. This amendment was made after passing of the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 by the Parliament. The Statement of Objects and Reasons for introduction of the said Bill read as under: -

"STATEMENT OF OBJECTS AND REASONS

At present, the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article 15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.

2. The directive principles of State policy contained in article 46 of the Constitution enjoins 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

3. *Vide* the Constitution (Ninety-third Amendment) Act, 2005, clause (5) was inserted in article 15 of the Constitution which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, clause (4) of article 16 of the Constitution enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

4. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it has been decided to amend the Constitution of India.

5. Accordingly, the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 provides for reservation for the economically weaker sections of society in higher educational institutions, including private institutions whether aided or unaided by the State other than the minority educational institutions referred to in article 30 of the constitution and also provides for reservation for them in posts in initial appointment in services under the State.

6. The Bill seeks to achieve the above objects."

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

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

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

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

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

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

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

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

32.3.2. These Articles 15 and 16, as now existing after various amendments, including the amendment in question, read as under: -

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

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

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

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

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

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

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

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

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

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

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

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

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

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than

the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

32.3.3. Articles 14, 17 and 18, forming the integral part of Equality Code along with the afore-mentioned Articles 15 and 16, could also be taken note of as under: -

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

*** *** ***

17. Abolition of Untouchability.—"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

18. Abolition of titles.—(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State."

32.4. Various provisions in Part IV of the Constitution of India laying down Directive Principles of State Policy also require a close look, including Article 46, which has been referred to in the Statement of Objects and Reasons for the purpose of the amendment in question. Articles 38, 39 and 46 of the Constitution of India read as under: -

"**38. State to secure a social order for the promotion of welfare of the people**. —(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing—
(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

*** *** ***

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.—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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

Doctrine of Basic Structure and Constitutional Amendments

33. It is hardly a matter of debate that the challenge herein is not to any executive order or even to an ordinary legislation. The challenge is to a constitutional amendment. There has not been any question as regards fulfilment of all other requirements of Article 368 of the Constitution of India while making the amendment in question and insertion of the relevant clauses to Articles 15 and 16. The challenge is founded on, and

in fact could only be founded on, the premise that the amendment in question violates the basic structure of the Constitution in the manner that it destroys its identity. According to the principal part of challenge, the Equality Code, an essential feature of the Constitution, gets abrogated because of reservation structured only on economic criteria and because of exclusion of classes covered under Articles 15(4), 15(5) and 16(4) from its benefit. Therefore, the entire challenge is essentially required to be examined on the anvil of the doctrine of basic structure.

33.1. In the aforesaid view of the matter, before entering into the concepts relating to the equality as also the reservation, it shall be apt and apposite to take into account all the vital elements of the doctrine of basic structure, as developed and hitherto applied to the constitutional amendments; and the discernible principles which are to be applied to the amendment in question.

34. The power to amend the Constitution availing under Article 368 has been a significant area of the development of Constitutional Law in our country. This power, recognised as a constituent power, is subject to various safeguards which are intrinsic to Article 368, including the procedural safeguards. The political process from time to time that resulted in various constitutional amendments, some of them radical in nature, gave rise to several debates in this Court as regards the width and amplitude as also the limitations of this amending power of the Parliament. Thus, Article 368 and the power of the Parliament had been

the subject-matter of various decisions, some of which being of far-reaching consequences. Before embarking upon a survey of the relevant decisions and the principles discernible therefrom, particularly after the *locus classicus* of ***Kesavananda*** and the later expositions (which had their genesis in the nature of amendment and which were relatable to the given set of facts and circumstances), it would be profitable to put a glance at a few background aspects.

35. The doctrine of basic structure was not as such discussed in the Constituent Assembly while formulating the enabling provisions for amending the Constitution. Then, at the initial stages of Constitutional Law development, the proposition of challenging an amendment to the Constitution, as mooted in the case of ***Sri Sankari Prasad Singh Deo v. Union of India and Anr.*****: 1952 SCR 89** as also in ***Sajjan Singh v. State of Rajasthan*****: (1965) 1 SCR 933** did not meet with approval of this Court. However, first reference to the idea of 'basic feature' was made by Justice Mudholkar in ***Sajjan Singh*** (supra)[26]. Then, the idea that certain Parts of the Constitution were unamendable was accepted by the 11-

[26] The learned Judge referred to the facts that the Constituent Assembly, consciously enacted a written Constitution; created three organs of State; enacted a federal structure; recognised certain rights as fundamental and provided for their enforcement; and prescribed forms of oath of Office which would require the Members of the Union Judiciary and of the higher judiciary in the State, to uphold the Constitution; and above all, formulated a solemn and dignified Preamble which, '*appears to be an epitome of the basic features of the Constitution*'. The learned Judge, thereafter, posed the points to ponder over thus:

> "…..Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?
>
> It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?"

Judge Bench in ***I.C. Golak Nath and Ors. v. State of Punjab and Anr.*: (1967) 2 SCR 762**. However, in ***Kesavananda****,* the 13-Judge Bench of this Court, while partially overruling ***Golak Nath*** by a majority of 7-6, held that though any part of the Constitution could be amended by the Parliament, its basic structure could not be damaged.

36. A precursor to the developments aforesaid could be traced to the year 1965 when a German jurist, Prof. Dietrich Conrad (1932- 2001), gave a lecture on '*Implied Limitations of the Amending Power*' at the Banaras Hindu University wherein he, *inter alia*, asked: "*Could the amending power be used to abolish the Constitution, and reintroduce, let's say, the rule of a Moghul emperor or the Crown of England?"*[27] Later,

[27] The contribution of Prof. Conrad in Origination and Development of doctrine of basic structure has been pertinently underscored in A.G. Noorani's, *'Constitutional Questions and Citizens' Rights,* Oxford University Press (2006) in the first chapter titled as "Sanctity of the Constitution: Dieter Conrad- The man behind the 'basic structure' doctrine", *inter alia*, in the following words: -

> "There is, sadly, little acknowledgment in India of that debt we owe to a distinguished German jurist and scholar steeped in other disciplines beyond the confines of law–Professor Dietrich Conrad, formerly Head of the Law Department, South Asia Institute of the University of Heidelberg, Germany.
>
> In *Golak Nath's* case, the doctrine of any implied limitations on Parliament's power to amend the Constitution was not accepted. The majority felt that 'there is considerable force in this argument' but thought it unnecessary to pronounce on it. 'This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in provisions other than in Part III of the Constitution.'
>
> The argument of implied limitations had been advanced at the Bar by M.K. Nambyar, one of India's leading constitutional lawyers. Few people knew then that he owed the argument to Professor Conrad. In February 1965, while on a visit to India, Conrad delivered a lecture on 'Implied Limitations of the Amending Power' to the Law Faculty of the Banaras Hindu University. A paper based on the subject was sent to Professor T.S. Rama Rao in Madras for his comments. Nambyar's attention was drawn to this paper which he read before the Supreme Court, though with little result.
>
> Professor Conrad's lecture, delivered in February 1965, showed remarkable perceptiveness besides deep learning. He observed:
>
> *'Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type of constitutional amendments.* It is the duty of the jurist, though, to *anticipate extreme cases of conflict,* and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion I may propose some fictive

he wrote an article titled '*Limitations of Amendment Procedures and the Constituent Power*' published in the Indian Year Book of International Affairs wherein he described the limits on the amending power as follows:-

> "The functional limitations implied in the grant of amending power to Parliament may then be summarized thus: No amendment may abrogate the constitution. No amendment may effect changes which amount to a practical abrogation or total revision of the constitution. Even partial alterations are beyond the scope of amendment if their repercussions on the organic context of the whole are so deep and far reaching that the fundamental identity of the constitution is no longer apparent….."[28]

36.1. Thus, even the origin of the submissions before this Court leading to the expositions on the doctrine of basic structure could be traced to the thought-process stimulated by the thinkers like Prof. Conrad. However, as shall be unfolding hereafter, there had been voices of concern about the exact nature and implication of this doctrine. For example, concern was expressed in the case of ***State of Karnataka v. Union of India and Anr.*: (1977) 4 SCC 608** in rather intriguing terms as follows: -

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> amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if a two-thirds majority changed Article 1 by dividing India into two States of Tamilnad and Hindustan proper?
>
> 'Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorization by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution and reintroduce, let us say, the rule of a Moghul emperor or of the Crown of England? I do not want, by posing such questions, to provoke easy answers. But I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period–discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner.'
>
> A more detailed exposition of Professor Conrad's views appeared after the judgment in Golak Nath's case (*Limitation of Amendment Procedures and the Constituent Power,* Indian Year Book of International Affairs, 1966–7, Madras, pp. 375–430)."

[28] The Indian Year Book of International Affairs, 1966-7, at p. 420.

> "120. …In *Kesavananda Bharati case* this Court had not worked out the implications of the basic structure doctrine in all its applications. It could, therefore, be said, with utmost respect, that it was perhaps left there in an amorphous state which could give rise to possible misunderstandings as to whether it is not too vaguely stated or too loosely and variously formulated without attempting a basic uniformity of its meaning or implications…"

36.2. However, when the enquiry itself is into the effect of amendment of the supreme and organic document, which is fundamental to everything related to the country, the amorphous state of the doctrine of basic structure, obviously, leaves every option open for purposive approach, in tune with the dynamics of change while ensuring that the fundamental ethos remain unscathed[29].

37. It shall now be appropriate to delve a bit deeper into some of the significant and important cases in which the doctrine of basic structure was employed/applied in the context of a constitutional amendment[30].

37.1. In ***Kesavananda***, this Court outlined the basic structure doctrine of the Constitution. In fact, in ***Kesavananda***, this Court, by a 7-6 majority, went several steps ahead in asserting its power of judicial review so as to scrutinize any amendment to see if it violated the basic structure of the Constitution; and asserted its right to strike down amendments to the Constitution that were in violation of the fundamental architecture of the Constitution. Factually, the case was a challenge to the Kerala Land

[29] The acclaimed and honourable jurist O. Chinnappa Reddy would define this journey in these words: "*Since there are no signposts signalling basic features of the Constitution, every attempt to discover a basic feature becomes a 'voyage of discovery'*." [The Court and the Constitution of India: Summits and Shallows; Oxford University Press 2008 – at p.54].

[30] The extractions hereinbelow are of the relevant passages/paragraphs, which may not be in continuity but the disjoining signs after end of the passage/paragraph have been generally avoided to maintain the continuity of discussion.

Reforms Act, 1963 which interfered with petitioner's rights to manage property under Article 26. Furthermore, the Twenty-fourth, Twenty-fifth and Twenty-ninth constitutional amendments were also challenged. By Twenty-fourth Amendment, Articles 13 and 368 were amended to exclude constitutional amendments from the definition of law under Article 13; the Twenty-fifth Amendment excluded judicial review by providing that the law giving effect to principles specified in clause (b) or clause (c) of Article 39 could not be questioned by the Court; and the Twenty-ninth Amendment put certain land reform enactments in the Ninth Schedule. The present discussion need not be over-expanded with reference to the variety of opinions expressed therein. For the present purpose, a few relevant opinions could be extracted as follows: -

> **Sikri, C.J.**
>
> "209…..In other words, the expression 'Amendment of this Constitution" does not include a revision of the whole Constitution. If this is true — I say that the concession was rightly made — then which is that meaning of the word "Amendment" that is most appropriate and fits in with the whole scheme of the Constitution. **In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble**.
>
> 284. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.
>
> 395. It was said that if Parliament cannot increase its power of amendment clause *(d)* of Section 3 of the 24th Amendment which makes Article 13 inapplicable to an amendment of the Constitution would be bad. I see no force in this contention. Article 13(2) as

existing previous to the 24th Amendment as interpreted by the majority in *Golak Nath's case* (supra), prevented Legislatures from taking away or abridging the rights conferred by Article 13. In other words, any law which abridged a fundamental right even to a small extent was liable to be struck down Article 368 can amend every article of the Constitution as long as the result is within the limits already laid down by me. **The amendment of Article 13(2) does not go beyond the limits laid down because Parliament cannot even after the amendment abrogate or authorise abrogation or the taking away of fundamental rights. After the amendment now a law which has the effect of merely abridging a right while remaining within the limits laid down would not be liable to be struck down.**

469. I have held that Article 368 does not enable Parliament to abrogate or take away fundamental rights. **If this is so, it does not enable Parliament to do this by any means, including the device of Article 31-B and the Ninth Schedule. The device of Article 31-B and the Ninth Schedule is bad in so far as it protects Statutes even if they take away fundamental rights**. Therefore, it is necessary to declare that the Twenty-Ninth Amendment is ineffective to protect the impugned Acts if they take away fundamental rights.

Shelat, J. and Grover, J.

546. The meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution. Even the concession of the learned Attorney-General and the Advocate-General of Maharashtra that the whole Constitution cannot be abrogated or repealed and a new one substituted supports the conclusion that the widest possible meaning cannot be given to it.

583. The entire discussion from the point of view of the meaning of the expression "amendment" as employed in Article 368 and the limitations which arise by implications leads to the result that **the amending power under Article 368 is neither narrow nor unlimited**. On the footing on which we have proceeded the validity of the 24th Amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. **The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit**

amendment of each and every article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity.

Hegde, J. and Mukherjea, J.

666. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society. **These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good**. We are unable to agree with the contention that in order to build a Welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. **Our Constitution envisages that the State should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way**.... Every encroachment on freedoms sets a pattern for further encroachments. Our constitutional plan is to eradicate poverty without destruction of individual freedoms.

Khanna, J.

1416. Argument has then been advanced that if power be held to be vested in Parliament under Article 368 to take away or abridge fundamental rights, the power would be, or in any case could be, so used as would result in repeal of all provisions containing fundamental rights. India, it is urged, in such an event would be reduced to a police state wherein all cherished values like freedom and liberty would be non-existent. This argument, in my opinion, is essentially an argument of fear and distrust in the majority of representatives of the people. It is also based upon the belief that the power under Article 368 by two-thirds of the members present and voting in each House of Parliament would be abused or used extravagantly. I find it difficult to deny to the Parliament the power to amend the Constitution so as to take away or abridge fundamental right by complying with the procedure of Article 368 because of any such supposed fear or possibility of the abuse of power. I may in this context refer

to the observations of Marshall, C.J., regarding the possibility of the abuse of power of legislation and of taxation in the case of *Providence Bank v. Alpheus Billings*:

> "This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."

1535. In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience. **Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristrocracy of the Robe, Covert Legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena.** That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision. The sobering reflection has always to be there that the Constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views. As observed by Justice Holmes while dealing with the Fourteenth Amendment to the U.S. Constitution:

> "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics…Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."…"

(emphasis supplied)

37.2. In ***Indira Nehru Gandhi***, using the doctrine of basic structure, the Thirty-ninth Constitutional Amendment Act was struck down whereby the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha were put beyond the judicial scrutiny. Such an amendment was held to be destroying the basic feature of the Constitution.

37.3. In ***Minerva Mills***, again, using the doctrine of basic structure, clauses (4) and (5) of the Constitution (Forty-second Amendment) Act, 1976 were struck down with the following, amongst other, observations: -

> **Chandrachud, C.J.**
>
> "56. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. **In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution**.
>
> 57. ….. **The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution**."
>
> (emphasis supplied)

37.4. In ***Waman Rao***, it was held that the First Constitution Amendment Act, that introduced Articles 31-A and 31-B, as well as the Twenty-fifth Amendment Act that introduced Article 31-C were constitutional, and did not damage any basic or essential features or the basic structure of the Constitution. Herein, this Court examined the validity of Article 31-A and Article 31-B of the Constitution of India with respect to the doctrine of basic structure introduced in ***Kesavananda*** and observed that all the decisions made prior to the introduction of the doctrine shall remain valid. The impact of this decision had been that all the acts and regulations that were included under Ninth Schedule to the Constitution prior to the ***Kesavananda*** decision were to remain valid while further amendments to the Schedule could be challenged on the grounds of violation of the doctrine of basic structure. The relevant observations in this case read as under: -

> **Chandrachud, C.J.**
>
> "14. … **We would like to add that every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution**.
>
> 29. The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution. It is impossible for any government, howsoever expertly advised, socially oriented and prudently managed, to remove every economic disparity without causing some hardship or injustice to a class of persons who also are

entitled to equal treatment under the law. **Thus, the adoption of 'family unit' as the unit of application for the revised ceilings may cause incidental hardship to minor children and to unmarried daughters. That cannot, in our opinion, furnish an argument for assailing the impugned laws on the ground that they violate the guarantee of equality. It seems to us ironical indeed that the laws providing for agricultural ceilings should be stigmatised as destroying the guarantee of equality when their true object and intendment is to remove inequalities in the matter of agricultural holdings.**

49. We propose to draw a line, treating the decision in *Kesavananda Bharati* as the landmark. Several Acts were put in the Ninth Schedule prior to that decision on the supposition that the power of the Parliament to amend the Constitution was wide and untrammelled. The theory that the Parliament cannot exercise its amending power so as to damage or destroy the basic structure of the Constitution, was propounded and accepted for the first time in *Kesavananda Bharati*. **This is one reason for upholding the laws incorporated into the Ninth Schedule before April 24, 1973, on which date the judgment in *Kesavananda Bharati* was rendered. A large number of properties must have changed hands and several new titles must have come into existence on the faith and belief that the laws included in the Ninth Schedule were not open to challenge on the ground that they were violative of Articles 14, 19 and 31. We will not be justified in upsetting settled claims and titles and in introducing chaos and confusion into the lawful affairs of a fairly orderly society.**

51. Thus, insofar as the validity of Article 31-B read with the Ninth Schedule is concerned, we hold that all Acts and Regulations included in the Ninth Schedule prior to April 24, 1973 will receive the full protection of Article 31-B. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. Acts and Regulations, which are or will be included in the Ninth Schedule on or after April 24, 1973 will not receive the protection of Article 31-B for the plain reason that in the face of the judgment in *Kesavananda Bharati*, there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. **The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution.**

54. Apart from this, if we are right in upholding the validity of Article 31-A on its own merits, it must follow logically that the unamended Article 31-C is also valid. … Whatever we have said in respect of the defined category of laws envisaged by Article 31-A

must hold good, perhaps with greater force, in respect of laws passed for the purpose of giving effect to clauses (*b*) and (*c*) of Article 39. It is impossible to conceive that any law passed for such a purpose can at all violate Article 14 or Article 19. Article 31 is now out of harm's way. **In fact, far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to directive principles contained in clauses (*b*) and (*c*) of Article 39 will fortify that structure. We do hope that the Parliament will utilise to the maximum its potential to pass laws, genuinely and truly related to the principles contained in clauses (*b*) and (*c*) of Article 39. The challenge made to the validity of the first part of the unamended Article 31-C therefore fails.**"

(emphasis supplied)

37.5. In ***P. Sambhamurthy and Ors. v. State of Andhra Pradesh and Anr.*: (1987) 1 SCC 362**[31] this Court examined Article 371-D inserted by the Constitution (Thirty-second Amendment) Act, 1973 and struck down its clause (5) with proviso, as being violative of the basic structure since it conferred power on the State Government to modify or annul the final order of the Administrative Tribunal, which was against the concept of justice and principle of rule of law.

37.6. In ***Kihoto Hollohan v. Zachillhu and Ors.*: 1992 Supp (2) SCC 651**, the constitutional validity of the Tenth Schedule to the Constitution introduced by the Constitution (Fifty-second Amendment) Act, 1985, was assailed. Though, the majority opinion did not find the entire amendment unconstitutional but the Court declared invalid Paragraph 7 of the Tenth Schedule to the Constitution, which excluded judicial review of any matter connected with the disqualification of a member of a House in terms of

[31] Hereinafter also referred to as '***P. Sambhamurthy***'.

the provisions contained in that Schedule, essentially for want of ratification in accordance with the proviso to clause (2) of Article 368.

37.7. In ***Raghunathrao***, the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 which removed privy purses was brought into question, *inter alia*, on the ground that it violated the basic structure and essential features of the Constitution of India and was, therefore, outside the scope and ambit of the powers of the Parliament to amend the Constitution. This Court denied interference while observing*, inter alia*, as under: -

> "96. Permanent retention of the privy purse and the privileges of rights would be incompatible with the sovereign and republican form of Government. Such a retention will also be incompatible with the egalitarian form of our Constitution. That is the opinion of the Parliament which acted to repeal the aforesaid provisions in exercise of its constituent power. The repudiation of the right to privy purse privileges, dignities etc. by the deletion of Articles 291 and 362, insertion of Article 363-A and amendment of clause (22) of Article 366 by which the recognition of the Rulers and payment of privy purse are withdrawn cannot be said to have offended Article 14 or 19(*g*) [*sic* 19(1)(*f*)] and we do not find any logic in such a submission. **No principle of justice, either economic, political or social is violated by the Twenty-sixth Amendment. Political justice relates to the principle of rights of the people, i.e. right to universal suffrage, right to democratic form of Government and right to participation in political affairs. Economic justice is enshrined in Article 39 of the Constitution. Social justice is enshrined in Article 38. Both are in the directive principles of the Constitution. None of these rights are abridged or modified by this Amendment. We feel that this contention need not detain us any more** and, therefore, we shall pass on to the next point in debate.
>
> 107. **On a deep consideration of the entire scheme and content of the Constitution, we do not see any force in the above submissions. In the present case, there is no question of change of identity on account of the Twenty-sixth Amendment. The removal of Articles 291 and 362 has not made any change in the personality of the Constitution either in its scheme or in its basic features, or in its basic form or in its character. The question of identity will arise only when**

> **there is a change in the form, character and content of the Constitution.** In fact, in the present case, the identity of the Constitution even on the tests proposed by the counsel of the writ petitioners and interveners, remains the same and unchanged."
>
> (emphasis supplied)

37.8. A 7-Judge Bench of this Court in ***L. Chandra Kumar v. Union of India and Ors.*: (1997) 3 SCC 261**[32] had the occasion to examine the nature and extent of jurisdiction of the High Court under Articles 226/227; and it was held that power of judicial review under Articles 226/227 and Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting its basic structure. The Constitution Bench held invalid the provisions of clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, inserted by the Constitution (Forty-second Amendment) Act, which excluded the jurisdiction of the High Court while observing as under: -

> "**99. In view of the reasoning adopted by us, we hold that clause 2(*d*) of Article 323-A and clause 3(*d*) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution.** While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution……."
>
> (emphasis supplied)

37.9. In ***M. Nagaraj***, the Constitution Bench validated the Constitution (Seventy-seventh Amendment) Act, 1995 which inserted Article 16(4-A);

[32] Hereinafter also referred to as '***L. Chandra Kumar***'.

the Constitution (Eighty-first Amendment) Act, 2000 which inserted Article 16(4-B); the Constitution (Eighty-second Amendment) Act, 2000 which inserted a proviso to Article 335; and the Constitution (Eighty-fifth Amendment) Act, 2001 which added "consequential seniority" for SC/STs under Article 16(4-B). The said amendments were introduced essentially to nullify the effect of the decision in ***Indra Sawhney*** wherein a 9-Judge Bench had ruled that reservation in appointments did not apply to promotions. Article 16(4-A) enables the State to make any law regarding reservation in promotion for SC/STs. Article 16(4-B) provides that reserved promotion posts for SC/STs that remain unfilled, can be carried forward to the subsequent year. Article 16(4-B) also ensures that the ceiling on the reservation quota for these carried forward posts does not apply to subsequent years. Article 335 mandates that reservations have to be balanced with the 'maintenance of efficiency'. The amendment to Article 335 clarified that the Article will not apply to the State relaxing evaluation standards 'in matters of promotion'. The Court held as under: -

> "104. **Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the**

parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

108. Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-second Amendment) Act, 2000 we find that the said proviso has a nexus with Articles 16(4-A) and 16(4-B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent 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 a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 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.

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

Conclusion

121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall

efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.

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

(emphasis supplied)

37.10. In ***Ashoka Kumar Thakur***, the provisions of Constitution (Ninety-third Amendment) Act, 2005 were under challenge, which inserted clause (5) to Article 15 of the Constitution. This Court rejected the contention of violation of the basic structure while holding, *inter alia*, as under: -

"**118.** Equality is a multicoloured concept incapable of a single definition as is also the fundamental right under Article 19(1)(*g*). **The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity**.

120. **If any constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(*g*), it cannot be said that it violates the basic structure of the Constitution. If such a principle is (*sic* not) accepted, our Constitution would not be**

able to adapt itself to the changing conditions of a dynamic human society. Therefore, the plea raised by the petitioners' counsel that the present Constitution (Ninety-third Amendment) Act, 2005 alters the basic structure of the Constitution is of no force. Moreover, the interpretation of the Constitution shall not be in a narrow pedantic way. The observations made by the Constitution Bench in *Nagaraj case* at p. 240 are relevant: (SCC para 19)

> "*19.* The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather 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 fossilised but remains flexible enough to meet the newly emerging problems and challenges."

122. **Therefore, we hold that the Ninety-third Amendment to the Constitution does not violate the "basic structure" of the Constitution so far as it relates to aided educational institutions.** Question whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the Constitution (Ninety-third Amendment); or whether reservation could be given in such institutions; or whether any such legislation would be violative of Article 19(1)(*g*) or Article 14 of the Constitution; or whether the Constitution (Ninety-third Amendment) which enables the State Legislatures or Parliament to make such legislation are all questions to be decided in a properly constituted lis between the affected parties and others who support such legislation."

(emphasis supplied)

37.11. In ***K. Krishna Murthy (Dr.) and Ors. v. Union of India and Anr.*:** **(2010) 7 SCC 202**, the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992 which had inserted Part IX and Part IX-A to the Constitution thereby contemplating the powers, composition and functions of local self-government institutions i.e., the Panchayats (for rural areas) and Municipalities (for

urban areas) were in challenge. This Court rejected the challenge while holding that there was no damage to the basic structure and concluded as follows: -

> "82. In view of the above, our conclusions are:
> (*i*) **The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. In this sense, Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government.** Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter.
>
> (*ii*) Article 243-D(6) and Article 243-T(6) are constitutionally valid since they are in the nature of provisions which merely enable the State Legislatures to reserve seats and chairperson posts in favour of backward classes. Concerns about disproportionate reservations should be raised by way of specific challenges against the State legislations.
>
> (*iii*) We are not in a position to examine the claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State legislations since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. As we have considered and decided only the constitutional validity of Articles 243-D(6) and 243-T(6), it will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of the said constitutional provisions before the High Court. We are of the view that the identification of "backward classes" under Article 243-D(6) and Article 243-T(6) should be distinct from the identification of SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16(4).
>
> (*iv*) **The upper ceiling of 50% vertical reservations in favour of SCs/STs/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of the Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas.**

> *(v)* **The reservation of chairperson posts in the manner contemplated by Articles 243-D(4) and 243-T(4) is constitutionally valid.** These chairperson posts cannot be equated with solitary posts in the context of public employment."
>
> (emphasis supplied)

37.12. In ***Pramati Trust***, the validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 was again in question in reference to the private unaided educational institutions (the aspect which was not under consideration in ***Ashoka Kumar Thakur***) as also the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 01.04.2010. This Court denied that there was any basic structure violation while observing, *inter alia*, as under: -

> "38. **We accordingly hold that none of the rights under Articles 14, 19(1)(*g*) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution** and the view taken by Bhandari, J. in *Ashoka Kumar Thakur v. Union of India* that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(*g*), a basic feature of the Constitution is not correct. Instead, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid.
>
> 51. **In our considered opinion, therefore, by the Constitution (Eighty-sixth Amendment) Act, a new power was made available to the State under Article 21-A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the directive principles in Article 45 before this constitutional amendment could not be achieved for fifty years. This additional power vested by the Constitution (Eighty-sixth Amendment) Act, 2002 in the State is independent and different from the power of the State under clause (6) of Article 19 of the Constitution and has affected the voluntariness of the right under Article 19(1)(*g*) of the Constitution. By exercising this additional power, the State can by law impose admissions on private unaided schools and so long as the law made by the State in exercise of this power under Article 21-A of the Constitution is for the**

purpose of providing free and compulsory education to the children of the age of 6 to 14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(*g*) of the Constitution.

56. **In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid.** We also hold that the 2009 Act is not ultra vires Article 19(1)(*g*) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution. Accordingly, Writ Petition (C) No. 1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petitions (C) Nos. 416 of 2012, 152 of 2013, 60, 95, 106, 128, 144-45, 160 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All IAs stand disposed of. The parties, however, shall bear their own costs."

(emphasis supplied)

37.13. In ***Supreme Court Advocates-on-Record Association and Anr. v. Union of India:*** **(2016) 5 SCC 1**[33], the questions were pertaining to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 and that of the National Judicial Appointments Commission Act, 2014. This Court held that the amendment violated the basic structure inasmuch as by altering the process of appointment of Judges to the Supreme Court and the High Court, the amendment was striking at the very basis of the independence of the judiciary, an essential feature of the Constitution. A few passages from the majority opinions read as under: -

Khehar, J.

[33] Hereinafter also referred to as '***NJAC Judgment'***.

"308. **Articles 124-A(1)(*a*) and (*b*) do not provide for an adequate representation in the matter to the judicial component to ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary, and therefore, the same are liable to be set aside and struck down as being violative of the "basic structure" of the Constitution of India. Thus viewed, we are satisfied that the "basic structure" of the Constitution would be clearly violated if the process of selection of Judges to the higher judiciary was to be conducted in the manner contemplated through NJAC.** The impugned constitutional amendment being ultra vires the "basic structure" of the Constitution is liable to be set aside.

Lokur,J.

928. The 99th Constitution Amendment Act and the NJAC Act not only reduce the Chief Justice of India to a number in NJAC but also convert the mandatory consultation between the President and the Chief Justice of India to a dumb charade with NJAC acting as an intermediary. On earlier occasions, Parliament enhanced its power through constitutional amendments, which were struck down, inter alia, in *Indira Nehru Gandhi* and *Minerva Mills*. **The 99th Constitution Amendment Act unconstitutionally minimises the role of the Chief Justice of India and the judiciary to a vanishing point in the appointment of Judges. It also considerably downsizes the role of the President. This effaces the basic structure of the independence of the judiciary by sufficiently altering the process of appointment of Judges to the Supreme Court and the High Court, or at least alters it unconstitutionally thereby striking at the very basis of the independence of the judiciary**."

(emphasis supplied)

37.14. In his powerful dissent in the above-referred ***NJAC Judgment***, Justice Chelameswar surveyed a vast variety of case law relating to the doctrine/theory of basic structure and thereafter, summed up the relevant propositions, *inter alia*, as follows: -

"1196. An analysis of the judgments of the abovementioned cases commencing from *Kesavananda case* yields the following propositions:

1196.1. Article 368 enables Parliament to amend any provision of the Constitution.

1196.2. The power under Article 368 however does not enable Parliament to destroy the basic structure of the Constitution.

1196.3. None of the cases referred to above specified or declared what is the basic structure of the Constitution.

1196.4. The expressions "basic structure" and "basic features" convey different ideas though some of the learned Judges used those expressions interchangeably.

1196.5. The basic structure of the Constitution is the sum total of the basic features of the Constitution.

1196.6. Some of the basic features identified so far by this Court are democracy, secularism, equality of status, independence of judiciary, judicial review and some of the fundamental rights.

1196.7. The abrogation of any one of the basic features results normally in the destruction of the basic structure of the Constitution subject to some exceptions.

1196.8. As to when the abrogation of a particular basic feature can be said to destroy the basic structure of the Constitution depends upon the nature of the basic feature sought to be amended and the context of the amendment. There is no universally applicable test vis-à-vis all the basic features."

(emphasis supplied)

37.15. Lastly, in the decision in ***Dr. Jaishri Patil*** to which one of us (S. Ravindra Bhat, J.) was a party, this Court considered the validity of the Constitution (One Hundred and Second Amendment) Act, 2018 which, *inter alia*, inserted Articles 366(26-C) and 342-A. As a result of this amendment, the President alone, to the exclusion of all other authorities, is empowered to identify socially and educationally backward classes and include them in a list to be published under Article 342-A (1), which shall be deemed to include SEBCs in relation to each State and Union territory for the purposes of the Constitution. The said amendment

was challenged, *inter alia*, on the ground that the same was not ratified by at least half of the States and that it was striking at the federal structure of the Constitution. While rejecting the challenge, this Court held that there was no breach of the basic structure of the Constitution. Some of the relevant questions formulated in that case and the opinions expressed could be usefully reproduced as under: -

> "7.4. (4) Whether the Constitution (One Hundred and Second) Amendment deprives the State Legislature of its power to enact a legislation determining the socially and economically backward classes and conferring the benefits on the said community under its enabling power?
>
> 7.5. (5) Whether, States' power to legislate in relation to "any backward class" under Articles 15(4) and 16(4) is anyway abridged by Article 342-A read with Article 366(26-C) of the Constitution of India?
>
> 7.6. (6) Whether Article 342-A of the Constitution abrogates States' power to legislate or classify in respect of "any backward class of citizens" and thereby affects the federal policy/structure of the Constitution of India?
>
> **Bhat, J.**
>
> 182. This Court is also of the opinion that the change brought about by the 102nd Amendment, especially Article 342-A is only with respect to the process of identification of SEBCs and their list. Necessarily, the power to frame policies and legislation with regard to all other matters i.e. the welfare schemes for SEBCs, setting up of institutions, grants, scholarships, extent of reservations and special provisions under Articles 15(4), 15(5) and 16(4) are entirely with the State Government in relation to its institutions and its public services (including services under agencies and corporations and companies controlled by the State Government). In other words, the extent of reservations, the kind of benefits, the quantum of scholarships, the number of schools which are to be specially provided under Article 15(4) or any other beneficial or welfare scheme which is conceivable under Article 15(4) can all be achieved by the State through its legislative and executive powers. This power would include making suggestions and collecting data — if necessary, through statutory commissions, for making recommendations towards inclusion or exclusion of castes and communities to the President on the aid

and advice of the Union Council of Ministers under Article 342-A. This will accord with the spirit of the Constitution under Article 338-B and the principle of cooperative federalism which guides the interpretation of this Constitution.

193. **By these parameters, the alteration of the content of the State legislative power in an oblique and peripheral manner would not constitute a violation of the concept of federalism. It is only if the amendment takes *away the very essence of federalism or effectively divests the federal content of the Constitution, and denudes the States of their effective power to legislate or frame executive policies (co-extensive with legislative power) that the amendment would take away an essential feature or violate the basic structure of the Constitution.* Applying such a benchmark, this Court is of the opinion that the power of identification of SEBCs hitherto exercised by the States and now shifted to the domain of the President (and for its modification, to Parliament) by virtue of Article 342-A does not in any manner violate the essential features or basic structure of the Constitution.** The 102nd Amendment is also not contrary to or violative of proviso to Article 368(2) of the Constitution of India. As a result, it is held that the writ petition is without merit; it is dismissed.

194.5. ***Re Point (5)***: Whether, States' power to legislate in relation to “any backward class” under Articles 15(4) and 16(4) is anyway abridged by Article 342-A read with Article 366(26-C) of the Constitution of India? On these two interrelated points of reference, my conclusions are as follows:

194.5.5. The States' power to make reservations, in favour of particular communities or castes, the quantum of reservations, the nature of benefits and the kind of reservations, and all other matters falling within the ambit of Articles 15 and 16 — except with respect to identification of SEBCs, remains undisturbed.

194.6. ***Re Point (6)*****: Article 342-A of the Constitution by denuding the States power to legislate or classify in respect of “any backward class of citizens” *does not affect or damage* the federal polity and does not violate the basic structure of the Constitution of India.**

Bhushan, J.

686. **We do not find any merit in the challenge to the Constitution 102nd Amendment. The Constitution 102nd Amendment does not violate any basic feature of the Constitution. The argument of the learned counsel for the petitioner is that Article 368 has not been followed since the Constitution 102nd Amendment was not ratified by the necessary majority of the State. Parliament never intended to take the rights of the State regarding identification of backward classes, the Constitution 102nd Amendment was**

> **not covered by the proviso to Article 368 clause (2), hence, the same did not require any ratification.** The argument of procedural violation in passing the 102nd Constitutional Amendment cannot also be accepted. We uphold the Constitution 102nd Amendment interpreted in the manner as above."
>
> (emphasis supplied)

38. A comprehension of the foregoing makes one aspect more than clear. It is that there is no, and there cannot be any, cut-and-dried formula or a theorem which could supply a ready-made answer to the question as to whether a particular amendment to the Constitution violates or affects the basic structure. The nature of amendment and the feature/s of the Constitution sought to be touched, altered, modulated, or changed by the amendment would be the material factors for an appropriate determination of the question. As observed hereinbefore, amorphous state of the doctrine of basic structure is rather pertinent in this quest, so as to keep in tune with the organic nature of the Constitution.

38.1. However, the observations foregoing are not to suggest as if the doctrine of basic structure is so open-ended that it would be readily applied to every constitutional amendment. Quite to the opposite, as exemplified by the decisions above-referred, this Court has applied the same only against such hostile constitutional amendments which were found to be striking at the very identity of the Constitution, like direct abrogation of the features of judicial review (***Kesavananda***, ***Minerva Mills*** and ***P. Sambhamurthy***[34]); free and fair elections (***Indira Nehru Gandhi***); plenary jurisdiction of constitutional Courts (***L. Chandra***

[34] In ***Kihoto Hollohan*** (supra), Paragraph 7 of the Tenth Schedule to the Constitution, though relating to the matter of exclusion of judicial review but was struck down essentially for the view of majority about want of ratification in accordance with the proviso to clause (2) of Article 368.

Kumar); and independence of judiciary (***NJAC Judgment***). Most of the other attempts to question the constitutional amendments have met with disapproval of this Court even when there had been departure from the existing constitutional provisions and scheme.

38.2. The reason for minimal interference by this Court in the constitutional amendments is not far to seek. In our constitutional set-up of parliamentary democracy, even when the power of judicial review is an essential feature and thereby an immutable part of the basic structure of the Constitution, the power to amend the Constitution, vested in the Parliament in terms of Article 368, is equally an inherent part of the basic structure of the Constitution. Both these powers, of amending the Constitution (by Parliament) and of judicial review (by Constitutional Court) are subject to their own limitations. The interplay of amending powers of the Parliament and judicial review by the Constitutional Court over such exercise of amending powers may appear a little bit complex but ultimately leads towards strengthening the constitutional value of separation of powers. This synergy of separation is the strength of our Constitution.

39. A few material aspects related with this interlacing of the amending powers of the Parliament and operation of the doctrine of basic structure could be usefully condensed as follows:

39.1. The power to amend the Constitution essentially vests with the Parliament and when a high threshold and other procedural safeguards

are provided in Article 368, it would not be correct to assume that every amendment to the Constitution could be challenged by theoretical reference to the basic structure doctrine.

39.2. As exposited in ***Kesavananda***, the amending power can even be used by the Parliament to reshape the Constitution in order to fulfil the obligation imposed on the State, subject, of course, to the defined limits of not damaging the basic structure of the Constitution.

39.3. Again, as put in ***Kesavananda***, judicial review of constitutional amendment is a matter of great circumspection for the judiciary where the Courts cannot be oblivious of the practical needs of the Government and door has to be left open even for 'trial and error', subject, again, to the limitations of not damaging the identity of the Constitution.

39.4. The expressions "basic features" and "basic structure" convey different meaning, even though many times they have been used interchangeably. It could reasonably be said that basic structure of the Constitution is the sum total of its essential features.

39.5. As to when abrogation of any particular essential feature would lead to damaging the basic structure of Constitution would depend upon the nature of that feature as also the nature of amendment.

39.6. As regards Part-III of the Constitution, every case of amendment of Fundamental Rights may not necessarily result in damaging or destroying the basic structure. The issue would always be as to whether

what is sought to be withdrawn or altered is an inviolable part of the basic structure.

39.7. Mere violation of the rule of equality does not violate the basic structure of the Constitution unless the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice, as exposited in ***Bhim Singhji***.

39.8. If any constitutional amendment moderately abridges or alters the equality principles, it cannot be said to be a violation of the basic structure.

40. While keeping in view the principles foregoing, we may embark upon the points arising for determination in this matter so as to answer the root question as to whether the amendment in question violates the basic structure of the Constitution?

41. As noticed, the principal part of challenge to the 103rd Amendment is premised on the ground that insertion of clause (6) to Article 15 as also the parallel insertion of clause (6) to Article 16 abrogates the Equality Code, an essential feature of the Constitution of India; and thereby destroys the basic structure of the Constitution. In order to determine as to whether the amendment in question destroys or violates the basic structure, we need to examine the doctrine of equality as enshrined in our Constitution; the concept of reservation by affirmative action as an exception to the general rule of equality; the economic disability and affirmative action to deal with the same; the implications of economic

criteria as the sole basis for affirmative action; the implications of the exclusion of socially and educationally backward classes from the affirmative action for economically weaker sections; and the implication of the quantum of additional ten per cent. reservation for EWS. These aspects may now be exmined in this very order as *infra*.

Expanding Doctrine of 'Equality'

42. It would be apt to begin this discussion with the following words of H. M. Seervai, a jurist of great repute, as regards fundamentals of the concepts of Liberty and Equality:

> "Liberty and equality are words of passion and power. They were the watchwords of the French Revolution; they inspired the unforgettable words of Abraham Lincoln's Gettysburg Address; and the U.S. Congress gave them practical effect in the 13th Amendment, which abolished slavery, and in the 14th Amendment, which provided that "the State shall not deny to any person within its jurisdiction…the equal protection of the laws." Conscious of this history, our founding fathers not only put Liberty and Equality in the Preamble to our Constitution but gave them practical effect in Art. 17 which abolished "Untouchability," and in Art. 14 which provides that "the State shall not deny to any person equality before the law and the equal protection of the laws in the territory of India"[35-36].

43. Articles 14 to 18 of the Constitution are to ensure the right to equality. The makers of our Constitution noticed the widespread social and economic inequalities in the society that obtained ever since a long past, often sanctioned by public policies, religion and other social norms and practices. Therefore, they enacted elaborate provisions for

[35] H.M. Seervai, '*Constitutional Law of India, A Critical Commentary*', 4th Edition, (1991-reprinted 1999) at p. 435.

[36] The echoing words of Abraham Lincoln's Gettysburg Address, as reproduced by H.M. Seervai read as follows: "*Four score and seven years ago our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal. We are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure.*"

eradication of inequalities and for establishing an egalitarian society. The first expression '*equality before the law*' of Article 14 is taken from the all-time wisdom as also from English Common Law, implying absence of any special privilege in any individual[37]; and the other expression '*the equal protection of the laws*', referable to the 14th Amendment to the U.S. Constitution, is a constitutional pledge of protection or guarantee of equal laws. Both these expressions occur in Article 7 of the Universal Declaration of Human Rights, 1948.

44. In a nutshell, the principle of equality can be stated thus: *equals must be treated equally while unequals need to be treated differently*, inasmuch as for the application of this principle in real life, we have to differentiate between those who being equal, are grouped together, and those who being different, are left out from the group. This is expressed as *reasonable classification*. Now, a classification to be valid must

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[37] In fact, total equality has been fundamental to the concept of *Dharma,* leaving no scope for discrimination on any ground. These aspects have been succinctly explained by the acclaimed jurist M. Rama Jois in his classic work *Legal and Constitutional History of India* (N. M. Tripathi Private Ltd. 1984 – Volume I, at p. 582) in the following amongst other expressions while reproducing from *Rig Veda*: -

> "…The very expression *Dharma* is opposed to and inconsistent with any such social inequality. The relevant provisions of the *Shruti* (Vedas) leave no room for doubt that discrimination on the ground of birth or otherwise had no Vedic sanction; on the other hand such discrimination was plainly opposed to Vedic injunction. Discrimination of any kind is, therefore, contrary to *Dharma*. It is really *Adharma*.
> Charter of equality (*Samanata*) is found incorporated in the *Rigveda*, the most ancient of the *Vedas*, and also in the *Atharvaveda*.
> *Rigveda – Mandala-5, Sukta-60, Mantra-5*:
> *** *** ***
> *Ajyestaso akanishtasa ete*
> *Sam bhrataro va vridhuhu sowbhagaya.*
>
> No one is superior (*ajyestasaha*) or inferior *(akanishtasaha*). All are brothers (*ete bhrataraha)*. All should strive for the interest of all and should progress collectively (*sowbhagaya sam va vridhuhu*)".

necessarily satisfy two tests: first, the distinguishing rationale should be based on a just objective and secondly, the choice of differentiating one set of persons from another should have a reasonable nexus to the object sought to be achieved. However, a valid classification does not require mathematical niceties and perfect equality; nor does it require identity of treatment.[38] If there is similarity or uniformity within a group, the law will not be condemned as discriminatory, even though due to some fortuitous circumstances arising out of a particular situation, some included in the class get an advantage over others left out, so long as they are not singled out for special treatment. In spite of certain indefiniteness in the expression 'equality', when the same is sought to be applied to a particular case or class of cases in the complex conditions of a modern society, there is no denying the fact that the general principle of 'equality' forms the basis of a Democratic Government.[39]

45. Since the early 1970s, equality in Article 14 being a dynamic concept, has acquired new dimensions. In ***E. P. Royappa*** (supra), a new approach to this doctrine was propounded in the following words: -

> "85. …**Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits.** From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is

[38] "From the fact that people are very different, it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in an equal position would be to treat them differently…", said an Austrian economist Friedrich A. Hayek (1899-1992) in '*The Constitution of Liberty*', 1960, the University of Chicago, p. 87.

[39] Dr. Alladi Krishnaswami Aiyar, '*The Constitution and Fundamental Rights'*, The Srinivasa Sastri Institute of Politics, Mylapore, Madras (1955), at p. 28.

> unequal both according to political logic and constitutional law and is therefore violative of Article 14…"
>
> (emphasis supplied)

45.1. In ***Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay and Ors.*****: (1974) 2 SCC 402**, it was observed: -

> "33. …..Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light pointing towards the goal of classless egalitarian socio-economic order which we promised to build for ourselves when we made a tryst with destiny on that fateful day when we adopted our Constitution. If we have to choose between fanatical devotion to this great principle of equality and feeble allegiance to it, we would unhesitatingly prefer to err on the side of the former as against the latter…"

46. Indian constitutional jurisprudence has consistently held the guarantee of equality to be substantive and not a mere formalistic requirement. Equality is at the nucleus of the unified goals of social and economic justice. In ***Minerva Mills*** it was observed: -

> "111. … **the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice**. The dynamic principle of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle…"
>
> (emphasis supplied)

47. Thus, equality is a feature fundamental to our Constitution but, in true sense of terms, equality envisaged by our Constitution as a component of social, economic and political justice is real and substantive equality, which is to organically and dynamically operate against all forms of inequalities. This process of striking at inequalities, by its very nature,

calls for reasonable classifications so that equals are treated equally while unequals are treated differently and as per their requirements.

Affirmative Action by 'Reservation': Exception to the General Rule of Equality

48. In the multifaceted social structure, ensuring substantive and real equality, perforce, calls for consistent efforts to remove inequalities, wherever existing and in whatever form existing. Hence, the State is tasked with affirmative action. And, one duly recognised form of affirmative action is by way of *compensatory discrimination*, which has the preliminary goal of curbing discrimination and the ultimate goal of its eradication so as to reach the destination of real and substantive equality. This has led to what is known as reservation and quota system in State activities.

49. Reservation and quota system was introduced in Malta much before it was mentioned in India[40]. Reservation in India was introduced in the last decades of the 19th century at a time when the Indian sub-continent was broadly divided, according to two main forms of governance, into British India and about 600 Princely States. Some of the progressive States had modernised the society through the promotion of education and industry. For example, the Princely States of Mysore, Baroda and Kolhapur took considerable interest in the awakening and advancement of deprived sections of society. Chhatrapati Shahuji

[40] '*Moments in a History of Reservations*' by Bhagwan Das in Economic and Political Weekly, 28.10.2000.

Maharaj, the Ruler of Princely State of Kolhapur, is said to have been influenced by the thoughts of egalitarian thinker Jyotirao Phule and is said to have introduced affirmative action in 1902, reserving a part of administrative posts for 'depressed classes'.[41]

50. Leaving the historical perspective at that, for the purpose of questions at hand, we may, however, move on to the provisions in the Constitution of India and take note of their operation with reference to the relevant decisions. The '*doctrine of equality'*, as collectively enshrined in Articles 14 to 18*,* happens to be the principal basis for the creation of a reasonable classification whereunder '*affirmative action'*, be it legislative or executive, is authorised to be undertaken. The constitutional Courts too, precedent by precedent, have constructively contributed to the evolution of what we may term as '*reservation jurisprudence'*.

51. The Constitution of India has about two dozen Articles providing for compensatory or special treatment for disadvantaged citizens or for protecting them against discrimination. Part III specifies the Fundamental Rights that are constitutionally guaranteed. Article 12 defines the 'State' against whom these Fundamental Rights can be enforced. Article 13 declares void all laws offending Fundamental Rights. Article 14, apparently considered to be one of the most important of the Fundamental Rights, guarantees the right to equality and equal protection

[41] He is also credited to have presided over the first All India Conference of the Depressed Classes at Nagpur in the year 1920 where Dr. B. R. Ambedkar was among the main speakers and where it was resolved, among other things, to have true representatives of the depressed classes in the legislature. [Vide: Dr. Sanjay Paswan, Dr. Pramanshi Jaideva, '*Encyclopaedia of Dalits in India'*, Kalpaz Publications, New Delhi (2003)].

of the laws. Article 15 confers on the SEBCs/OBCs/SCs/STs the right to seek reservation in admission to educational institutions. It also provides for the advancement of these classes. Similarly, Article 16 provides for reservation in the matter of public employment for Backward Classes. Both Articles 15 and 16, being citizenship-specific unlike Article 14, prohibit discrimination broadly i.e., only on the grounds of, religion, race, caste, sex or place of birth. Part XVI of the Constitution, making 'Special Provisions Relating to Certain Classes', provides for reservation of seats in legislatures for Scheduled Castes, Scheduled Tribes and so on.

52. Although several Articles are relevant as expressing the spirit of the Constitution, three of them are predominantly germane i.e., Article 14 as embodying the generic principle of equality (as *genus)* and Articles 15 and 16, enacting the facets of general equality (as *species),* vide ***N.M. Thomas****.*

52.1. It is evident that the normal process of development benefits only that section of society which already possesses land, education, and social status/respect. For those who have none of these, or are deprived of any of these, there was the task of making sure that they, who had been unable to enjoy these rights due to myriad reasons, were given special facilities, privileges and encouragement so that they could participate as equals in the mainstream of socio-economic system, taking them to the path of Liberty and Justice and thereby promoting Fraternity among all the citizens, assuring the dignity of the individual. Given these

objectives, the Indian constitutional structure, unlike the U.S. Constitution, specifically provides for *'compensatory discrimination',* vide ***Vasanth Kumar****;* and, in that context, reservation is the basic gateway to tread the path of all-around development.

52.2. Thus, Article 15 enacts the principle of equality before law to specific situations. While it prohibits certain classifications, it expressly requires making of certain classifications which would impliedly be within the broad reach of Article 14. Clause (4) was added to Article 15 by the Constitution (First Amendment) Act, 1951, w.e.f. 18.06.1951 to nullify the effects of the decision in ***Champakam***. Article 16, which enacts another facet of equality, prohibits discrimination in the matters relating to employment or appointment to any office under the State on almost the same grounds as in Article 15. Clauses (4) and (4-A) of Article 16 carve out another exception to the rule of equality and enable the State to make provisions for reservations of appointment in favour of any backward class of citizens. Such provisions include reservations or quotas that can be made in the exercise of executive powers and even without any legislative support, vide ***Indra Sawhney***. The twin objectives of Articles 15 and 16 are to provide adequate protection to the disadvantaged and, through special measures, to raise their capabilities so that they would, on their own, compete with the rest.

52.3. The reference to Scheduled Castes and Scheduled Tribes in Articles 15 and 16 takes us to Articles 341 and 342, which authorise the

President to issue a notified order in respect of each of the States/Union Territories specifying the castes, races or tribes which are to be regarded as Scheduled Castes and Scheduled Tribes. Articles 338 and 338-A respectively provide for the establishment of National Commission for Scheduled Castes and National Commission for Scheduled Tribes. Similarly, Article 338-B provides for the establishment of National Commission for Backward Classes. These constitutional bodies, *inter alia,* have the duty to participate in and advice on the socio-economic development of the communities concerned. Article 342-A introduced by 102nd Constitutional Amendment w.e.f. 15.08.2018 authorises the President in consultation with the Governor of the State concerned to notify socially and educationally backward classes (discussed and upheld in ***Dr. Jaishri Patil***).

53. Reverting to Articles 15 and 16, it could at once be noticed that the provisions concerning reservation were crafted carefully to be just 'enabling provisions'. They were worded to confer no more than a discretionary power on the State. They did not cast a duty on the State to the effect that it must set apart such and such proportion of seats in educational institutions or of posts in government services by way of reservation[42].The provisions were written so as to obviate a challenge to the steps that the State may take to raise the downtrodden. However, they were, as such, not to confer a right on anyone.

[42] Vide ***Chairman and Managing Director, Central Bank of India and Ors. v. Central Bank of India SC/ST Employees Welfare Association and Ors.*: (2015) 12 SCC 308**.

54. As regards reservation as one of the measures of affirmative action, the extent thereof has been a major area of debates and has led to various expositions, as shall be noticed in the later segments of this judgment. For the present purpose, of comprehending the ethos and contours of this affirmative action, the following are the pertinent observations of this Court in ***M. Nagaraj***, essentially made in the context of Article 16: -

> "**102 …… 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…….. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid…….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.
> *** *** ***
> 104…… 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 the facts of each case….."
>
> (emphasis supplied)

55. Thus, it could reasonably be summarised that for the socio-economic structure which the law in our democracy seeks to build up, the

requirements of real and substantive equality call for affirmative actions; and reservation is recognised as one such affirmative action, which is permissible under the Constitution; and its operation is defined by a large number of decisions of this Court, running up to the detailed expositions in ***Dr. Jaishri Patil***.

56. However, it need be noticed that reservation, one of the permissible affirmative actions enabled by the Constitution of India, is nevertheless an exception to the general rule of equality and hence, cannot be regarded as such an essential feature of the Constitution that cannot be modulated; or whose modulation for a valid reason, including benefit of any section other than the sections who are already availing its benefit, may damage the basic structure.

Economic Disabilities and Affirmative Action

57. After having traversed through the two fundamental aspects, Equality and Reservation, we may focus on the central point of consideration in these matters i.e., the economic disabilities and affirmative action in that regard.

58. The social revolution was put at the top of the national agenda by the Constituent Assembly when it adopted Objectives Resolution. In ***Kesavananda***, it was observed: -

> "646....By the Objectives Resolution adopted on January 22, 1947, the Constituent Assembly solemnly pledged itself to draw up for India's future governance a Constitution wherein "shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith,

> worship, vocation, association and action subject to law and public morality and wherein adequate safeguard would be provided for minorities, backward and tribal areas and depressed and other backward classes". The close association between political freedom and social justice has become a common concept since the French Revolution. Since the end of the First World War, it was increasingly recognised that peace in the world can be established only if it is based on social justice. The most modern Constitutions contain declaration of social and economic principles, which emphasise, among other things, the duty of the State to strive for social security and to provide work, education and proper condition of employment for its citizens. In evolving the Fundamental Rights and the Directive Principles, our founding fathers, in addition to the experience gathered by them from the events that took place in other parts of the world, also drew largely on their experience in the past. The Directive Principles and the Fundamental Rights mainly proceed on the basis of Human Rights. Representative democracies will have no meaning without economic and social justice to the common man. This is a universal experience. Freedom from foreign rule can be looked upon only as an opportunity to bring about economic and social advancement. After all freedom is nothing else but a chance to be better. It is this liberty to do better that is the theme of the Directive Principles of State Policy in Part IV of the Constitution."

59. The Chief Architect of the Constitution Dr. B.R. Ambedkar, on 19.11.1948, had stressed in the Constituent Assembly that the Constitution was committed to the principle of 'economic democracy' as a compliment to political democracy. His words are worth quoting: -

> "Sir, that is the reason why the language of the articles in Part IV is left in the manner in which this Drafting Committee thought it best to leave it….It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of Government to the instituted through the various mechanisms provided in the Constitution. without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. I think, if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really twofold:
>
> (i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that

every Government whatever, it is in power, shall strive to bring about economic democracy, much of the misunderstanding under which most members are labouring will disappear…."[43]

60. H.M. Seervai writes: -

"**4.13** (a) The words "justice, liberty, equality and fraternity" are words of passion and power – the last three were the watchwords of the French Revolution. If they are to retain their power to move men's hearts and to stir them to action, the words must be used absolutely – as they are used in the preamble. But do they throw any light on the provisions of the Constitution? The only one of the four objectives which is directly incorporated in any Article is "Justice, social, economic and political", for Art. 38 provides: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which *justice, social, economic and political*, shall inform all the institutions of the national life." (italics supplied) And Art. 39 amplifies the concept of justice by providing that the State shall *in particular* (that is, especially) direct its policy towards securing the objectives set out of Clauses (a) to (f) of that Article."[44]

61. The Preamble to our Constitution sets the ideals and goals which the makers of the Constitution intended to achieve. Therefore, it is also regarded as 'a key to open the mind of the makers' of the Constitution which may show the general purposes for which several provisions in the Constitution are enacted. In ***Kesavananda***, the Preamble is held to be a part of the Constitution. Further, in ***State of Uttar Pradesh v. Dr. Dina Nath Shukla and Anr.*: (1997) 9 SCC 662**, the Preamble is held to be a part of the Constitution and its basic structure. The Preamble indicates the intent of the makers of the Constitution *'to secure to all its citizens: JUSTICE, social, economic and political…*' In V.N. Shukla's Constitution of India, the significance of the expressions occurring in the Preamble and their sequence has been highlighted in the following words: -

[43] Constituent Assembly Debates, Vol VII, p. 494.
[44] H.M. Seervai, '*Constitutional Law of India, A Critical Commentary*', 4th Edition, (1991-reprinted 1999) at p. 280.

> "….the Constitution makers sought to secure to citizens of India justice- social, economic and political; liberty of thought, expression, belief, faith, and worship; equality of status and of opportunity, and to promote among the people of India, fraternity, assuring the dignity of the individual and the unity and integrity of the nation. Although the expressions "justice", "liberty", "equality", "fraternity" and "dignity of the individual" do not have fixed contents and may not be easy to define, they are not without content or as mere platitudes. They are given content by the enacting provisions of the Constitution, particularly by Part III, the Fundamental Rights; Part IV, the Directive Principles of State Policy; Part IVA, the Fundamental Duties; and Part XVI, Special Provisions Relating to Certain Classes. Special attention has been drawn to the sequence of these values in the Preamble which establishes primacy of justice over freedom and equality and this is what the Constitution does by making special provisions for the weaker and excluded sections of the society, women, children and minorities."[45]

61.1. The word 'economic' is employed more than thirty times in the Constitution. The relevant provisions in which it prominently occurs are: the Preamble and Article 38 (economic justice); Article 39-A (legal aid with neutrality of economic disability); Article 46 (promotion of economic interests of weaker sections), Articles 243-G and 243-W (economic development to be undertaken by local bodies).

62. Our jurisprudence supports making of a provision for tackling the disadvantages arising because of adverse economic conditions. In fact, Article 38 of the Constitution, *inter alia*, provides for securing economic justice and for striving to minimise the inequalities in income amongst individuals and groups of people. In ***Jolly George Varghese and Anr. v. The Bank of Cochin*: (1980) 2 SCC 360**, adopting of coercive recovery proceedings in execution of decree, which were impinging upon liberty of

[45] '*V.N. Shukla's Constitution of India',* Eastern Book Company, Lucknow, 13th Edition (2017), pp. 4-5.

a judgment-debtor, was not countenanced by this Court; and in that context, a decision of the Kerala High Court relying upon the Universal Declaration of Human Rights, 1948 was referred to. Article 22 of the Universal Declaration of Human Rights, 1948, on which the said decision is based, providing for social security reads as under: -

> "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

63. As noticed hereinbefore, in ***Minerva Mills***, this Court distinctly pointed out that the equality clause in the Constitution does not speak of mere formal equality but embodies the concept of real and substantive equality, which strikes at inequalities arising on account of vast social and economic differentials; and that the dynamic principle of egalitarianism furthers the concept of social and economic justice.

63.1 A few other observations of this Court, though made in different contexts but having a bearing on the question of economic justice as a part of overall socio-economic justice, could also be usefully indicated.

63.1.1. In ***Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan and Ors.*****: (1997) 11 SCC 121** this Court said: -

> "25.…It is to be remembered that the Preamble is the arch of the Constitution which accords to every citizen of India socio-economic and political justice, liberty, equality of opportunity and of status, fraternity, dignity of person in an integrated Bharat. The fundamental rights and the directive principles and the Preamble being trinity of the Constitution, the right to residence and to settle in any part of the country is assured to every citizen. In a secular socialist democratic republic of Bharat hierarchical caste structure,

> antagonism towards diverse religious belief and faith and dialectical difference would be smoothened and the people would be integrated with dignity of person only when social and economic democracy is established under the rule of law. The difference due to cast, sect or religion pose grave threat to affinity, equality and fraternity. Social democracy means a way of life with dignity of person as a normal social intercourse with liberty, equality and fraternity. The economic democracy implicits in itself that the inequalities in income and inequalities in opportunities and status should be minimised and as far as possible marginalised… "

63.1.2. In ***People's Union for Democratic Rights and Ors. v. Union of India and Ors.*****: (1982) 3 SCC 235**, this Court observed: -

> "2…..Large numbers of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty; utter grinding poverty has broken their back and sapped their moral fibre…….The only solution for making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights. There is indeed close relationship between civil and political rights on the one hand and economic, social and cultural rights on the other and this relationship is so obvious that the International Human Rights Conference in Teheran called by the General Assembly in 1968 declared in a final proclamation:
>
> > "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."
>
> Of course, the task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive…The State or public authority…should be…interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position….."

64. Thus, in almost all references to real and substantive equality, the concept of economic justice has acquired equal focus alongside the principles of social justice.

65. In giving effect to the rule of equality enshrined in Article 14, the Courts have also been guided by the jurisprudence evolved by the U.S. Supreme Court in the light of the amendments made to their Constitution, which were founded on economic considerations.[46] This is to highlight that the economic backwardness of citizens can also be the sole ground for providing reservation by affirmative action. Any civilized jurisdiction differentiates between haves and have-nots, in several walks of life and more particularly, for the purpose of differential treatment by way of affirmative action.

66. Poverty, the disadvantageous condition due to want of financial resources, is a phenomenon which is complex in origin as well as in its manifestation. The 2001 explanation of poverty by the United Nations Committee on Economic, Social and Cultural Rights says: -

> "Persons living in poverty are confronted by the most severe obstacles – physical, economic, cultural and social - to accessing their rights and entitlements. Consequently, they experience many interrelated and mutually reinforcing deprivations – including dangerous work conditions, unsafe housing, lack of nutritious food, unequal access to justice, lack of political power and limited access to health care – that prevents them from realising their rights and perpetuate their poverty. Persons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another."[47]

[46] It is pertinent to quote what an American Judge of Seventh Circuit, Court of Appeals, said about amendments to the American Constitution: "The takings clause of the Fifth Amendment also seems founded on economic considerations – and so indeed does the Fourth Amendment (and not just the exclusionary rule that has been grafted onto it by the courts)"- Richard A. Posner, '*The Constitution as an Economic Document*', 56 George Washington Law Review 4 (1987).

[47] United Nations General Assembly, *'Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona',* A/HRC/21/39, 18th July 2012.

67. The above-quoted expositions and explanations would comprehensively inform anyone that if an egalitarian socio-economic order is the goal so as to make the social and economic rights a meaningful reality, which indeed is the goal of our Constitution, the deprivations arising from economic disadvantages, including those of discrimination and exclusion, need to be addressed to by the State; and for that matter, every affirmative action has the sanction of our Constitution, as noticeable from the frame of Preamble as also the text and texture of the provisions contained in Part III and Part IV.

Whether Economic Criteria as Sole Basis for Affirmative Action Violates Basic Structure

68. The principal ground of assailing the amendment in question in this batch of matters is that even when the State could take all the relevant measures to deal with poverty and disadvantages arising therefrom, so far as the affirmative action of reservation is concerned, the same is envisaged by the Constitution only for socially and educationally backward class of citizens; and economic disadvantage alone had never been in contemplation for this action of reservation. We may examine the sustainability of this line of arguments.

69. The expression '*economically weaker sections of citizens*' is not a matter of mere semantics but is an expression of hard realities. Poverty is not merely a state of stagnation but is a point of regression. Of course, mass poverty cannot be eliminated within a short period and it is a

question of progress along a time path. The United Nations General Assembly, by its Resolution dated 25.09.2015, set forth seventeen Sustainable Development Goals and the first of them is to *'End poverty in all its forms everywhere'.* The 2030 agenda for Sustainable Development by one hundred and ninety-three countries of the United Nations General Assembly, including India, brought institutionalised focus in measuring and addressing poverty in all its forms, as expounded under the aforesaid Goal 1. The impact of this was also reflected in the work of the World Bank which is the custodian of the International Poverty Line Statistics[48]. In this backdrop, the insertion of enabling provisions, within the framework of the Constitution of India, to remedy the evil effects of poverty by way of reservation, is primarily to be regarded as a part of the frontal efforts to eradicate poverty '*in all its forms everywhere*'. The only question is as to whether providing for economic criteria as the sole basis for reservation is a violation of the basic structure of the Constitution.

70. In ***Kesavananda***, building a Welfare State is held to be one of the main objectives of the Constitution. In the Welfare State, public power becomes an instrumentality for the achievement of purposes beyond the minimum objectives of domestic order and national defence. It is not enough that the society be secured against internal disorder and/or external aggression; a society can be thus secured and well-ordered but, could be lacking in real and substantive justice for all. Equally, providing for affirmative action in relation to one particular segment or class may

[48] National Multidimensional Poverty Index, Baseline report, NITI Aayog (2021).

operate constructively in the direction of meeting with and removing the inequalities faced by that segment or class but, if another segment of society suffers from inequalities because of one particular dominating factor like that of poverty, the question arises as to whether the said segment could be denied of the State support by way of affirmative action of reservation only because of the fact that that segment is otherwise not suffering from other disadvantages. The answer could only be in the negative for, in the State's efforts of ensuring all-inclusive socio-economic justice, there cannot be competition of claims for affirmative action based on disadvantages in the manner that one disadvantaged section would seek denial of affirmative action for another disadvantaged section.

71. With the foregoing preliminary comments, reference could be made to the pertinent and instructive expositions of this Court in a few of the relevant cases cited by the respective parties in support of their respective contentions as regards the economic criteria being the sole basis for affirmative action, on its permissibility or impermissibility.

71.1. In ***M.R. Balaji***, an order dated 31.07.1962 by the State of Mysore, reserving a total of sixty-eight per cent. seats in engineering and medical colleges and other technical institutions for various backward classes was challenged, being violative of Article 15(4) of the Constitution. In the given context, it was observed by this Court as under:

> **P.B. Gajendragadkar, J.**
>
> "That takes us to the question about the extent of the special provision which it would be competent to the State to make under

> Art. 15(4). Article 15(4) authorises the State to make any special provision for the advancement of the Backward Classes of citizens or for the Scheduled Castes and Scheduled Tribes. The learned Advocate-General contends that this Article must be read in the light of Art. 46, and he argues that Art. 15(4) has deliberately and wisely placed no limitation on the State in respect of the extent of special provision that it should make. Art. 46 which contains a directive principle, 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 the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. **There can be no doubt that the object of making a special provision for the advancement of the castes or communities, there specified, is to carry out the directive principle enshrined in Art. 46. It is obvious that unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality will not be attained, and so, there can be no doubt that Art. 15(4) authorises the State to take adequate steps to achieve the object which it has in view. No one can dispute the proposition that political freedom and even fundamental rights can have very little meaning or significance for the Backward Classes and the Scheduled Castes and Scheduled Tribes unless the backwardness and inequality from which they suffer are immediately redressed...**
>
> *** *** ***
>
> **…. In our country where social and economic conditions differ from State to State, it would be idle to expect absolute uniformity of approach; but in taking executive action to implement the policy of Art. 15(4). It is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Art. 46 and the preamble of the Constitution.** It is for the attainment of social and economic justice that Art. 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistant with the fundamental rights guranteed under Art. 15 or 29(2). The context, therefore, requires that the executive action taken by the State must be based on an objective approach, free from all extraneous pressures. **The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done.**"
>
> (emphasis supplied)

71.2. Similarly, in ***R. Chitralekha*** (supra), this Court upheld an order of the Government that defined 'backwardness' without any reference to caste, using other criteria such as occupation, income and other

economic factors. The Court ruled that while caste may be relevant to determine backwardness, the mere exclusion of caste does not impair the classification if it satisfies other tests. The relevant observations of this Court read as under: -

> **K. Subba Rao, J.**
>
> "The Constitution of India promises Justice, social, **economic** and political; and equality of status and of opportunity, among others. Under Art. 46, one of the Articles in Part IV headed "Directive Principles of State Policy", 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation…."

71.3. Furthermore, in ***Janki Prasad Parimoo and Ors. v. State of J&K and Ors.*: (1973) 1 SCC 420**, the teachers in the Secondary High School of the State, who comprised a large portion of Kashmiri Pandits, found that in spite of their seniority, promotions to the gazetted posts in the service were being made on communal basis and not in accordance with the Jammu and Kashmir Civil Services (Classification, Control and Appeals) Rules, 1969. In this matter, this Court held that mere poverty cannot be a consideration for the test of backwardness for the purpose of enabling reservations by observing as follows: -

> **D.G. Palekar, J.**
>
> "24. It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially backward. **In India social and educational backwardness is further associated with economic backwordness and it is observed in *Balaji's case* (supra) referred to above that backwardness, socially and educationally, is ultimately and primarily due to proverty.** But if proverty is the exclusive test, a very large proportion of the

> population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor — some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. **His chief concern is, therefore, to determine whether the class or group is socially and educationally backward. Though the two words 'socially' and 'educationally' are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced itis generally also socially advanced because of the reformative effect of education on that class.** The words "advanced" and "backward" are only relative terms — there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as been socially and educationally backward."

71.4. In ***N.M. Thomas***, provisions of the Kerala State and Subordinate Services Rules, 1958 were in question, where Rule 13A required every employee, to be promoted in subordinate services, to clear a test within two years of promotion, but it gave SC/ST candidates an extension of two more years. Later, Rule 13AA was added that enabled the State Government to grant more time to SC/ST candidates to pass the test for promotional posts apart from the initial four years. The main issue was as to whether the said Rule 13-AA was offending Article 16(1) and 16(2) of the Constitution. In this regard, the following observations of this Court become relevant with emphasis on economic criteria: -

> **A.N. Ray, C.J.**
>
> "44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of backward classes require adequate representation in legislative and

executive bodies. If members of scheduled castes and tribes, who are said by this Court to be backward classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Article 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept equality is equality of opportunity for appointment. **Preferential treatment for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the backward classes in services with due regard to administrative efficiency is permissible object and backward classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality.**

K.K. Mathew, J.

64. It would follow that if we want to give equality of opportunity for employment to the members of the scheduled castes and scheduled tribes, we will have to take note of their social, educational and economic environment. Not only is the directive principle embodied in Article 46 binding on the law-maker as ordinarily understood but it should equally inform and illuminate the approach of the Court when it makes a decision as the Court also is 'State' within the meaning of Article 12 and makes law even though "interstitially from the molar to the molecular". I have explained at some length the reason why Court is 'State' under Article 12 in my judgment in *His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala*.

*** *** ***

67. Today, the political theory which acknowledges the obligation of Government under Part IV of the Constitution to provide jobs, medical care, old age pension, etc., extends to human rights and imposes an affirmative obligation to promote equality and liberty. The force of the idea of a State with obligation to help the weaker sections of its members seems to have increasing influence in constitutional law. **The idea finds expression in a number of**

cases in America involving social discrimination and also in the decisions requiring the State to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc. Today, the sense that Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in constitutional law. While special concessions for the underprivileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances.

*** *** ***

78. I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of scheduled castes and scheduled tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upto the point of making reservation.

M.H. Beg, J.

93. When citizens are already employed in a particular grade, as government servants, considerations relating to the sources from which they are drawn lose much of their importance. As public servants of that grade they could, quite reasonably and logically, be said to belong to one class, at least for purposes of promotion in public service for which there ought to be a real “equality of opportunity”, if we are to avoid heart burning or a sense of injustice or frustration in this class. **Neither as members of this single class nor for purposes of the equality of opportunity which is to be afforded to this class does the fact that some of them are also members of an economically and socially backward class continue to be material, or, strictly speaking, even relevant. Their entry, into the same relevant class as others must be deemed to indicate that they no longer suffer from the handicaps of a backward class.** For purposes of government service the source from which they are drawn should cease to matter. As government servants they would, strictly speaking, form only one class for purposes of promotion.

94. **….**The specified and express mode of realization of these objects contained in Article 16(4), must exclude the possibility of other methods which could be implied and read into Article 16(1) for securing them in this field, one could think of so many other legally permissible and possibly better, or, at least more direct**, methods of removing socio-economic inequalities by appropriate legislative action in other fields left open and unoccupied for purposes of discrimination in favour of the backward.**

95. ….Article 16(4) was designed to reconcile the conflicting pulls of Article 16(1), representing the dynamics of justice, conceived of as equality in conditions under which candidates actually compete for posts in government service, and of Articles 46 and 335, embodying the duties of the State to promote the interests of the economically, educationally, and socially backward so as to release them from the clutches of social injustice. These encroachments on the field of Article 16(1) can only be permitted to the extent they are warranted by Article 16(4). To read broader concepts of social justice and equality into Article 16(1) itself may stultify this provision itself and make Article 16(4) otiose.

V.R. Krishna Iyer, J.

120. **The domination of a class generates, after a long night of sleep or stupor of the dominated, an angry awakening and protestant resistance and this conflict between thesis, i.e. the status quo, and antithesis, i.e., the hunger for happy equality, propels new forces of synthesis, i.e., an equitable constitutional order or just society. Our founding fathers, possessed of spiritual insight and influenced by the materialist interpretation of history, forestalled such social pressures and pre-empted such economic upsurges and gave us a trinity of commitments — justice: social, economic and political**. The 'equality articles' are part of this scheme. My proposition is, given two alternative understandings of the relevant sub-articles [Article 16(1) and (2)], the Court must so interpret the language as to remove that ugly 'inferiority' complex which has done genetic damage to Indian polity and thereby suppress the malady and advance the remedy, informed by sociology and social anthropology. My touchstone is that functional democracy postulates participation by all sections of the people and fair representation in administration is an index of such participation.

*** *** ***

126. … The Directive Principles of State Policy, fundamental in the governance of the country, enjoin on the State the promotion

> **with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes, ... and protect them from social injustice.**
>
> **To neglect this obligation is to play truant with Article 46. Undoubtedly, economic interests of a group — as also social justice to it — are tied up with its place in the services under the State.** Our history, unlike that of some other countries, has found a zealous pursuit of government jobs as a mark of share in State power and economic position. Moreover, the biggest — and expanding, with considerable State undertakings, — employer is Government, Central and State, so much so appointments in the public services matter increasingly in the prosperity of backward segments. **The scheduled castes and scheduled tribes have earned special mention in Article 46 and other 'weaker sections', in this context, means not every 'backward class' but those dismally depressed categories comparable economically and educationally to scheduled castes and scheduled tribes. To widen the vent is to vitiate the equal treatment which belongs to all citizens, many of whom are below the poverty line. Realism reveals that politically powerful *castes* may try to break into equality, using the masterkey of backwardness but, leaving aside Article 16(4), the ramparts of Article 16(1) and (2) will resist such oblique infiltration.**
>
> **S. Murtaza Fazal Ali, J.**
>
> **166.** Article 46 of the Constitution runs thus:
>
> > 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
>
> **Properly analysed this article contains a mandate on the State to take special care for the educational and economic interests of the weaker sections of the people and as illustrations of the persons who constitute the weaker sections the provision expressly mentions the scheduled castes and the scheduled tribes.**"
>
> (emphasis supplied)

71.5. In ***M/s Shantistar Builders v. Narayan K. Totame and Ors.*: (1990) 1 SCC 520**, the Government of Maharashtra exempted certain excess land from the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 for the purpose of constructing dwelling houses

under a scheme for the weaker sections of the society on the conditions specified in the order. In the given context, this Court observed as follows: -

> **Ranganath Misra, J.**
>
> "**12. Members of the Scheduled Castes and Scheduled Tribes have ordinarily been accepted as belonging to the weaker sections. Attempt to bring in the test of economic means has often been tried but no guideline has been evolved. Undoubtedly, apart from the members of the Scheduled Castes and Scheduled Tribes, there would be millions of other citizens who would also belong to the weaker sections. The Constitution-makers intended all citizens of India belonging to the weaker sections to be benefited when Article 46 was incorporated in the Constitution.** Parliament in adopting the same language in Section 21 of the Act also intended people of all weaker sections to have the advantage. It is, therefore, appropriate that the Central Government should come forward with an appropriate guideline to indicate who would be included within weaker sections of the society."
>
> (emphasis supplied)

71.6. In ***Indra Sawhney***, the following observations were made in regard to the myriad features of backwardness including the economic backwardness: -

> **S. Ratnavael Pandian, J.**
>
> "**44. The word 'backward' is very wide bringing within its fold the social backwardness, educational backwardness, economic backwardness, political backwardness and even physical backwardness.**
>
> *** *** ***
>
> **116. The composition and terms of reference of the Second Backward Classes Commission show that the Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India but not the socially, economically and educationally backward classes.** The earlier OM issued on August 13, 1990 reads that with a view to providing certain weightage to socially and educationally backward classes in the services of the Union and their Public Undertakings, as recommended by the Commission, the orders are issued in the terms mentioned therein. The said OM also explains that "the SEBC would comprise in the

first phase the castes and communities which are common to both the lists, in the report of the Commission and the State Governments' list". In addition it is said that a list of such castes/communities is being issued separately. The subsequent amended OM dated September 25, 1991 states that in order to enable the 'poorer sections' of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, the Government have decided to amend the earlier Memorandum. **Thus this amended OM firstly speaks of the 'poorer sections' of the SEBCs and secondly about the economically backward sections of the people not covered by any of the existing schemes of reservation. However, both the OMs while referring to the SEBCs, do not include the 'economic backwardness' of that class along with 'social and educational backwardness'. By the amended OM, the Government while providing reservation for the backward sections of the people not covered by the existing schemes of reservation meant for SEBCs, classifies that section of the people as 'economically backward', that is to say that those backward sections of the people are to be identified only by their economic backwardness and not by the test of social and educational backwardness, evidently for the reason that they are all socially and educationally well advanced.**

117. Coming to Article 16(4) the words 'backward class' are used with a wider connotation and without any qualification or explanation. Therefore, it must be construed in the wider perspective. **Though the OMs speak of social and educational backwardness of a class, the primary consideration in identifying a class and in ascertaining the inadequate representation of that class in the services under the State under Article 16(4) is the social backwardness which results in educational backwardness, both of which culminate in economic backwardness. The degree of importance to be attached to social backwardness is much more than the importance to be given to the educational backwardness and the economic backwardness, because in identifying and classifying a section of people as a backward class within the meaning of Article 16(4)for the reservation of appointments or posts, the 'social backwardness' plays a predominant role."**

Sawant, J.

482. Economic backwardness is the bane of the majority of the people in this country. There are poor sections in all the castes and communities. Poverty runs across all barriers. The nature and degree of economic backwardness and its causes and effects, however, vary from section to section of the

populace. Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social backwardness. The educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness. It is necessary to bear this vital distinction in mind to understand the true import of the expression "backward class of citizens" in Article 16(4). If it is mere educational backwardness or mere economic backwardness that was intended to be specially catered to, there was no need to make a provision for reservation in employment in the services under the State. That could be taken care of under Articles 15(4), 38 and 46. The provision for reservation in appointments under Article 16(4) is not aimed at economic upliftment or alleviation of poverty. Article 16(4) is specifically designed to give a due share in the State power to those who have remained out of it mainly on account of their social and, therefore, educational and economic backwardness. The backwardness that is contemplated by Article 16(4) is the backwardness which is both the cause and the consequence of non-representation in the administration of the country. All other kinds of backwardness are irrelevant for the purpose of the said article. Further, the backwardness has to be a backwardness of the whole class and not of some individuals belonging to the class, which individuals may be economically or educationally backward, but the class to which they belong may be socially forward and adequately or even more than adequately represented in the services. Since the reservation under Article 16(4) is not for the individuals but to a class which must be both backward and inadequately represented in the services, such individuals would not be beneficiaries of reservation under Article 16(4). It is further difficult to come across a "class" (not individuals) which is socially and educationally advanced but is economically backward or which is not adequately represented in the services of the State on account of its economic backwardness. Hence, mere economic or mere educational

backwardness which is not the result of social backwardness, cannot be a criterion of backwardness for Article 16(4).

*** *** ***

492. While discussing Question No. I, it has been pointed out that so far as "backward classes" are concerned, clause (4) of Article 16 is exhaustive of reservations meant for them. It has further been pointed out under Question No. II that the only "backward class" for which reservations are provided under the said clause is the socially backward class whose educational and economic backwardness is on account of the social backwardness. A class which is not socially and educationally backward though economically or even educationally backward is not a backward class for the purposes of the said clause. What follows from these two conclusions is that reservations in posts cannot be made in favour of any other class under the said clause. Further, the purpose of keeping reservations even in favour of the socially and educationally backward classes under clause (4), is not to alleviate poverty but to give it an adequate share in power.

B.P. Jeevan Reddy, J.

799. It follows from the discussion under Question No. 3 that a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same.

*** *** ***

843. While dealing with Question No. 3(*d*), we held that exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No. 5, we held that it is not impermissible for the State to categorise backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the goldsmiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backwards classes may indeed serve to help the more backward among them to get their due. But the question now

is whether clause (i) of the Office Memorandum dated September 25, 1991 is sustainable in law. The said clause provides for preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as a measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e., 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is: what is the meaning and context of the expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally — if the 'more backward' take away all the available vacancies/posts reserved for OBCs, none would remain for 'backward' among the OBCs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression 'preference' in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true intention behind the clause."

(emphasis supplied)

71.7. The relevant observations in ***M. Nagaraj*** would read as under: -

S.H. Kapadia, J.

"120. At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, "formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional

> equality and it expects the States to take affirmative action in favour of 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 a 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."
>
> (emphasis supplied)

72. On a contextual reading, it could reasonably be culled out that the observations, wherever occurring in the decisions of this Court, to the effect that reservation cannot be availed only on economic criteria, were to convey the principle that to avail the benefit of this affirmative action under Articles 15(4) and/or 15(5) and/or 16(4), as the case may be, the class concerned ought to be carrying some other disadvantage too and not the economic disadvantage alone. The said decisions cannot be read to mean that if any class or section other than those covered by Articles 15(4) and/or 15(5) and/or 16(4) is suffering from disadvantage only due to economic conditions, the State can never take affirmative action qua that class or section.

73. In view of the principles discernible from the decisions aforesaid as also the background aspects, including the avowed objective of socio-

economic justice in the Constitution, the observations of this Court in the past decisions that reservations cannot be claimed only on the economic criteria, apply only to class or classes covered by or seeking coverage under Articles 15(4) and/or 15(5) and/or 16(4); and else, this Court has not put a blanket ban on providing reservation for other sections who are disadvantaged due to economic conditions.

74. On behalf of the petitioners, much emphasis has been laid on the phraseology of Article 46 of the Constitution of India; and it has been suggested that the measures contemplated therein are supposed to be taken in favour of SCs/STs and such other weaker sections who are "similarly circumstanced to SCs/STs". The submission has been that this provision cannot be invoked for reservation in favour of any economically weaker section that is not carrying other attributes which could place it at par with, or akin to, SCs/STs. This line of arguments is premised on the passages occurring in the Statement of Objects and Reasons for introduction of the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 in the Parliament which led to the Constitution (One Hundred and Third Amendment) Act, 2019 but, is based on too narrow and unacceptably restricted reading of the text of Article 46 while totally missing on its texture; and suffers from at least three major shortcomings.

74.1. The first and the apparent shortcoming is that this line of arguments not only goes off at a tangent but also misses out the

important principle of “Distributive Justice”, which is a bedrock of the provisions like Article 46 as also Articles 38 and 39 of the Constitution of India. The principle of distributive justice has been explained and put into effect by this Court in the case of ***Lingappa Pochanna Appelwar v. State of Maharashtra and Anr.*****: (1985) 1 SCC 479** thus: -

> “**16.** …… Legislators, Judges and administrators are now familiar with the concept of distributive justice. **Our Constitution permits and even directs the State to administer what may be termed ‘distributive justice’. The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society.** Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: “From each according to his capacity, to each according to his needs”. Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transactions and, perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society or there may be legislative control of unfair agreements.”
>
> (emphasis supplied)

74.1.1. Of course, the aforesaid decision was rendered in the context of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974, which provides for annulment of transfer of agricultural land from tribals to non-tribals and restoration of possession to tribals but, the principle stated therein, being related to scheme of the Constitution, makes it clear that the mandate of the Constitution to the State is to administer distributive

justice; and in the law-making process, the concept of distributive justice connotes, *inter alia*, the removal of economic inequalities. There could be different methods of distributive justice; and it comprehends more than merely achieving the lessening of inequalities by tax or debt relief measures or by regulation of contractual transactions or redistribution of wealth, etc. This discussion need not be expanded on all other means of distributive justice but, it is more than evident that the philosophy of distributive justice is of wide amplitude which, *inter alia*, reaches to the requirements of removing economic inequalities; and then, it is not confined to one class or a few classes of the disadvantaged citizens. In other words, the wide spectrum of distributive justice mandates promotion of educational and economic interests of all the weaker sections, in minimizing the inequalities in income as also providing adequate means of livelihood to the citizens. In this commitment, leaving one class of citizens to struggle because of inequalities in income and want of adequate means of livelihood may not serve the ultimate goal of securing all-inclusive socio-economic justice.

74.1.2. In fact, the argument that the State may adopt any poverty alleviation measure but cannot provide reservation for EWS by way of affirmative action proceeds on the assumption that the affirmative action of reservation in our constitutional scheme is itself reserved only for SEBCs/OBCs/SCs/STs in view of the existing text of Articles 15(4), 15(5) and 16(4) of the Constitution. Such an assumption is neither valid nor

compatible with our constitutional scheme. This line of argument is wanting on the fundamental constitutional objectives, with the promise of securing '*JUSTICE, social, economic and political*' for *'all'* the citizens; and to promote FRATERNITY among them '*all*'. Thus viewed, the challenge to the amendment in question fails on the principle of distributive justice.

74.2. Secondly, this argument concerning Article 46 crumbles down on the basic rules of interpretation of the text of a constitutional provision.

74.2.1. It remains trite that a Constitution, unlike other enactments, is intended to be an enduring instrument. The great generalities of the Constitution have a content and a significance that vary from age to age.[49] The Constitution is recognised as a living organic thing to be required to meet the current needs and requirements. Ergo, the provisions of the Constitution cannot be put in a straitjacket. This Court, in the case of ***Association of Unified Tele Services Providers and Ors. v. Union of India and Ors.*: (2014) 6 SCC 110**, with reference to a previous decision in the case of ***People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and Anr.*: (2003) 4 SCC 399** has pithily explained the principles in the following terms (of course, in the context of Article 149):-

> "**43.** The Constitution, as it is often said "is a living organic thing and must be applied to meet the current needs and requirements". **The Constitution, therefore, is not bound to be understood or**

[49] Benjamin N. Cardozo, *'The Nature of the Judicial Process',* Yale University Press (1921), p. 17.

> **accepted to the original understanding of the constitutional economics**. Parliamentary Debates, referred to by service providers may not be the sole criteria to be adopted by a court while examining the meaning and content of Article 149, since its content and significance has to vary from age to age. **Fundamental rights enunciated in the Constitution itself, as held by this Court** in *People's Union For Civil Liberties* v. *Union of India*, **have no fixed content, most of them are empty vessels into which each generation has to pour its content in the light of its experience.**"
>
> (emphasis supplied)

74.2.2. Therefore, it cannot be said that the eclectic expression "other weaker sections" is not to be given widest possible meaning or that this expression refers only to those weaker sections who are similarly circumstanced to SCs and STs.

74.2.3. Though, the text and the order of expressions used in the body of Article 46 have been repeatedly recounted on behalf of the petitioners to emphasise on the arguments based on *ejusdem generis* principle of interpretation but, as aforesaid, that principle does not fit in the interpretation of an organic thing like the Constitution. This apart, when traversing through the principles of interpretation, it could also be noticed that in case of any doubt, the heading or sub-heading of a provision could also be referred to as an internal aid in construing the provision, while not cutting down the wide application of clear words used in the provision.[50] What is interesting to notice is that in the heading of Article 46, the chronology of the description of target groups for promotion of educational and economic interests is stated in reverse order than the contents of the provision. The heading signifies '*Promotion of educational*

[50] Vide ***M/s Frick India Ltd. v. Union of India and Ors.*: (1990) 1 SCC 400**.

and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections' whereas the contents of the main provision are framed with the sentence '*interest of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes*'. A simple reading of the heading together with the contents would make it clear that the broader expression "other weaker sections" in Article 46 is disjointed from the particular weaker sections (Schedule Castes and Scheduled Tribe); and is not confined to only those sections who are similarly circumstanced to SCs and STs.

74.3. Apart from the aforesaid two major shortcomings in the argument suggesting restricted operation of the measures contemplated by Article 46, the other shortcoming rather knocks the bottom out of this argument when the same is examined in the context of a constitutional amendment. The fundamental flaw in this argument is that even if the Statement of Objects and Reasons for the amendment in question refers to Article 46, such a reference is only to one part of DPSP to indicate the constitutional objective which is sought to be addressed to, or fulfilled. However, the amendment in question could be correlated with any other provision of the Constitution, including the Preamble as well as Articles 38 and 39. Moreover, it is not the requirement of our constitutional scheme that an amendment to the Constitution has to be based on some existing provision in DPSP. In fact, an amendment to the Constitution (of course,

within the bounds of basic structure) could be made even without any corresponding provision in DPSP.

75. In the aforesaid view of matter, there appears no reason to analyse another unacceptable line of arguments adopted by the petitioners that the amendment in question provides for compensatory discrimination in favour of the so-called forward class/caste. Suffice it to observe that the amendment in question is essentially related to the requirements of those economically weaker sections who have hitherto not been given the benefit of such an affirmative action (particularly of reservation), which was accorded to the other class/classes of citizens namely, the SEBCs/OBCs/SCs/STs. Viewing this affirmative action of EWS reservation from the standpoint of backward class versus forward class is not in accord with the very permissibility of compensatory discrimination towards the goal of real and substantive justice for all.

76. There has been another ground of challenge that if at all reservation on economic criteria is to be given, keeping the SEBCs/OBCs/SCs/STs out of this affirmative action is directly at conflict with the constitutional scheme and hits the Equality Code. This line of arguments shall be dealt with in the next segment. Enough to say for the present purpose that the challenge to the amendment in question on the ground that though the State could take all the relevant measures to deal with poverty and the disadvantages arising therefrom but, the affirmative action of reservation is envisaged by the Constitution only for socially and

educationally backward class of citizens; and economic disadvantage alone had never been in contemplation for this action of reservation, is required to be rejected. In any case, any legitimate effort of the State towards all-inclusive socio-economic justice, by way of affirmative action of reservation in support of economically weaker sections of citizens, who had otherwise not been given the benefit of this affirmative action, cannot be lightly interfered with by the Court.

EWS Reservation Not Availing to Certain Classes: Whether Violates Basic Structure

77. The discussion aforesaid takes us to the next major area of discord in these matters where the aggrieved petitioners state that the exclusion of SEBCs/OBCs/SCs/STs from the benefit of EWS reservation violates the basic framework of the Constitution. While entering into this point for determination, worthwhile it would be to recapture the salient features of the provisions introduced by the 103rd Amendment.

77.1. As noticed, the amendment in question introduces clause (6) to both the Articles, i.e., 15 and 16. Clause (6) of Article 15 starts with a *non obstante* preposition, making it operative notwithstanding anything otherwise contained in other clauses of Article 15 or Article 19(1)(g) or Article 29(2). Sub-clause (a) of clause (6) of Article 15 enables the State to make any special provision for the advancement of any economically weaker sections of citizens and sub-clause (b) thereof provides for making a maximum of ten per cent. reservation in the matter of admission

to educational institutions, public or private, barring minority educational institutions. Similarly, clause (6) of Article 16 also starts with a *non obstante* preposition, making it operative notwithstanding anything otherwise contained in other clauses of that Article and enables the State to make any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens to a maximum of ten per cent. As per the *Explanation* to clause (6) of Article 15, "economically weaker sections" for the purpose of both these Articles 15 and 16 shall be such as to be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage. However, when both these clauses exclude from their ambit those classes who are already covered under Articles 15(4), 15(5) and 16(4), that is to say, the benefits under these amended provisions do not avail to Scheduled Castes, Scheduled Tribes, and Other Backward Classes (Non-creamy layer), the ground of challenge is that keeping the socially and educationally backward classes out of Articles 15(6) and 16(6) is directly at conflict with the constitutional scheme and is of inexplicably hostile discrimination. Rather, according to the petitioners, the classes covered by Articles 15(4), 15(5) and 16(4) are comprising of the poorest of the poor and hence, keeping them out of the benefit of EWS reservation is an exercise conceptionally at conflict with the constitutional norms and principles.

77.2. At the first blush, the arguments made in this regard appear to be having some substance because it cannot be denied that the classes covered by Articles 15(4), 15(5) and 16(4) would also be comprising of poor persons within. However, a little pause and a closer look makes it clear that the grievance of the petitioners because of this exclusion remains entirely untenable and the challenge to the amendment in question remains wholly unsustainable. As noticed *infra*, there is a definite logic in this exclusion; rather, this exclusion is inevitable for the true operation and effect of the scheme of EWS reservation.

78. It is true that in identifying the classes of persons for the purpose of Articles 15(4), 15(5) and 16(4) of the Constitution i.e., Other Backward Classes (Non-creamy layer), Scheduled Castes and Scheduled Tribes, the social and educational backwardness predominantly figures but then, it needs no great deal of research to demonstrate that the poverty too is thickly associated with these factors.

78.1. In fact, poverty was recognised as the primary source of social and educational backwardness in ***Vasanth Kumar***, but in the following words**: -**

> "**80.** Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. **Despite individual exceptions, it may be possible and easy to identify social backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature. Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they**

> **must be recognised for what they are along with other less primary sources.** There is and there can be nothing wrong in recognising poverty wherever it is reflected as an identifiable group phenomena whether you see it as a caste group, a sub-regional group, or occupational group or some other class. Once the relevant factors are taken into consideration, how and where to draw the line is a question for each State to consider since the economic and social conditions differ from area to area. Once the relevant conditions are taken into consideration and the backwardness of a class of people is determined, it will not be for the Court to interfere in the matter. But, lest there be any misunderstanding, judicial review will not stand excluded."
>
> (emphasis supplied)

78.2. Though, the principal factor in the observations aforesaid is class poverty which is indicated to be different than individual poverty but, it cannot be denied that poverty is a material factor taken into consideration along with caste, residence, occupation or other dominant feature while recognising any particular class/caste's entitlement to the affirmative action by way of reservation enabled in terms of Articles 15(4), 15(5) and 16(4). In that scenario, if the Parliament has considered it proper not to extend those classes covered by the existing clauses of Articles 15(4), 15(5) and 16(4) another benefit in terms of affirmative action of reservation carved out for other economically weaker sections, there is no reason to question this judgment of the Parliament. Obviously, for the reason that those classes are already provided with affirmative action in terms of reservation, in the wisdom of the Parliament, there was no need to extend them or any of their constituents yet another benefit in the affirmative action of reservation carved out for *other economically weaker sections*.

78.3. Moreover, the benefit of reservation avails to the excluded classes/castes under the existing clauses of Articles 15 and 16; and by the amendment in question, the quota earmarked for them is not depleted in any manner.

79. The amendment in question makes a reasonable classification between “economically weaker sections” and other weaker sections, who are already mentioned in Articles 15(4), 15(5) and 16(4) of the Constitution and are entitled to avail the benefits of reservation thereunder. The moment there is a vertical reservation, exclusion is the vital requisite to provide benefit to the target group. In fact, the affirmative action of reservation for a particular target group, to achieve its desired results, has to be carved out by exclusion of others. The same principle has been applied for the affirmative action of reservation qua the groups of SEBCs, OBCs, SCs, and STs. Each of them takes reservation in their vertical column in exclusion of others. But for this exclusion, the purported affirmative action for a particular class or group would be congenitally deformative and shall fail at its inception. Therefore, the claim of any particular class or section against its exclusion from the affirmative action of reservation in favour of EWS has to be rejected.

80. In fact, it follows as a necessary corollary to the discussion in the preceding segments of this judgment that looking to the purpose and the objective of the present affirmative action, that is, reservation for the benefit of economically weaker sections, the other classes, who are

already availing the benefit of affirmative action of reservation by virtue of Articles 15(4), 15(5) and 16(4), are required to be kept out of the benefits of EWS reservation in Articles 15(6) and 16(6). It could easily be seen that but for this exclusion, the entire balance of the general principles of equality and compensatory discrimination would be disturbed, with extra or excessive advantage being given to the classes already availing the benefit under Articles 15(4), 15(5) and 16(4). In other words, sans such exclusion, reservation by way of the amendment in question would only lead to an incongruous and constitutionally invalid situation.

81. Putting it in other words, the classes who are already the recipient of, and beneficiary of, compensatory discrimination by virtue of Articles 15(4), 15(5) and 16(4), cannot justifiably raise the grievance that in another set of compensatory discrimination for another class, they have been excluded. It gets, perforce, reiterated that the compensatory discrimination, by its very nature, would be structured as exclusionary in order to achieve its objectives. Rather, if the classes for whom affirmative action is already in place are not excluded, the present exercise itself would be of unjustified discrimination.

82. Even a slightly different angle of approach would also lead to the same result. The case sought to be made out on behalf of the class or classes already availing the benefit of Articles 15(4), 15(5) and 16(4) is that their exclusion from EWS reservation is of inexplicable discrimination. What this argument misses out is that in relation to the principles of

formal equality, both the reservations, whether under the pre-existing provisions or under the newly inserted provisions, are of *compensatory discrimination* which is permissible for being an affirmative action; and is to be contra-distinguished from *direct discrimination,* which is not permissible.

82.1. According to the petitioners, it is a case of their direct discrimination when they have been excluded from EWS reservation. The problem with this argument is that EWS reservation itself is another form of compensatory discrimination, which is meant for serving the cause of such weaker sections who have hitherto not been given any State support by way of reservation. SEBCs/OBCs/SCs/STs are having the existing compensatory discrimination in their favour wherein the presently supported EWS are also excluded alongwith all other excluded classes/persons. As a necessary corollary, when EWS is to be given support by way of compensatory discrimination, that could only be given by exclusion of others, and more particularly by exclusion of those who are availing the benefit of the existing compensatory discrimination in exclusion of all others. Put in simple words, the exclusion of SEBCs/OBCs/SCs/STs from EWS reservation is the compensatory discrimination of the same species as is the exclusion of general EWS from SEBCs/OBCs/SCs/STs reservation. As said above, compensatory discrimination, wherever applied, is exclusionary in character and could acquire its worth and substance only by way of exclusion of others. Such

differentiation cannot be said to be legally impermissible; rather it is inevitable. When that be so, clamour against exclusion in the present matters could only be rejected as baseless.

83. The fact that exclusion is innate in compensatory discrimination could further be exemplified by the fact that in ***Indra Sawhney***, this Court excluded the creamy layer of OBCs from the benefit of reservation. In the complex set-up of formal equality on one hand (which debars discrimination altogether) and real and substantive equality on the other (which permits compensatory discrimination so as to upset the disadvantages), exclusion is as indispensable as the compensatory discrimination itself is.

83.1. In fact, 'creamy layer' principle itself was applied to make a true compact of socially and educationally backward class. Two features strikingly come to fore with creamy layer principle. One is that to make a real compact of socially and educationally backward class, economic factors play an equally important role; and then, the exclusionary principle applies therein too. These two features, when applied to the present case, make it clear that the use of economic criteria is not contra-indicated for the exercise of reservation, rather it is imperative; and second, to make the exercise of compensatory discrimination meaningful so as to achieve its desired result, exclusion of every other class/person from the target group is inevitable. Thus viewed, the amendment in

question remains unexceptionable in the accepted principles of constitutional law presently in operation.

84. Yet further, in ***Indra Sawhney****,* in the context of the question as to whether Article 16(4) is exhaustive of the concept of reservation in favour of backward classes, Jeevan Reddy, J. made the following, amongst other, observations: -

> "**743.** ….In our opinion, therefore, where the State finds it necessary — for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under clause (4) itself. In this sense, clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". **Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Article 16**."
>
> (emphasis supplied)

84.1. The above observations make it absolutely clear that so far as the classes availing the benefit of compensatory discrimination in the form of reservation under Article 16(4) are concerned, no further classification or special treatment is to be given to them. *A fortiori*, they cannot make a claim to intrude into other compensatory discrimination in favour of another deserving group.

85. Having said so, even if it be assumed for the sake of argument that the amendment in question alters the existing equality principles, it is not of abrogation or annulment of the existing rights but could only be treated to be of moderate abridgment thereof for a valid purpose. Thus viewed, it cannot be said that the amendment in question leads to such a violation of the rule of equality which is shocking or is unscrupulous travesty of quintessence of equal justice.

86. Viewed from any angle, the amendment in question cannot be declared invalid as being violative of the basic structure of the Constitution of India.

87. Though the discussion and the observations foregoing are sufficient to conclude this segment but, before moving on to the other point, it could be usefully observed that in the ultimate analysis, the questions as to how all the requirements of socio-economic justice are to be balanced in our constitutional scheme and, for that purpose, whether any constitutional amendment is to be made or not, are essentially in the domain of the Parliament. Any constitutional amendment cannot be disturbed by the Court only for its second guess as to the desirability of a particular provision or by way of synthesis of advantages or disadvantages flowing from an amendment. In this context and in the context of the amendment in question, a reference to the following words of P.B. Gajendragadkar, the former Chief Justice of India, shall be apposite: -

> "Modern liberalism draws its inspiration from a progressive and comprehensive ethical philosophy. Its main postulate is that individual life should show preference for social obligation. The root and basic motive of this ethical approach is the passion for the relief of human suffering and misery. In the pursuit of this ideal, liberalism does not hesitate to embark upon newer and newer socio-economic experiments. These experiments represent in a sense an adventurous voyage of discovery in unknown ethical regions, prepared to take the risks but determined to win the ultimate prize of socio-economic justice."[51]

87.1. Even if the provisions in question are said to be of experiment, the Parliament is entitled to do any such experiment towards the avowed objective of socio-economic justice. Such an action (or say, experiment) of the Parliament by way of constitutional amendment can be challenged only on the doctrine of basic structure and not otherwise.

88. Thus, the exclusion of other groups and classes from the ten per cent. reservation earmarked for EWS does not make them constitutionally aggrieved parties to invoke the general doctrine of equality for assailing the amendment in question. In other words, their grievance cannot be said to be a legal grievance so as to be agitated before the Court.

89. One of the submissions that the words "other than" in Articles 15(6) and 16(6) of the Constitution of India should be read as "in addition to", so as to include SCs/STs/OBCs within EWS has also been noted only for rejection for the simple reason that the suggested construction is plainly against the direct meaning of the exclusionary expression "other than" as employed in, and for the purpose of, the said Articles 15(6) and 16(6). If there is any doubt yet, the official Hindi translation of the

[51] '*Law, Liberty and Social Justice*', Asia Publishing House, Bombay (1965), p. 120.

amendment in question, as published in the Gazette of India, Extraordinary, Part II, Section 1A dated 17.07.2019 would remove any misconception where the exclusionary Hindi expression "भिन्न" *(bhinn)* has been employed in relation to the expression "other than". No further comment appears requisite in this regard.

Breach of Fifty Per Cent. Ceiling of Reservations and Basic Structure

90. A long deal of arguments by the learned counsel challenging the amendment in question had also been against the prescription of ten per cent. reservation for EWS on the ground that it exceeds the ceiling limit of fifty per cent. laid down by this Court in the consistent series of cases. Apart that this argument is not precisely in conformity with the law declared by this Court, it runs counter to the other argument that this EWS reservation is invalid because of exclusions. If at all the cap of fifty per cent. is the final and inviolable rule, the classes already standing in the enabled bracket of fifty per cent. cannot justifiably claim their share in the extra ten per cent., which is meant for a separate class and section, i.e., economically weaker section.

91. Moreover, the argument regarding the cap of fifty per cent. is based on all those decisions by this Court which were rendered with reference to the reservations existing before the advent of the amendment in question. The fifty per cent. ceiling proposition would obviously be applied only to those reservations which were in place

before the amendment in question. No decision of this Court could be read to mean that even if the Parliament finds the necessity of another affirmative action by the State in the form of reservation for a section or class in need, it could never be provided. As noticed hereinbelow, the decisions of this Court are rather to the contrary and provide that flexibility within which the Parliament has acted for putting in place the amendment in question.

92. In the above backdrop, the relevant decisions of this Court in regard to this fifty per cent. ceiling limit could be referred but, while reiterating that these decisions are applicable essentially to the class/classes who are to avail the benefits envisaged by Articles 15(4), 15(5) and 16(4) of the Constitution of India.

92.1. In ***M.R. Balaji***, the Constitution Bench of this Court, while considering whether sixty per cent. reservation in engineering and medical colleges and other technical institutions was appropriate, observed as under: -

> "…It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4)….
> *** *** ***
> ....Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case…"

92.2. In ***T. Devadasan*** (supra), constitutionality of carry forward rule was challenged on the ground that it violated fifty per cent. limit. The

majority relied upon ***M.R. Balaji*** and observed that the ratio of the said decision pertaining to Article 15(4) equally applied to the case at hand pertaining to Article 16(4); and held that reservation of more than half of the vacancies was invalid. The Court struck down the carry forward rule by holding that 16(4) was a proviso to 16(1), in the following words: -

> "……In the case before us 45 vacancies have actually been filled out of which 29 have gone to members of the Scheduled Castes and Tribes on the basis of reservation permitted by the carry forward rule. This comes to 64.4% of reservation. Such being the result of the operation of the carry forward rule we must, on the basis of the decision in *Balaji's case* hold that the rule is bad…..
> ……Further, this Court has already held that cl. (4) of Art. 16 is by way of a proviso or an exception to cl. (1). A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under cl. (4) would in effect efface the guarantee contained in cl. (1) or at best make it illusory…."

92.3. As noticed, the case of ***N.M. Thomas*** arose in the context of constitutionality of the rules contained in the Kerala State and Subordinate Services Rules, 1958, by which the State Government was empowered to grant exemption to SC/ST candidates from passing qualifying test for departmental exam. In that case, two learned judges opined about the rule of ceiling limit thus: -

> **Fazal Ali, J.**
>
> "191…….. **As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases.** Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of

reservation is bad and violates the permissible limits of clause (4) of Article 16?.....

Krishna Iyer, J.

143…....**I agree with my learned Brother Fazal Ali, J. in the view that the arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far.** Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the 'carry forward' rule."

(emphasis supplied)

92.3.1. The other learned Judges did not specifically deal with the fifty per cent. rule but the majority judges agreed that Article 16(4) was not an exception to 16(1).

92.4. In ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors.*: (1981) 1 SCC 246**, several concessions and exemptions granted by the Railway Board in favour of SCs/STs came to be challenged. Therein, the opinions as regards percentage of reservation came to be expressed as under: -

Chinnappa Reddy, J.

"135… There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty per cent. **There is no rigidity about the fifty per cent rule which is only a convenient guide-line laid down by judges.** Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future. Judged in the light of this discussion I am unable to find anything illegal or unconstitutional in anyone of the impugned orders and circulars….

Krishna Iyer, J.

88……..All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC & ST candidates be actually appointed to substantially more than 50 per

cent of the promotional posts. **Some excess will not affect as mathematical precision is difficult in human affairs, but substantial excess will void the selection.** Subject to this rider or condition that the 'carry forward' rule *shall not result*, in any given year, in the selection or appointments of SC & ST candidates considerably in excess of 50 per cent, we uphold Annexure 'I'."

(emphasis supplied)

92.4.1. Thus, in effect, while Chinnappa Reddy, J. held that there can be no ceiling limit on reservation, Krishna Iyer, J. held that reservation in substantial excess of fifty per cent. cannot be sustained.

92.5. In ***Vasanth Kumar***, two learned Judges stated slightly different conclusions as regards this ceiling limit of fifty per cent. and the effect of the decision in ***N.M. Thomas*** as follows: -

Chinnappa Reddy, J.

"57. ……**The percentage of reservations is not a matter upon which a court may pronounce with no material at hand. For a court to say that reservations should not exceed 40 per cent 50 per cent or 60 per cent, would be arbitrary and the Constitution does not permit us to be arbitrary**. Though in the *Balaji case*, the Court thought that generally and in a broad way a special provision should be less than 50 per cent, and how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case, the Court confessed: "In this matter again, we are reluctant to say definitely what would be a proper provision to make." All that the Court would finally say was that in the circumstances of the case before them, a reservation of 68 per cent was inconsistent with Article 15(4) of the Constitution. **We are not prepared to read *Balaji* as arbitrarily laying down 50 per cent as the outer limit of reservation**…….

58. We must repeat here, what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess of 50 per cent may impair efficiency. It is a rule of thumb and rules of the thumb are not for judges to lay down to solve complicated sociological and administrative problems. Sometimes, it is obliquely suggested that excessive reservation is indulged in as a mere vote-catching device. Perhaps so, perhaps not. One can only say "out of evil cometh good" and quicker the redemption of the oppressed classes, so much the better for the nation. Our observations are not intended to show

> the door to genuine efficiency. Efficiency must be a guiding factor but not a smokescreen. **All that a court may legitimately say is that reservation may not be excessive. It may not be so excessive as to be oppressive; it may not be so high as to lead to a necessary presumption of unfair exclusion of everyone else**.
>
> **Venkataramiah, J.**
>
> 149. After carefully going through all the seven opinions in the above case, **it is difficult to hold that the settled view of this Court that the reservation under Article 15(4) or Article 16(4) could not be more than 50% has been unsettled by a majority on the Bench which decided this case**. I do not propose to pursue this point further in this case because if reservation is made only in favour of those backward castes or classes which are comparable to the Scheduled Castes and Scheduled Tribes, it may not exceed 50% (including 18% reserved for the Scheduled Castes and Scheduled Tribes and 15% reserved for "special group") in view of the total population of such backward classes in the State of Karnataka……..".
>
> (emphasis supplied)

92.6. In ***Indra Sawhney***, Jeevan Reddy, J., speaking for the majority, though made it clear that reservation contemplated by Article 16(4) should not exceed fifty per cent., yet left that small window open where some relaxation to the strict rule may become imperative in view of the extraordinary situations inherent in the great diversity of our country. As an example, it was pointed out that the population inhabiting farflung and remote areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to them, need to be treated in a different way. However, a caveat was put that a special case has to be made out and extreme caution has to be exercised in this regard. The relevant observations read as under: -

> “809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.
>
> 810. **While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out**."
>
> (emphasis supplied)

92.6.1. Pandian, J. also opined that no maximum percentage of reservation can be fixed in the following words:

> “189. I fully share the above views of Fazal Ali, Krishna Iyer, Chinnappa Reddy, JJ holding that no maximum percentage of reservation can be justifiably fixed under Articles 15(4) and/or 16(4) of the Constitution."

92.6.2. P.B. Sawant, J. also echoed that fifty per cent. ordinary ceiling can be breached but would be required to be seen in the facts and circumstances of every case in the following words: -

> “518. To summarise, the question may be answered thus. There is no legal infirmity in keeping the reservations under clause (4) alone or under clause (4) and clause (1) of Article 16 together, exceeding 50%. However, validity of the extent of excess of reservations over 50% would depend upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept. Although, further, legally and theoretically the excess of reservations over 50% may be justified, it would ordinarily be wise and nothing much would be lost, if the intentions of the Framers of the Constitution and the observations of Dr Ambedkar, on the subject in particular, are kept in mind. The reservations should further be kept category and gradewise at appropriate percentages and for practical purposes the extent of reservations should be calculated category and gradewise.”

92.7. In ***M. Nagaraj***, while interpreting Article 16 (4-A) and (4-B) and while considering the extent of reservation, the expression "ceiling limit" came to be employed by this Court while underscoring the concept of “proportional equality”. Paragraph 102 of the said decision, which had been reproduced hereinabove in the discussion pertaining to reservation, could be usefully re-extracted alongwith other relevant passages as under: -

> "102 …… 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…….. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid……..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**.
>
> *** *** ***
>
> 104…..**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 the facts of each case**…..
>
> *** *** ***
>
> **Conclusion**
>
> 121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the

> controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STS on the other hand as held in *Indra Sawhney*, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.
>
> 122. **We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse**."
>
> (emphasis supplied)

92.8. In ***K. Krishna Murthy*** (supra), as noticed, this Court rejected the challenge to the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992 which had inserted Part IX and Part IX-A to the Constitution thereby contemplating the powers, composition and functions of the Panchayats (for rural areas) and Municipalities (for urban areas). In the present context, the passage referring to the ceiling aspect of reservation in regard to local self-government could be re-extracted as under: -

> "82.....(*iv*) The upper ceiling of 50% vertical reservations in favour of SCs/STs/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of the Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas….."

92.9. In ***Dr. Jaishri Patil***, Bhat, J. after analysis of ***Indra Sawhney*** said as follows: -

> "10. A careful reading of the judgments in *Indra Sawhney v. Union of India*, clarifies that seven out of nine Judges concurred that

> there exists a quantitative limit on reservation-spelt out at 50%. In the opinion of four Judges, therefore, per the judgment of B.P. Jeevan Reddy, J., this limit could be exceeded under extraordinary circumstances and in conditions for which separate justification has to be forthcoming by the State or the agency concerned. However, *there is unanimity in the conclusion* by all seven Judges that an outer limit for reservation should be 50%. Undoubtedly, the other two Judges, Ratnavel Pandian and P.B. Sawant, JJ. indicated that there is no general rule of 50% limit on reservation. In these circumstances, given the general common agreement about the existence of an outer limit i.e. 50%, the petitioner's argument about the incoherence or uncertainty about the existence of the rule or that there were contrary observations with respect to absence of any ceiling limit in other judgments (the dissenting judgments of K. Subba Rao, in *T. Devadasan v. Union of India*, the judgments of S.M. Fazal Ali and Krishna Iyer, JJ. in *State of Kerala v. N.M. Thomas* and the judgment of Chinnappa Reddy, J. in *K.C. Vasanth Kumar v. State of Karnataka*) is not an argument compelling a review or reconsideration of *Indra Sawhney* rule."

92.9.1. In the said decision, Bhushan, J. observed as under: -

> "442. The above constitutional amendment makes it very clear that ceiling of 50% "has now received constitutional recognition". Ceiling of 50% is ceiling which was approved by this Court in *Indra Sawhney case*, thus, the constitutional amendment in fact recognises the 50% ceiling which was approved in *Indra Sawhney case* and on the basis of above constitutional amendment, no case has been made out to revisit *Indra Sawhney*."

93. Thus, having examined the permissible limits of affirmative action in light of the possible harm of preferential treatment qua other innocent class of competitors, i.e., general merit candidates, this Court has expressed the desirability of fifty per cent. as the ceiling limit for reservation in education and public employment but, as observed hereinbefore, all such observations are required to be read essentially in the context of the reservation obtaining under Articles 15(4), 15(5) and 16(4) or other areas of affirmative action like that in relation to local self-government [the case of ***K. Krishna Murthy*** (supra)] and cannot be

overstretched to the reservation provided for entirely different class, consisting of the economically weaker sections.

94. Moreover, as noticed, this ceiling limit, though held attached to the constitutional requirements, has not been held to be inflexible and inviolable for all times to come. Reasons for this are not far to seek. As mentioned hereinbefore, reservation by affirmative action is not having trappings of any such essential feature of the Constitution, collectively enumerated by ***Kesavananda*** and successive decisions, that its modulation with reference to any particular compelling reason or requirement could damage the basic structure of the Constitution.

95. In another view of the matter, the prescription of ceiling limit of fifty per cent., being apparently for the benefit of general merit candidates, does not provide any justified cause to the candidates standing in the bracket of already available reservation to raise any grievance about extra ten per cent. reservation for the benefit of another section of society in need of affirmative action. In any case, there is no question of violation of any such basic feature of the Constitution that the entire structure of equality of opportunity in Article 16 would collapse by this EWS reservation.

Other Factors and General Summation

96. There have been several suggestions during the course of arguments that while the existing reservations are class-specific, the impugned reservation is person-specific and even the eligibility factor,

that is of ‘economic weakness’, is itself uncertain, fortuitous and mutable. All these submissions have only been noted to be rejected in the context of the limited permissible challenge to the amendment in question on the doctrine of basic structure. None of these submissions make out a case of violation of any such essential feature of the Constitution that leads to destroying the basic structure.

97. It may, however, be observed that as per the *Explanation* to Article 15(6), the reservations in relation to economically weaker sections would avail to such sections/persons as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage. The question as to whether any particular section or person falls in or is entitled to stand within the class of ‘*economically weaker sections of citizens*’ may be a question to be determined with reference to the parameters laid down and indicators taken into consideration by the State. Coupled with this, even the extent of reservation provided therein may also be a question to be determined with reference to the relevant analysis of the material data justifying a particular percentage. In other words, the question as to whether any particular classification as economically weaker section is based on relevant data and factors as also the extent of reservation for that section could be the matters of consideration as and when arising but, for these and akin grounds, the constitutional amendment, moderately expanding the enabling power of the State, cannot be questioned.

98. The fact that ‘representation’ alone is not the purpose of enabling provisions of Article 16 could be directly seen from clause (4-B) of Article 16, inserted later and upheld by this Court ensuring that ceiling on reservation quota to carried forward posts does not apply to subsequent years. Interestingly, clause (5) of Article 16, protecting the operation of any law in relation to any incumbent of an office in connection with the affairs of any religious or denominational institution as regards eligibility, operates in an entirely different field but finds mention in Article 16 for being an exception to the general rule of equality of opportunity. Viewed as a whole, it is difficult to say that permissible deviation from the rule of equality in the matters of employment is having the objective of representation alone.

98.1. Moreover, even if it be assumed that the existing provisions concerning reservation are correlated with ‘representation’, such a correlation would only remain confined to the classes availing benefit under Article 16(4); and it cannot be said that for any other deserving section or class reservation could be provided only for the purpose of representation. As repeatedly noticed, the real and substantive equality takes myriad shapes, depending on the requirements. Therefore, questioning clause (6) of Article 16 only on the ground of it being not representation-oriented, does not appear to be a sustainable argument vis-a-vis the doctrine of basic structure.

99. A few other pertinent features of consideration herein may also be usefully indicated.

99.1. As noticed, our country is and has been a participant in various International Conventions having a co-relation with the questions pertaining to economic disabilities. ***Kesavananda*** has referred to a decision rendered by Lord Denning in ***Corocraft v. Pan American Airways*****: 1969 (1) All ER 82** that, *'…it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it.'* In ***R. D. Upadhyay v. State of Andhra Pradesh and Ors.*****: (2007) 15 SCC 337**, a 3-Judge Bench affirmed the earlier decisions upholding the enforceability of International Conventions when they elucidate and effectuate the Fundamental Rights and that such conventions may also be read as part of domestic law as long as there is no inconsistency between them. Thus understood, it hardly needs elaboration that the laws (including constitutional amendments) enacted, *inter alia*, for giving effect to International Conventions, have to be broadly construed and cannot be struck down for askance.

99.2. Apart from the principles relating to judicial restraint and circumspection in the matters of challenge to constitutional amendment, as stated by Khanna, J. in ***Kesavananda*** (reproduced hereinbefore), what Justice Cardozo of U.S. Supreme Court said about the judicial process in the matters of challenge to constitutionality is also instructive: -

> "… The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone

> beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."[52]

99.3. It would also be worthwhile to quote the words of famous American jurist Thomas M. Cooley thus: -

> "The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the constitution, and the case shown to come within them."[53]

100. The above-mentioned norms of circumspection had been the guiding factors in examining the challenge to the amendment in question, with this Court being conscious that the Parliament, whilst enacting amendments to the Constitution, exercises constituent power, as distinguished from ordinary legislative power. Same as that the Parliament is not at liberty to destroy the basic structure of the Constitution, the Constitutional Court is also not at liberty to declare

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[52] Benjamin N. Cardozo, *'The Nature of the Judicial Process',* Yale University Press (1921), p. 94.

[53] T.M. Cooley, *'A Treatise on the Constitutional Limitations',* Hindustan Law Book Company (2005), p 168.

constitutional amendments void because of their perceived injustice or impolicy or where they appear to the Court to be violating fundamental principles of governance, unless such principles are placed beyond legislative encroachment by the Constitution itself. As noticed from ***Kesavananda**,* the power to amend the Constitution can be used to reshape the Constitution to fulfil the obligation imposed on the State. Starting from the insertion of clause (4) to Article 15 by the Constitution (First Amendment) Act, 1951; moving on to the insertion of clause (4-A) to Article 16 by the Constitution (Seventy-seventh Amendment) Act, 1995 to the insertion of clause (4-B) to Article 16 by the Constitution (Eighty-first Amendment) Act, 2000 and further amendment of the said clause (4-A) by the Constitution (Eighty-fifth Amendment) Act, 2001; yet further with the insertion of clause (5) to Article 15 by the Constitution (Ninety-third Amendment) Act, 2005; and lately with insertion of Articles 366(26-C) and 342-A by the Constitution (One Hundred and Second Amendment) Act, 2018, the Parliament has indeed brought about certain modulations, within the framework of the Constitution of India, to cater to the requirements of the citizenry with real and substantive justice in view. In the same vein, if the Parliament has considered it fit to make provisions in furtherance of the objectives of socio-economic justice by the amendment in question for economically weaker sections, the amendment cannot be condemned as being violative of any of the basic features of the Constitution and thereby damaging the basic structure.

101. In the ultimate analysis, it is beyond doubt that using the doctrine of basic structure as a sword against the amendment in question and thereby to stultify State's effort to do economic justice as ordained by the Preamble and DPSP and, *inter alia*, enshrined in Articles 38, 39 and 46, cannot be countenanced. This is essentially for the reason that the provisions contained in Articles 15 and 16 of the Constitution of India, providing for reservation by way of affirmative action, being of exception to the general rule of equality, cannot be treated as a basic feature. Moreover, even if reservation is one of the features of the Constitution, it being in the nature of enabling provision only, cannot be regarded as an essential feature of that nature whose modulation for the sake of other valid affirmative action would damage the basic structure of the Constitution. Therefore, the doctrine of basic structure cannot be invoked for laying a challenge to the 103rd Amendment. In this view of the matter, the other contentions and submissions need not be dilated herein.

Conclusions

102. For what has been discussed and held hereinabove, the points formulated in paragraph 31 are answered as follows: -

a. Reservation is an instrument of affirmative action by the State so as to ensure all-inclusive march towards the goals of an egalitarian society while counteracting inequalities; it is an instrument not only for inclusion of socially and educationally backward classes to the

mainstream of society but, also for inclusion of any class or section so disadvantaged as to be answering the description of a weaker section. In this background, reservation structured singularly on economic criteria does not violate any essential feature of the Constitution of India and does not cause any damage to the basic structure of the Constitution of India.

b. Exclusion of the classes covered by Articles 15(4), 15(5) and 16(4) from getting the benefit of reservation as economically weaker sections, being in the nature of balancing the requirements of non-discrimination and compensatory discrimination, does not violate Equality Code and does not in any manner cause damage to the basic structure of the Constitution of India.

c. Reservation for economically weaker sections of citizens up to ten per cent. in addition to the existing reservations does not result in violation of any essential feature of the Constitution of India and does not cause any damage to the basic structure of the Constitution of India on account of breach of the ceiling limit of fifty per cent. because, that ceiling limit itself is not inflexible and in any case, applies only to the reservations envisaged by Articles 15(4), 15(5) and 16(4) of the Constitution of India.

103. Not much of the contentions have been urged in relation to the impact of the amendment in question on admissions to private unaided institutions. However, it could at once be clarified that what has been observed hereinabove in relation to the principal part of challenge to the

amendment in question, read with the decision of this Court in ***Pramati Trust***, the answer to the issue framed in that regard would also be against the challenge.

104. Accordingly, and in view of the above, the answers to the issues formulated in these matters are as follows:

1. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria.

2. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions.

3. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation.

105. Consequently, the transferred cases, transfer petitions, writ petitions and the petition for special leave to appeal forming the part of this batch of matters are dismissed.

Acknowledgments

106. While closing on this reference, sincere thanks and compliments deserve to be placed on record for the learned counsel for the respective parties, their associates, and their researchers as also all the constructive contributors, whose erudite and scholarly presentation of respective view-

points has rendered invaluable assistance to this Court in shaping the formulations herein.

……..…….J.
(DINESH MAHESHWARI)

NEW DELHI;
NOVEMBER 07,2022.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No. 55 of 2019

JANHIT ABHIYAN ..... APPELLANT

VERSUS

UNION OF INDIA .... RESPONDENT

WITH

T.C. (C) No.8/2021, W.P. (C) No. 596/2019, W.P. (C)No. 446/2019, W.P. (C) No. 427/2019, W.P. (C) No. 331/2019, W.P.(C) No. 343/2019, W.P.(C) No. 798/2019, W.P.(C) No. 732/2019, W.P.(C) No. 854/2019, T.C.(C) No. 12/2021, T.C.(C) No. 10/2021, T.C.(C) No. 9/2021, W.P.(C) No. 73/2019, W.P.(C) No. 72/2019, W.P.(C) No. 76/2019, W.P.(C) No. 80/2019, W.P.(C) No. 222/2019, W.P.(C) No. 249/2019, W.P.(C) No. 341/2019, T.P.(C) No. 1245/2019, T.P.(C) No. 2715/2019, T.P.(C) No. 122/2020, SLP(C) No. 8699/2020, T.C.(C) No. 7/2021, T.C.(C) No. 11/2021, W.P.(C) No. 69/2019, W.P.(C) No. 122/2019, W.P.(C) No. 106/2019, W.P.(C) No. 95/2019, W.P.(C) No. 133/2019, W.P.(C) No. 178/2019, W.P.(C) No. 182/2019, W.P.(C) No. 146/2019, W.P.(C) No. 168/2019, W.P.(C) No. 212/2019, W.P.(C) No. 162/2019, W.P.(C) No. 419/2019, W.P.(C) No. 473/2020, W.P.(C) No. 493/2019

J U D G M E N T

BELA M. TRIVEDI, J.

1. I have had the benefit of perusing the opinion of my learned Brother Dinesh Maheshwari, J. and I am in respectful agreement with him. However, having

regard to the importance of the constitutional issues involved, I deem it appropriate to pen down my few views, in addition to his opinion.

2. For the sake of brevity, the divergent and irreconcilable submissions made by the Learned Counsels for the parties and the propositions of law laid down by this Court from time to time on the issues involved, are not repeated, the same having already been narrated in the opinion of my learned Brother.

3. Since the advent of the Constitution, there is a constant churning process going on to keep alive the spirit of its Preamble and to achieve the goal of establishing a Welfare State, adhering to the inherent elements of the Constitutional morality and Constitutional legality. As a result thereof about 105 amendments have been made so far, in the Constitution. We have been called upon to examine the constitutional validity of the Constitution (One hundred and third Amendment) Act, 2019.

4. For ready reference, the impugned 103rd Amendment along with the Statement of Objects and Reasons is reproduced:-

"MINISTRY OF LAW AND JUSTICE
(Legislative Department)
New Delhi, the 12th January, 2019/Pausha 22, 1940 (Saka)

The following Act of Parliament received the assent of the President on the 12th January, 2019, and is hereby published for general information:—

THE CONSTITUTION (ONE HUNDRED AND THIRD AMENDMENT) ACT, 2019

[12th January, 2019.]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

Short title and commencement.

1. (1) This Act may be called the Constitution (One Hundred and Third Amendment) Act, 2019.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Amendment of article 15.

2. In article 15 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

'(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.'.

Amendment of article 16.

3. In article 16 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

"(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in

clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.".

DR . G. NARAYANA RAJU,
Secretary to the Govt. of India."

"STATEMENT OF OBJECTS AND REASONS

At present, the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article 15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.

2. The directive principles of State policy contained in article 46 of the Constitution enjoins 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

3. Vide the Constitution (Ninety-third Amendment) Act, 2005, clause (5) was inserted in article 15 of the Constitution which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, clause (4) of article 16 of the Constitution enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

4. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in

employment in the services of the State, it has been decided to amend the Constitution of India.

5. Accordingly, the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 provides for reservation for the economically weaker sections of society in higher educational institutions, including private institutions whether aided or unaided by the State other than the minority educational institutions referred to in article 30 of the constitution and also provides for reservation for them in posts in initial appointment in services under the State.

6. The Bill seeks to achieve the above objects.

NEW DELHI;
The 7th January, 2019. THAAWARCHAND GEHLOT"

5. The legal and constitutional history of India depicted through the erudite, scholarly and authoritative opinions pronounced by this Court in the past, has always been very educative and interesting. The wide spectrum and perspectives of the contours of the Constitution of India laid down therein, have actually worked at the fulcrum and have guided us as a laser beam in the interpretation of the Constitutional provisions. The sole fountainhead of the constituent power conferred upon the Parliament to amend the provisions of the Constitution is Article 368 thereof. It is very well-established proposition of law that it is the Constitution and not the constituent power which is supreme. The Constitution which reflects the hopes and aspirations of people, also provides for the framework of the different organs of the State viz. the Executive, the Legislature and the Judiciary. The Judiciary is entrusted with

the responsibility of upholding the supremacy of the Constitution. That does not mean that such power of judicial review makes the judiciary supreme. The Constitution itself has created a system of checks and balances by which the powers are so distributed that none of the three organs it sets up, can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them.[1] Yet the power of judicial review is provided expressly in our Constitution by means of Articles 226 and 32, which is one of the features upon which hinges the system of checks and balances. This power is of paramount importance in a federal Constitution like ours and is the heart and core of the democracy.

6. It is axiomatic that the Parliament has been conferred upon the constituent power to amend by way of addition, variation or repeal any provision of the Constitution under Article 368 of the Constitution, and the same is required to be exercised in accordance with the procedure laid down in the said Article. The Constitution is said to be a living document or a work in progress only because of the plenary power to amend is conferred upon the Parliament under the said provision. Of course, as laid down in plethora of judgments, the said power is subject to the constraints of the basic structure theory. Deriving inspiration from the Preamble and the whole scheme of the Constitution, the

[1] ***Kesavananda Bharati vs. State of Kerala & Anr***. (1973) 4 SCC 225 (Para 577)

majority in ***Kesavananda Bharati*** case held that every provision of the Constitution can be amended so long as the basic foundation and structure of the Constitution remains the same. Some of the basic features of the constitutional structure carved out by the Court in the said judgment were, the supremacy of the Constitution, Republican and democratic form of government, separation of powers, judicial review, sovereignty and the integrity of the nation, Federal Character of Government etc. A multitude of features have been acknowledged as the basic features in various subsequent judicial pronouncements. Accordingly, any amendment made by the Parliament is open to the judicial review and is liable to be interfered with by the Court on the ground that it affects one or the other basic feature of the Constitution.

7. In case of ***Kihoto Hollohan vs. Zachillhu & Ors***.[2] the Court explaining the limitations imposed on the constituent power observed that the limitations imposed are substantive limitations and procedural limitations. Substantive limitations are those which restrict the field of exercise of the amending power and exclude some areas from its ambit. Therefore, violation of the basic structure of the Constitution would be a substantive limitation restricting the field of exercise of the amending power under Article 368 of the Constitution.

[2] (1992) Suppl. 2 SCC 651

Procedural limitations 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, the disregard of which invalidates its exercise. In ***Kesavananda Bharati***[3] Case, it has been observed that while examining the width of the constituent power, it is essential to see its limits, the maximum and the minimum; the entire ambit and the magnitude of it. It has been further observed that Parliament could under Article 368 amend Article 13 and also the fundamental rights; and that the power of amendment under Article 368 is wide, but it is not wide enough to totally abrogate any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity[4].

8. In the light of afore-stated legal position, let us examine whether the impugned amendment has disregarded any of the limitations - substantive or procedural. The gravamen of the submissions made by the learned counsels for the petitioners is that the Equality clause as interpreted in catena of decisions is the most important and indispensable feature of the Constitution, and the destruction thereof will amount to changing the basic structure of the Constitution. The bone of contention raised by them is that the exclusionary

[3] Ibid (Para-524-525)
[4] Ibid (Para-1162)

clauses contained in Articles 15(6) and 16(6) keeping out the backward classes and SCs/STs from having the benefits of the economic reservation, are discriminatory in nature and violate the equality code and in turn the basic structure of the Constitution.

9. At the outset, very relevant and apt observations made by Krishna Iyer, J. in ***Maharao Sahib Shri Bhim Singhji vs. Union of India & Ors.***[5]**,** with regard to the breach of equality code, deserve reference.

> "Every breach of equality cannot spell disaster as a lethal violation of basic structure. Peripheral inequality is inevitable when large scale equalization processes are put into action. If all the judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genius will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far, it shakes the democratic foundation and must suffer the death penalty."

[5] (1981) 1 SCC 166

10. In an another interesting opinion by Justice Mathew in ***Indira Nehru Gandhi Vs. Raj Narain***[6], it was observed that: -

> "334. Equality is a multi-coloured concept incapable of a single definition. It is a notion of many shades and connotations. The preamble of the Constitution guarantees equality of status and of opportunity. They are nebulous concepts. And I am not sure whether they can provide a solid foundation to rear a basic structure. I think the types of equality which our democratic republic guarantees are all subsumed under specific articles of the Constitution like Articles 14, 15, 16, 17, 25 etc. and there is no other principle of equality which is an essential feature of our democratic polity."

11. The seven-judge Bench of this Court in ***State of Kerala & Anr. vs. N.M. Thomas & Ors.***[7]**,** stated that Article 16(1) is only part of comprehensive scheme to ensure equality in all spheres and is an instance of larger concept of equality of law. Article 16(4) cannot be viewed as an exception to Article 16(1), but only as something which logically emanates from Article 16(1).

12. In ***Waman Rao & Ors. Vs. Union of India & Ors.***[8], it was observed that every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of

[6] (1975) Suppl. SCC 1
[7] (1976) 2 SCC 310
[8] (1981) 2 SCC 362

Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution.

13. The case of ***M. Nagraj & others Vs. Union of India***[9], classifies equality into two parts - "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 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. The Constitution Bench in the said case was called upon to examine the constitutional validity of Article 16(4A) and 16(4B) as well as the 77th, 82nd and 85th amendments of the Constitution. While unanimously upholding the validity of the said Amendments, it was observed that-

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

[9] (2006) 8 SCC 212

14. In ***State of Gujarat and Another vs. & The Ashok Mills Co. Ltd. Ahmedabad and Another***[10]**,** it was observed: -

> "53. The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox, the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.
>
> 54. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase 'similarly situated' mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good."

15. What is discernible from the above cited decisions is that the concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Equality is violated if it rests on unreasonable classification. A reasonable classification is permissible, which includes all who are similarly situated, and none who are not. Discrimination is the essence of classification. Those who are similarly circumscribed are entitled to an equal treatment. Classification has to be founded on substantial

[10] (1974) 4 SCC 656

differences which distinguish persons grouped together from those left out of the groups, and such differential attributes must bear a just and rational relation to the object sought to be achieved.

16. The Preamble, the Part III-Fundamental Rights and the Part IV-Directive Principles of State Policy- the Trinity are the conscience of the Constitution. The Preamble visualises to remove economic inequalities and to secure to all citizens of India, Justice - Social, Economic and Political, which is the sum total of the aspirations incorporated in Part IV. Economic empowerment to the weaker sections of the society is the fundamental requirement for ensuring equality of status and to promote fraternity assuring dignity as visualised by the framers of our Constitution. And therefore any positive discrimination in favour of the weak or disadvantaged class of people by means of a valid classification has been treated as an affirmative action on the part of the State. The Preamble to the Constitution and the Directive Principles of the State Policy give a positive mandate to the State and the State is obliged to remove inequalities and backwardness from the society.

17. As observed in ***Ashok Kumar Thakur***[11]**,** while considering the constitutionality of social justice legislation, it is worthwhile to note the objectives which have been incorporated by the Constitution makers in the

[11] Ibid. (2008) 6 SCC 1

Preamble of the Constitution and how they are sought to be secured by enacting Fundamental Rights in Part-III and Directive Principles of State Policy in Part-IV of the Constitution. The Fundamental Rights represent the civil and political rights and the Directive Principles embody social and economic rights. Together they are intended to carry out the objectives set out in the Preamble to the Constitution. Article 46 enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation. The theory of reasonable classification is implicit and inherent in the concept of equality. Equality of opportunity would also mean a fair opportunity not only to one section or the other but to all sections by removing the handicaps if a particular section of the society suffers from the same.

18. Justice Krishna Iyer in ***N.M. Thomas***[12] has beautifully explained what is "social engineering"

> **"119.** Social engineering — which is law in action — must adopt new strategies to liquidate encrusted group injustices or surrender society to traumatic tensions. Equilibrium, in human terms, emerges from release of the handicapped and the primitive from persistent social disadvantage, by determined, creative and canny legal manoeuvres of the State, not by hortative declaration of arid equality. "To discriminate positively in favour of the weak may sometimes be promotion of genuine equality before the law" as Anthony Lester argued in his talk in the B.B.C. in 1970 in

[12] Ibid (1976) 2 SCC 310

> the series: *What is wrong with the law* [Published in book form —Edited by Micheel Zander — BBC, 1970 — quoted in Mod Law Rev Vol 33, Sept 1970, pp. 579, 580] . "One law for the Lion and Ox is oppression". Or, indeed, as was said of another age by Anatole France:
>
> "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread. **"**

19. As transpiring from the Statements of Objects and Reasons for introducing the Bill to the impugned amendment, the Parliament has taken note that the economically weaker sections of the citizens have largely remained excluded from attaining the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under Clauses(4) and (5) of Article 15 and Clause(4) of Article 16 are generally unavailable to them unless they meet with the specific criteria of social and educational backwardness. It has been further stated that vide the Constitution (Ninety-third Amendment) Act, 2005, Clause(5) was inserted in Article 15 of the Constitution which enables the State to make special provision for the advancement of any social and educational backwardness of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, Clause(4) of Article 16 of the Constitution enables the State to make special provision for the reservation of

appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in the services under the State. However, economically weaker sections of citizens were not eligible for the benefit of reservation. Therefore, with a view to fulfil the ideals lying behind Article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it was decided to amend the Constitution of India.

20. As well settled, it must be presumed that the legislature understands and appreciates the needs of its own people. Its laws are directed to the problems made manifest by experience, and its discriminations are based on adequate norms. Therefore, the constitutional amendment could not be struck down as discriminatory if the state of facts are reasonably conceived to justify it. In the instant case, the Legislature being aware of the exclusion of economically weaker sections of citizens from having the benefits of reservations provided to the SCs/STs and SEBCs citizens in Clauses(4) and (5) of Article 15 and Clause(4) of Article 16, has come out with the impugned amendment empowering the State to make special provision for the advancement of the "economically weaker sections" of citizens other than the classes mentioned in Clauses(4) and (5) of Article 15 and further to make special provision for

the reservation of appointments or posts in favour of the economically weaker sections of the citizens other than the classes mentioned in Clause(4) of Article 16. The impugned amendment enabling the State to make special provisions for the "economically weaker sections" of the citizens other than the scheduled castes/schedules tribes and socially and educationally backward classes of citizens, is required to be treated as an affirmative action on the part of the Parliament for the benefit and for the advancement of the economically weaker sections of the citizens. Treating economically weaker sections of the citizens as a separate class would be a reasonable classification, and could not be termed as an unreasonable or unjustifiable classification, much less a betrayal of basic feature or violative of Article 14. As laid down by this Court, just as equals cannot be treated unequally, unequals also cannot be treated equally. Treating unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution.

21. The Scheduled Castes/Scheduled Tribes and the backward class for whom the special provisions have already been provided in Article 15(4), 15(5) and 16(4) form a separate category as distinguished from the general or unreserved category. They cannot be treated at par with the citizens belonging to the general or unreserved category. The impugned amendment creates a

separate class of "economically weaker sections of the citizens" from the general/unreserved class, without affecting the special rights of reservations provided to the Scheduled Caste/Scheduled Tribe and backward class of citizens covered under Article 15(4), 15(5) and 16(4). Therefore, their exclusion from the newly created class for the benefit of the "economically weaker sections of the citizens" in the impugned amendment cannot be said to be discriminatory or violative of the equality code. Such amendment could certainly be not termed as shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice as sought to be submitted by the Learned Counsels for the petitioners.

22. The sum and substance is that the limitations – substantive or procedural – imposed on the exercise of constituent power of the State under Article 368 could not be said by any stretch of imagination, to have been disregarded by the Parliament. Neither the procedural limitation i.e. the mode of exercise of the amending power has been disregarded nor the substantive limitation i.e. the restricted field has been disregarded, which otherwise would invalidate the impugned amendment. What is visualised in the Preamble and what is permissible both in Part-III and Part-IV of the Constitution could not be said to be violative of the basic structure or basic feature of the Constitution. In absence of any obliteration of any of the constitutional provisions and in

absence of any alteration or destruction in the existing structure of equality code or in the basic structure of the Constitution, neither the width test nor the identity test as propounded in ***Kesavananda*** could be said to have been violated in the impugned Amendment. Accordingly, the challenge to the constitutional validity of the 103rd Amendment fails, and the validity thereof is upheld.

23. Before parting, let me say something on the time span of the reservation policy.

24. It is said that no document can be perfect and no ideals can be fully achieved. But does that mean we should have no ideals? No vision? Sardar Patel had said [13] - "But in the long run, it would be in the interest of all to forget that there is anything like majority or minority in this country; that in India there is only one community…"

25. Can we not move towards an ideal envisaged by the framers of our Constitution to have an egalitarian, casteless and classless society? Though difficult, it is an achievable ideal. Our Constitution which is a living and organic document continuously shapes the lives of citizens in particular and societies in general.

[13] CAD Vol. VIII P.272, 25 May 1949

26. At this juncture, some of the very apt observations made by the Constitution Bench in ***K.C. Vasanth Kumar***[14] are worth noting-

Per D.A. Desai, J.

> **"30.** Let me conclude. If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty.
>
> **31.** Let me make abundantly clear that this approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes. Thousands of years of discrimination and exploitation cannot be wiped out in one generation. But even here economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefited by it and improved their position. <u>And finally reservation must have a time span otherwise concessions tend to become vested interests.</u>"

Per E.S. Venkataramiah, J.

> "**150.** At this stage it should be made clear that if on a fresh determination some castes or communities have to go out of the list of backward classes prepared for Article 15(4) and Article 16(4), the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the Directive Principle contained in Article 46 of the Constitution. "

[14] (1985) Suppl. SCC 714

In the said judgment, Chief Justice Y.V. Chandrachud, as he then was, had proposed thus:-

> **"2.** I would state my opinion in the shape of the following propositions:
>
> (1) The reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present, there is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.
>
> (2) The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. <u>It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.</u>
>
> (3) Insofar as the other backward classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.
>
> (4) The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (*i*) to the State to rectify distortions arising out of particular facets of the reservation policy and (*ii*) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations."

27. The concern for continuing the reservation as an affirmative action only for a limited period was also expressed by this Court in "***Ashok Kumar Thakur vs. Union of India***"[15]

> **"666.** Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be realisation of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag—either social or economical. But post reservation, there is a tendency even among those who are considered as "forward", to seek the "backward" tag, in the hope of enjoying the benefits of reservations. When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates. Be that as it may. Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that the Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society."

[15] (2008) 6 SCC 1

28. What was envisioned by the framers of the Constitution, what was proposed by the Constitution Bench in 1985 and what was sought to be achieved on the completion of fifty years of the advent of the Constitution, i.e. that the policy of reservation must have a time span, has still not been achieved even till this day, i.e. till the completion of seventy-five years of our Independence. It cannot be gainsaid that the age-old caste system in India was responsible for the origination of the reservation system in the country. It was introduced to correct the historical injustice faced by the persons belonging to the scheduled castes and scheduled tribes and other backward classes, and to provide them a level playing field to compete with the persons belonging to the forward classes. However, at the end of seventy-five years of our independence, we need to revisit the system of reservation in the larger interest of the society as a whole, as a step forward towards transformative constitutionalism.

29. Be it noted that as per Article 334 of the Constitution, the provisions of the Constitution relating to the reservation of seats for the SCs and the STs in the House of the People and in the Legislative Assemblies of the States would cease to have effect on the expiration of a period of eighty years from the commencement of the Constitution. The representation of Anglo-Indian community in the House of the Parliament and in the Legislative Assemblies of the States by nomination, has already ceased by virtue of the 104th

Amendment w.e.f. 25.01.2020. Therefore, similar time limit if prescribed, for the special provisions in respect of the reservations and representations provided in Article 15 and Article 16 of the Constitution, it could be a way forward leading to an egalitarian, casteless and classless society.

..……...J.
[BELA M. TRIVEDI]

NEW DELHI;
07.11.2022

REPORTABLE

IN THE SUPREME COURT OF INDIA

ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO. 55 OF 2019

JANHIT ABHIYAN …PETITIONER(S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

WITH

T.C. (Civil) No. 8 of 2021

W.P. (Civil) No. 596 of 2019

W.P. (Civil) No. 446 of 2019

W.P. (Civil) No. 427 of 2019

W.P. (Civil) No. 331 of 2019

W.P. (Civil) No. 343 of 2019

W.P. (Civil) No. 798 of 2019

W.P. (Civil) No. 732 of 2019

W.P. (Civil) No. 854 of 2019

T.C. (Civil) No. 12 of 2021

T.C. (Civil) No. 10 of 2021

T.C. (Civil) No. 9 of 2021

W.P. (Civil) No. 73 of 2019

W.P. (Civil) No. 72 of 2019

W.P. (Civil) No. 76 of 2019

W.P. (Civil) No. 80 of 2019

W.P. (Civil) No. 222 of 2019

W.P. (Civil) No. 249 of 2019

W.P. (Civil) No. 341 of 2019

T.P. (Civil) No. 1245 of 2019

T.P. (Civil) No. 2715 of 2019

T.P. (Civil) No. 122 of 2020

S.L.P. (Civil) No. 8699 of 2020

T.C. (Civil) No. 7 of 2021

T.C. (Civil) No. 11 of 2021

W.P. (Civil) No. 69 of 2019

W.P. (Civil) No. 122 of 2019

W.P. (Civil) No. 106 of 2019

W.P. (Civil) No. 95 of 2019

W.P. (Civil) No. 133 of 2019

W.P. (Civil) No. 178 of 2019

W.P. (Civil) No. 182 of 2019

W.P. (Civil) No. 146 of 2019

W.P. (Civil) No. 168 of 2019

W.P. (Civil) No. 212 of 2019

W.P. (Civil) No. 162 of 2019

W.P. (Civil) No. 419 of 2019

W.P. (Civil) No. 473 of 2020

W.P. (Civil) No. 493 of 2019

J U D G M E N T

J.B. PARDIWALA, J. :

1. I have had the benefit of carefully considering the lucid and erudite judgment delivered by my learned Brother Justice Ravindra Bhat taking the view that Sections 2 and 3 resply of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted clause (6) in Article 15 and clause (6) in Article 16 respectively are unconstitutional and void on the ground that they destroyed and are violative of the basic structure of the Constitution. My esteemed Brother Justice Bhat has taken the view that the State's compelling interest to fulfil the objective set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate; that reservation or special provisions have so far been provided in favour of historically disadvantaged communities cannot be the basis of contending that the other disadvantaged groups who have not been able to progress due to the ill effects of abject poverty should remain so and the special provisions should not be made by way of affirmative action or even reservation on their behalf. My learned esteemed Brother Justice Bhat has concluded that therefore the special provisions based on objective economic criteria, is *per se* not violative of the basic structure. However, my esteemed Brother Justice Bhat thought fit to declare clause (6) of Article 15 as unconstitutional essentially on the ground that the exclusion clause therein and the classification could be termed as arbitrary resulting in hostile discrimination of the poorest sections of the society who are socially and educationally backward and/or subjected to caste discrimination.

2. In so far as clause (6) of Article 16 is concerned, my esteemed Brother Justice Bhat struck it down on two counts – first, the same is violative of the equality code particularly the principle of non-discrimination and non-exclusion which forms an inextricable part of the basic structure of the Constitution and,

secondly, although the "economic criteria" *per se* is permissible in relation to access of public goods (under Article 15), yet the same is not true for Article 16 as the goal of which is empowerment through representation of the community.

3. On the other hand, my esteemed Brother Justice Dinesh Maheshwari, in his separate judgment, has taken the view that clause (6) in Article 15 and clause (6) in Article 16 do not violate the basic structure of the Constitution in any manner and are valid.

4. Having gone through both the sets of judgments, I regret my inability to agree with my esteemed Brother Justice Bhat that clause (6) in Article 15 and clause (6) in Article 16 are unconstitutional and void. Whereas, I agree with the final decision taken by my esteemed Brother Justice Dinesh Maheshwari that the impugned amendment is valid, I would like to assign my own reasons as I have looked into the entire issue from a slightly different angle.

5. *"The Judgment of this Court in His Holiness Keshvananda Bharati Sripadagalvaru and others v. State of Kerala and another, AIR 1973 SC 1461, which introduced the concept of Basic Structure in our constitutional jurisprudence is the spontaneous response of an activist Court after working with our Constitution for about 25 years. This Court felt that in the absence of such a stance by the constitutional Court there are clear tendencies that the tumultuous tides of democratic majoritarianism of our country may engulf the constitutional values of our nascent democracy. The judgement in Kesavananda Bharti (supra) is possibly an "auxiliary precaution against a possible tidal wave in the vast ocean of Indian democracy". ..... But we must have a clear perception of what the Basic Structure is. It is hazardous to define what is the Basic Structure of the Constitution as what is basic does not remain static for all time to come....."*

[See : ***J&K National Panthers Party v. The Union of India & Ors***, (2011) 1 SCC 228]

6. The idea of equality is the heart and soul of the Indian Constitution. India achieved independence on the 15th of August, 1947 after a long political struggle in which a number of patriots laid down their lives and countless suffered to secure self-government and to throw off the foreign yoke. But self-government was not an end in itself. It was a means to an end. They struggled and suffered not merely to be ruled by their chosen representatives in the place of foreign rulers, but to achieve the basic human rights and freedom and to secure social, economic and political justice so as to build up a welfare State from which poverty, ignorance and disease may be banished and to lay the foundation of a strong and independent country which may command respect in the world.

7. A Constituent Assembly was formed to draw up a Constitution which was ultimately adopted on the 26th January, 1950. The aspirations of the people are reflected in the Preamble of the Constitution which reads thus:-

> *"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:*
>
> *JUSTICE, social, economic and political;*
>
> *LIBERTY of thought, expression, belief, faith and worship;*
>
> *EQUALITY of status and of opportunity;*
>
> *and to promote among them all*
>
> *FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;*
>
> *IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."*

8. The Preamble of our Constitution promises equality, which is explained in detail in Articles 14 and 15 resply as enshrined in Part III of the Constitution. Equality, as contemplated under our constitutional system, is 'among equal and similarly situated'. Equality in general cannot be universally applied and is subject

to the condition and restriction as spelt out in the Constitution itself. The Preamble to the Constitution referred to above does not grant any power but it gives the direction and purpose to the Constitution. It outlines the objective of the whole Constitution. The Preamble contains the fundamentals of the Constitution. It serves several important purposes, as for example: -

(1) It contains the enacting clause which brings the Constitution into force.

(2) It declares the great rights and freedoms which the People of India intended to secure to all its citizens.

(3) It declares the basic type of Government and polity which is sought to be established in the country.

(4) It throws light on the source of the Constitution, viz. the People of India.

9. Articles 14, 15 and 16 resply deal with the various facets of the right to equality. Article 14 provides for equality before law and prohibits the State from denying to any person, equality before law or equal protection of laws. Article 15 provides for prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth or any of them, but permits special provisions being made for women and children or for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Article 16 guarantees equality of opportunity in matters of public employment to the citizens of India.

10. These three Articles form part of the same Constitutional code of guarantees and, in the sense, supplement to each other. Article 14 on the one hand, and Articles 15 and 16 resply on the other, have frequently

been described as being the genesis and the species respectively.

11. I propose to look into the constitutional validity of the Constitution (103rd Amendment) Act, 2019 in the first instance, as if there is nothing like Articles 15(6) and 16(6) resply in the Constitution. It would be profitable to look into the various relevant provisions (Articles) of the Constitution of India:-

> "***14. Equality before law***.—*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*
>
> ***15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth***.—*(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*
> *(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—*
> *(a) access to shops, public restaurants, hotels and places of public entertainment; or*
> *(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.*
> *(3) Nothing in this article shall prevent the State from making any special provision for women and children.*
> *(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.*
> *(5) Nothing in this article or in sub-clause (g) of the clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.*

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—
(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.
Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

***16. Equality of opportunity in matters of public employment**.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
(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.

(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.

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

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

x *x* *x* *x*

***21-A. Right to education**.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.*

x *x* *x* *x*

***25. Freedom of conscience and free profession, practice and propagation of religion**.—(1) Subject to public order, morality and health and to the other provision of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.*

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to Hindu religious institutions shall be construed accordingly.

***26. Freedom to manage religious affairs**.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—*

(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law.

x *x* *x* *x*

***29. Protection of interests of minorities**.—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*

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

***30. Right of minorities to establish and administer educational institutions**.—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

x *x* *x* *x*

> ***46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections****.—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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."*

12. The Constitution of India was framed by the Constituent Assembly after long drawn debates. Many of the Members of the Constituent Assembly themselves were actively and directly involved in the struggle for freedom. They, therefore, brought in framing the Constitution their experience of movement for liberation from the colonial rule. The Constitution was framed at a time when the memories of violation of human and fundamental rights at the hands of colonial rulers were fresh. So was fresh in the mind of the people the Nazi excesses during the time of Second World War. Declaration of separate chapter of fundamental rights with special focus on equality and personal liberties was thus inevitable. The framers of the Constitution, thus, dedicated a whole chapter (Part III) for fundamental rights. While doing so, important provisions were made in Part IV pertaining to the Directive Principles of State Policy, making detailed provisions laying down a road-map for bringing about a peaceful social revolution through Constitutional means and for the Governments to bear in mind those principles while framing future governmental policies. Article 37 contained in Part IV provides that the provisions contained in that Part shall not be enforceable by any court, but it makes it clear that the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws. Interplay of fundamental rights and directive principles of state policy has occupied

the minds of this Court on several occasions.

13. Article 15, as originally framed, did not contain clauses (4) and (5). Clause (4) in fact was introduced through the First Constitution Amendment in the year 1951. This was necessitated due to a judicial pronouncement of the Supreme Court in the case of ***The State of Madras v. Sm. Champakam Dorairajan & Another***, AIR 1951 SC 226 : (1951) SCR 525.

14. In Article 15, there are two words of very wide import – (1) "discrimination" and (2) "only". The expression "discriminate against", according to the Oxford Dictionary means, "to make an adverse distinction with regard to; to distinguish favourably from others". The true purport of the word "discrimination" has been very well explained by this Court in a Constitution Bench decision of five Judges in ***Kathi Raning Rawat v. State of Saurashtra***, reported in AIR 1952 SC 123: -

> *"**7.** All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different…."*

15. The principle has been consistently followed in subsequent decisions. Reference may be made, in this respect, in the case of ***Ashutosh Gupta v. State of Rajasthan***, AIR 2002 SC 1533.

16. A very important decision on the significance of the word "only" (as used in Article 29(2) also relating to fundamental rights) is that of the Full Bench in ***Srimathi Champakam Dorairajan and Another v. The State of Madras***, reported in AIR 1951 Madras 120. In that case the Madras Government, finding that there were not sufficient vacancies for admission of students to Medical College, issued a circular making, what it considered, an equitable division of the vacancies available among the various classes of citizens of the State. Out of every 14 seats, 6 were to be filled by non-Brahmin Hindus, 2 to backward Hindu communities, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims. The circular was challenged by various persons on the ground that it decided admission to persons only on the ground of religion or caste. It was sought to support the circular on the ground that the denial was not only on the ground of religion or caste, but as a matter of public policy based upon the provisions of Article 46 together with the paucity of the vacancies. It was held that much significance could not be attached to the word 'only' because even reading the Article without that word, the result would be the same. It was further held that the circular was bad because it infringed the clear and unambiguous terms of Article 15(1) since it discriminated against citizens only on the ground of religion, race, caste, sex, place of birth or any of them. The judgment states:-

> *"**15**....."Discriminate against" means "make an adverse distinction with regard to"; "distinguish unfavourably from others" (Oxford Dictionary). What the article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste. Now what does the Communal G.O. purport to do? It says that a limited number of seats only are allotted to persons of a particular caste, namely Brahmins. The qualifications which would enable a*

candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a person of another caste or religion, say, Harijan or Muslim to secure admission….."

It was, therefore, held that the Communal G.O. was void.

17. This decision was upheld by the Supreme Court on appeal in ***The State of Madras v. Sm. Champakam Dorairajan & another*** (supra). Their Lordships say:-

*"**11.** It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, e.g. (a) they are Brahmins, (b) Brahmins have an allotment of only two seats out of 14 and (c) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmins are concerned but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom those reservations have been made. The classification in the Communal G.O. proceeds on the basis of religion, race and caste. In our view, the classification made in the Communal G.O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Art. 29(2)….."*

18. In view of the aforesaid, the Parliament intervened & introduced clause (4) to Article 15 which provided that if any action was taken by the State to make special provisions for the advancement of the communities specified therein, that could not be challenged on the ground that it contravened Article 15(1). In other words, a specific exception was made to the provisions of Article 15(1) in regard to the backward communities mentioned in Article 15(4). This amendment also shows how a progressive democratic legislature does not hesitate even to

amend the Constitution with a view to harmonise the fundamental rights of the individual citizen with the claims of social good.

19. Thus, the decisions of this Court in ***Champakam Dorairajan*** (supra) and ***Kathi Raning Rawat*** (supra) establish the proposition that, while classification is permissible, it cannot be based on any of the factors mentioned in the Articles 15 and 16 resply. So far as this proposition of law is concerned, it still holds good even after the pronouncement of this Court in the case of ***Indra Sawhney and Others v. Union of India and Others*** reported in 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

20. Article 16 of the Constitution guarantees equality of opportunity in matters of public employment to all the citizens. Article 16(1) provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (2) of Article 16 further amplifies this equality of opportunity in public employment, by providing that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Clause (4) of Article 16 reads thus:

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

21. Article 21 pertains to protection of life and personal liberty and provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This important guarantee, though seemingly plain, has been interpreted by this Court as to include variety of rights which would form part of right to life and personal liberty, without enjoyment of which the rights, like the right to life and personal liberty would be meaningless and nugatory. Right to education has been recognised as one of the facets of

Article 21 long before it was codified as one of the fundamental rights separately guaranteed under Article 21-A of the Constitution.

22. The Constitution of India was amended by the Eighty-sixth Amendment Act, 2002, to include the right to education as a fundamental right under Article 21-A providing that "the State shall provide free and compulsory education to all children of the age of six to fourteen yearsin such manner as the State may, by law, determine."

23. Article 29 guarantees protection of interests of minorities and reads as under:-

> *"**29. Protection of interests of minorities.—**(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall havethe right to conserve the same.*
>
> *(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."*

24. Article 30 pertains to the right of minorities to establish and administer educational institutions. Clause (1) thereof provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

25. Article 46 contained in Part IV 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

26. The Constitution of India places immense importance on the fundamental rights for which a separate chapter was dedicated while framing the Constitution itself. The fact that Article 32 guaranteeing the right to move the Supreme Court for appropriate proceedings for the enforcement of

rights conferred in Part III itself is contained in the fundamental rights and thus made a fundamental right, is a strong indication that such rights were considered sacrosanct. However, it has always been recognised while framing the Constitution as well as while interpreting the same that no right of a citizen can be absolute and every right would have reasonable restriction. Article 19, for example, while guaranteeing various individual freedoms to citizens contains various clauses limiting enjoyment of such rights under specified conditions. Likewise, though Article 14 in plain terms provides that the State shall not deny to any person equality before the law or the equal protection of the laws, since the earliest days of interpretation of the Constitution, it has been recognised that this does not imply that there shall be one law which must apply to every person and that every law framed must correspondingly cover every person. In legal terminology, it means though Article 14 prohibits class legislation, the same does not prevent reasonable classification. It is, of course, true that for the classification to be valid and to pass the test of reasonableness twin tests laid down by this Court, time and again, must be fulfilled. Such tests are that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

27. Article 14 guarantees equality in very wide terms and is worded in negative term preventing the State from denying any person equality before law or the equal protection of the laws within the territory of India. Article 15(1), on the other hand, prevents the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (2) of the Article further provides that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with

regard to access to shops, public restaurants, use of wells, tanks, bathing ghats, etc. of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. Article 16, in turn, pertains to equality of opportunity in matters of public employment. Clause (1) of Article 16, as already noted, guarantees equality of opportunity to all citizens in matters of employment or appointment to any office under the State. Clause (2) thereof, further amplifies that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of, any employment or office under the State.

28. Thus, Articles 14, 15 and 16 resply are all different facets of concept of equality. In different forms, such Articles guarantee equality of opportunity and equal treatment to all the citizens while specifically mandating that the State shall not discriminate against the citizens only on the grounds of religion, race, caste, sex, descent, place of birth or any of them. Like Article 14, neither Article 15(1) nor Article 16(1) prohibits reasonable classification. In other words, the clauses of Articles 15 and 16 respectively guaranteeing non-discrimination on the grounds only of religion, race, caste, sex, place of birth or equality of opportunity for all citizens in matters of public employment prohibit hostile discrimination, but not reasonable classification. As in Article 14, as well in Article 15(1), if it is demonstrated that special treatment is meted out to a class of citizens, not only on the ground of religion, race, caste, sex, place of birth or any of them, but due to some special reasons and circumstances, the enquiry would be, does such a classification stand the test of reasonableness and in the process, it would be the duty of the court to examine whether such classification fulfills the above noted twin conditions, namely, it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a

rational relation to the object sought to be achieved by the statute in question. (See :- ***Adam B. Chaki v. Government of India,*** Writ Petition (PIL) No. 20 of 2011 (Guj).)

29. In the case of ***Mohammad Shujat Ali and others v. Union of India and others,*** AIR 1974 SC 1631, a Constitution Bench of this Court in the context of concept of equality flowing from Articles 14 and 16 resply of the Constitution observed that Article 16 is an instance or incident of guarantee of equality enshrined in Article 14. It gives effect to the doctrine of equality in the spheres of public employment. The constitutional code of equality and equal opportunity, however, does not mean that the same laws must be applicable to all persons. It was held and observed as under:-

> *"**23.** Now we proceed to consider the challenge based on infraction of Articles 14 and 16 of the Constitution. Article 14 ensures to every person equality before law and equal protection of the laws and Article 16 lays down that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16 is only an instance or incident of the guarantee of equality enshrined in Article 14 : It gives effect to the doctrine of equality in the spheres of public employment. The concept of equal opportunity to be found in Article 16 permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension and gives expression to the ideal of equality of opportunity which is one of the great socio-economic objectives set out in the Preamble of the Constitution. The constitutional code of equality and equal opportunity, however, does not mean that the same laws must be applicable to all persons. It does not compel the State to run "all its laws in the channels of general legislation". It recognises that having regard to differences and disparities which exist among men and things, they cannot all be treated alike by the application of the same laws. "To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." Morey v. Doud, 354 U.S.*

457, p. 473. The Legislature must necessarily, if it is to be effective at all in solving the manifold problems which continually come before it, enact special legislation directed towards specific ends and limited in its application to special classes of persons or things. "Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it." (1889) 134 US 594.

24. *We thus arrive at the point at which the demand for equality confronts the right to classify. For it is the classification which determines the range of persons affected by the special burden or benefit of a law which does not apply to all persons. This brings out a paradox. The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And, as pointed out by Justice Brewer, "the very idea of classification is that of inequality". The court has tackled this paradox over the years and in doing so, it has neither abandoned the demand for equality nor denied the legislative right to classify. It has adopted a middle course of realistic reconciliation. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. This doctrine recognises that the legislature may classify for the purpose of legislation but requires that the classification must be reasonable. It should ensure that persons or things similarly situated are all similarly treated. The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly situated. "The Equal Protection of the Laws", 37 California Law Review, 341.*

25. *<u>But the question is : what does this ambiguous and crucial phrase "similarly situated" mean? Where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law</u>. A reasonable classification is one which includes all persons or things similarly situated with respect to the purpose of the law. There should be no discrimination between one person or thing and another, if as regards the subject-matter of the legislation their position is substantially the same. This is sometimes epigrammatically described by saying that what the constitutional code of equality and equal opportunity requires is that among equals, the law should be equal and that like should be treated alike. <u>But the basic principle</u>*

underlying the doctrine is that the legislature should have the right to classify and imposed special burdens upon or grant special benefits to persons or things grouped together under the classification, so long as the classification is of persons or things similarly situated with respect to the purpose of the legislation, so that all persons or things similarly situated are treated alike by law. The test which has been evolved for this purpose is — and this test has been consistently applied by this Court in all decided cases since the commencement of the Constitution — that the classification must be founded on an intelligible differentia which distinguishes certain persons or things that are grouped together from others and that differentia must have a rational relation to the object sought to be achieved by the legislation." [Emphasis supplied]

30. While doing so, a note of caution was sounded that the fundamental guarantee is of equal protection of the laws and the doctrine of classification is only a subsidiary rule evolved by the courts to give a practical content to that guarantee by accommodating it with the practical needs of the society and it should not be allowed to submerge and drown the precious guarantee of equality.

31. In the case of ***State of Kerala and Another v. N.M. Thomas and Others,*** (1976) 2 SCC 310, Mathew, J. observed that Articles 16(1) and 16(2) resply of the Constitution do not prohibit prescription of a reasonable classification for appointment or for promotion. Any provision as to qualification for employment or appointment to an office reasonably fixed and applicable to all would be consistent with the doctrine of equality of opportunity under Article 16(1). It was observed that classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law.

32. In the case of ***Indra Sawhney*** (supra), B.P. Jeevan Reddy, J. in his majority opinion, observed in para 733 that Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification so does Article 16(1).

33. In a judgment of the Constitution Bench of this Court, in the case of ***E.P.***

Royappa v. State of Tamil Nadu and Another, AIR 1974 SC 555, Bhagwati, J. in the context of co-relation between Article 14 and Article l6 of the Constitution observed as under: -

> *"**85.** The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground it is really in substance and effect merely an aspect of the second ground based on violation of Arts.14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality enshrined inArticle 14. In other words, Art. 14 is the genus while Art. 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? Itis a founding faith, to use the words of Bose, J., "a way of life", and itmust not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action mustbe based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant*

considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16."

34. Similar observations were made also in the context of co-relation between Articles 14 and 16 resply in the case of ***Govt. of Andhra Pradesh v. P.B. Vijaykumar and another,*** AIR 1995 SC 1648. It was observed thus:

*"**6.** This argument ignores Article 15(3). The interrelation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Art. 15 deals with every kind of State action in relation to the citizens of this country. Every sphere of activity of the State is controlled by Article 15(1). There is, therefore, no reason to exclude from the ambit of Article 15(1) employment under the State. At the same time Article 15(3) permits special provisions for women. Both Arts. 15(1) and 15(3) go together. In addition to Art. 15(1) Art. 16(1), however, places certain additional prohibitions in respect of a specific area of State activity viz. employment under the State. These are in addition to the grounds of prohibition enumerated under Article 15(1) which are also included under Article 16(2). There are, however, certain specific provisions in connection with employment under the State under Article 16. Article 16(3) permits the State to prescribe a requirement of residence within the State or Union Territory by parliamentary legislation; while Article 16(4) permits reservation of posts in favour of backward classes. Article 16(5) permits a law which may require a person to profess a particular religion or may require him to belong to a particular religious denomination, if he is the incumbent of an office in connection with the affairs of the religious or denominational institution. Therefore, the prohibition against discrimination of the grounds set out in Article 16(2) in respect of any employment or office under the State is qualified by clauses 3,4 and 5 of Article*

16. Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 ─ the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State."

35. In the case of ***State of Kerala v. N.M. Thomas*** (supra), A.N. Ray, CJ also advanced this theory, observing that there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification. It was observed as under:-

*"**27.** There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection (State of Mysore v. V. P. Narasing Rao (1968) 1 SCR 407 : AIR 1968 SC 349 : (1968) 2 LLJ 120).*

***28.** This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).*

x x x x

***30.** Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class.*

The Roadside Station Masters and Guards are recruited separately, trained separately and have separate avenues of promotion. The Station Masters claimed equality of opportunity for promotion vis-a-vis the guards on the ground that they were entitled to equality of opportunity. It was said the concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated. The Roadside Station Masters and Guards were recruited separately. Therefore, the two form distinct and separate classes and there is no scope for predicating equality or inequality of opportunity in matters of promotion. (See All India Station Masters and Assistant Station Masters' Association v. General Manager, Central Railway (1960) 2 SCR 311 : AIR 1960 SC 384). The present case is not to create separate avenues of promotion for these persons.

31. *The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."*

36. Education, by now, which is well recognised through judicial pronouncements and outside, is perhaps the most fundamental requirement of

development. Without access to quality basic education, it would be impossible in the modern world to expect any individual, race, class or community to make any real advancement. While recognising the role of education to achieve development and to provide equality of opportunity, the Courts have also recognised that the State has an important role, in fact an obligation, to provide quality basic education to all the citizens. Long before the Constitution was amended by introduction of Article 21-A, providing for free and compulsory education to children between age of 6 and 14 years, this Court had been expanding this principle through purposive interpretation and meaningful construction of guarantee to life and liberty enshrined under Article 21 of the Constitution. In case of ***Mohini Jain (Miss) v. State of Karnataka and Others,*** (1992) 3 SCC 666, this Court observed as under: -

> *"**9.** The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.*
>
> *x x x x*
>
> ***12**. "Right to life" is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.*

13. *The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.*

14. *The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. Increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments. The Karnataka State has permitted the opening of several new medical colleges under various private bodies and organisations. These institutions are charging capitation fee as a consideration for admission. Capitation fee is nothing but a price for selling education. The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage. As far back as December 1980 the Indian Medical Association in its 56th All India Medical Conference held at Cuttack on December 28-30, 1980 passed the following resolutions:*

"The 56th All India Medical Conference views with great concern the attitude of State Governments particularly the State Government of Karnataka in permitting the opening of new medical colleges under various bodies and organisations in utter disregard to the recommendations of Medical Council of India and urges upon the authorities and the Government of Karnataka not to permit the opening of any new medical college, by private bodies.

It further condemns the policy of admission on the basis of capitation fees. This commercialisation of medical education endangers the lowering of standards of medical education and encourages bad practice."" [Emphasis supplied]

37. In the case of ***Unni Krishnan, J.P. and Others v. State of Andhra Pradesh and Others,*** (1993) 1 SCC 645, the decision in the case of ***Mohini Jain***

(supra) came up for consideration before a larger Bench of this Court. While not approving the judgment in toto, the above concept was further expanded and refined. It was observed as under: -

> *"**168.** In Brown v. Board of Education [98 L Ed 873 : 347 US 483 (1954)] Earl Warren, C. J., speaking for the U.S. Supreme Court emphasised the right to education in the following words:*
>
> > *"Today, education is perhaps the most important function of State and local governments .... It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."*
>
> ***169.** In Wisconsin v. Yoder [32 L Ed 2d 15 : 406 US 205 (1971)] the court recognised that:*
>
> > *"Providing public schools ranks at the very apex of the function of a State."*
>
> *The said fact has also been affirmed by eminent educationists of modern India like Dr Radhakrishnan, J. P. Naik, Dr Kothari and others.*
>
> ***170.** It is argued by some of the counsel for the petitioners that Article 21 is negative in character and that it merely declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Since the State is not depriving the respondents'-students of their right to education, Article 21 is not attracted, it is submitted. If and when the State makes a law taking away the right to education, would Article 21 be attracted, according to them. This argument, in our opinion, is really born of confusion; at any rate, it is designed to confuse the issue. The first question is whether the right to life guaranteed by Article 21 does take in the right to education or not. It is then that the second question arises whether the State is taking away that right. The mere fact that the State is not taking away the right as at present does not mean that right to education is not included within the right to life. The content of the right is not determined by perception of threat. The content of right to life is not to be*

determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law.

171. *In the above state of law, it would not be correct to contend that Mohini Jain [Mohini Jain v. State of Karnataka, (1992) 3 SCC 666] was wrong insofar as it declared that "the right to education flows directly from right to life". But the question is what is the content of this right? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words, whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs? Mohini Jain [Mohini Jain v. State of Karnataka, (1992) 3 SCC 666] seems to say, yes. With respect, we cannot agree with such a broad proposition. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it. Article 41 says that the "State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want". Article 45 says that "the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". Article 46 commands 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation". Education means knowledge — and "knowledge itself is power". As rightly observed by John Adams, "the preservation of means of knowledge among the lowest ranks is of more importance to the public than all the property of all the rich men in the country". (Dissertation on Canon and Feudal Law, 1765) It is this concern which seems to underlie Article 46. It is the tyrants and bad rulers who are afraid of spread of education and knowledge among the deprived classes. Witness Hitler railing against universal education. He said: "Universal education is the*

most corroding and disintegrating poison that liberalism has ever invented for its own destruction." (Rauschning, The Voice of Destruction: Hitler speaks.) A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. The three Articles 45, 46 and 41 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development. We may deal with both these limbs separately.

172. *Right to free education for all children until they complete the age of fourteen years (Art.45). It is noteworthy that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to "endeavour to provide" the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years — more than four times the period stipulated in Article 45 — convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not speak of the "limits of its economic capacity and development" as does Article 41, which inter alia speaks of right to education. What has actually happened is — more money is spent and more attention is directed to higher education than to — and at the cost of — primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age.) Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the government — we are only emphasising the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question. This inversion of*

priorities has been commented upon adversely by both the educationists and economists.

173. *Gunnar Myrdal, the noted economist and sociologist, a recognised authority on South Asia, in his book 'Asian Drama' (Abridged Edition ─ published in 1972) makes these perceptive observations at page 335:*

> *"But there is another and more valid criticism to make. Although the declared purpose was to give priority to the increase of elementary schooling in order to raise the rate of literacy in the population, what has actually happened is that secondary schooling has been rising much faster and tertiary schooling has increased still more rapidly. There is a fairly general tendency for planned targets of increased primary schooling not to be reached, whereas targets are over-reached, sometimes substantially, as regards increases in secondary and, particularly, tertiary schooling. This has all happened in spite of the fact that secondary schooling seems to be three to five times more expensive than primary schooling, and schooling at the tertiary level five to seven times more expensive than at the secondary level.*
>
> *What we see functioning here is the distortion of development from planned targets under the influence of the pressure from parents and pupils in the upper strata who everywhere are politically powerful. Even more remarkable is the fact that this tendency to distortion from the point of view of the planning objectives is more accentuated in the poorest countries, Pakistan, India, Burma and Indonesia, which started out with far fewer children in primary schools and which should therefore have the strongest reasons to carry out the programme of giving primary schooling the highest priority. It is generally the poorest countries that are spending least, even relatively, on primary education, and that are permitting the largest distortions from the planned targets in favour of secondary and tertiary education."*

174. *In his other book Challenge of World Poverty (published in 1970, Chapter 6 'Education') he discusses elaborately the reasons for and the consequences of neglect of basic education in this country. He quotes J.P. Naik, (the renowned educationist, whose Report of the Education Commission, 1966 is still considered to be the most authoritative study of the education scene in India)*

as saying "Educational development ... is benefitting the 'haves' more than the 'have nots'. This is a negation of social justice and 'planning' proper" — and our Constitution speaks repeatedly of social justice [Preamble and Article 38(1)]. As late as 1985, the Ministry of Education had this to say in para 3.74 of its publication Challenge of Education — A Policy Perspective. It is stated there:

> *"3.74. Considering the constitutional imperative regarding the universalisation of elementary education it was to be expected that the share of this sector would be protected from attribution (sic). Facts, however, point in the opposite direction. From a share of 56 per cent in the First Plan, it declined to 35 per cent in the Second Plan, to 34 per cent in the Third Plan, to 30 per cent in the Fourth Plan. It started going up again only in the Fifth Plan, when it was at the level of 32 per cent, increasing in Sixth Plan to 36 per cent, still 20 per cent below the First Plan level. On the other hand, between the First and the Sixth Five Year Plans, the share of university education went up from 9 per cent to 16 per cent."*

175. *Be that as it may, we must say that at least now the State should honour the command of Article 45. It must be made a reality — at least now. Indeed, the National Education Policy 1986 says that the promise of Article 45 will be redeemed before the end of this century. Be that as it may, we hold that a child (citizen) has a fundamental right to free education up to the age of 14 years."*

38. The decision of this Court in the case of ***Unni Krishnan*** (supra) was later on overruled in a larger Bench decision in the case of ***T.M.A. Pai Foundation and Others v. State of Karnataka and Others,*** (2002) 8 SCC 481, but on a different point.

39. In the case of ***Society for Unaided Private Schools of Rajasthan v. Union of India and Another,*** (2012) 6 SCC 1, this Court considered the validity of the Right of Children to Free and Compulsory Education Act, 2009 insofar as it made the provisions therein applicable to unaided non-minority schools. S.H. Kapadia, CJ, speaking for the majority, observed as under:

*"**27.** At the outset, it may be stated, that fundamental rights have two aspects—they act as fetters on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity. Right to live in Article 21 covers access to education. But unaffordability defeats that access. It defeats the State's endeavour to provide free and compulsory education for all children of the specified age. To provide for free and compulsory education in Article 45 is not the same thing as to provide free and compulsory education. The word "for" in Article 45 is a preposition. The word "education" was read into Article 21 by the judgments of this Court. However, Article 21 merely declared "education" to fall within the contours of right to live.*

***28.** To provide for right to access education, Article 21-A was enacted to give effect to Article 45 of the Constitution. Under Article 21-A, right is given to the State to provide by law "free and compulsory education". Article 21-A contemplates making of a law by the State. Thus, Article 21-A contemplates right to education flowing from the law to be made which is the 2009 Act, which is child-centric and not institution-centric. Thus, as stated, Article 21-A provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is thus enacted in terms of Article 21-A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education."*

40. I am conscious of the fact that the economically weaker sections of the citizens are not declared as socially and economically backward classes (SEBCs) for the purpose of Article 15(4) of the Constitution. However, for the purpose of judging the validity of the impugned amendment, this, in my view, would not be of any consequence. One should take notice of the fact that Article 16(4) of the Constitution refers to backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State. In such a case, it is provided that nothing in that Article shall prevent the State from

making any provision for the reservation of appointments or posts in favour of such backward classes of the citizens. On the other hand, Article 15(4) refers to socially and educationally backward classes of citizens along with the Scheduled Castes or the Scheduled Tribes and provides that nothing in that Article or Article 29(2) shall prevent the State from making any special provision for the advancement of such classes. Article 16(4) pertains to backward class of citizens for the purpose of making reservation in public employment. Article 15(4), on the other hand, refers to socially and educationally backward classes for the purpose of making any special provision by the State for the advancement of such classes. While affirmative action implied in Article 16(4) is restricted to reservation in employment, Article 15(4) has a wider canvass and reach by virtue of the pronounced purpose of making special provision.

41. Such a distinction between the two provisions was noticed by this Court in the case of ***Indra Sawhney*** (supra) wherein Reddy, J. speaking for the majority, observed as under:

> *"(c) Whether the backwardness in Article 16(4) should be both social and educational?*
>
> ***786**. The other aspect to be considered is whether the backwardness contemplated in Article 16(4) is social backwardness or educational backwardness or whether it is both social and educational backwardness. Since the decision in Balaji (M.R. Balaji v. State of Mysore, 1963 Supp 1 SCR 439: AIR 1963 SC 649) it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4). Though Article 15(4) came into existence later in 1951 and Article 16(4) does not contain the qualifying words "socially and educationally" preceding the words "backward class of citizens" the same meaning came to be attached to them. Indeed, it was stated in Janki Prasad Parimoo (Janki Prasad Parimoo v. State of J & K, (1973) 1 SCC 420: 1973 SCC (L&S) 217: (1973) 3 SCR 236) (Palekar, J speaking for the Constitution Bench) that:*

"Article 15(4) speaks about 'socially and educationally backward classes of citizens' while Article 16(4) speaks only of 'any backward class citizens'. However, it is now settled that the expression 'backward class of citizens' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4)."

787. *It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does clause (4) of Article 15. It may be remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: "backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. Thus, SEBCs referred to in Article 340 is only one of the categories for whom Article 16(4) was enacted: Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that 'backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services — which may mean, at any*

level whatsoever — insisting upon educational backwardness may not be quite appropriate." (Emphasis supplied)

42. Despite such legal distinction drawn by this Court between the "backward classes" referred to in Article 16(4) and "socially and educationally backward classes" referred to in Article 15(4) of the Constitution, in the practice which has developed over a period of time, such distinction has been virtually obliterated. It is an undisputed position that the State has been categorising various classes and communities as socially and educationally backward classes (SEBCs) often referred to in popular term as the Other Backward Classes or OBCs. Such list is common for both the benefits envisaged under Article 16(4) of the Constitution as well as Article 15(4). In other words, it is this very list of SEBCs which is utilised by the State organs for the purpose of granting reservation in public employment in terms of Article 16(4) of the Constitution. This very classification of the SEBC status also qualifies the member of the community to reservation in education including professional courses which would flow from the provisions made in Article 15(4) of the Constitution.

43. Though previously Articles 15(4) and 16(4) resply were seen as exception of the equality enshrined in the Articles 15(1) and 16(1) respectively, this understanding of the constitutional provisions underwent a major change in the decision in ***N.M. Thomas*** (supra). Mathew J, observed as under:-

*"**78.** I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of scheduled castes and scheduled tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upto the point of making reservation."*

44. This change in the approach was noticed and amplified by this Court in the larger Bench judgment in the case of ***Indra Sawhney*** (supra). It was observed as under: -

> "***741.*** *In Balaji [M.R. Balaji v. State of Mysore,1963 Supp 1 SCR 439 : AIR 1963 SC 649] it was held — "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in Champakam [State of Madras v. Smt Champakam Dorairajan, 1951 SCR 525 : AIR 1951 SC 226], with a view to remove the defect pointed out by this court namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. Following Balaji [M.R. Balaji v. State of Mysore, 1963 Supp 1 SCR 439 : AIR 1963 SC 649] it was held by another Constitution Bench (by majority) in Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] — "further this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1)". Subba Rao, J, however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] , it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe setback from the majority decision in State of Kerala v. N.M. Thomas [(1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906]. Though the minority (H.R. Khanna and A.C. Gupta, JJ) stuck to the view that Article 16(4) is an exception, the majority (Ray, CJ, Mathew, Krishna Iyer and Fazal Ali, JJ) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg, J took a slightly different view which it is not necessary to mention here.) The said four learned Judges — whose views have been referred to in para 713 — held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in Thomas [(1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be*

necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1). The speech of Dr Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly — referred to in para 693 — shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft clause (3) was put in in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

742. *Regarding the view expressed in Balaji [M.R. Balaji v. State of Mysore, 1963 Supp 1 SCR 439 : AIR 1963 SC 649] and Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560], it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of clause (4) being an exception to clause (1) became untenable. It had to be accepted that clause (4) is an instance of classification inherent8 in clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect if clause (4) an exception to clause (2), if 'class' does not means 'caste'. Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit."*

45. In that context, this Court answered the question whether Article 16(4) is exhaustive of the very concept of reservation. It was held that though Article

16(4) is exhaustive for reservation in favour of backward classes and no further special treatment is permissible in their favour outside of Article 16(4), Article 16(4) itself is not exhaustive of the concept of reservation. It was held that Article 16(1) itself, of course, in very exceptional situations and not for all and sundry reasons permits reservations. The contention that Article 16(1) permits preferential treatment and not reservation was thus rejected.

46. According to the Constitutional scheme, the right to education forms part of the right to life under Article 21 and the right to education is incorporated separately and in clear terms as an independent fundamental right in the form of Article 21-A. That Article is couched in the language which is mandatory insofar as the State is obliged to provide free and compulsory education to all children of the age of 6 to 14 years. The matter of free and compulsory primary education has been perceived to be so important even at the time of drafting of the Constitution that Articles 45 and 46 resply were incorporated in Part IV of the Constitution to lay the principles fundamental in the governance of the country and they were made the duty of the State to apply those principles in making laws by virtue of Article 37. Now that right to education is not only declared as fundamental right of every child, but the State has been obliged to provide free and compulsory education, no authority which is the State within the definition contained in Article 12 could legitimately renege on the constitutional covenant. The phrase "free and compulsory education" in Article 21-A clearly makes it obligatory on the State to not only provide necessary funds and facilities for free, but also compulsory education. Thus, the State is under an obligation to apply the provisions contained in Articles 45 and 46 resply to provide childhood care and primary education and promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. (See : ***Adam B. Chaki*** (supra))

CONSTITUTIONAL VALIDITY OF CLAUSE (5) IN ARTICLE 15

47. The constitutional validity of clause (5) in Article 15 of the Constitution introduced by the Constitution (93rd Amendment) Act, 2005 was made the subject matter of challenge before this Court in ***Pramati Educational and Cultural Trust (Registered) and Others v. Union of India and Others***, (2014) 8 SCC 1.

48. The constitutional validity of clause (5) in Article 15 was essentially challenged on the ground that the same is violative of Article 19(1)(g) of the Constitution, inasmuch as it compels the private educational institutions to give up a share of the available seats to the candidates chosen by the State and such appropriation of seats would not be a regulatory measure and not a reasonable restriction on the right under Article 19(1)(g) of the Constitution within the meaning of Article 19(6) of the Constitution. It was further argued that clause (5) of Article 15 of the Constitution, as its very language, indicates would not apply to the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. It was argued that thus it violated Article 14 because the aided minority institutions and unaided minority institutions cannot be treated alike. It was also argued that clause (5) of Article 15 of the Constitution is discriminatory and violative of the equality clause in Article 14 of the Constitution, which is a basic feature of the Constitution.

49. On the other hand, while defending clause (5) of Article 15 of the Constitution, it was argued on behalf of the Union of India that clause (5) of Article 15 of the Constitution is only an enabling provision empowering the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including the private educational institutions. It was also argued that Article 15(5) is consistent with the socialistic goals set out in the

Preamble and the Directive Principles in Part IV and to ensure the march and progress of the weaker sections resulting in progress to socialistic democratic State establishing the egalitarian ethos/egalitarian equality which is the mandate of the Constitution and has also been recognised by this Court in the case of ***M. Nagaraj and Others v. Union of India and Others***, (2006) 8 SCC 212 : AIR 2007 SC 71. It was argued that this Court in ***M.R. Balaji and Others v. State of Mysore*** (1963) Supp 1 SCR 439, disagreed with the judgment in the ***State of Madras v. Sm. Champakam Dorairajan*** (supra) and upheld that Article 46 of the Constitution charges the State with promoting with special care the educational and economic interests of the weaker sections of the society. The underlying logic behind the judgment in ***M.R. Balaji*** (supra) has logically flown from the mandate of Article 15(4), Article 16(4), Article 38, Article 45 and Article 46 resply and that Article 15(5) is only a continuation of that process. Much emphasis was laid on the fact that when the elementary education has been made a fundamental right, in order to make that objective more meaningful, it was also necessary for the State to ensure that even in higher education, there must be affirmative equality by providing chances or opportunities to the socially and educationally backward classes.

50. The Constitution Bench, in ***Pramati Educational and Cultural Trust*** (supra), after due consideration of the rival contentions canvassed on either side and while upholding the validity of clause (5) of Article 15 of the Constitution, held as under:

> *"**29.** We may now examine whether the Ninety-third Amendment satisfies the width test. A plain reading of clause (5) of Article 15 would show that the power of a State to make a law can only be exercised where it is necessary for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and not for any other purpose. Thus, if a law is made by the State only to appease a class of citizen which is not socially or educationally backward or which is not a Scheduled Caste or Scheduled Tribe, such a law will be beyond the powers of*

the State under clause (5) of Article 15 of the Constitution. A plain reading of clause (5) of Article 15 of the Constitution will further show that such law has to be limited to making a special provision relating to admission to private educational institutions, whether aided or unaided, by the State. Hence, if the State makes a law which is not related to admission in educational institutions and relates to some other aspects affecting the autonomy and rights of private educational institutions as defined by this Court in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481], such a law would not be within the power of the State under clause (5) of Article 15 of the Constitution. In other words, power in clause (5) of Article 15 of the Constitution is a guided power to be exercised for the limited purposes stated in the clause and as and when a law is made by the State in purported exercise of the power under clause (5) of Article 15 of the Constitution, the Court will have to examine and find out whether it is for the purposes of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and whether the law is confined to admission of such socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to private educational institutions, whether aided or unaided, and if the Court finds that the power has not been exercised for the purposes mentioned in clause (5) of Article 15 of the Constitution, the Court will have to declare the law as ultra vires Article 19(1)(g) of the Constitution. In our opinion, therefore, the width of the power vested on the State under clause (5) of Article 15 of the Constitution by the constitutional amendment is not such as to destroy the right under Article 19(1)(g) of the Constitution.

30. *We may now examine the contention of Mr Nariman that clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The distinction between a private aided educational institution and a private unaided educational institution is that private educational institutions receive aid from the State, whereas private unaided educational institutions do not receive aid from the State. As and when a law is made by the State under clause (5) of Article 15 of the Constitution, such a law would have to be examined whether it has taken into account the fact that private unaided educational institutions are not aided by the State and has made provisions in the*

law to ensure that private unaided educational institutions are compensated for the admissions made in such private unaided educational institutions from amongst socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. In our view, therefore, a law made under clause (5) of Article 15 of the Constitution by the State on the ground that it treats private aided educational institutions and private unaided educational institutions alike is not immune from a challenge under Article 14 of the Constitution. Clause (5) of Article 15 of the Constitution only states that nothing in Article 15 or Article 19(1)(g) will prevent the State to make a special provision, by law, for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) of Article 15 of the Constitution does not say that such a law will not comply with the other requirements of equality as provided in Article 14 of the Constitution. Hence, we do not find any merit in the submission of the Mr Nariman that clause (5) of Article 15 of the Constitution that insofar as it treats unaided private educational institutions and aided private educational institutions alike it is violative of Article 14 of the Constitution.

31. *We may now deal with the contention of Mr Divan that clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution as it excludes from its purview the minority institutions referred to in clause (1) of Article 30 of the Constitution and the contention of Mr Nariman that clause (5) of Article 15 excludes both unaided minority institutions and aided minority institutions alike and is thus violative of Article 14 of the Constitution.*

x *x* *x* *x*

34. *Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational*

institutions referred to in clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority. As has been held by the Constitution Bench of this Court in Ashoka Kumar Thakur v. Union of India [(2008) 6 SCC 1], the minority educational institutions, by themselves, are a separate class and their rights are protected under Article 30 of the Constitution, and, therefore, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution.

35. *We may now consider the contention of Mr Divan that clause (5) of Article 15 of the Constitution is violative of secularism insofar as it excludes religious minority institutions referred to in Article 30(1) of the Constitution from the purview of clause (5) of Article 15 of the Constitution. In M. Ismail Faruqui v. Union of India [(1994) 6 SCC 360], this Court has held that: (SCC p. 403, para 37)*

"37. ... The Preamble of the Constitution read in particular with Articles 15 to 28 emphasises this aspect and indicates that ... the concept of secularism embodied in the constitutional scheme [is] a creed adopted by the Indian people…."

Hence, secularism is no doubt a basic feature of the Constitution, but we fail to appreciate how clause (5) of Article 15 of the Constitution which excludes religious minority institutions in clause (1) of Article 30 of the Constitution is in any way violative of the concept of secularism. On the other hand, this Court has held in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481)] that the essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs and Articles 29 and 30 seek to preserve such differences and at the same time unite the people of India to form one strong nation (see para 161 of the majority judgment of Kirpal, C.J., in T.M.A. Pai Foundation (T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481) at p. 587 of SCC). In our considered opinion, therefore, by excluding the minority institutions referred to in clause (1) of Article 30 of the Constitution, the secular character of India is maintained and not destroyed.

x *x* *x* *x*

37. Educational institutions in India such as Kendriya Vidyalayas, Indian Institute of Technology, All India Institute of Medical Sciences and Government Medical Colleges admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes and yet these government institutions have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Moreover, the contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes in private educational institutions is contrary to the Preamble of the Constitution which promises to secure to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation. We, therefore, find no merit in the submission of Mr Nariman that clause (5) of Article 15 of the Constitution violates the right under Article 21 of the Constitution.

38. We accordingly hold that none of the rights under Articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in Ashoka Kumar Thakur v. Union of India [(2008) 6 SCC 1] that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid.*"*

[Emphasis supplied]

51. Thus, if Article 15(5) of the Constitution has been found to be consistent with the socialistic goals set out in the Preamble and the Directive Principles in Part IV and to ensure the march and progress of the weaker sections resulting in progress to Socialistic Democratic State establishing the egalitarian ethos/egalitarian equality which is the mandate of the Constitution and has also been approved in ***M. Nagaraj*** (supra), then clause (6) in Article 15 of the

Constitution could also be said to be consistent with the socialistic goals set out in the Preamble and the Directive Principles in Part IV. Article 15(6), brought in by way of the Constitution (103rd Amendment) Act, 2019, which provides for identical reservation for the economically weaker sections of the citizens in private unaided educational institutions. The Constitution Bench in ***Pramati Educational and Cultural Trust*** (supra) was not impressed with the challenge to Article 15(5) on the ground of breach of basic structure so far as it relates to the unaided private educational institutions.

52. Taking the aforesaid view of the matter, the Constitution Bench of this Court, in the case of ***Pramati Educational and Cultural Trust*** (supra), held that the Constitution (93rd Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution could not be said to have altered the basic structure or framework of the Constitution and is constitutionally valid.

53. In view of the aforesaid, Article 15(6), which is the subject matter of challenge and which provides for reservation for the "EWS other than the SC, ST and OBC-NCL" in private unaided educational institutions, cannot be said to be altering the basic structure. It is constitutionally valid. However, the question whether the exclusion clause is violative of the equality code, particularly the principle of non-discrimination and non-exclusion which forms inextricable part of the basic structure of the Constitution, shall be answered by me a little later.

54. Let us remember the observations made by Mathew, J. in the case of ***N.M. Thomas*** (supra), as under:

> *"**73.** There is no reason why this Court should not also require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims."*
>
> (Emphasis supplied)

55. It has been held by this Court in the case of ***Dalmia Cement (Bharat) Ltd. and Another v. Union of India and Others***, (1996) 10 SCC 104, that with a view to establish an egalitarian social order, the trinity, the Preamble, the Fundamental Rights in Part III and the Directive Principles of State Policy in Part IV of the Constitution delineated the social economic justice. The word "justice" envisioned in the Preamble is used in a broad spectrum to harmonise the individual right with the general welfare of the society. The Constitution is the supreme law. The purpose of law is realization of justice whose content and scope vary depending on the prevailing social environment. Every social and economic change causes change in the law. In a democracy governed by the rule of law, it is not possible to change the legal basis of social and economic life of the community without bringing about any corresponding change in the law. In ***Dalmia Cement (Bharat) Ltd.*** (supra), this Court further observed that social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor, etc. from the handicaps, penury, to ward them off from distress and to make their lives livable for the greater good of the society at large. Therefore, social and economic justice in the context of our Indian Constitution must, be understood in a comprehensive sense to remove every inequality and to provide equal opportunity to all citizens in social as well as economic activities and in every part of life. Economic justice means abolition of those economic conditions which ultimately result in the inequality of economic values between men leading towards backwardness.

56. In the case on hand, it was vociferously argued that the individuals belonging to the economical weaker sections may not form a class and they may be weaker as individual only. Secondly, their weakness may not be the result of the past social and educational backwardness or discrimination. The basis of such argument is the observation of Sawant, J. in ***Indra Sawhney*** (supra). All the learned counsel while criticising the impugned amendment kept reminding this Court time and again that the Constitution has never recognised economic

criteria as a mode of reservation. Reservation in employment, etc. is only meant for the socially oppressed class. Economically weaker sections of the citizens may be financially handicapped or poor but still socially, they can be said to be much advanced and cannot be compared with the socially oppressed class like the SCs/STs. Thus, the reservation for the weaker sections of the citizens has destroyed or rather abridged the basic structure of the Constitution. I shall deal with this argument of abridgement of the basic structure a little later. But, I would definitely like to say something as regards the economic criteria for the purpose of reservation.

57. In this country with a population of around 1.41 billion, the economic backwardness is not confined only to those who are covered by Article 15(4) or Article 16(4) of the Constitution. In a country where only a small percentage of the population is above the poverty line, to deny opportunities of higher education (which secures employment) and employment is to deny to those who are qualified and deserving what is or at least should be their due.

58. When the 42nd Constitutional Amendment was on the anvil, there was suggestion of inclusion of "right to work" which carries with it the natural corollary of assured employment as a fundamental right. This, understandably, could not be done in a political system which is based on mixed economy. The natural effect of reservation is to close the door of betterment or even employment to even a portion of economically weak section of community. This all the more emphasises the urgent necessity of eliminating or at least substantially reducing the causes which have contributed to the creation of socially and educationally backward section of the community, thus, creating a situation when the need of reservation would be no more. Then alone the promise of equality for all would become a reality. And, it is to be remembered that right of equality is the "Cornerstone of the Constitution" (per Khanna, J.). Chandrachud, J. says: "it is a right which more than any other is a basic postulate of our Constitution". Mathew,

J. describes it as the "most fundamental postulate of republicanism". [See : ***Padmraj Samarendra v. the State of Bihar***, Patna High Court, Special Bench, 1978 SCC OnLine Pat 64 : 1979 PLJR 258 : AIR 1979 Pat 266 at page 267]

59. In the aforesaid context, it would further be useful again to extract the observation of Iyer, J., in ***N. M. Thomas*** (supra) who concurring with A. N. Ray, CJ, observed:

> *"**149**. ....no caste, however seemingly backward, or claiming to be derelict, can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens. To them the answer is that, save in rare cases of 'chill penury repressing their noble rage', equality is equality — nothing less and nothing else. The heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers. The constitutional dharma, however, is not an unending deification of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exercising of the social evil and gradual withdrawal of artificial crutches. Here the Court has to be objective, resisting mawkish politics….."*

60. Also, the note of caution sounded by this Court in ***the State of Jammu & Kashmir v. Triloki Nath Khosa and others***, AIR 1974 SC 1, reads as follows:

> *"**56.**.....let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: what after all is the operational residue of equality and equal opportunity?"*

61. In ***Ram Singh and Others v. Union of India***, (2015) 4 SCC 697, this Court, while considering a challenge to the notification published in the Gazette of India dated 04.03.2014 by which the Jat Community came to be included in the Central List of Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur districts of Rajasthan, Uttar Pradesh and Uttarakhand, observed very

emphatically as under:-

> *"**54.** Past decisions of this Court in M.R. Balaji v. State of Mysore [AIR 1963 SC 649 : 1963 Supp (1) SCR 439] and Janki Prasad Parimoo v. State of J&K [(1973) 1 SCC 420 : 1973 SCC (L&S) 217] had conflated the two expressions used in Articles 15(4) and 16(4) and read them synonymously. It is in Indra Sawhney case [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] that this Court held that the terms "backward class" and "socially and educationally backward classes" are not equivalent and further that in Article 16(4) the backwardness contemplated is mainly social. The above interpretation of backwardness in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] would be binding on numerically smaller Benches. We may, therefore, understand a social class as an identifiable section of society which may be internally homogeneous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lay the foundation for affirmative action by the State to reach out to the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in National Legal Services Authority v. Union of India [(2014) 5 SCC 438] is too significant a development to be ignored. In fact it is a pathfinder, if not a path-breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice*

would certainly result in under protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice."

[Emphasis supplied]

62. In ***State of Kerala v. R. Jacob Mathew and others***, AIR 1964 Kerala 316, Chief Justice M.S. Menon observed as follows:

*"**9.** In these regions of human life and values the clear-cut distinctions of cause and effect merge into each other. Social backwardness contributes to educational backwardness; educational backwardness perpetuates social backwardness; and both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition…."*

[Emphasis supplied]

63. In ***M.R. Balaji*** (supra), Gajendrakadkar J. said that:

".....Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward…

x *x* *x* *x*

.....However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty....."

[Emphasis supplied]

ECONOMIC CRITERIA FOR THE AFFIRMATIVE ACTION UNDER THE CONSTITUTION

64. What is so principally, so fundamentally wrong in singling out an economic criterion for reservation? Is it that they do not belong to a homogenous

group? Is it cast in stone that they (beneficiaries of reservation) should belong to homogenous group? Why cannot economic criterion be a ground for the State's affirmative action?

65. The aforesaid are the few questions which were put by this Bench to the learned counsel appearing for the respective petitioners. One common reply to the aforesaid questions was that the reservation is only meant for the persons falling within Article 15(4) and Article 16(4) of the Constitution and that there are other affirmative actions which can address the problem of economy, but not necessarily reservation.

66. Economic criteria can be a relevant factor for affirmative action under the Constitution. In ***N.M. Thomas*** (supra), the constitutional validity of Rule 13AA giving further exemption of two years to the members belonging to the Scheduled Tribes and Scheduled Castes in the service from passing the tests referred to in Rule 13 or Rule 13A, was questioned. The High Court struck down the rule. Allowing the State appeal, this Court held that:

> *"**67.** Today, the political theory which acknowledges the obligation of Government under Part IV of the Constitution to provide jobs, medical care, old age pension, etc., extends to human rights and imposes an affirmative obligation to promote equality and liberty.* ***The force of the idea of a State with obligation to help the weaker sections of its members seems to have increasing influence in constitutional law.*** *The idea finds expression in a number of cases in America involving social discrimination and also in the decisions requiring the State to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc.* ***Today, the sense that Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in constitutional law.*** *While special concessions for the underprivileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality ; rather the equality clause has been held to*

require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances. [See "Developments—Equal Protection", 82 Harv L R 1165]

68. *The idea of compensatory State action to make people who are really unequal in their wealth, education or social environment, equal, in specified areas, was developed by the Supreme Court of the United States. Rousseau has said :*

It is precisely because the force of circumstances tends to destroy equality that force of legislation must always tend to maintain it. [Contract Social ii, 11.]

69. *In Griffin v. Illinois [351 US 12.] an indigent defendant was unable to take advantage of the one appeal of right granted by Illinois law because he could not afford to buy the necessary transcript. Such transcripts were made available to all defendants on payment of a similar fee ; but in practice only non-indigents were able to purchase the transcript and take the appeal. The Court said that*

there can be no equal justice where the kind of trial a man gets depends on the amount of money he has

and held that the Illinois procedure violated the equal protection clause.

The State did not have to make appellate review available at all; but if it did, it could not do so in a way ***which operated to deny access to review to defendants solely because of their indigency****. A similar theory underlies the requirement that counsel be provided for indigents on appeal. In Douglas v. California [372 US 353] the case involved the California procedure which guaranteed one appeal of right for criminal defendants convicted at trial. In the case of indigents the appellate Court checked over the record to see whether it would be of advantage to the defendant or helpful to the appellate Court to have counsel appointed for the appeal. A negative answer meant that the indigent had to appeal pro se if at all. The Court held that this procedure denied defendant the equal protection of the laws. Even though the State was pursuing an otherwise legitimate objective of providing counsel only for non-frivolous claims, it had created a situation in which the well-to-do could always have a lawyer — even for frivolous appeals — whereas the indigent could not.*

x *x* *x* *x*

71. *Though in one sense Justice Harlan is correct, when one comes to think of the real effect of his view, one is inclined to think that the opinion failed to recognise that* ***there are several ways of looking at equality, and treating people equally in one respect always results in unequal treatment in some other respects.*** *For Mr. Justice Harlan, the only type of equality that mattered was numerical equality in the terms upon which transcripts were offered to defendants. The majority, on the other hand, took a view which would bring about equality in fact, requiring similar availability to all of criminal appeals in Griffin's case (supra) and counsel-attended criminal appeals in Douglas case (supra). To achieve this result, the Legislature had to resort to a proportional standard of equality. These cases are remarkable in that they show that* ***the kind of equality which is considered important in the particular context and hence of the respect in which it is necessary to treat people equally****. [See "Developments—Equal Protection", 82 Harv LR 1165.]*

x *x* *x* *x*

158. *It is no doubt true that Article 16(1) provides for equality of opportunity for all citizens in the services under the State. It is, however, well-settled that the doctrine contained in Article 16 is a hard and reeling reality, a concrete and constructive concept and not a rigid rule or an empty formula. It is also equally well-settled by several authorities of this Court that Article 16 is merely an incident of Article 14, Article 14 being the genus is of universal application whereas Article 16 is the species and seeks to obtain equality of opportunity in the services under the State. The theory of reasonable classification is implicit and inherent in the concept of equality for there can hardly be any country where all the citizens would be equal in all respects.* ***Equality of opportunity would naturally mean a fair opportunity not only to one section or the other but to all sections by removing the handicaps if a particular section of the society suffers from the same****. It has never been disputed in judicial pronouncements by this Court as also of the various High Courts that Article 14 permits reasonable classification. But what Article 14 or Article 16 forbid is hostile discrimination and not reasonable classification. In other words, the idea of classification is implicit in the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society. It follows, therefore, that in order to provide equality of opportunity to all citizens of our country, every class of citizens must have a sense of equal participation in building up an* ***egalitarian society, where there is peace and plenty, where there is complete economic freedom and***

there is no pestilence or poverty, no discrimination and oppression, where there is equal opportunity to education, to work, to earn their livelihood so that the goal of social justice is achieved *.....*

x *x* *x* *x*

230. *Scheduled castes and scheduled tribes are castes and tribes specified by the President under Articles 341 and 342 of the Constitution to be known as such for the purposes of the Constitution. It is accepted that generally speaking these castes and tribes are backward in educational and economic fields. It is claimed that the expression "scheduled castes" does not refer to any caste of the Hindu society but connotes a backward class of citizens. A look at Article 341 however will show that the expression means a number of existing social castes listed in a schedule ; castes do not cease to be castes being put in a schedule though backwardness has come to be associated with them.* ***Article 46 requires the State to promote the economic interests of the weaker sections of the people and, in particular, of the scheduled castes and the scheduled tribes. The special reference to the scheduled castes and the scheduled tribes does not suggest that the State should promote the economic interests of these castes and tribes at the expense of other "weaker sections of the people". I do not find anything reasonable in denying to some lower division clerks the same opportunity for promotion as others have because they do not belong to a particular caste or tribe. Scheduled castes and scheduled tribes no doubt constitute a well-defined class, but a classification valid for one purpose may not be so for another*** *; in the context of Article 16(1) the sub-class made by Rule 13AA within the same class of employees amounts to, in my opinion, discrimination only on grounds of race and caste which is forbidden by clause (2) of Article 16....*

231. *All I have said above relates to the scope of Article 16(1) only, because Counsel for the appellant has built his case on this provision alone. Clause (4) of Article 16 permits reservation of appointments on posts in favour of backward classes of citizens notwithstanding Article 16(1) ; I agree with the views expressed by Khanna, J. on Article 16(4) which comes in for consideration incidentally in this case.* ***The appalling poverty and backwardness of large sections of the people must move the State machinery to do everything in its power to better their condition but doling out unequal favours to members of the clerical staff does not seem to be a step in that direction : tilting at the windmill taking it to be a monster serves no useful purpose.*** *"* [Emphasis supplied]

67. On the issue of economic criteria as an affirmative action under the Constitution, there is no difference of opinion amongst us. My esteemed Brother Justice Bhat, in his dissenting judgment has beautifully observed that the economic emancipation is a facet of economic justice which the Preamble as well as Articles 38 and 46 resply promise to all Indians. It is intrinsically linked with distributive justice – ensuring a fair share of the material resources, and a share of the progress of the society as a whole, to each individual. My esteemed Brother Justice Bhat has rightly observed that the break from the past – which was rooted on elimination of caste-based social discrimination, in affirmative action – to now include affirmative action based on deprivation, through impugned amendment, does not alter, destroy or damage the basic structure of the Constitution. On the contrary, it adds a new dimension to the constitutional project of uplifting the poorest segments of the society.

68. The following is discernable from the aforesaid: -

(1) When substantive equality is the avowed constitutional mandate, the State is obliged to provide a level playing field (***M. Nagaraj*** (supra) para 47).

(2) The test for such reasonable classification is not necessarily, or much less exclusively, the social backwardness test of Article 15(4) and Article 16(4) resply.

(3) Article 16(4) [and Article 15(4)] provision is rooted as historical reasons of exclusion from service. The provision was thus fulcrummed on the Constituent Assembly's clear intent (expressed through Dr. B.R. Ambedkar's speech) to redress the specific wrong.

(4) ***Indra Sawhney*** (supra) was limited to then existing Article 16 and construed the meaning of "socially" backward classes for the purpose of Article 16(4).

(5) ***Indra Sawhney*** (supra) was thus undertaking a "schematic

interpretation" of the Article 16(4) [subsequently held equally applicable for Article 15(4)].

(6) The Special "schematic interpretation" based on the original intent doctrine led the amendment of the Constitution and introduction of Article 16(4A) [77th Amendment], Article 16(4B) [81st Amendment] and Article 15(5) [91st Amendment] all of which have been upheld by this Court.

(7) The recuring feature of such constitutional progression is the Parliament's freedom and liberty from the "original intent" doctrine. It is the same theme that enables the Parliament to constantly innovate and improvise to better attend to the Directive Principles' mandate of Articles 38 & 46 resply or of the equality code itself.

69. The march from the past is also discernible from the judicial approach. If adequate representation in services of under-represented class was the sole purpose of Article 16(4), any person from that class would be representative of that class. When ***Indra Sawhney*** (supra) read the necessity of excluding Creamy Layer from the 'backward class' in Article 16(4) – it took note of the events 42 years post the adoption of the Constitution. It is 30 years since the seminal judgment of ***Indra Sawhney***. Time enough for the Parliament to feel the necessity of attending to another section of deprived classes.

70. Therefore, the 103rd Constitutional Amendment signifies the Parliament's intention to expand affirmative action to hitherto untouched groups – who suffer from similar disadvantages as the OBCs competing for opportunities. If economic advance can be accepted to negate certain social disadvantages for the OBCs [Creamy Layer concept] the converse would be equally relevant. At least for considering the competing disadvantages of Economically Weaker Sections. Economic capacity has been upheld as a valid basis for classification by this Court in various other contexts. It has also been implored to be considered as a relevant

facet of the 'Equality Code' provisions. The 103rd Amendment offers a basis not frowned upon by Article 15(1) or 16(2) for providing a population generic and caste/religion/community neutral criteria. It also harmonizes with the eventual constitutional goal of a casteless society. ***Indra Sawhney*** (supra) holds that the ***Chitralekha*** (supra) propounded occupation-cum-means test can be a basis of social backwardness even for the purposes of Article 16(4). Article 15(6)(b) Explanation defining EWS could be said to be fully compliant with this norm.

CONSTITUTION (103RD AMENDMENT) ACT, 2019

71. Let me now look into the Constitution (103rd Amendment) Act, 2019 which came into effect on 14th of January, 2019 amending Articles 15 and 16 resply of the Constitution by adding new clauses which empower the State to provide a maximum of 10% reservation for the "weaker sections" (EWS) of citizens other than the Scheduled Castes (SCs), Scheduled Tribes (STs) and Non-Creamy Layer of the Other Backward Classes (OBCs-NCL).

72. The Constitution (124th Amendment) Bill, 2019 reads thus:

"*THE CONSTITUTION (ONE HUNDRED AND TWENTY-*

FOURTH AMENDMENT) BILL, 2019

A

BILL

further to amend the Constitution of India.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. (1) This Act may be called the Constitution (One Hundred and Twenty-fourth Amendment) Act, 2019.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In article 15 of the Constitution, after clause (5), the following

clause shall be inserted, namely:—

'(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.'.

3. In article 16 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

"(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.".

The Statement of Objects and Reasons reads thus:-

"STATEMENT OF OBJECTS AND REASONS

At present, the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article

15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.

2. The directive principles of State policy contained in article 46 of the Constitution enjoins 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

3. Vide the Constitution (Ninety-third Amendment) Act, 2005, clause (5) was inserted in article 15 of the Constitution which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, clause (4) of article 16 of the Constitution enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

4. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it has been decided to amend the Constitution of India.

5. Accordingly, the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 provides for reservation for the economically weaker sections of society in higher educational institutions, including private institutions whether aided or unaided by the State other than the minority educational institutions referred to in article 30 of the constitution and also provides for reservation for them in posts in initial appointment in services under the State.

6. The Bill seeks to achieve the above objects."

73. Thus, from the Objects and Reasons as aforesaid it is evident that the entire edifice of the impugned amendment is to fulfil the mandate of Article 46 of the

Constitution. What was looked into by the Parliament was the fact that the economically weaker sections of citizens were not eligible for the benefit of reservations. However, with a view to fulfil the mandate of Article 46 and to ensure that economically weaker sections of the citizens get a fair chance of being imparted higher education and participation in employment in the services of the State, the Constitution (103rd Amendment) Act was brought into force.

74. The reservation for the new category will be in addition to the existing scheme of 15%, 7.50% and 27% resply reservations for the SC, ST and OBC-NCL, thus, bringing the total reservation to 59.50%. An 'Explanation' appended to Article 15 states that the EWS shall be such as may be notified by the State from time to time based on the family income and other indicators of economic disadvantage. In its Office Memorandum F. No. 20013/01/2018-BC-II dated January 17, 2019, the Ministry of Social Justice and Empowerment, Government of India has stipulated that only persons whose families have a gross annual income less than Rs.8 lakhs, or agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plot less than 100 sq. yards in the notified Municipalities, or residential plot less than 200 sq. yards in the areas other than the notified Municipalities, are to be identified as EWS for the benefit of reservation.

75. What is exactly happening after the impugned amendment? Or to put it in other words, what is the effect of it?

(1) The total reservation is now to the extent of 59.50%. The hue and cry is that the same is in excess of the ceiling of 50% fixed by this Court in ***Indra Sawhney*** (supra).

(2) It excludes the Scheduled Castes (SCs), the Schedule Tribes (STs) and the Non-Creamy Layer of Other Backward Classes (OBCs-NCL). The hue and cry is that the same has

abridged the equality code. In other words, the exclusion is violative of Articles 14, 15 and 16 resply of the Constitution.

(3) Reservation of 10% of the vacancies among the open competition candidates means exclusion of those above the demarcating line from those 10% seats. In other words, the competition will now be within 40%. The hue and cry in this regard is that it is not permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding.

76. In the aforesaid context, by and large, all the learned counsel who argued that the impugned judgment is unconstitutional strenuously urged before the Constitution Bench to take the view that Article 46 of the Constitution could not have been made the edifice for the impugned amendment. It was vociferously argued that Article 46 should be interpreted on the principle of *ejusdem generis*. To put in other words, it was vociferously submitted that the words "weaker sections" used in Article 46 should be read to mean only the Scheduled Castes or the Scheduled Tribes.

77. Article 46 reads as under:-

> "***46.—Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.-*** *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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation*."

78. I found something very interesting to read in regard to Article 46 from the decision of this Court in the case of ***M/s Shantistar Builders v. Narayan Khimalal Totame and Others***, (1990) 1 SCC 520, wherein a Bench of three Judges speaking through Ranganath Misra, J. observed: -

> ***"11. …. 'Weaker sections' have, however, not been defined either in the Constitution or in the Act itself. An attempt was made in the Constituent Assembly to provide a definition but was given up. Attempts have thereafter been made from time to time to provide such definition but on account of controversies which arise once the exercise is undertaken, there has been no success. A suggestion for introducing economic criterion for explaining the term was made in the approach to the Seventh Five Year Plan (1985-1990) brought out by the Planning Commission and approved by the National Development Council and the Union Government. A lot of controversy was raised in Parliament and the attempt was dropped. In the absence of a definition perhaps a proper guideline could be indicated but no serious attention has been devoted to this aspect.***
>
> ***12. Members of the Scheduled Castes and Scheduled Tribes have ordinarily been accepted as belonging to the weaker sections. Attempt to bring in the test of economic means has often been tried but no guideline has been evolved. Undoubtedly, apart from the members of the Scheduled Castes and Scheduled Tribes, there would be millions of other citizens who would also belong to the weaker sections. The Constitution-makers intended all citizens of India belonging to the weaker sections to be benefited when Article 46 was incorporated in the Constitution. ….."***
>
> [Emphasis supplied]

79. I am of the view that the words "weaker sections" used in Article 46 cannot be read to mean only the Scheduled Castes or the Scheduled Tribes nor the same can be interpreted on the principle of *ejusdem generis*, as argued. The expression refers to all weaker sections and in particular the Scheduled Castes and the Scheduled Tribes. Inasmuch as, if we confine the meaning of the expression "weaker sections" only to the Scheduled Castes or the Scheduled Tribes or the likes, namely backward class, then it will expose the weaker

sections of citizens, other than the Scheduled Castes and the Scheduled Tribes and backward class people to exploitation without any protection from it. Sandro Galea, Dean and Robert A. Knox Professor, Boston University School of Public Health has defined Economic Justice as *"a set of moral principles for building economic institutions, the ultimate goal of which is to create an opportunity for each person to create a sufficient material foundation upon which to have a dignified, productive, and creative life beyond economics." Therefore, an economic justice argument focuses on the need to ensure that everyone has access to the material resources that create opportunities, in order to live a life unencumbered by pressing economic concerns*." Social welfare or welfare of the State is the onus of the State itself. Thus, Part IV has been given the status and expression in the Constitution which lays down the constitutional policy that the State must strive for, if the country is to develop as a welfare State. The weaker section of the people is the lowliest class of people (poorest of the poor), economically and educationally weak who have been given constitutional protection. Their welfare is paramount as can be read from the conjoint reading of Articles 21 and 46 resply of the Constitution.

80. Speaking the constitutional position in this regard, this Court in ***N.M. Thomas*** (supra) observed as under: -

> ***"126.*** *..... The Preamble to the Constitution silhouettes a 'justice-oriented' community. The Directive Principles of State Policy, fundamental in the governance of the country, enjoin on the State the promotion* ***with special care*** *the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes, . . . and protect them from social injustice.*
>
> *To neglect this obligation is to play truant with Article 46. Undoubtedly, economic interests of a group — as also social justice to it — are tied up with its place in the services under the State. ..."*

81. Article 21 encompasses the right to live with dignity. The right to live with dignity is not an ordinary expression. It has serious meaning attached to it. In the words of the Allahabad High Court (Abdul Moin, J.), "our society is an amalgamation of various classes of people. Some are wealthy. Some are not wealthy. Some lead life of penance with pleasure. Some lead life of penance due to their fortune. Our Constitution endorses welfare of all classes." This is why Article 21 has been given wide connotation and expression by the courts, particularly, by this Court to give effect to the constitutional policy of welfare state. The decision of this Court in ***Unni Krishnan*** (supra) is an authority on this aspect where the Court confirmed that right to education is implicit under Article 21 and proceeded to identify the content and parameters of this right to be achieved by Articles 41, 45, and 46 resply in relation to education. Understood in this context, Article 46 gives not only solemn protection to the weaker sections of the people at par with the Scheduled Castes and the Scheduled Tribes but speaks of special care to be taken by the State of this section of people. Further, the expression "educational and economic interests" in Article 46 concludes the whole legal position in relation to Article 46 to mean that the State must endeavour to do welfare especially of this section of people. The endeavour of the State to give the weaker section of the people a life of dignity is the link between Articles 46 and 21 resply. The conjoint reading of both the provisions puts constitutional obligation on the State to achieve the goal of welfare of the weaker sections of the people by all means. Article 46 is not based on social test but on the means test. It speaks of "educational and economic interests" of "weaker sections". The expression "weaker sections" and their "economic interests" are correlative and denote the means status of the people who are to be taken care of. Although, the phrase "economic interests" is not to be read alone but in consonance with the expression "educational" used in Article 46; yet to confuse Article 46 with the "social status" would be to put a strain and nullify otherwise the pure object of Article 46. The distinction can

be explained with the aid of Article 15(4). Article 15(4) gives impetus to the social and educational "advancement" of Backward Classes or the Scheduled Castes and Scheduled Tribes. It is an enabling provision for the State to make special provisions for the socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. The emphasis here is on the upliftment of three constitutionally earmarked classes i.e., Scheduled Castes, Scheduled Tribes and Backward classes. However, Article 46 is wide in expression. The object of welfare under Article 46 is towards those educationally and economically weak. In fact, this Court has laid down in ***M.R. Balaji*** (supra) that, "in taking executive action to implement the policy of Art. 15(4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Article 46 and the preamble of the Constitution." Reference in this context may also be made to ***Ashoka Kumar Thakur v. Union of India***, (2008) 6 SCC 1. [See : ***Atish Kumar v. Union of India***, Writ (C) No. 14955 of 2019, High Court of Judicature at Allahabad, Lucknow Bench].

82. Thus, it is evident from the aforesaid that there can be reservation for certain weaker sections other than the SCs/STs and socially and educationally backward classes. The impugned amendment is meant for weaker sections of the society who are economically weak and cannot afford to impart education to their children or are unable to secure employment in the services of the State.

83. Thus, in view of my aforesaid discussion, I am not impressed with the submission canvassed on behalf of the writ applicants that Article 46 of the Constitution cannot be brought in aid to defend the constitutional validity of the impugned amendment.

INTERPRETATION OF THE CONSTITUTION

84. There are certain important differences in the theory of interpretation of a Constitution contrasted with the theory of interpretation of statutes. These differences arise from the very nature and quality of a Constitution. It would be pertinent over here to make a brief reference to these differences. Although the validity of a statute can be assailed on the ground that it is *ultra vires* (beyond the powers), yet the Legislature which enacted it, the validity of the Constitution cannot be assailed on any ground whatsoever.

85. The framing of the Constitution of a State is a capital political fact and not a juridical act. No court or other authority in the State under the Constitution can, therefore, determine the primordial question whether the Constitution has been lawfully framed according to any standards. Even if a Constitution is framed under violence, rebellion or coercion, it stands outside the whole area of law, jurisprudence and justiciability. The basic principle of constitutional jurisprudence is that the Constitution is the supreme law of the land, even supreme above the law and itself governing all other laws. [*Mukharji 'The New Jurisprudence" p. 103*]. But this principle is not applicable to an amendment of the Constitution. The Constitution can be amended only in accordance with the provisions thereof by the authority empowered to do so in accordance with the procedure laid down therein. The validity of a constitutional amendment can, therefore, be challenged on the ground that it is *ultra vires*.

86. The interpretation of a Constitution involves more than a passing interest concerning the actual litigants and being a pronouncement of the Courts on the government and administration, has a more general and far-reaching consequence. Chief Justice Marshall of the American Supreme Court, therefore warned in ***Mcculloch v. Maryland***, 4 Wheaton 316, "We must never forget that it is a Constitution we are expounding". The policy of a particular state is more

easily discernible and interpreted than the policy of a Constitution, which is a charter for government and administration of a whole nation and a country. It is that policy consideration which makes the statutory interpretation different from the interpretation of the Constitution. [Mukharji *'The New Jurisprudence', p. 105*]. More foresight in the nature of judicial statesmanship, therefore, is required in interpreting a Constitution than in construing a statute. The Constitution is not to be construed in any narrow pedantic sense [*Per Lord Wright in* ***James v. Commonwealth of Australia***, (1936) A.C. 578, 614] and a broad liberal spirit should inspire those whose duty it is to interpret it, for a Constitution, which provides for the government of a country, is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void).[*Per Gwyer C.J. in* ***Central Provinces Case***, (1939) F. C. R. 18 at p. 37]. But this does not mean that a Court is free to stretch for pervert the language of a Constitution in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or for the purpose of correcting supposed errors. [*ibid*]

87. If there is an apparent or real conflict between two provisions of the Constitution, it is to be resolved by applying the principle of harmonious construction. [*Seervai 'Constitutional Law of India' pp.25-27 (Vol.I)*] Since it is impossible to make a clear-cut distinction between mutually exclusive legislative powers, it is well settled that in case of conflict, Central Law would prevail over State Law, for otherwise an absurd situation would arise if two inconsistent laws, each of equal validity, could exist side by side within the same territory. [Salmond 'Jurisprudence', p.32]

88. Stone J. of the American Supreme Court in ***United States v. Patrick B. Classic*** [1941 SCC OnLine US SC 112 : 313 US 299 (1941)] expressed the important principle of constitutional interpretation in these terms: -

> *"....in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616; Brown v. Walker, 161 U.S. 591, 595, 16 S.Ct. 644, 646, 40 L.Ed. 819; Robertson v. Baldwin, 165 U.S. 275, 281, 282, 17 S.Ct. 326, 328, 329, 41 L.Ed. 715. If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose."*

89. This has been sometimes called as 'flexible' or 'progressive' interpretation of the Constitution which Dr. Wynes refers to as the doctrine of 'generic interpretation'.

90. The rules of the interpretation of the Constitution have to take into consideration the problems of government, structure of a State, dynamism in operation, caution about checks and balances, not ordinarily called for in the interpretation of statutes. [Mukharji *'The New Jurisprudence', p. 106*]

91. Although a Constitution is not to be fettered by the past history, yet it is relevant for properly interpreting the Constitution. This Court accepted the logic that the Indian Constitution was not written on a 'blank slate' and because the Government of India Act, 1935 provided the basic fabric for the Indian Constitution, it was invoked to interpret the Constitution in the light of the provisions of the Act. [***M.P.V. Sundararamier & Co. v. State of A.P. and Others***, 1958 SCR 1422 : AIR 1958 SC 468]

92. The principle of *ejusdem generis*, a rule of statutory interpretation, has been applied to the Indian Constitution by this Court in the ***State of West Bengal v. Shaik Serajuddin Batley***, 1954 SCR 378. The statutory rule of interpretation expressed "*Expressio unius est exclusion alterius*" (the express mention of one person or thing is the exclusion of another) is not strictly applicable to constitutional interpretation. [Mukharji *'The New Jurisprudence', p. 110*]

93. It is the fundamental principle of construction that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitution vide ***Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Others***, 1959 SCR 279 : AIR 1958 SC 538. [Reference : Law, Judges and Justice by S.M.N. Raina, First Edn.]

94. In the case of ***R.C. Poudyal v. Union of India and Others***, 1994 Supp (1) SCC 324, this Court at p. 385, para 124 held as under:

> *"**124.** .... In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details"."*

95. In the case of ***Kihoto Hollohan v. Zachillhu and Others***, 1992 Supp (2) SCC 651, this Court at p. 676, para 27 held as under:

> *"**27.** A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances — a distinction which differentiates a statute from a Charter under which all statutes are made. ..."*

96. In the case of ***M. Nagaraj and Others v. Union of India and Others***, (2006) 8 SCC 212, this Court at p. 240 & p. 241, para 19 held as under:

> ***"19.*** *The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."* [Emphasis supplied]

DOCTRINE OF BASIC STRUCTURE

97. *"Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity." [**Minerva Mills Ltd. and Ors. v. Union of India and others**,* AIR 1980 SC 1789*]*

98. The doctrine of Basic Structure includes general features of the broad democracy, supremacy of the Constitution, rule of law, separation of powers, judicial review, freedom and dignity of the individual, unity and integrity of the nation, free and fair education, federalism and secularism. The Basic Structure Doctrine admits to identify a philosophy upon which a Constitution is based. A Constitution stands on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged, the whole constitutional edifice may fall down. The metaphor of a living Constitution is usually used in its interpretive meaning i.e., that the language of the document should evolve through judicial decisions according to the changing environment of society. A Constitution's amendment process provides another mechanism for such evolution, as a 'built-in provision for growth'. *Prima facie*, the view that a Constitution must develop over a period of time supports a broad use of the

amendment power. Nevertheless, even if we conceive of the Constitution as a living tree, which must evolve with the nation's growth and develop with its philosophical and cultural advancement, it has certain roots that cannot be uprooted through the growth process. In other words, the metaphor of a living tree captures the idea of certain constraints: 'trees, after all, are rooted, in ways that other living organisms are not'. These roots are the basic principles of a given Constitution. [Reference : "Unconstitutional Constitutional Amendments : A Study of the Nature and Limits of Constitutional Amendment Powers", Yaniv Roznai, Thesis, February, 2014]

99. In the words of Carl Friedrich, a German mathematician and physicist:

> *"A constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper functions, so also in a constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed."*

100. Therefore, it is not merely a matter of which principles are more fundamental than the others. It is not an exercise of 'ranging over the constitutional scheme to pick out elements that might arguably be more fundamental in the hierarchy of values', William Harris correctly claimed, adding that: 'a Constitutional provision would be fundamental only in terms of some articulated political theory that makes sense of the whole Constitution'. The idea of a hierarchy of norms within the foundational structuralism is to examine whether a constitutional principle or institution is so basic to the constitutional order that changing it – and looking at the whole constitution - would be to change the entire constitutional identity.

101. Gary Jacobsohn, Professor of Constitutional and Comparative Law in the Department of Government and Professor of Law at the University of Texas at

Austin, argues that constitutional identity is never a static thing, as it emerges from the interplay of inevitably disharmonic elements. But changes to the constitutional identity, 'however significant, rarely culminate in a wholesale transformation of the constitution'. This is because a nation usually aims to remain faithful to a 'basic structure', which comprises its constitutional identity. 'It is changeable', Gary writes, 'but resistant to its own destruction'.

102. Yaniv Roznai in his thesis referred to above, has referred to Water Murphy who argues:

> "*Thus an "amendment" corrects or modifies the system without fundamentally changing its nature: An "amendment" operates within the theoretical parameters of the existing Constitution. A proposal to transform a central aspect of the compact to create another kind of system – for example, to change a constitutional democracy into an authoritarian state ... – would not be an amendment at all, but a re-creation of both the covenant and its people. That deed would lie outside the authority of any set of governmental bodies, for all are creatures of the people's agreement*."

103. In other words, constitutional changes should not be tantamount to constitutional metamorphosis. Conversely, one should not confuse constitutional preservation with constitutional stagnation. As Joseph Raz writes:

> "*The law of the constitution lies as much in the interpretive decisions of the courts as in the original document that they interpret ... But ... it is the same constitution. It is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house lives in a house built two hundred years ago. His house had been repaired, added to, and changed many times since. But it is still the same house and so is the constitution. A person may, of course, object to redecorating the house or to changing its windows, saying that it would not be the same. In that sense it is true that an old constitution is not the same as a new constitution, just as an old person is not the same as the same person when young. Sameness in that sense is not the sameness of identity ... It is the sameness of all the intrinsic properties of the object. ... The point of my coda is to*

warn against confusing change with loss of identity and against the spurious arguments it breeds. Dispelling errors is all that a general theory of the constitution can aspire to achieve."

STANDARD OF REVIEW

104. While considering the appropriate standards of review of the constitutional amendments vis-à-vis unamenable principles, Yaniv Roznai has suggested three different levels of standards:

1. **Minimal Effect Standard**:

105. The first option is the Minimal Effect Standard. This is the most stringent standard of the judicial review of amendments. According to this standard, any violation or infringement of an unamendable principle is prohibited no matter how severe the intensity of the infringement is, including amendments that have only a minimal effect on the protected principles. On the one hand, one may claim that the importance of the protected unamendable principles – as pillars of the constitution – necessitates the most stringent protection. If the aim of unamendability is to provide for hermetic protection of a certain set of values or institutions, then any violation of these principles ought to give rise to grounds for judicial intervention. On the other hand, such a standard would not only bestow great power to the courts, but also would place wide – perhaps too wide – restrictions on the ability to amend the constitution. The theory of unamendability should not be construed as a severe barrier to change. It should be construed as a mechanism enabling constitutional progress, permitting certain flexibility by allowing constitutional amendments, while simultaneously shielding certain core features of the constitution from amendment, thereby preserving the constitutional identity.

2. **Disproportionate Violation Standard** :

106. The intermediate standard of review is the Disproportionate Violation Standard. It is an examination of the proportionality of the violation. The principle of proportionality is nowadays becoming an almost universal doctrine in constitutional adjudication. Proportionality generally requires that a violation of a constitutional right has a 'proper purpose;' that there is a rational connection between the violation and that purpose; that the law is narrowly tailored to achieve that purpose; and that the requirements of the proportionality *stricto* (balancing) test are met. A disproportionate violation of a constitutional right would be considered unconstitutional and thus void. This standard emphasises the balancing of conflicting interests.

3. **Fundamental Abandonment Standard**:

107. Fundamental Abandonment Standard is the lowest level of scrutiny. According to this standard, only an extraordinary infringement of unamendable principles, one that changes and 'fundamentally abandons' them, would allow judicial annulment of constitutional amendments. This seems to be the approach taken by the German Constitutional Court.

108. One of the initial references to doctrine of basic features and its permanency was in ***Sajjan Singh v. State of Rajasthan***, AIR 1965 SC 845, observed, that the Constitution "formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?"

109. The doctrine actually came to be in the seminal case of ***Kesavananda Bharati*** (supra), where the Supreme Court emphasising on the essence of the basic structure held that "every provision of the Constitution can be amended

provided in the result the basic foundation and structure of the Constitution remains the same." The concept of basic structure, as such gives coherence and durability to a Constitution, for it has a certain intrinsic force in it.

110. Inspired by the doctrine of Basic Structure enshrined in Articles 1 to 19 of the German Constitution, 1949 ("The Basic Law for the Federal Republic of Germany'), where these principles are based on the premise that democracy is not only a parliamentary form of government but also is philosophy of life based on the appreciation of the dignity, the value and the inalienable rights of each individual human being; such as that of right to life and physical integrity; equality before law; rights to personal honour and privacy; occupational freedom; inviolability of the home; right to property and inheritance. The essence of basic rights could, under no circumstance, be affected.

111. Article 20 of the Federal Republic of Germany provides that Germany is a Democratic and Social Federal State. State authority is derived from the people through elections. All Germans have right to resist anyone seeking to abolish the constitutional order, if no other remedy is available.

112. Article 79 of the Federal Republic of Germany lays down the procedure to amend the Basic Law by supplementing a particular provision or expressly amending the same. However, amendments to the Basic Law affecting the principles laid down in Articles 1 and 20 or affecting the division of federation i.e. participation of Centre and State in the legislative process are inadmissible.

113. The provisions under the German Constitution deal with rights, which are not mere values, rather, they are justiciable and capable of interpretation. Thus, those values impose a positive duty on the State to ensure their attainment as far as practicable. The State must facilitate the rights, liberties and freedoms of the individuals.

114. In India, the doctrine of Basic Structure is a judicial innovation, and it continues to evolve via judicial pronouncements of this Court. The contours of the expression have been looked into by the Court from time to time, and several constitutional features have been identified as the basic structure of the Constitution; but there is not an exhaustive definition or list of what constitutes the 'basic structure' of the Constitution - the Court decides from case to case if a constitutional feature can be regarded as basic or not.

115. ***Kesavananda Bharati*** (supra) was heard by a Full Bench of this Court consisting of 13 Judges. A majority of Judges held that the view taken in ***C. Golak Nath and Others v. State of Punjab and Another***, 1967 AIR 1643 : (1967) 2 SCR 762, that the word "law" in Article 13 included a constitutional amendment, could not be upheld. The said decision was, therefore, overruled. But the Court was sharply split on the question whether the word "amendment" in Article 368 as it stood before its amendment by the 24th Amendment included the power to alter the basic feature or to repeal the Constitution itself.

116. Six Judges led by Sikri CJ were of the view that the Constitution could not be amended so as to abrogate or emasculate the basic features of the Constitution some of which were characterized by Sikri, CJ as under: -

> ***"(1) Supremacy of the Constitution;***
> ***(2) Republican and Democratic forms of Government;***
> ***(3) Secular character of the Constitution;***
> ***(4) Separation of powers between the legislature, the executive and the judiciary;***
> ***(5) The Federal character of the Constitution."***

117. It was further held that fundamental rights could not be abrogated though reasonable abridgment of fundamental rights could be affected in public interest. According to this view, Parliament would be able to adjust fundamental rights in order to secure what the Directive Principles directed to be accomplished while maintaining the freedom and dignity of the citizens. Khanna, J. took a more liberal

view in regard to the power of amendment of the Parliament. He agreed with the above-mentioned six Judges that the power of amendment is not unlimited and made the following pertinent observations in Paragraph 1437:

> ***"1437. ….The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alternations. ……. The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution…."***

118. He was, however, of the view that subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. He was also of the view that the right to property does not pertain to basic structure or framework of the Constitution (vide Paragraph 1550). In short, the decision of the majority may be stated as under : -

> ***(1) Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 762 : (1967) 2 SCJ 486] is overruled;***
> ***(2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;***
> ***(3) The Constitution (Twenty-fourth Amendment) Act, 1971, is valid;***
> ***(4) Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid;***
> ***(5) The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid;***
> ***(6) The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.***

119. Other six Judges led by Ray J. (as he then was) held that the power to amend was wide and unlimited and included the power to add, alter or repeal any provision of the Constitution. They, therefore, upheld all the Constitutional amendments.

120. Seven judges against six thought that the basic structure of the Constitution cannot be altered under the amending power although there was no agreement among themselves about the meaning and content of the so-called basic structure.

121. Sikri, CJ, observed:

> "*The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.*" [***Kesavananda Bharati***, at p. 1565.]

122. Shelat and Grover, JJ., said on the scope of amending power under Article 368 as follows:

> *"Though the power to amend cannot be narrowly construed and extends to all the articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features;"* [***Kesavananda Bharati***, at p. 1609-10.]

123. Hegde and Mukherjea, JJ., expressed the same opinion. They said:

> *"Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution."* [***Kesavananda Bharati***, at p. 1648.]

124. Reddy, J. was of the same opinion. Khanna, J. held that the amending power of Parliament is very wide under Article 368, but he also imposed certain limitations on the amending power in the name of basic structure of the Constitution. He said:

> *"....it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution....."* [***Kesavananda Bharati***, at p. 1860.]

He further said that:

> *".....Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and would include within itself the power to amend the various articles of the Constitution. ... The power of amendment would also include within itself the power to add, alter or repeal the various articles."*
>
> [***Kesavananda Bharati***, at p. 1903-04.]

125. Thus, it is very clear that the sense in which Khanna, J., uses the expression 'basic structure or framework of the Constitution' is very different from the sense in which six judges led by Sikri, CJ., use the expression 'essential features or basic features' of the Constitution. Fundamental rights can be abrogated by the use of the amending power according to Khanna, J., but not so according to six judges led by Sikri, C.J.

126. Ray, J. rejected the idea of any implied limitations on the amending power and thought that the power to amend is wide and unlimited. He said that:

> *"....There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features...."* [***Kesavananda Bharati*** at p. 1718]

127. The aforesaid opinion was also shared by Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.

128. Thus, if ***Kesavananda Bharati*** (supra) is to be read closely and carefully, it says that there are no limitations on the exercise of Article 368 (which is a constituent power), yet it is subject to the 'Basic Structure Doctrine'. The origin

of the ‘Doctrine of Basic Features’ lies in the fear of an apprehension of constitutional collapse, and anxiety which is exceptional in the life of a Constitution. The ‘Basic Structure Doctrine’ was meant for special use in times when constitutional amendments threatened the fundamental structure of the Constitution. The special stature anticipates a careful use of the doctrine so as to ensure that its unique place is preserved. Vital as the doctrine was, even more important was to exercise some restraint and to ensure its meaningful use. The ‘Basic Structure Doctrine’ has been taken recourse to over and over again with little concern about its restrained use. Professor Satya Prateek, former Assistant Professor, O.P. Jindal Global University, in one of his essays titled ‘Today’s Promise, Tomorrow’s Constitution : ‘Basic Structure’, Constitutional Transformations And The Future Of Political Progress In India’ has very rightly stated that the doctrine has been extensively used in affecting policy decisions and its indifferent use is the root cause of the resentment that has brewed against it. Over a period of time, it has been used less for constitutional gate–keeping in times of crisis and more for decisively influencing the course which State policy might take in future. The repeated use of the doctrine of Basic Structure may impair the doctrine itself and it is likely that the idea of constitutional essentialism might not get the respect it deserves from the political institutions. Prof. Satya Prateek has beautifully explained stating that the ‘Basic Structure Doctrine’ is indeed special, it is a powerful tool we have for constitutional preservation but its special character as well as its authority is severely threatened in a culture of unresponsive use.

129. According to the widely accepted principles of constitutional interpretation, the provisions of a constitution should be construed in the widest possible manner. Constitutional law is the basic law. It is meant for people of different opinions. It should be workable by people of different ideologies and at different times. Since it provides a framework for the organisation and working

of a State in a society which keeps on changing, it is couched in elastic terms and, therefore, it has to be interpreted broadly. No generation has a right to bind the future generations by its own beliefs and values. Each generation has to choose for itself the ways of life and social organisation. Constitution should be so adaptable that each generation may be able to make use of it to realise its aspirations and ideals. An amending clause is specifically provided to adapt the Constitution according to the needs of the society and the times. In view of this, no implied limitation can be imposed on the amending power. To do so would be to defeat the very purpose of it. The Constitution-makers had before them the Constitutions of the United States, Australia, Canada, Ireland, South Africa and Germany which they were constantly referring to while discussing and drafting the amending provisions. In all these Constitutions the word 'amendment' is used in the widest possible sense. Therefore, our Constitution-makers may be presumed to have used this word in the same broad sense in the absence of any express limitations. [B.N. Rau, Table of Amending Process, *Constitutional Precedents, 1st Series* (1947) *cf.* Hari Chand, *Amending Process in the Indian Constitution* 96 (1972).]

130. Dwivedi, J., in ***Kesavanand Bharati*** (supra) said about the scope of amending power as follows:

> "*Article 368 is shaped by the philosophy that every generation should be free to adapt the Constitution to the social, economic and political conditions of its time. Most of the Constitution-makers were freedom-fighters. It is difficult to believe that those who had fought for freedom to change the social and political organisation of their time would deny the identical freedom to their descendants to change the social, economic and political organisation of their times. The denial of power to make radical changes in the Constitution to the future generation would invite the danger of extra constitutional changes of the Constitution.*
>
> *"The State without the means of some change is without means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to*

preserve." [Burke, Recollections on the Revolution in France and other Writings. Oxford University Press, 1958 Reprint, p. 23.]"

131. The whole Constitution is basic law. It is not easy to distinguish which part is more basic than the other as there is no objective test to distinguish. [Ray, J., in ***Kesavananda Bharati*** (supra) at p. 1675, 1682 & 1684.] Since, there are no objective criteria to distinguish, there are bound to be subjective preferences and choices in deciding what constitutes this so-called basic structure. Even, if it were possible to distinguish essential features from non-essential features, it is not possible to assert that the essential features are necessarily eternal and immutable. [Mathew, J., ***Kesavananda Bharati*** (supra) at p. 1947.] Judging from past history one may doubt if any feature of law and society is unchangeable. What was considered fundamental by one society at one time was abandoned later as an outmoded impediment.

132. Fundamental rights, no doubt, are very important and constitute the bed-rock of civilization. But society keeps on changing with the changes in the socio-economic conditions. The limits of these rights may need constant re-definition. Even their essential content may undergo a radical transformation. To enable necessary adjustments in the legal relationships and to bring them in harmony with social realities, an amending power is provided in all Constitutions. The easier the mode of amendment, the more flexible the Constitution is. In the absence of some amending provision, a Constitution will fail to contain the social changes and is bound to break down. It is a necessary safety valve to allow radical changes through constitutional processes. If the necessary changes cannot be brought through constitutional means, revolution becomes a necessity. Thus, an unlimited amending power and a simple procedure of amendment is an effective means to bring about social revolution through law. The British Constitution offers a very good example of a flexible Constitution with an easy procedure of simple majority vote to bring about any changes in law including constitutional

law. Perhaps, this aspect of constitutional law and strong democratic traditions in Britain prompted even Marx to say that probably Britain is the only country where revolution may be brought about through peaceful and democratic means. [Friedrich Engels (ed.) Karl Marx, *Capital*, (1952. 50 Britannic Great Book Series] Thus, to have wide amending power and easy procedure of amendment is not to undervalue fundamental rights, nor is it an invitation to abolish them but is a means to preserve them through necessary adaptations in harmony with the changed social realities. Stability of fundamental rights lies not in the absence of legal power to remove them but in the social and political support for them. [Reference : ***Phantom of Basic Structure of the Constitution***, Source : Journal of the Indian Law Institute, April-June 1974, Vol. 16]

133. Mr. N. Palkhivala has summed up the effect of the majority judgment in his book titled "Our Constitution Defaced and Defiled" in the following words:

> ***"Parliament cannot, in the exercise of its amending power, alter the basic structure or framework of the constitution. For instance, it cannot abolish the sovereignty of India or the free democratic character of the republic; nor can it impair the integrity and unity of India or abolish the States. (The principle that the basic structure or framework of the Constitution cannot be altered gives a wider scope to the amending power than the principle that none of the essential features of the Constitution can be damaged or destroyed.) The Court's jurisdiction cannot be ousted as is sought to be done by Article 31C. If the Court's jurisdiction were ousted, any of the States could pass laws which might lead to the dismemberment of India."***

134. Thus, ***Kesavananda Bharati*** (supra) struck a balance between the rights of the individuals and the powers of the State to curtail those rights. It found a suitable via-media between the two rival philosophies – one favouring the complete sanctity of fundamental rights while the other supporting the complete flexibility of the Constitution. [Reference: Law, Judges and Justice – by Justice S.M.N. Raina].

135. In ***Smt. Indira Nehru Gandhi v. Shri Raj Narain***, AIR 1975 SC 2299, the Court, expanding the scope of the basic structure, held that there were four unamendable features which formed part of the basic structure, namely, "(i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and (iv) The nation shall be governed by a government of laws, not of men." These, according to them, were "the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."

136. The Court also noted that the principle of free and fair elections is an essential postulate of democracy, and which, in turn, is a part of the basic structure of the Constitution. That democracy was an essential feature forming part of the basic structure. In this case, the Court struck down clause (4) of Article 329-A which provided for special provision as to elections to Parliament in the case of Prime Minister and Speaker, on the ground that it damaged the democratic structure of the Constitution. That the said clause (4) had taken away the power of judicial review of the courts as it abolished the forum without providing for another forum for going into the dispute relating to the validity of election of the Prime Minister. It extinguished the right and the remedy to challenge the validity of such an election. The complaints of improprieties, malpractices and unfair means have to be dealt with as the principle of free and fair elections in a democracy is a basic feature of the Constitution, and thus, clause (4) was declared to be impermissible piece of constitutional amendment.

137. However, the Court in this case also observed that "the concept of a basic structure, as brooding omnipresence in the sky, apart from specific provisions of the Constitution, is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law."

138. In ***Minerva Mills Ltd.*** (supra), discussing the standard to be applied to what qualifies as the basic structure, this Court held that "….***the features or elements which constitute the basic structure or framework of the Constitution or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution. …*** *Therefore, in every case where the question arises as to whether a particular feature of the Constitution is a part of its basic structure, it would have to be determined on consideration of various factors such as the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of country's governance…..*". The Court further held that *"Fundamental rights occupy a unique place in the lives of civilised societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial".....they constitute the ark of the Constitution". ... "....To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure*".

139. In ***S.R. Bommai and others etc. etc. v. Union of India and others etc. etc.***, AIR 1994 SC 1918, expanding the list of basic features, this Court held that secularism was an essential feature of the Constitution and part of its basic structure. In this case, this Court explained the concept of basic structure of the Constitution, while dealing with the issue of exercise of the power by the Central Government under Article 356 of the Constitution.

140. In ***M. Nagraj*** (supra), the Constitution Bench of this Court dealing with the issue of basic structure observed that "axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principles of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all

enacted laws and they stand at the pinnacle of the hierarchy of constitutional values". Such rights have to be respected and cannot be taken away.

141. The framers of the Constitution have built a wall around the fundamental rights, which has to remain forever, limiting the ability of the majority to intrude upon them. That wall is a part of basic structure. [See : ***I.R. Coelho (dead) by L.Rs. v. State of Tamil Nadu***, AIR 2007 SC 861; See also ***Kesavananda Bharati*** (supra)].

142. Thus, "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 Parliament i.e. to form a part of the basic structure." [***M. Nagaraj*** (supra)]

143. When an issue is raised regarding the basic structure, the question does arise as to whether the amendment alters the structure of the constitutional provisions. "The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power." [***M. Nagaraj*** (supra)]

144. The aforesaid structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot be destroyed by any form of amendment. Parliament cannot expand its power of amendment under Article 368 so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution.

145. In ***I.R. Coelho (dead) by L.R.s*** (supra), a Nine Judge Bench of this Court laid down the concrete criteria for basic structure principle, observing:

*"**123.** ... Since power to amend the Constitution is not unlimited, **if changes brought about by amendments destroy the identity of the constitution, such amendments would be void**.....*

x *x* *x* *x*

***137.** ....every improper enhancement of its own power by Parliament, be it clause 4 of Article 329-A or clauses 4 and 5 of Article 368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure doctrine as they introduced new elements which altered the identity of the Constitution, or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded....."* [Emphasis added]

146. Articles 14, 19 and 21 resply represent the fundamental values and form the basis of rule of law, which is a basic feature of the Constitution. For instance, Parliament, in exercise of its amending power under Article 368, can make additions in the three legislative lists contained in the Seventh Schedule of the Constitution, but it cannot abrogate all the lists as that would abrogate the federal structure, which is one of the basic features of the Constitution.

147. To qualify to be a basic structure it must be a "terrestrial concept having its habitat within the four corners of the Constitution." What constitutes basic structure is not like "a twinkling star up above the Constitution." It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either

separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution form the yarn from which the basic structure has to be woven.

148. In ***Supreme Court Advocates-on-Record Association and another v. Union of India,*** AIR 2016 SC 117, this Court held that there are declared limitations on the amending power conferred on Parliament which cannot be breached. Breach of a single provision of the Constitution is sufficient to render the entire legislation *ultra vires* the Constitution. The Court held that the basic structure of the Constitution includes supremacy of the Constitution, the republican and democratic form of Government, the federal character of distribution of powers, secularism, separation of powers between the Legislatures, Executive and the Judiciary, and independence of the Judiciary.

149. In ***Kuldip Nayar v. Union of India & Ors***., AIR 2006 SC 3127, this Court, while dealing with the question of political party system vis-à-vis democracy observed that "parliamentary democracy and multi-party system are an inherent part of the basic structure of Indian Constitution. It is the political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures." Further, the Court, placing reliance on ***Kesavananda Bharati*** (supra) observed that "….a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet Government are such that the people as a whole can have little control in the matter of detailed law-making".

150. In ***Kihoto Hollohan v. Zachillhu*** (supra), the Court felt that the existence of the Tenth Schedule of the Constitution further strengthens the importance of the political parties in our democratic set-up. Rejecting the argument that the political party is not a democratic entirety, and that Whip issued under the Tenth Schedule is unconstitutional, the Court reiterated that the Parliament was

empowered to provide that the Members are expected to act in accordance with the ideologies of their respective political parties and not against it. Thus, 'Basic' means the base of a thing on which it stands and on the failure of which it falls. Hence, the essence of the 'basic structure of the Constitution' lies in such of its features, which if amended would amend the very identity of the Constitution itself, ceasing its current existence. It, as noted above is, not a "vague concept" or "abstract ideals found to be outside the provisions of the Constitution". Therefore, the meaning/extent of 'basic structure' needs to be construed in view of the specific provision(s) under consideration, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of governance of the country. [Reference : paragraphs 108 to 114, paragraphs 135 to 150 from - Doctrine of Basic Structure : Contours by Dr. Justice B.S. Chauhan Former Judge, Supreme Court of India; dated 16 September, 2018]

151. In the case on hand, the entire debate on the constitutional validity of the 103rd Constitution Amendment has proceeded on the doctrine of Basic Structure. If there is one decision of this Court which explains the doctrine of Basic Structure and its reach and effects in the most lucid and simple manner, the same is the case of ***Glanrock Estate Private Limited v. State of Tamil Nadu***, (2010) 10 SCC 96. In the said case, a Bench of three Judges examined the constitutional validity of the Constitution (34th Amendment) Act, 1974 by which the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 stood inserted in the Ninth Schedule to the Constitution as Item 80. It was argued on behalf of the petitioner therein that the inclusion of Janmam Act in the Ninth Schedule amounted to direct negation and abrogation of judicial review. It was argued that the Constitution (34th Amendment) Act, 1974 destroyed the basic feature of the Constitution, namely, judicial review.

152. S.H. Kapadia, CJ, speaking for the Bench, in the ***Glanrock Estate*** (supra), has explained certain concepts like the egalitarian equality, overarching principles and reading of Article 21 with Article 14.

153. The learned Judge explained that in applying the above three principles, one has to go by the degree of abrogation as well as the degree of elevation of an ordinary principle of equality to the level of overarching principles. The learned Judge reminded that the case was not one wherein the challenge was to any ordinary law of the land. The Court said that the challenge was to the constitutional amendment. In a rigid Constitution (Article 368) power to amend the Constitution is a derivative power, which is an aspect of the constituent power.

154. In the case on hand also, the challenge is to the exercise of derivative power of the Parliament in the matter of 103rd Constitution Amendment. Since the power to amend the Constitution is a derivative power, the exercise of such power to amend the Constitution is subject to two limitations, namely, the doctrine of Basic Structure and lack of legislative competence. The doctrine of Basic Structure is brought in as a window to keep the power of judicial review intact as abrogation of such a power would result in violation of basic structure. When we speak of discrimination or arbitrary classification, the same constitutes violation of Article 14 of the Constitution. This Court laid stress to keep in mind that the distinction between constitutional law and ordinary law in a rigid Constitution like ours. The said distinction proceeds on the assumption that ordinary law can be challenged on the touchstone of the Constitution. Therefore, when an ordinary law seeks to make a classification without any rational basis and without any nexus with the object sought to be achieved, such ordinary law could be challenged on the touchstone of Article 14 of the Constitution. However, when it comes to the validity of a constitutional amendment, one has to examine the validity of such amendment by asking the question as to whether such an amendment violates any overarching principle in the Constitution. What is overarching principle?

Concepts like secularism, democracy, separation of powers, power of judicial review fall outside the scope of amendatory powers of the Parliament under Article 368. If any of these were to be deleted, it would require changes to be made not only in Part III of the Constitution but also in Article 245 and the three Lists of the Constitution resulting in the change of the very structure or framework of the Constitution. When an impugned Act creates a classification without any rational basis and having no nexus with the objects sought to be achieved, the principle of equality before law is violated undoubtedly. Such an Act can be declared to be violative of Article 14. Such a violation does not require re-writing of the Constitution. This would be a case of violation of ordinary principle of equality before law. Similarly, "egalitarian equality" is a much wider concept. It is an overarching principle. The term "egalitarianism" has distinct definition that all people should be treated as equal and have the same political, economic, social and civil rights or have a social philosophy advocating the removal of economic inequalities among the people, economic egalitarianism or the decentralisation of power.

155. For the purpose of explaining "egalitarian equality" as an overarching principle, this Court in ***Glanrock Estate*** (supra) gave an illustration of the acquisition of forests. This Court observed thus:

> ***"26.*** *... This would be a case of violation of ordinary principle of equality before law.*
>
> ***27.*** *Similarly, "egalitarian equality" is a much wider concept. It is an overarching principle. Take the case of acquisition of forests. Forests in India are an important part of environment. They constitute national asset. In various judgments of this Court delivered by the Forest Bench of this Court in T.N. Godavarman Thirumulpad v. Union of India (Writ Petition No. 202 of 1995), it has been held that "inter-generational equity" is part of Article 21 of the Constitution.*

28. *What is inter-generational equity? The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated.*

29. *The doctrine of sustainable development also forms part of Article 21 of the Constitution. The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21.*

30. *The important point to be noted is that in this case we are concerned with vesting of forests in the State. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of overarching principle. Equality doctrine has various facets. It is in this sense that in I.R. Coelho case [(2007) 2 SCC 1] this Court has read Article 21 with Article 14. The above example indicates that when it comes to preservation of forests as well as environment vis-à-vis development, one has to look at the constitutional amendment not from the point of view of formal equality or equality enshrined in Article 14 but on a much wider platform of an egalitarian equality which includes the concept of "inclusive growth". It is in that sense that this Court has used the expression Article 21 read with Article 14 in I.R. Coelho case [(2007) 2 SCC 1]. Therefore, it is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31-B. If every breach of Article 14, however, egregious, is held to be unprotected by Article 31-B, there would be no purpose in protection by Article 31-B.*

31. *The question can be looked at from yet another angle. Can Parliament increase its amending power by amendment of Article 368 so as to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all limitations/restrictions placed on the amending power or free the amending power from all limitations. This is the effect of the decision in Kesavananda Bharati [(1973) 4 SCC 225]. …"*

156. This Court, in the aforesaid context, said that the point to be noted, therefore, is that when constitutional law is challenged, one has to apply the

"effect test" to find out the degree of abrogation. This is the "degree test" which has been referred to earlier. If one finds that the constitutional amendment seeks to abrogate core values/overarching principles like secularism, egalitarian equality, etc. and which would warrant re-writing of the Constitution, then such constitutional law would certainly violate the basic structure. In other words, such overarching principles would fall outside the amendatory power under Article 368 in the sense that the said power cannot be exercised even by the Parliament to abrogate such overarching principles. The Court proceeded to quote the observations made by Mathew, J. in ***Indira Nehru Gandhi*** (supra), that equality is a feature of rule of law and not vice-versa. The expression "rule of law" describes a society in which Government must act in accordance with law. A society governed by law is the foundation of personal liberty. It is also the foundation of economic development since investment will not take place in a country where rights are not respected. The Court said that it is in that sense that the expression "Rule of Law" constitutes an overarching principle embodied in Article 21, one aspect of which is equality.

157. As stated above, the amending power under Article 368 of the Constitution is a derivative power. The doctrine of Basic Structure provides a touchstone on which the validity of the Constitutional Amendment Act could be judged. While applying this doctrine, one need not go by the content of a "right" but by the test of justifiability under which one has to see the scope and the object of the Constitutional Amendment. The doctrine of Classification under Article 14 has several facets. Equality is a comparative concept. This Court proceeded to observe something very important. It said that *"a person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are "similarly situated" to the complainant."*

158. The pivotal or seminal question that falls for my consideration is whether the "similarly situated test" is attracted in the present case so as to say that the

egalitarian equality as an overarching principle is violated and has thereby rendered clause (6) of Article 15 and clause (6) of Article 16 invalid as they exclude the SCs, STs and OBCs.

159. In ***Glanrock Estate*** (supra), K.S. Panicker Radhakrishnan, J., concurring with S.H. Kapadia, CJ, thought fit to supplement the reasonings by his separate order. Radhakrishnan, J. observed thus:

> ***"79.*** *Right to equality before law, right to equality of opportunity in matters of public employment, right to protection of life and personal liberty, right against exploitation, right to freedom of religion, etc. are all fundamental rights guaranteed under Part III of the Constitution and a common thread running through all the articles in Part III of the Constitution have a common identity committed to an overarching principle which is the basic structure of the Constitution. Rule of law is often said as closely interrelated principle and when interpreted as a principle of law, it envisages separation of powers, judicial review, restriction on the absolute and arbitrary powers, equality, liberty, etc. Separation of powers is an integral part of rule of law which guarantees independence of judiciary which is a fundamental principle viewed as a safeguard against arbitrary exercise of powers, legislative and constitutional.*
>
> ***80.*** *Doctrine of absolute or unqualified parliamentary sovereignty is antithesis to rule of law. Doctrine of parliamentary sovereignty may, at times, make rule of law and separation of powers subservient to the wish of the majority in Parliament. Parliamentary supremacy cannot be held unqualified so as to undo the basic structure.* ***Basic structure doctrine is, in effect, a constitutional limitation against parliamentary autocracy. Let us, however, be clear that the principles of equality inherent in the rule of law do not averse to the imposition of special burdens, grant special benefits and privileges to secure to all citizens justice, social and economic, and for implementing the directive principles of State policy for establishing an egalitarian society.*** *"*
>
> [Emphasis supplied]

160. Thus, the word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alteration. As a result of the amendment, the old Constitution

cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, yet it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy, nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha.

161. Justice H.R. Khanna in one of his lectures delivered at the Delhi Study Group in New Delhi, stated something which is worth taking note of:

> *"Criticism has been levelled against the concept of basic structure that it creates uncertainty in a vital matter like the power to amend the Constitution. It is urged that unless that concept is put in precise cut and dry form, those amending the Constitution would always remain uncertain whether the constitutional amendment, even though passed by the requisite majority, would be upheld by the courts.* ***In this respect it may be stated that the majority decision of this Court in Kesavananda Bharati case contains sufficient indication by giving illustrations as to what would constitute basic structure of the Constitution. It is never desirable in constitutional matters to put either the provisions or basic propositions in cut and dry form, nor is it proper in such matters to try to be exhaustive for once you do that you forget a vital fact of life that in human affairs there can arise a variety of situations and that it is beyond any human ingenuity to pierce through the visage of time and to contrive for all types of contingencies. It is for that reason that the provision of a Constitution are couched in general terms because that fact gives the provisions flexibility, helps them to grow and enables them to adapt themselves to new situations. Rigidity is one thing which the provisions of a Constitution must shun for such rigidity can result in the break-down of the Constitution in***

situations where what is needed is resilience and flexibility rather than brittleness and rigidity. Absence of formal exactitude or want of fixity of meaning is not unusual or even regrettable attribute of constitutional provision. Nor is it desirable in such matters to freeze a concept at some fixed stage of thought or time. The US Constitution was framed about 200 years ago. It was designed for a country which at that time was primarily agricultural and consisted of a small number of States. The fact that the said Constitution has stood the test of time and has proved effective for the most industrialized country consisting of a very large number of States is primarily due to the fact that the provisions of its Constitution are couched in general language. *As mentioned by a great master the generalities of US Constitution have helped it to grow and adapt its provisions to the varying situations. Although one can never prevent the challenge to any provision, however immaculately drafted, there can be not much doubt about the validity of most of the provisions."* [Emphasis supplied]

162. Thus, what is important from the aforesaid is that it is never desirable in constitutional matters to put either the provisions or basic propositions in cut and dry form nor is it proper in such matters to try to be exhaustive for once you do that you forget a vital fact of life that in human affairs there can arise a variety of situations and that it is beyond any human ingenuity to pierce through the visage of time and to contrive for all types of contingencies. The amending power cannot be construed in a narrow and pedantic manner. It cannot be said that no part of Part III can be abridged. What is violative of the basic structure is the withdrawal of the props on which the edifice stands, will alter the identity of the Constitution. [See : ***Kesavananda Bharati*** (supra)]. Only if a right is so abridged that it tends to affect the basic structure or essential content of the right and reduces the right only to a name, will be abridgement or ceases to be an abridgement.

163. If the economic criteria based on the economic indicator which distinguishes between one individual and another is relevant for the purpose of classification and grant of benefit of reservation under clause (6) of Article 15

as held by my esteemed Brother Justice Bhat, then merely because the SCs/STs/OBCs are excluded from the same, by itself, will not make the classification arbitrary and the amendment violative of the basic structure of the Constitution. This is where with all humility at my command I beg to differ with my esteemed Brother Justice Bhat for whom I have utmost and profound respect.

164. Article 14 has two clear facets which are invalid. One is over-classification and the other is under-classification, which is otherwise, over-inclusiveness or under-inclusiveness. The judicial review of over-classification should be undertaken very strictly. In the cases of under-classification when the complaint is either by those who are left out or those who are in i.e. that the statute has roped him in, but a similarly situated person has been left out, it would be under-inclusiveness. It is to say that you ought to have brought him in to make the classification reasonable. It is in such cases that the courts have said that 'who should be brought in' should be left to the wisdom of the legislature because it is essentially a stage where there should be an element of practicability. Therefore, the cases of under-inclusion can be reviewed in a little liberal manner. The under-inclusion argument should not be very readily accepted by the courts because the stage could be experimental. For instance, in the case on hand, the argument in the context of 103rd Constitution Amendment is that SCs, STs and OBCs have been left out, the Court would say that it is under-inclusiveness. The Legislature does not have to bring any and everybody to make it reasonable. The case on hand is not one of active exclusion. The SCs, STs and OBCs who have been left out at the first instance are telling the Court that they ought to have been included. In such circumstances, the test would be very strict, not that it would be impervious to review. Had they been included in clause (6) of Article 15 & clause (6) of Article 16 resply at any point of time and thereafter, excluded, it would be legitimate for them to argue that having treated them as one, they cannot be excluded in an arbitrary manner.

165. This Court in the ***State of Gujarat and Another v. Shri Ambika Mills Ltd. Ahmedabad and Another***, (1974) 4 SCC 656, has explained the concept of under-inclusiveness. I quote the relevant observations: -

> ***"54.*** *A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is : what does the phrase 'similarly situated' mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.*
>
> ***55.*** *A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.*
>
> ***56.*** *The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognized the very real difficulties under which legislatures operate — difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape — and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated*

that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. [Missouri, K & T Rly v. May, 194 US 267, 269] What, then, are the fair reasons for non-extension? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters? Should it, by its judgment, force the legislature to choose between inaction or perfection?" [Emphasis supplied]

166. ***Ambica Mills*** (supra) justified under-inclusiveness on the grounds of recognition of degrees of harm, administrative convenience, and legislative experimentation. Reference was made to Justice Oliver Wendell Holmes's observation in ***Missouri, K & T Rly v. May***, 194 US 267 (1904), 269, that "legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched", to state that the judiciary must exercise self-restraint in such cases.

167. The equality code in Article 14 of the Indian Constitution prescribes substantive and not formal equality. It is now a settled position that classification *per se* is not discriminatory and violative of Article 14. Article 14 only forbids class legislation and not reasonable classification. A classification is reasonable, when the following twin tests as laid down by S.R. Das, J., in ***The State of West Bengal v. Anwar Ali Sarkar***, 1952 SCR 284, are fulfilled:

(i) The classification must be based on an intelligible differentia which distinguishes persons or things that are grouped, from others left out of the group; and

(ii) The differentia must have a rational relationship to the object sought to be achieved by the statute.

168. Das J. in ***Anwar Ali Sarkar*** (supra) held that there must be some yardstick to differentiate the class included and the others excluded from the group. The

differentia used for the classification in the amendment is to promote or uplift the economically weaker sections of citizens who are otherwise not covered under Article 15(4) and Article 16(4) of the Constitution. This is keeping in mind the Directive Principles of State Policy as embodied under Article 46 of the Constitution. Therefore, there is a yardstick used for constituting the class for the purpose of the amendment. To put it in other words, the insertion of the economically weaker sections is perfectly valid as a class for the extension of special provision for their advancement for admission and for reservation in posts.

169. The broad egalitarian principle of social and economic justice for all is implicit in every Directive Principle and, therefore, a law designed to promote a directive principle, even if it comes into conflict with the formalistic and doctrinaire of equality before the law, would most certainly advance the broader egalitarian principles and desirable constitutional goal of social and economic justice for all. [See : ***Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd***., (1983) 1 SCC 147]

170. Article 14 of the Constitution of India corresponds to the last portion of Section 1 of the 14th Amendment of the American Constitution, except that our Article 14 has also adopted the English doctrine of Rule of law by the addition of the words "equality before the law". However, the addition of these extra words does not make any substantial difference in its practical application. The, meaning, scope and effect of Article 14 of the Constitution of India have been discussed and laid down by this Court in the case of ***Charanjit Lal Chowdhury v. The Union of India and others***, AIR 1951 SC 41.

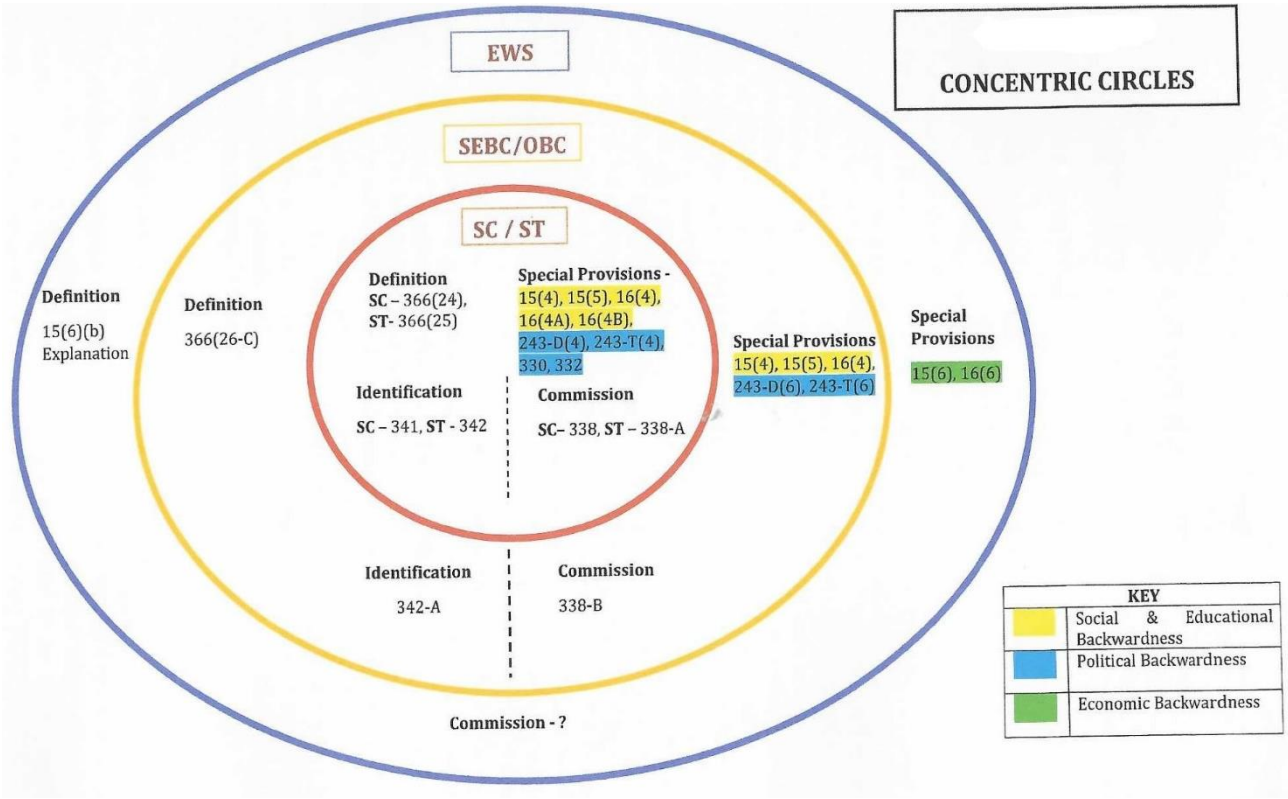
171. It could be said that this Court in ***S. Seshachalam and Others v. Chairman, Bar Council of Tamil Nadu and Others*** reported in (2014) 16 SCC 72, has taken

the view that the reasonable classification to prevent double benefits under the equality code is permissible. This Court observed thus:

> ***"28.*** *The various welfare fund schemes are in actuality intended for the benefit of those who are in the greatest need of them. The lawyers, straight after their enrolment, who join the legal profession with high hopes and expectations and dedicate their whole lives to the professions are the real deservers. Lawyers who enrol themselves after their retirement from government services and continue to receive pension and other terminal benefits, who basically join this field in search of greener pastures in the evening of their lives cannot and should not be equated with those who have devoted their whole lives to the profession.* ***For these retired persons, some amount of financial stability is ensured in view of the pension and terminal benefits and making them eligible for lump sum welfare fund under the Act would actually amount to double benefits. Therefore, in our considered view, the classification of lawyers into these two categories is a reasonable classification having a nexus with the object of the Act.***
>
> ***29. Furthermore, it is also to be noted that in view of their being placed differently than the class of lawyers who chose this profession as the sole means of their livelihood, it can reasonably be discerned that the retired persons form a separate class. As noticed earlier, the object of the Act is to provide for the constitution of a Welfare Fund for the benefit of advocates on cessation of practice. As per Section 3(2)(d) any grant made by the Government to the welfare fund is one of the sources of the Advocates' Welfare Fund. The retired employees are already in receipt of pension from the Government or other employer and to make them get another retiral benefit from the Advocates' Welfare Fund would amount to double benefit and they are rightly excluded from the benefit of the lump sum amount of the welfare fund."***
>
> [Emphasis supplied]

172. One of the arguments of Mr. Gopal Sankaranarayanan, the learned senior counsel who appeared for the petitioner in Writ Petition (Civil) No. 73 of 2019 that has appealed to me is that the SC/ST/OBCs received political reservation as well as under the Constitution and there are no ceiling limits to the extent of reservation which each of the groups can receive. On the other hand, the EWS reservation is

kept at 10% and is not extended to the political reservation, thereby providing a balance. Indisputably, the exclusion in Articles 15(6) and 16(6) resply from the benefits of EWS measures is only of the "classes mentioned" in the Articles 15(4), 15(5) and 16(4) of the Constitution. The contention that the exclusion of these groups is discriminatory overlooks the fact that by exclusion of the creamy layer, the lower economic strata of the SC/ST and OBCs are already represented in the classes covered by the Articles 15(4), 15(5) and 16(4) resply. The sketch below would make it more clear.



173. Let me go back to ***Kathi Raning Rawat*** (supra). I have referred to ***Kathi Raning Rawat*** (supra) in para 14 of my judgment. Let me reiterate the observations made in ***Kathi Raning Rawat*** (supra) which I have incorporated in para 14. I quote once again:

> *"**7.** All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different…."*

174. Article 15, just like Article 16, is a facet of the right to equality. That right as interpreted in the context of Article 14 is not the right to uniform or identical treatment. It is a right to be treated equally among equals. Unequal treatment of equals is as much violation of that right as equal treatment of unequals. Every difference of treatment is not inconsistent with that right just as every identical treatment is not consistent with it. For determining the consistency of such treatment with the right to equality from time to time different tests such as reasonable classification, suspect classification, or classification lying in between the two, etc. have been devised and applied. But they have not always been able to provide satisfactory explanation, particularly when it comes to affirmative action or positive equality. An all comprehensive and satisfactory test in this regard has been provided by Ronald Dworkin, an American philosopher and scholar of United States Constitutional Law, in his distinction between the right to equal treatment and the right to treatment as an equal. According to Ronald Dworkin, the latter is the fundamental right, while the former is only a derivative right. The right to treatment as an equal consists in equal respect and concern, while the right to equal treatment consists in identical treatment. But identical treatment is neither possible

nor consistent with the right to equality. Therefore, what the right to equality requires is equal concern. As long as that concern exists, the difference of treatment is consistent with the right to equality. Not every difference of treatment is *per se* inconsistent with the right to equality. Only that difference of treatment which is based on lack of equal concern is inconsistent with that right. To illustrate, different treatment on the basis of race, religion or caste is not, in itself, bad so long as equal concern or respect is shown to every race, religion or caste. It becomes vulnerable only when it is based on disrespect, contempt or prejudice to a race, religion or caste. Article 15 prohibits only such and not every difference of treatment based on religion, race, caste, sex, place of birth or any of them. This is very much obvious from the expression "discriminate against" in Article 15 of the Constitution. The State is not prohibited from treating people differently on the basis of religion, race, caste, sex or place of birth; it is prohibited from discriminating against them on these grounds. Discrimination results only when religion, race, caste, sex or place of birth or any of them is made the basis of disrespect, contempt or prejudice for difference in treatment. In other words, if difference in treatment on any of these grounds is not based on any disrespect, contempt or prejudice, it is not discriminatory and, therefore, not against Article 15(1). The same is true for Article 29(2).

175. Articles 15(1) and 29(2) resply while thus prohibiting discrimination or prejudicial or contemptuous difference of treatment on the grounds mentioned in those Articles, Article 15(4) sanctions "special provisions for the advancement of any socially and educationally backward classes ... or for the Scheduled Castes and the Scheduled Tribes". Could it be said or argued that any provision for the advancement of any socially and educationally backward class or for SCs and STs can

be termed or characterised as the one based on any prejudice, contempt or insult to any forward class? If the answer is in the negative, then why any provision for the advancement of any economically weaker section of the society excluding SCs and STs should be termed or characterised as the one based on any prejudice, contempt or insult to any backward class? The aforesaid would equally apply to Article 16 of the Constitution. [Reference : "*Are Articles 15(4) and 16(4) Fundamental Rights*" by Prof. Mahenendra P. Singh, Professor of Law, Delhi University]

176. M. Patanjali Sastri, CJ in ***Kathi Raning Rawat*** (supra) explained:

> *"**7.** All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies.... "*

177. Fazal Ali, J. in his concurring judgment ***Kathi Raning Rawat*** (supra) explained the concept in the following words:

> *"**19.** I think that a distinction should be drawn between "discrimination without reason" and "discrimination with reason".*

The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects, may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances…."

178. In the ***State of Madhya Pradesh v. Narmada Bachao Andolan and Another***, (2011) 7 SCC 639, this Court observed quoting ***Kathi Raning Rawat*** (supra):

*"**73.** Discrimination means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination that arises from oversight which the State is ready to rectify. [Vide Kathi Raning Rawat v. State of Saurashtra [AIR 1952 SC 123 : 1952 Cri LJ 805], and Video Electronics (P) Ltd. v. State of Punjab [(1990) 3 SCC 87 : 1990 SCC (Tax) 327 : AIR 1990 SC 820]."*

179. Let me also refer to a speech of the President of the Supreme Court of the United States on "Equality and Human Rights", Oxford Equality Lecture 2018, Lady Hale dated 29th October, 2018. The speech starts stating: -

"Equality sounds a simple concept but the reality is very complicated. Is it about where you start – with equal opportunities - or where you end up – with equal outcomes - or something in between – like a level playing field?"

180. Let me now refer to some relevant parts of the speech:

"There must be other people in an 'analogous situation' or 'similarly situated' who are treated more favourably than the complainant. In ordinary discrimination cases, now under the Equality Act 2010, the equivalent requirement, that the circumstances of the comparator must be the same or not materially different from those of the complainant, can generate a lot of argument. How different is

different? I usually give the illustration of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337: the House of Lords held that the situation of a senior female police officer was not the same as the situation of male officers who had been treated more favourably, because there had been complaints against her from subordinates and not against them. This begs the question of whether the complaints themselves stemmed from discriminatory attitudes towards senior police officers. A better illustration now might be Hewage v Grampian Health Board [2012] UKSC 37, 2013 SC (UKSC) 54, where an Asian female consultant in orthodontics complained of bullying and harassment by her managers and the more favourable treatment given to white male consultants who'd made similar complaints. The Health Board tried hard to argue that their situations were different because of minor differences between them – but we did not agree.

These arguments arise because under the Equality Act it is not generally a defence to direct discrimination that the difference in treatment is justified. It is tempting, therefore, where a court or tribunal thinks that there might have been a justification to find that the cases are not the same. This is not a problem under article 14 where both direct and indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. So the approach to comparability ought to be more relaxed, as indeed it is. As Lord Nicholls put it in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL17, [2006] 1 AC 173, para 3:

> ***". . . the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."***

Thus in most cases it comes down to justification. There is a link here with status. Discrimination on some grounds is more difficult to justify than discrimination on others. In R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63, [2009] 1 AC 311, Lord Walker produced the illuminating idea that personal characteristics are 'more like a series of concentric circles' (para 5). The inner circle is innate, largely immutable, and closely connected with personality: gender, sexual orientation, colour, race, disability. Next come nationality, language, religion and politics, which may be innate or acquired, but are all-important to personality and reflect important values protected by the European Convention. Outside those are acquired characteristics, more concerned with what people do or with what happens to them than with who they are, such as military status, residence, or past employment. He put street homelessness into that category: 'The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify' (para 5). So denying disability premium to street homeless was justified. Strasbourg has also put immigration status into this category (Bah v United Kingdom (2011) 31 BHRC 609).

But there is also a link with the subject matter. Discrimination in some areas is easier – much easier – to justify than in others. Generally speaking, we address justification in four questions: is there a legitimate aim; is there a rational connection between the means and the aim; could the aim be achieved by measure which would intrude less upon the fundamental right in question; and has a fair balance been struck between the end and the means? But the test to be applied in striking that balance does differ according to the subject-matter.

This brings me to the most fraught area of all – welfare benefits. Welfare benefits do more than try to ensure a level playing field on which all start equal and then make of life what they can. Welfare benefits are trying to do something to redress inequality of results: to lift people out of absolute poverty; to redress some of the disadvantage suffered by children growing up in poverty; to make reasonable adjustments to cater for disability. They are not of course trying to achieve absolute equality – just to prevent the worst effects of gross socio-economic inequalities*."*

181. Keeping in view the aforesaid, let me now refer to some of the observations made by this Court in ***Ashoka Kumar Thakur*** (supra):

> ***"114.*** *A survey of the conclusions reached by the learned Judges in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] clearly shows that the power of amendment was very wide and even the fundamental rights could be amended or altered. It is also important to note that the decision in Berubari Union and Exchange of Enclaves, Reference under Article 143(1) of the Constitution of India, In re [AIR 1960 SC 845 : (1960) 3 SCR 250] to the effect that the Preamble to the Constitution was not part of the Constitution was disapproved in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] and it was held that it is a part of the Constitution and the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble visions envisaged in the Preamble. A close analysis of the opinions in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] shows that all the provisions of the Constitution, including the fundamental rights, could be amended or altered and the only limitation placed is that the basic structure of the Constitution shall not be altered. The judgment in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] clearly indicates what is the basic structure of the Constitution. It is not any single idea or principle like equality or any other constitutional principles that are subject to variation, but the principles of equality cannot be completely taken away so as to leave the citizens in this country in a state of lawlessness.* ***But the facets of the principle of equality could always be altered especially to carry out the directive principles of the State policy envisaged in Part IV of the Constitution****...."*
>
> ***115.*** *The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the fundamental rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the basic structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are*

large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.

116. *... as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on* ***the basic features of the Constitution.***

117. *It may be noticed that the majority in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] did not hold that all facets of Article 14 or any of the fundamental rights would form part of the basic structure of the Constitution….*

118. *Equality is a multicoloured concept incapable of a single definition as is also the fundamental right under Article 19(1)(g). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity.*

119. *The observations made by Mathew, J. in Indira Nehru Gandhi v. Raj Narain [1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347] are significant in this regard [**Ed.**: Quoted and paraphrased in Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, p. 673, para 83.] :*

"83. ... 'To be a basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution.' (Indira Nehru case [1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347] , SCC p. 137, para 341)

What constitutes basic structure is not like 'a twinkling star up above the Constitution'. It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven. (Indira Nehru case [Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347] , SCC p. 138, para 345)"

x x x x

***121.** It has been held in many decisions that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the directive principles of State policy as the "book of interpretation". The Preamble embodies the hopes and aspirations of the people and directive principles set out the proximate grounds in the governance of this country.*

x x x x

***373.** Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who*

may not otherwise gain admission or employment. Articles 14, 15 and 16 allow for affirmative action. To promote Article 14 egalitarian equality, the State may classify citizens into groups, giving preferential treatment to one over another. When it classifies, the State must keep those who are unequal out of the same batch to achieve constitutional goal of egalitarian society."

182. I am of the view as Prof. Satya Prateek rightly puts that the enabling provisions, varying enforcement mechanisms and the State opinion on backwardness, reservation, adequate representation etc., in any circumstances cannot be recognised as the fundamental or basic structure of the Constitution. By their very nature, they are bound to change, with time, location and circumstances. On the other hand, the fundamental tenets or the core principles of the Constitution are foundational – they are at the core of its existence. They are seminal to the Constitution's functioning. The Constitution retains its existence on these foundations as they preserve the Constitution in its essence. This is not to mark out the possibilities of structural adjustments in the foundations with time. The foundations may shift, fundamental values may assume a different meaning with time but they would still remain to be integral to the constitutional core of principles, the core on which the Constitution would be legitimately sustained. (Reference: Virendra Kumar, Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance, 49:3, Journal of the Indian Law Institute, 365, 385 (2007))

183. Prof. Virendra Kumar believes that there is a difference between the fundamental rights and the values that structure such fundamental rights. He views the values to have an overarching influence and says that it is totally possible to hold that violation of the fundamental rights in certain situations, may not infringe the fundamental values in their backdrop. (Reference –Essay by Satya Prateek).

184. The *ad hoc* policies of the State directed towards achieving a larger, fundamental standard of equality, cannot by itself become fundamental. Fundamental would only be the principle and not the way these principles are sought to be realised. Such mechanisms which facilitate 'equality of opportunity in public employment' as guaranteed under Article 16 of the Constitution are *ad hoc* arrangements. They could be suitably modified with passage of time or even be done away with for a more suitable, convenient and efficient reservation policy, largely dependent on the State's own understanding of the best way to pursue the constitutional ends.

185. This Court in ***Ajit Singh and Others v. State of Punjab and Others*** *reported as (1999) 7 SCC 209* (5-Judge Bench) after quoting with approval the law laid down in its previous judgments in ***M.R. Balaji*** (supra) and ***C.A. Rajendran v. Union of India & Others*** reported as (1968) 1 SCR 721 : AIR 1968 SC 507 ruled that there is no duty on the Government to provide reservation. The Court held that both Articles 16(4) and 16(4A) resply do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those articles so warranted.

186. Each one of these Constitutional provisions that are categorised as rights under Part III has intrinsic value content. Many of these rights are a part of the mechanism geared towards realising a common constitutional principle. For example, Articles 14, 15 and 16 resply of the Constitution are committed to the common principle of equality. Reasonably then, if an amendment is to be struck down under the 'basic structure' formulation, the central principle of these inter-related provisions should be at threat. A mere violation of one of these enabling provisions would not be of much consequence under the doctrine of Basic Structure as long as such violation does not infringe upon the central thesis of

equality. Redress for marginal encroachment cannot be found under the 'Basic Structure Doctrine'. In considering the effect of an amendment on the constitutional core, it is important to keep in mind the widest ramifications of the amendment. It is imperative to contemplate and consider every way in which the 'basic structure' of the Constitution might be threatened through the impugned amendment. The amendment would stand as constitutional only after a satisfactory understanding as to its effect on the constitutional core is reached by the courts. To sustain itself, the amendment should not violate such core in the widest interpretation given to it. (Reference : Prof. Satya Prateek's essay)

187. The new concept of economic criteria introduced by the impugned amendment for affirmative action may go a long way in eradicating caste-based reservation. It may be perceived as a first step in the process of doing away with caste-based reservation. In the words of Nani A. Palkhivala, *"……The basic structure of the Constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism the judgment (Mandal-Indra Sawhney) fractures the nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into two – forward and backward – and open up new vistas for internecine conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgment (Mandal) will revive casteism which the Constitution emphatically intended to end; and the pre-independence tragedy would be re-enacted with the roles reversed – the erstwhile underprivileged would now become the privileged…..*"

188. Baba Saheb Ambedkar recognised fraternity as a necessary principle for the survival of Indian democracy. He defined fraternity as the 'common brotherhood of all Indians'. In his revolutionary, yet undelivered speech titled

'Annihilation of Caste', he described fraternity as the 'essential attitude of respect and reverence towards fellowmen'.

189. Let me remind one and all of what this Court observed almost five decades back in ***Minor A. Peeriakaruppan v. State of Tamil Nadu and Others*** [(1971) 1 SCC 38 : AIR 1971 SC 2303]:

> *"**29.** .... But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest....."* [Emphasis supplied]

190. Thus, reservation is not an end but a means – a means to secure social and economic justice. Reservation should not be allowed to become a vested interest. Real solution, however, lies in eliminating the causes that have led to the social, educational and economic backwardness of the weaker sections of the community. This exercise of eliminating the causes started immediately after the Independence i.e., almost seven decades back and it still continues. The longstanding development and the spread of education have resulted in tapering the gap between the classes to a considerable extent. As larger percentages of backward class members attain acceptable standards of education and employment, they should be removed from the backward categories so that the attention can be paid toward those classes which genuinely need help. In such circumstances, it is very much necessary to take into review the method of identification and the ways of determination of backward classes, and also, ascertain whether the criteria adopted or applied for the classification of

backward is relevant for today's conditions. The idea of Baba Saheb Ambedkar was to bring social harmony by introducing reservation for only ten years. However, it has continued past seven decades. Reservation should not continue for an indefinite period of time so as to become a vested interest.

191. In the result, I hold that the impugned amendment is valid and in no manner alters the basic structure of the Constitution.

192. I am of the view that all the petitions challenging the impugned amendment should fail.

..……..…….J.
(J.B. PARDIWALA)

New Delhi;
November 07, 2022

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO(S). 55 OF 2019

JANHIT ABHIYAN …PETITIONER(S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

WITH

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J U D G M E N T

S. RAVINDRA BHAT, J.

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1. I regret my inability to concur with the views expressed by the majority opinion on the validity of the 103rd Amendment on Question No. 3, since I feel - for reasons set out elaborately in the following opinion - that this court has for the first time, in the seven decades of the republic, sanctioned an avowedly exclusionary and discriminatory principle. Our Constitution does not speak the language of exclusion. In my considered opinion, the amendment, by the language of exclusion, undermines the fabric of social justice, and thereby, the basic structure.

2. At the outset, I must state that I am in agreement that the addition, or insertion of the 'economic criteria' for affirmative action in aid of the section of population who face deprivation due to poverty, in furtherance of Article 46, does not *per se* stray from the Constitutional principles, so as to alter, violate, or destroy its basic structure. As long as the State addresses deprivation resulting from discriminatory social practices which have kept the largest number of our populace in the margins, and continues its ameliorative policies and laws, the introduction of such deprivation-based affirmative action, is consistent with constitutional goals. What, however, needs further scrutiny, (which this opinion proposes to address

presently) is whether the manner of implementing – i.e., the *implicit* exclusion of those covered under Art. 15(4) and 16(4) [Scheduled Castes ("SC"), Scheduled Tribes ("ST"), and socially and educationally backward classes ("SEBC")], cumulatively referred to as 'backward classes'] violates, or damages the basic structure or essential features of the Constitution.

3. Therefore, I will first address the point of my disagreement – Question 3 [**Part III**] followed by a discussion on Question 1 [**Part IV**]; I have also separately considered economic criteria vis-a-vis Article 16, specifically [**Part V**]. I have given my additional reasoning on Question 2 [**Part VI**]. Since all three questions framed by this court, entail an examination under the doctrine of basic structure, I find it necessary to lay out the contours of this doctrine, the standard of review for identifying the essential feature or principle, and for application of the doctrine itself [**Part II**].

I. Context and history of reservations

4. Given that it has been exhaustively recounted in the judgment of Justice Dinesh Maheshwari - it is unnecessary for the purpose of this opinion to retrace the history of how affirmative action and reservations in India have been worked out; I have briefly outlined what is relevant to my analysis.
5. Aside from the allusion to Maharaja Chhatrapati Shahuji's reservation of 50% (in 1902), the kind of affirmative action one sees today, can be traced to the 1931 census which separately determined the "depressed classes". Premised on this, the *Government of India (Scheduled Castes) Order, 1936*[1] enlisted a large number of communities which faced the brunt of caste stigma and other socially evil practices. Parallelly, in several princely

[1] Government of India (Scheduled Castes) Order, 1936 <https://socialjustice.gov.in/writereaddata/UploadFile/GOI-SC-ORDER-1936.pdf>.

states disparate efforts were made to ameliorate the lot of such communities and castes, that had been discriminated against and marginalised for centuries. This history informs a large part of the Constituent Assembly debates, during which, member after member, reiterated the fledgling nation's determination not only to ensure equality before law, and equal protection of the law, but travelling beyond that, to ensuring *substantive* equality of *opportunity* and *access* to public places, goods, employment, etc.

6. One of the first cases that this court decided was *State of Madras v. Champakam Dorairajan*[2], where this court held to be unconstitutional, a communal reservation which fixed quotas for different communities and castes – this led to insertion of Article 15(4) by the Constitution (First Amendment) Act. The next important case was *M.R. Balaji v. State of Mysore*[3] where this court held that reservations cannot be solely based on caste, and rather would have to satisfy the test of social and educational backwardness, as per the (then) text of the Constitution. It was held that the result of poverty, to a large extent, was that the poor class of citizens automatically became socially backward. They did not enjoy a status in society and were therefore, forced to take a backward seat. Other decisions followed the law declared in *M.R. Balaji* – In *T. Devadasan v. Union of India*[4], too, a rule enabling carrying forward of SC vacancies which resulted in almost 2/3rd of the vacancies being earmarked for SC candidates, was adversely commented upon and held to be unconstitutional. The majority remarked importantly that the reason for backwardness of SC/ST communities was due to *"historical causes"* and that the *"purpose of Article 16(4) is to ensure that such people, because of*

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[2] *State of Madras v. Champakam Dorairajan*, 1951 SCC 351, (hereinafter, "*Champakam Dorairajan*").
[3] *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439 (hereinafter, "*M.R. Balaji*"), See para 21.
[4] *T. Devadasan v. Union of India* (1964) 4 SCR 680 (hereinafter, "*T. Devadasan")*.

their backwardness should not be unduly handicapped in the matter of securing employment in the services of the State". Reservations is therefore *"in favour of backward classes who are not adequately represented in the services under the State".* The court also said that a rule for reservation and posts for such backward classes *"cannot be said to have violated Article 14"*, as advanced classes cannot be considered for appointment to such posts because *"they may be equally or even more meritorious than the members of the backward classes"*.

7. However, in an illuminating dissenting, Subba Rao, J, highlighted the linkages between Articles 14, 15 and 16, stressing on the fact that Article 16(4) was a facet of Article 16(1):

> *"*26. *Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only an utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. Two horses are set down to run a race—one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause (4) in Art. 16. The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article.*"

8. A majority of the 7-judge bench in *State of Kerala v. N.M. Thomas*[5], accepted this dissenting view of K. Subba Rao, J. (in *T. Devadasan)*. In *N.M. Thomas*, a rule exempting SC candidates from qualifying in a departmental examination for a longer duration than others, was upheld by the Supreme Court. The court noted that:

(i) The basic content of Articles 14, 15(1) and 16(1) constituted a code in that Articles 15(4) and 16(4) was to enable equality of opportunity for class which would otherwise have been excluded from appointment. Hence, any preferential rule for backward classes, could not be unconstitutional;

(ii) Article 16(1) permits classification and Article 16(4) is not an exception to Article 16(1);

(iii) A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose[6];

(iv) Article 16(1) sets out a positive aspect of equality of opportunity in matters of public employment and Article 16(2) negatively prohibits discrimination on the enumerated grounds in the area covered by Article 16(1);

(v) But for Article 16(4), 16(1) would have prevented preferential treatment for reservations for backward classes of citizens.

It was held that Article 16(4) was introduced to reconcile Article 16(1) [representing the dynamics of 'justice' conceived as 'equality', in conditions under which candidates actually competing for posts in the Government] and Articles 46 and 335 embodying the duties of the State so as to protect them from the inequities of social injustice. These

[5] *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 (hereinafter "*N.M. Thomas*")
[6] para 83 per Mathew, J.

encroachments in the field of Article 16(1) can only be permitted if they are warranted under Article 16(4).

9. The most authoritative decision on the point of reservations was the nine-Judge ruling in *Indra Sawhney v. Union of India*[7]. The court also had the occasion to consider the validity of an office memorandum which introduced a 27% quota in favour of other backward classes in relation to Central Government posts and services. The verdict was not a unanimous one. There were six opinions. The broadest summary of those opinions:

(i) the reference to backward classes of citizens within Article 16(4) refers to social and educational backwardness;

(ii) Article 16(4) is a facet and part of Article 16(1), and not an exception to the latter. The judgment of Jeevan Reddy, J explains the ruling in *N.M. Thomas* on this point approvingly at paragraph 713 (SCC p. 672-674);

(iii) Caste alone cannot be the determining factor to decide social and educational backwardness and that a caste can be and can often be a social class in India;

(iv) The economic criterion alone for determining backwardness of classes or groups is impermissible, because the indicators are social and educational backwardness having regard to the express terms of Articles 15(4) and 16(4);

(v) There can be sub-classification amongst backward classes of citizens for the purpose of ensuring that most vulnerable groups benefit;

(vi) There can be no reservations in promotions under Article 16(4); and

(vii) The “creamy layer” or more affluent sections of other backward classes had to be identified by the state to ensure that the most

[7] *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, (hereinafter, "*Indra Sawhney*").

deprived sections were not kept out. Such categories could not claim the benefit of reservation.

10. *M. Nagaraj* v. *Union of India*[8], *Ashok Kumar Thakur v. Union of India*[9], *K. Krishna Murthy v. Union of India*[10], *Pramati Educational & Cultural Trust v. Union of India*[11], *Chebrolu Leela Prasad Rao v. State of A.P*[12], and *Jaishri Laxmanrao Patil v. State of Maharashtra*[13], are the other significant decisions, rendered by Constitution Benches, after *Indra Sawhney* on this. In *M. Nagaraj*, the court negatived a challenge to Article 16(4-A and B) introduced by a Constitutional amendment on the ground that it violated the basic structure principle. The court held that though facets of equality were part of the basic structure, the provision Article 16(4A) permitting reservations in promotion for SC/STs did not violate the basic structure. The amendment in fact, restored the situation which existed due to prior court rulings that such reservations in promotion were permissible. The court also held that the "catch-up rule"[14] was not an rule of equality, or a constitutional principle that could not be overborne.[15] The court, in *M. Nagaraj,* discussed the principles underlying the basic structure doctrine, as well as the applicable tests to determine it (which I have referred to in the following section).

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[8] *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, (hereinafter, "*M. Nagaraj*").
[9] *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 (hereinafter, "*Ashok Kumar Thakur*").
[10] *K. Krishna Murthy v. Union of India*, (2010) 7 SCC 202, (hereinafter as "*K. Krishna Murthy*").
[11] *Pramati Educational & Cultural Trust v. Union of India*, (2014) 8 SCC 1, ("*Pramati*").
[12] *Chebrolu Leela Prasad Rao v. State of A.P.*, (2021) 11 SCC 401, ("*Chebrolu Leela Prasad* ").
[13] *Jaishri Laxmanrao Patil v. State of Maharashtra*, (2021) 8 SCC 1, (hereinafter, "*Jaishri Laxmanrao Patil*").
[14] So described, in view of the previous decisions of the court, which had declared that senior employees in a cadre, overlooked for promotion on account of quotas in promotion in favour of SC/STs were entitled to "catch up" their seniority in the lower cadre, when they were promoted. This was to balance their equities, or off-set the disadvantage they were placed in due to reservations in promotions, which enabled junior officials in a cadre to steal a march and secure promotions earlier.
[15] The court stated that
"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."

II. Dealing with the basic structure

11. I agree with the judgment of Justice Dinesh Maheshwari in its tracing of the doctrine of basic structure, and its journey, through past precedents spanning nearly five decades. I will however, record a few additional conclusions based upon my reading.

A. Important cases on the doctrine

12. The court's polyvocal majority in *Kesavananda Bharati v. State of Kerala*[16], did not offer unanimity on the key elements of the constitution, or the values underlying it, as essential features. What however, the judges constituting the majority were clear, was that the power of amendment needed *regulation,* or control, through the basic structure doctrine. For the purpose of brevity – and compactness, it would be sufficient to notice the analysis and summary[17] of the majority in *Kesavananda Bharati,* made by the majority opinion of Chandrachud, CJ, in *Minerva Mills v. Union of India*[18] (paragraph 7-11, SCC).

13. In *Indira Nehru Gandhi v. Raj Narain*[19], this court invalidated provisions of the 39th Constitutional Amendment (which resulted in taking away the court's adjudicatory powers and vesting it in a tribunal, which was to decide legality of elections of four specified functionaries), as violative of

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[16] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; 1973 Supp SCR 1 (hereinafter, "*Kesavananda Bharti*").

[17] Salient aspects are that: Sikri, CJ stated that the *"fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence"* and enumerated some of the essential features - supremacy of the constitution, republican and democratic form of Government, secular character of the Constitution; separation of powers between the Legislature, the executive and the judiciary, and the federal character of the Constitution. Shelat and Grover, JJ too indicated that the Preamble contained the key to the basic structure, which rested on a harmony between Parts III and IV and that the amendments could not result in *"changing the identity of the Constitution."* Hegde and Mukherjea, JJ stated similarly that the basic structure was *"delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements or fundamental features".* Reddy, J draws analogy from the Preamble to say that the features *"are justice, freedom of expression and equality of status and opportunity"*. Khanna, J emphasises survival of the Constitution *"without loss of its identity"*.

[18] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, (hereinafter as "*Minerva Mills*")

[19] *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1. ("*Indira Gandhi*").

the basic structure doctrine – specifically the principle of rule of law, and the doctrine of separation of powers. Chandrachud, J. in his judgment made pertinent observations about what constitutes the basic structure, and how equality is an integral part of it. Speaking about the basic structure, he said:

> *"664. I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and that (iv) the nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."*
> […]
> 6*91. […] The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features — this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."*

14. K. K Mathew, J. made general observations with regard to the fact that the basic structure should be rooted in some provisions of the Constitution and also importantly, flagged the equality code as one of the basic features of the Constitution.

15. This court's decision in *Minerva Mills* marks a watershed moment in the journey of the basic structure doctrine. The court had to decide on the validity of Sections 4 and 55 of the 42nd Amendment Act[20] which sought to nullify the basic structure doctrine itself, by amending Article 368[21]; and

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[20] Constitution (Forty-second Amendment) Act 1976.

[21] Introducing two clauses (4) and (5), which read as follows:
"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.
(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article"

amendment to Article 31C which sought to immunize all laws which declared that they were made to advance all or any of the provisions of Part IV of the Constitution. The court reiterated the basic structure doctrine, and held that the amendment to Article 368, which sought to fetter the court's inquiry into the validity of constitutional amendments, violated the basic structure. By a majority decision of 4:1, the court held that the amendment to Article 31C too violated the basic structure.

16. Judicial review was the value, which the court held to be violated in other decisions as well – such as in *P. Sambamurthy v. State of A.P*[22], *Kihoto Hollohan v. Zachillhu*[23], in *L. Chandra Kumar v. Union of India*[24]. In the latter, it was held that judicial review, through Articles 32 and 226 are part of the basic structure of the Constitution. Thus, here, for the first time, specific provisions were held to be part of the basic structure. *Raghunathrao Ganpatrao v. Union of India*[25] held that the *deletion* of provisions – held to be an "integral" part of the constitution (by the judgment of a 11-judge bench, when the basic structure doctrine was not recognized), did not violate the basic structure, or lead to loss of its identity. The majority judgment in *Kihoto Hollohon* is narrowly premised[26]; it severed a part of the offending portion of the 52nd Amendment, to the extent it excluded judicial review, since its deletion was procedurally unsustainable, given the text of Article 368, which requires that such

[22] *P. Sambamurthy v. State of A.P.*, (1987) 1 SCC 362, (hereinafter as "*P. Sambamurthy*").
[23] *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651, (hereinafter "*Kihoto Hollohan*").
[24] *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, (hereinafter "*L. Chandra Kumar*").
[25] *Raghunathrao Ganpatrao v. Union of India*, 1994 Supp (1) SCC 191, (hereinafter "*Raghunathrao Ganpatrao*").
[26] The minority opinion of Verma, J. (see para 181-182) struck down the provision on the ground that it violated the rule of law, which is a basic feature of the Constitution.[26] The majority judgment, by Venkatachaliah, J also struck down the offending provision, but for different reasons *(procedural lapses)*.

amendments need ratification by the legislatures of one half of the total states forming the Union.

17. Next, in *M. Nagaraj*, this court tersely stated that the standard to be applied in evaluating whether an amendment has also modified the overarching principles, that inform each and every fundamental right and link them, is to find whether due to such change we have a completely different Constitution. In particular, after summarising various opinions in *Kesavananda Bharati*, the court observed that *"[t]he basic structure jurisprudence is a preoccupation with constitutional identity."* The object of which is *"continuity"* within which *"continuity of identity, changes are admissible"*. The court, however refused to strike down Article 16(4B) [which had sought to overrule decisions of this court, to the effect that when reservations are resorted to in promotions, leading to accelerated promotions, the non-reserved category of employees, upon their promotions should be permitted to retain or "catch up" their previous seniority]. The court made certain general observations which are relevant, and are extracted below:

> *"102 ... 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.*

18. The other decisions in *I.R. Coelho* and *Pramati*, too dealt with facets of basic structure. I shall be discussing *I.R. Coelho* and *M. Nagaraj*, later,

more elaborately, when dealing with the equality code, and its facets being intrinsic to the basic structure of the Constitution.

B. Test for determining basic structure

19. It was remarked in *Indira Gandhi* that:

> *"*661.*...The subject-matter of constitutional amendments is a question of high policy and Courts are concerned with the implementation of laws, not with the wisdom of the policy underlying them...."*[27]*

It is axiomatic that a constitutional provision cannot be construed in the same manner as a legislative enactment, delegated legislation, or executive measure. All those can be subjected to judicial review on distinct heads such as legislative competence, constitutional limitations (such as in Part III or Part XI of the Constitution), *ultra vires* the parent enactment or constitutional limitation (delegated legislation), illegality, conflict with provisions of the constitution, Wednesbury unreasonableness, unfair procedure, proportionality, or other grounds of administrative law review (executive action).

20. Logically, then, the applicable standard of review of constitutional amendments should be higher – also because the procedure adopted to amend, under Article 368, is special, and requires two-third majority in favour of any proposed amendment, with the super-added provision in case of amendments to certain enumerated provisions, of resolutions approving the amendment by a majority of the legislatures of all states as well. This exercise of *constituent* power, therefore, cannot be subjected to the same standard of review, as in the case of legislative or executive actions. The clearest enunciation of this was in Chandrachud, J's opinion in *Indira Gandhi*:

> *"*691. […] *Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not*

[27] *Indira Gandhi,* para 661.

> *offend against the provisions of Articles 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. ... 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features'—this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."*

At another place, the same learned judge (Chandrachud, J) observed that:

> *"*663. […] *For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance…"*[28]
>
> […]
>
> *"*692. […] *There is no paradox, because certain limitations operate upon the higher power for the reason that it is a higher power. A constitutional amendment has to be passed by a special majority and certain such amendments have to be ratified by the legislatures of not less than one-half of the States as provided by Article 368(2). An ordinary legislation can be passed by a simple majority. The two powers, though species of the same genus, operate in different fields and are therefore subject to different limitations."*[29]

21. In *M. Nagaraj* upon review of previous authorities, this court indicated the methodology of determining whether a constitutional amendment violates the basic structure:

> *"24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.*
>
> *25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up : in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to*

[28] *Indira Gandhi*, para 663.
[29] *Indira Gandhi*, para 692.

bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

26. […] secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values. For example, under the German constitutional law, human dignity under Article 1 is inviolable. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence. The constitutional courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by interpretation given to the concept by the constitutional courts.

27. Under the Indian Constitution, the word "federalism" does not exist in the Preamble. However, its principle (not in the strict sense as in USA) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the Seventh Schedule to the Constitution.

28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In Kesavananda Bharati v. State of Kerala [(1973) 4 SCC 225] 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 [(1973) 4 SCC 225] 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 [(1973) 4 SCC 225] . 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."

(emphasis supplied)

Thus, the test of "identity" which some of the judges in *Kesavananda Bharati* indicated, as of the core of the basic structure doctrine, was re-

stated, and elaborated upon in *M. Nagaraj* as the concept or doctrine of 'constitutional identity'. The standard of review, it was held was that *firstly*, the essential feature must be a constitutional law principle, which is binding on the legislature and *secondly*, the analysis is whether such principle is so *fundamental* that it must restrict even the Parliament's amending power (see paragraph 25, extracted above).

22. This court has, in applying the test, followed the historical approach in conducting substantive basic structure review. This method was indicated by Chandrachud, J in *Waman Rao v. Union of India*[30]. In this case, Articles 31-A, 31-B, and 31-C which had been introduced to advance the land reform programmes were challenged as violations of the basic structure of the Constitution. Chandrachud, J observed that the *"questions have a historical slant and content: and history can furnish a safe and certain clue to their answer".* After considering the history of the newly inserted provision (by the first Amendment Act, 1951) it was held that

> *"24. ...Looking back over the past thirty years of constitutional history of our country, we as lawyers and Judges, must endorse the claim made ... that if Article 31-A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated and that by the 1st Amendment, the constitutional edifice was not impaired but strengthened."*

23. An independent justification for the amendments was of implementing the constitutional purposes as outlined in Article 39(b) and (c), i.e., *"that the ownership and control of the material resources of the community are so distributed as best to subserve the common good".* The historical approach was also apparent, when this court considered the amendments which

[30] *Waman Rao v. Union of India*, (1981) 2 SCC 362, (hereinafter, "*Waman Rao*").

deleted Articles 291 and 362 of the Constitution in *Raghunathrao Ganpatrao*, as well as in *Kihoto Hollohon.*

24. Likewise, in *R.C. Poudyal v. Union of India*[31], where this court, speaking through three different judgments (one of them a dissenting judgment, by L.M. Sharma, CJ) used history of the amendment, and contrasted it with the history of the provisions of the Constitution. The impugned provision, Article 371F(f) enabled representation of members of the Buddhist Monasteries, in the Sikkim Legislature. The dissenting view held that the provisions for reservation in state assembly, based upon religion, violated the basic structure of the Constitution. The majority judgment upheld the amendment, as necessary because of *historical continuity*, and the need to assimilate Sikkimese society within the republic. However, the majority at the same time, also stated that such a conclusion might not have been the same, if such reservation were introduced elsewhere:

> *"*128. […] *These adjustments and accommodations reflect a political expediencies for the maintenance of social equilibrium. The political and social maturity and of economic development might in course of time enable the people of Sikkim to transcend and submerge these ethnic apprehensions and imbalances and might in future -- one hopes sooner -- usher-in a more egalitarian dispensation. Indeed, the impugned provisions, in their very nature, contemplate and provide for a transitional phase in the political evolution of Sikkim and are thereby essentially transitional in character.*
> 129. *It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the Constitutional muster". But in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify in equality and special treatment..."*
>
> (emphasis supplied)

25. Judicial review of legislation on the touchstone of their validity vis-à-vis fundamental rights, is an analogy closest to constitutional amendment review, on the ground of its conformity to the basic structure. It is an entirely different kind of review that *"imposes substantive limits on the*

[31] *R. C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, (hereinafter "*R.C. Poudyal*").

scope of constitutional amendment. However, these limits or basic features are identified as constitutional principles which are distinct from the constitutional provisions which embody these principles"[32]. Drawing from the remarks in *Minerva Mills* and *Indira Gandhi*. Dr. Krishnaswamy notes in his work that this form of basic structure review has to account for the distinction between

> *"ordinary democratic law making and higher level democratic law making, it must rightly identify the different limits on these two forms of law making. Only an independent model of basic structure review which ensures that constitutional amendments do not destroy core constitutional principles can fulfil this requirement."*[33]

26. It also needs to be noticed that when the court conducts a constitutional amendment validity review, to consider if it violates the basic structure, apart from the standard, the discussion is rooted in the lexicology of *judicial review*, developed from the jurisprudence of past precedents. In other words, the difference in standard which this court adopts does not result in a difference in the approach, to consider if the amendment violates the basic structure. In judicial review, of a legislation, which violates the provisions of the constitution, the court considers the law, its impact on the fundamental right, its object and its *reasonableness* or *proportionality*. In basic structure review, likewise, the subject of scrutiny is the amendment, its content, its impact on the overarching value or principle, which is part of the basic structure, and whether that impact destroys or violates the identity of the Constitution. Illustratively, in *Kihoto Hollohon*, the court dealt with the constitutionality of amendments, introducing the Xth Schedule to the Constitution and considered past cases, interpreting the Constitution to see if the newly added provisions accorded with the

[32] Dr. Sudhir Krishnaswamy, '3 Applying Basic Structure Review: The Limits of State Action and the Standard of Review', Democracy and Constitutionalism in India - A Study of the Basic Structure doctrine, Oxford University Press (2009).
[33] *Ibid.*, p. 88.

existing Constitution. In *R.C. Poudyal*, the court upheld reservation in favour of Buddhist monasteries, and explained that it was for continuity. The court drew upon the equality jurisprudence. The minority and dissenting views also relied heavily upon past judicial precedents to underscore the importance of prohibition against religion-based discrimination and reservation not necessarily dealing with the validity of constitutional amendments alone, but to bring out the idea of judicial review. The same goes for the five judge decision in *Supreme Court Advocates on Record Association (SCAORA) v. Union of India*[34] in which the value of an independent judiciary, and what it is expected to achieve in a democracy was underlined, by reference to past cases which did not deal with constitutionality of amendments. Hence, even while judicial review of constitutional amendments carries with it a standard higher than judicial review of law or executive action, and uses a particular methodology or test to discern whether the amendment changes or damages the basic structure, the court at the same time, draws upon past precedents its exercise of judicial review, and the resulting interpretation of the Constitution, as it exists.

27. This idea – of a distinct category of judicial review, which deals with constitutional amendment review, was also voiced in *M. Nagaraj*.[35] In basic structure review parlance, the legitimate role of the court is to evaluate whether, in the given case, the "identity" of the Constitution is

[34] (2016) 5 SCC 1

[35] "*103. The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power. Though the amending power in the Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise." (See Kihoto Hollohan v. Zachillhu [1992 Supp (2) SCC 651] .)*

affected so as to violate the basic structure and to apply the *"direct impact"* test (as propounded in *I.R. Coelho*).

28. It is evident that at different points in time, different *values* that underlie the Constitution and are manifested - either directly in the form of express provisions, or what can be inferred as basic *"overarching"* principles (*Nagaraj*) or what impacts the *identity* (*Kesavananda Bharati, Raghunathrao Ganpatrao, M. Nagaraj*, and *I.R. Coelho*) or takes away the *"essence"* of certain core principles, through amendment were examined. *Raghunathrao Ganpatrao* echoed the idea of *identity*, and the idea of *"basic form or in its character"* of the Constitution. *I.R. Coelho* went on to say that *"it cannot be held that essence of the principle behind Article 14 is not part of the basic structure"* and also that "*doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values"* – which, if allowed to be altered, would change the "*nature"* of the Constitution. The court also stated that *"in judging the validity of constitutional amendment we have to be guided by the impact test"*.

29. It is therefore clear that the appropriate test or standard of judicial review of constitutional amendments is not the same as in the case of ordinary laws; the test is whether the amendment challenged destroys, abrogates, or damages the "*identity"*, or *"nature*" or *"character"* or *"personality"* of the Constitution, by *directly impacting* one or some of the *"overarching principles"* which inform its express provisions. Further in constitutional amendment judicial review, the court would consider the history of the

provision amended, or the way the new provision impacts the identity, or character, or nature of the Constitution.

30. The standard of judicial review of constitutional amendments, draws upon distinct terminologies – *identity*, *personality*, *nature* and *character* to see if the *constitutional identity* undergoes a fundamental change, as to alter the Constitution into something it can never be. Or, differently put, the test is whether the *impact* of the amendment is to change the Constitution, into something it could never be considered to be. Each of the terms, i.e. identity, nature, personality, character, and so on, are methods of expressing the idea that some part of the Constitution, either through its express provisions, or its general scheme, and yet transcending those provisions, are embedded as overarching principles, which cannot be destroyed or damaged.

31. Having laid out the test of basic structure assessment in the paragraphs above, I will now apply this standard of review to the impugned amendment in the following sections.

III. Re Question 3: analyzing the exclusionary clause "other than" and whether it offends the basic structure

32. The insertion of clause (6) in Article 15 and 16, introduces a new class i.e., "economically weaker sections" which are defined to be *"other than"* the classes covered in Article 15(4) [i.e., other than socially and educationally backward classes including Scheduled Castes and Scheduled Tribes, which coincides with "backward class of citizens" covered in Article 16(4)]. The plain interpretation of this new expression, read along with the Statement of Objects and Reasons brings home the idea that this allusion to "special provision" - including reservations, is meant only for the newly created class and *excludes* the classes described under Article 15(4) and 16(4).

This is the base on which the petitioners' mount their challenge, contending that the exclusion falls foul of the equality code and amounts to a violation of basic structure.

33. The Union's position was that objections to the exclusion of SC/ST/OBC communities could not be countenanced; at any rate, such exclusion did not reach to the level of damaging the basic structure of the Constitution. It was contended that the mechanism of reservation itself *per se*, carries within it the idea of exclusion. Consequently, the "set apart" by way of reservation for SC/ST/OBC collectively to the tune of 50% by itself, implies that others are kept apart and cannot question such reservation for the weaker sections of society (as settled in *Indra Sawhney*). It was submitted that the exclusion of all categories except the target groups [i.e, exclusion of SC/ST/OBC and the general category who do not fulfil the economic criteria] was not discriminatory, let alone violative of the basic structure of the Constitution.

34. Clearly there is no dispute, in the manner that the phrase "other than" appearing in Articles 15(6) and 16(6), is to be read – either on the side of the petitioners, or the respondents. That *exclusion* is implicit, is agreed upon – the point of divergence is only on whether such an exclusion is *permissible* or not. To examine this, it is necessary to trace the history of the provisions that constitute the Equality Code and its content, and the cases that have interpreted them, in order to cull out the principle(s), relevant for a basic structure assessment. For this, I will *firstly* trace the history of the provisions that constitute the Equality Code, *secondly* discuss the content of this Code; *thirdly*, how this Equality Code is in itself, a part of the basic structure; and *lastly* how the impugned amendment violates the basic structure on the ground of exclusion.

A. Historical analysis of the Equality Code

(i) Article 15

35. The original draft Constitution contained a provision that comprehensively encompassed the idea of non-discrimination, in draft Article 9, which later emerged as Article 15. This article, and more specifically Article 15(2), prohibited discrimination in various spheres and commended that access be made available to a range of facilities, spaces, and resources on a non-discriminatory basis.

36. The history and evolution of this Article as it stands today, is revealing. The Motilal Nehru Report 1928[36], had recommended, in the demand for self-rule a charter of governance and basic human rights. The relevant provision, Clause 4 (v), (vi), (xiii) and (xiv) read as follows:

> *(v) All citizens in the Commonwealth of India have the right to free elementary education without any distinction of caste or creed in the matter of admission into any educational institutions, maintained or aided by the state, and such right shall be enforceable as soon as due arrangements shall have been made by competent authority. Provided that adequate provisions shall be made by the State for imparting public instruction in primary schools to the children of members of minorities of considerable strength in the population through the medium of their own language and in such script as in vogue among them. Explanation:- This provision will not prevent the State from making the teaching of the language of the Commonwealth obligatory in the said schools.*
>
> *(vi) All citizens are equal be for the law and possess equal civic rights.*
>
> ********** **********
>
> *(xiii) No person shall by reason of his religion, caste or creed be prejudiced in any way in regard to public employment, office of power or honour and the exercise of any' trade or calling.*
>
> *(xiv) All citizens have an equal right of access to, and use of, public roads, public wells and all other places of public resort."*

37. Similarly, the historic Poona Pact[37] contained the seeds of what are now Articles 15 and 16:

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[36] Motilal Nehru Report, 1928 <https://www.constitutionofindia.net/historical_constitutions/nehru_report__motilal_nehru_1928__1st%20January%201928>

[37] Poona Pact, Agreed to by Leaders of Caste-Hindus and of Dalits, at Poona on 24-1932 <https://www.constitutionofindia.net/historical_constitutions/poona_pact_1932__b_r_ambedkar_and_m_k_gandhi__24th%20September%201932>

> *"…8. There shall be no disabilities attached to any one on the ground of his being a member of the Depressed Classes in regard to any election to local bodies or appointment to the public services. Every endeavour shall be made to secure a fair representation of the Depressed Classes in these respects, subject to such educational qualifications as may be laid down for appointment to the Public Services.*
> *9. In every province out of the educational grant an adequate sum shall be ear-marked for providing educational facilities to the members of Depressed Classes,"*

38. Dr. Ambedkar[38] and Sh. K.M. Munshi[39], had drafted two versions, on similar lines. These two drafts were discussed by the Sub-Committee on Fundamental Rights and an amended form, was included in their draft report:

> *(1) All persons within the Union shall be equal before the law. No personal shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on grounds of religion, race, caste, language or sex.*
> *In particular –*
> (a) *There shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public*.[40]

39. After discussions, the Advisory Committee recommended that the non-discrimination provision would be an <u>independent clause</u> protecting a 'citizen', and the ground of 'language' was dropped. Members of the

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[38] Art. II(1)(4) in Dr. B. R. Ambedkar's draft, available in B. Shiva Rao, *'The Framing of India's Constitution: Select Documents'*, vol. II, 4(ii)(d), p. 86:

> "*Whoever denies to any person, except for reasons by law applicable to persons of all classes and regardless of their social status, the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutions, roads, paths, streets, tanks, wells, and other watering places, public conveyances on land, air or water, theatres, or other places of public amusement, resort or convenience, where they are dedicated to or maintained or licensed for the use of the public, shall be guilty of an offence".*

[39] Art. III (1), (3), (4)(b) in K.M. Munshi's draft available in B. Shiva Rao, *'The Framing of India's Constitution: Select Documents'*, vol. II, 4(ii)(b), p. 74-75.

> *"All persons irrespective of religion, race, colour, caste, language, or sex are equal before the law and are entitled to the same rights and are subject to the same duties.*
> *Women citizens are the equal of men citizens in all spheres of political, economic, social and cultural life and are entitled to the same civil rights and are subject to the same civil duties unless where exception is made in such rights or duties by the law of the Union on account of sex.*
> ***
> *All persons shall have the right to the enjoyment of equal facilities in public places subject only to such laws as impose limitations on all persons, irrespective of religion, race, colour, caste or language.*"

[40] Draft report, Annexure, clause 4 available in B. Shiva Rao, *'The Framing of India's Constitution: Select Documents'*, vol. II, 4(iv), p. 138.

Minority Sub-Committee, then considered this clause and made further recommendations – including, that education and schools should not be within the purview of this provision. A four-member sub-committee including Dr. Ambedkar was constituted and tasked to draw a specific provision in this regard. This resulted in a general provision which reads as follows: "*the State shall make no discrimination against any citizens on grounds of religion, race, caste or sex*", but it was clarified that with regard to access to trading establishments, restaurants, etc., '*sex'* would not be a prohibited ground. This too, did not pass muster and therefore, the re-drafted clause[41] had a general principle prohibiting discrimination, with a separate articulation within the provision which allowed for separate amenities for the benefit of women and children. With minor changes, this was included as clause 11 in the Draft Constitution of October 1947, and was later accepted by the Drafting Committee without change, as Article 9. The debates in the Constituent Assembly leading to the framing of Articles 15(1) and 15(2) clearly point to the overarching idea of *non-discrimination* as one of the basic facets of equality [which is reflected clearly in the jurisprudence of this court; elaborated more in **Part III (A)**].

40. Laws or executive action that further discrimination, directly or *indirectly*, on proscribed grounds, have also been recognised as violative of the right to equality, and consequently have been struck down, routinely by this court[42].

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[41] *"(1) The State shall make no discrimination against any citizen on the grounds of religion, race, caste or sex.*
(2) There shall be no discrimination against any citizen on any ground of religion, race, caste, or sex in regard to –
(a) Access to trading establishments including public restaurants and hotels;
(b) The use of wells, tanks, roads, and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public:
Provided that nothing contained in this clause shall prevent separate provision being made for women and children".
Advisory Committee Proceedings, April 21-22, 1947; and Interim Report of the Advisory Committee, Annexure. *Select Documents*, vol. II, 6(iv) and 7(i), p. 221, 253, 254-4, 296

[42] *Air India v. Nargesh Mirza* (1981) SC 1829, 1982 SCR (1) 438; *Vishaka v. State of Rajasthan* (1997) 6 SCC 241: 1997 SCC (Cri) 932; *Anuj Garg and Others v. Hotel Association of India and Others,* (2008) 3 SCC 1;

(ii)<u>*Article 16*</u>

41. As far as Article 16 goes, the idea behind that provision was to achieve the goal of equal opportunity (as appearing in the Preamble) in matters of public employment. The difference between Articles 15(1) and 16(1) is that the former applies generally and prohibits the State from discriminating on enumerated grounds in diverse activities – including access to educational institutions, amenities, and other public goods, which are to be made available without regard to caste, religion, or sex, etc. Article 16(1) is a positive right declaring that all are equal in terms of opportunity for public employment. Article 16(2) goes on to enumerate grounds such as caste, race, religion, caste, sex, descent, place of birth and residence [few of which are different from the proscribed ground under Article 15(1)] as grounds on which the *state cannot discriminate*. Article 16(3) empowers Parliament (to the exclusion of State legislatures) to enact law, prescribing requirements as to residence within a State or Union Territory, for a class or classes of employment or appointment to local or other authorities, within a State or Union Territory. The Constitution makers did not wish to arm the State legislature with the power of prescribing local residential qualifications for employment within the State or local authorities and preferred to entrust that power with the Parliament which were expected to lay down principles of general application in that regard. Article 16(4) is the only provision in the original Constitution which enabled *reservation* – in favour of any backward class of citizens that were not adequately represented in the services under the State.

National Legal Services Authority v UOI and Others (2014) 5 SCC 438; *Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.* (2019) 11 SCC 1; *Vineeta Sharma v. Rakesh Sharma & Others*, (2020) 9 SCC 1; *Secretary, Ministry of Defence v. Babita Puniya & Others* (2020) 7 SCC 469; *Lt. Col. Nitisha & Others v. Union of India & Others*, 2021 SCC OnLine SC 261.

42. In this context, in that part of the debate dealing with "backward classes" in draft Article 10(1)- in the Constituent Assembly Debates, Dr. Ambedkar spoke about the three points of view which recommended reconciliation to a workable proposition: firstly, that every individual qualified for a particular post should be free to apply and compete for it; secondly, that the fullest operation of the first rule would mean that there ought to be no reservation for any class or community at all; and the third significant point that though theoretically, equality of opportunity should be available to all, at the same time, some provision should be made for entry of certain community "*which have so far been outside the administration*"[43].

43. Proposing Article 10(3), Dr. Ambedkar stated that Article 10(1) (precursor to Article 16(4) and 16(1) respectively) is a *"generic principle"*:

> "*At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now—for historical reasons—been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services."*

Dr. Ambedkar then went on to say that reservation should operate ideally for a minority of posts and that the identifying principle for positive discrimination would be use of a "*qualifying phrase such as backward*"[44] in whose favour an exception could be made without which the exception could ultimately eat up the rule.

44. The idea or dominant theme behind the entire scheme of Article 16, right through Article 16(4) - is <u>*equality of opportunity*</u> in matters of public employment. At the same time, the Constitution framers realised that <u>substantive equality</u> would not be achieved unless allowance were made through some special provision ensuring representation of the most backward class of citizens who were hitherto, on account of caste practices,

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[43] Constituent Assembly Debates, Vol. 7, 30th November 1948, 7.63.205.
[44] *Ibid.*

or such constraints, barred from public employment. Therefore, the idea of Section 16(4) essentially is to enable representation, the controlling factor being *adequacy* of representation. That apart, the other control which the Constitution envisioned was the *identification* of backward classes of citizens through entrenched provisions that set up institutions which were to function in an objective manner based on certain norms – Articles 340, 341 and 342, which relate to Identification of SC/ST/BC- and the newly added Article 342A.

(iii) Article 17

45. The anxiety of the Constitution framers in outlawing untouchability in all forms (without any reference to religion or community), resulted in its express manifestation as Article 17, wherein the expression "untouchability" was left undefined. The debates of the Assembly suggest that this was intentional. B. Shiva Rao's treatise[45] discloses that proceedings of the Sub-Committee on Fundamental Rights, which undertook the task of preparing the draft provisions on fundamental rights suggested a clause enabling for the abolition of "untouchability"- this was Clause 4(a) of Article III of K.M. Munshi's draft of fundamental rights:

> *"Untouchability is abolished and the practice thereof is punishable by the law of the Union."*

And similarly, Article 11(1) of Dr Ambedkar's draft provided that:

> *"any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom is abolished."*

46. Considerable deliberations took place since there was unanimity among all sections of representatives in the Constituent Assembly that the practice of untouchability (in all its forms) had to be outlawed. The Assembly

[45] B. Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at p. 202.

bestowed its attention to the *minutiae* of what constitutes untouchability, whether its forms of practice in the Hindu religion alone qualified for prohibition, or also inter-communally, etc. Dr. Ambedkar, K.M. Munshi, Sardar Patel, and B.N. Rau, participated in all these deliberations. Shiva Rao observes that the Committee came to the general conclusion that "*the purpose of the clause was to abolish untouchability in all its forms—whether it was untouchability within a community or between various communities*"[46]. Attempts made to amend the article were deemed unnecessary due to the careful and extensive deliberations, and the unanimity amongst members; there was actually no change in the draft, which survived to become a part of the Constitution:

> *"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law."*

47. The result was an all-encompassing provision which Article 17 is as it stands, outlawing untouchability in all its forms - by the State, individuals, and other entities. The reach and sweep of this provision – like Article 15(2) is wide; it is truly horizontal in its application.

48. Given that the case law relating to Article 15 and 16 has substantially been covered in the judgment of Justice Dinesh Maheshwari, I have not reiterated the same. However, it is my considered opinion, that due weightage was not given to Article 17, which as argued by some of the petitioners, is also a part of the Equality Code; I have included some judgments which underscore the importance of this injunction and its continued need.

49. The social evil - of untouchability and its baleful effect of untouchability based discrimination was recounted by this court, in *State of Karnataka v.*

[46] *Ibid.*

Appa Balu Ingale[47] :

> *"21. Thus it could be concluded that untouchability has grown as an integral facet of socio-religious practices being observed for over centuries; keeping the Dalits away from the mainstream of the society on diverse grounds, be it of religious, customary, unfounded beliefs of pollution etc. It is an attitude and way of behaviour of the general public of the Indian social order towards Dalits. Though it has grown as an integral part of caste system, it became an institution by itself and it enforces disabilities, restrictions, conditions and prohibitions on Dalits for access to and the use of places of public resort, public means, roads, temples, water sources, tanks, bathing ghats, etc., entry into educational institutions or pursuits of avocation or profession which are open to all and by reason of birth they suffer from social stigma. Untouchability and birth as a Scheduled Caste are thus intertwined root causes. Untouchability, therefore, is founded upon prejudicial hatred towards Dalits as an independent institution. It is an attitude to regard Dalits as pollutants, inferiors and outcastes. It is not founded on mens rea. The practice of untouchability in any form is, therefore, a crime against the Constitution. The Act also protects civil rights of Dalits. The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the Dalits in the national mainstream."*

50. The criterion for determining communities or castes as scheduled castes has been recognized as those who suffered on account of the practice of untouchability, and its pernicious effects, in *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College & Ors.*[48]*:*

> *"9. It appears that Scheduled Castes and Scheduled Tribes in some States had to suffer the social disadvantages and did not have the facilities for development and growth. It is, therefore, necessary in order to make them equal in those areas where they have so suffered and are in the state of underdevelopment to have reservations or protection in their favour so that they can compete on equal terms with the more advantageous or developed Sections of the community. Extreme social and economic backwardness arising out of traditional practices of untouchability is normally considered as criterion for including a community in the list of Scheduled Castes and Scheduled Tribes…."*

51. That SC communities are victims of the practise of untouchability, and the equality code was meant to provide them opportunities, and eliminate

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[47] 1995 Supp (4) SCC 469
[48] (1990) 3 SCC 130

discrimination, was narrated in the earlier decision in *Valsamma Paul & Ors. V. Cochin University & Ors*[49]*:*

> *"*7. […] *The practice of untouchability, which had grown for centuries, denuded social and economic status and cultural life of the Dalits and the programmes evolved under Articles 14 15(2) 15(4) and 16(4) aimed to bring Dalits into national mainstream by providing equalitarian facilities and opportunities. They are designated as "Scheduled Castes" by definition under Article 366(24) and "Scheduled Tribes" under Article 366(25) read with Articles 341 and 342 respectively. The constitutional philosophy, policy and goal are to remove handicaps, disabilities, suffering restrictions or disadvantages to which Dalits/ Tribes are subjected, to bring them into the national mainstream by providing facilities and opportunities for them…"*

52. In *Abhiram Singh and Ors. v. C.D. Commachen*[50] this court again revisited the "central theme" of elimination of discrimination of SCs:

> *"*118. […] *The Constitution is not oblivious to the history of discrimination against and the deprivation inflicted upon large segments of the population based on religion, caste and language. Religion, caste and language are as much a symbol of social discrimination imposed on large segments of our society on the basis of immutable characteristics as they are of a social mobilisation to answer centuries of injustice. They are part of the central theme of the Constitution to produce a just social order..."*

53. The Constitution Bench ruling in *Indian Young Lawyers Assn. (Sabarimala Temple) v. State of Kerala*[51] took note of the fact that the evil of untouchability, which kept out large swathes of Indian population in the thrall of caste-based exclusion, was sought to be dismantled, and real equality was sought to be achieved:

> *"386. The rights guaranteed under Part III of the Constitution have the common thread of individual dignity running through them. There is a degree of overlap in the Articles of the Constitution which recognise fundamental human freedoms and they must be construed in the widest sense possible. To say then that the inclusion of an Article in the Constitution restricts the wide ambit of the rights guaranteed, cannot be sustained. Article 17 was introduced by the Framers to incorporate a specific provision in regard to untouchability. The introduction of Article 17 reflects the transformative role and vision of the Constitution. It brings focus upon centuries of discrimination*

[49] (1996) 3 SCC 545
[50] (2017) 2 SCC 629
[51] (2019) 11 SCC 1

> *in the social structure and posits the role of the Constitution to bring justice to the oppressed and marginalised. The penumbra of a particular Article in Part III which deals with a specific facet of freedom may exist elsewhere in Part III. That is because all freedoms share an inseparable connect. They exist together and it is in their co-existence that the vision of dignity, liberty and equality is realised. As noted in Puttaswamy [K.S. Puttaswamy (Privacy-9 J.) v. Union of India, (2017) 10 SCC 1], "the Constituent Assembly thought it fit that some aspects of liberty require a more emphatic declaration so as to restrict the authority of the State to abridge or curtail them…"*

54. The centrality of Article 17 and the constitutional resolve to eliminate untouchability in all forms to any debate on equality involving SC/ST communities is undeniable. Other provisions such as Article 15 (2), Article 23 and 24 also contain links to Article 17, because the constitution aimed not merely at outlawing untouchability, but ensuring access to public amenities and also guaranteeing that the stigma of caste discrimination should not result in exploitation.

(iv) *Other provisions in the Constitution*

55. Apart from Article 16, the other provisions which expressly talked of *reservations* are not in regard to public employment but are in respect of elective offices – Articles 330 and 332 – both of which enabled reservation in favour of SCs and STs in proportion to their population in the concerned States legislative or Parliamentary constituencies.

56. The other provisions which expressly forbid and injunct the state from practising discrimination are Article 29(2) and Article 325. Article 29 (2) enacts that

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

Article 325 reads as follows:

> ***"325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex:*** *There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any*

such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

B. Content of Equality Code

57. The *equality code* (Articles 14, 15, 16, and 17), so referred to in various previous decisions of this court) does not merely visualize a bland statement of equality before law and equal protection of law but also contains specific injunctions against state from discriminating on proscribed grounds [such as caste, race, sex, place of birth, religion, or any of them, in Article 15; and caste, sex, religion, place of residence, descent, place of birth, or any of them, in Article 16]. The engraining of these specific heads – enjoining the State *not* to discriminate on such specific heads, such as *caste, religion or sex* is therefore, as much part of equality code, as the principle of equality enacted in general terms, in Article 14. The inclusion of Article 17 – as an unequivocal injunction, against untouchability, of any form, enjoins the state to forbear caste discrimination, overtly, or through classification, and looms large as a part of the equality code and indeed the entire framework of the Constitution.

58. Joseph Raz described this dimension as *"the ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives*".[52] Dr. Ambedkar put the issue very poignantly, saying that systematic caste discrimination was akin to slavery, since such subjugation *"means a state of society in which some men are forced to accept from others the purposes which control their conduct*"[53]. In caste based hierarchal societies, which discriminated against a significant segment of society, the extent of deprivation – *of choice* was such that those born into those castes or

[52] Joseph Raz, The Morality of Freedom (OUP, 1986), p. 369.
[53] Dr. B.R. Ambedkar, Annihilation of Caste (1939).

communities were not part of the community and were termed "outcastes". This exclusion was specifically *targeted against*, and sought to be *eliminated*, by the Constitution.It is inconceivable that the deletion of caste (as long as Indian society believes in and practices the caste system) as a proscribed ground through a constitutional amendment would stand scrutiny. This example is given to illustrate that the *value of proscribing caste discrimination is rooted in the express provision of the Constitution, as a part of the equality code*. Equally, one cannot visualize an amendment which promotes or even permits discrimination of other proscribed grounds, such as gender, descent, or religion. All this would *per se* violate equality - both textually, as well as the *principle* of equality, which the Constitution propounds. The *rationale* for enacting these as proscribed grounds either under Article 15 or 16 (or both) was that the framers of the Constitution were aware that courts could use these markers to determine when reasonable classification is permissible. Thus, for instance, if the proscribed ground of 'gender' was absent, it could have been argued that gender is a basis for an *intelligible differentia*, in a given case. To ensure that such classifications and arguments were ruled out, these proscribed grounds were included as specific injunctions against the State. The provisions, and the code, therefore, are not only about the grand declaratory sweep of equality: but equally about the absolute prohibition against exclusion from participation in specified, enumerated activities, through entrenched provisions.

59. A closer look at Article 15, especially Article 15(2), would further show that likewise most of the proscribed grounds in Article 15(1) were engrafted to ensure that access to public resources – in some cases not even maintained by the state, but available to the public generally, could not be barred. This provision too was made to right a *historical wrong*, i.e., denial of access to the most deprived sections of society of the most basic

resources, such as water, food, etc. The injunction against untouchability under Article 17, ensuring that such practice is outlawed is strengthened by taking away the subject matter from state domain and placing it as an exclusive legislative head to the Parliament through Article 35. In a similar vein, Articles 23 and 24 (although seemingly unconnected with the issue of equality), enact very special rights – which are enforceable against both the State agencies and others. Through these articles, the forms of discrimination, i.e., exploitation, trafficking, and forced labour (which was resorted to against the most deprived classes of society described as SCs and STs) was sought to be outlawed.

60. The elaborate design of the Constitution makers, who went to great lengths to carefully articulate provisions, such that all forms of discrimination were eliminated - was to ensure that there was no scope for discrimination of the kind that the society had caused in its most virulent form in the past, before the dawn of the republic. These, together with the affirmative action provisions - initially confined to Articles 15(3) and 16(4), and later expanded to Article 15(4) and 15(5) - was to guarantee that not only facial discrimination was outlawed but also that the existing inequalities were ultimately eliminated. To ensure the latter, only one segment, i.e., socially and educationally backward classes were conceived as the target group, i.e., or its beneficiaries. Therefore, in this Court's opinion, the basic framework of the constitution or the idea and *identity* of equality was that:

(i) There ought to be no discrimination in any form, for any reason whatsoever on the proscribed grounds, including in matters of public employment;

(ii) That the provision for affirmative action was an intrinsic part of the framework and value of equality, i.e., to ensure that the equality of classes hitherto discriminated and ostracized, was eventually redressed.

61. This was recognized in *Jaishri Laxmanrao Patil* as "the obligation or duty to equalize those sections of the population" on the States' part.[54] Likewise, the observations of Sahai, J. in *Indra Sawhney* characterize Article 15(4) and 16(4) as 'obligations'.

C. Equality Code is a part of the basic structure

62. That the principle of equality is the most important indispensable feature of the Constitution and destruction thereof will amount to changing the basic structure of the Constitution has been held in numerous cases. That it is an inextricable part of the basic structure, is clearly enunciated in *Kesavananda Bharati* (para 1159, SCC), *Minerva Mills* (para 19), *Raghunath Ganpatrao* (para 142), *R. C. Poudyal* (para 54), *Indra Sawhney* (para 260-261), *Indra Sawhney (2) v. Union of India*[55] (para 64-65), *M. Nagaraj* (para 31-32) *and I.R. Coelho* (para 105), among others.

63. In *Indira Gandhi,* Y.V. Chandrachud, J. identified "*equality of status and opportunity*" to all its citizens, as an unamendable basic feature of the Constitution. In the same case, K. K. Mathew, J. identified specific provisions of the Constitution, relating to the equality principle, as a part of the basic structure:

> *"*334. *Equality is a multi-coloured concept incapable of a single definition. It is a notion of many shades and connotations. The preamble of the Constitution guarantees equality of status and of opportunity. They are nebulous concepts. And I am not sure whether they can provide a solid foundation to rear a basic structure. I think the types of equality which our democratic republic guarantees are all subsumed under specific articles of the Constitution like Articles 14, 15, 16, 17, 25 etc., and there is no other principle of equality which is an essential feature of our democratic polity."*

64. In a five-judge bench decision, through his concurring opinion, S.B. Sinha, J stated, in *Saurabh Chaudri & Ors. v. Union of India & Ors.*[56] That:

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[54] See paragraph 23-24, SCC.
[55] (2000) 1 SCC 168
[56] (2003) 11 SCC 146; 2003 (Supp 5) SCR 152

> *"*82. *Article 14 of the Constitution of India prohibits discrimination in any form. Discrimination at its worst form would be violative of the basic and essential feature of the Constitution. It is trite that even the fundamental rights of a citizen must conform to the basic feature of the Constitution. Preamble of the Constitution in no uncertain terms lays emphasis on equality."*

65. A nine-judge bench of this court, in *S.R. Bommai v. Union of India*[57], though not dealing with a constitutional amendment, opined that "*these fundamental rights enshrined in Articles 15, 16, and 25 to 30 leave no manner of doubt that they form part of the basic structure of the Constitution*....". Again, in *M. Nagaraj*, it was opined that *"...the principle which emerges is that "equality" is the essence of democracy and, accordingly a basic feature of the Constitution*."

66. *I.R. Coelho v. State of Tamil Nadu*[58] is the next important decision, of note, by a nine-judge bench decision. The court, undoubtedly was not concerned with the *direct* impact of an amendment on Article 14 or equality, but with the effect of an overarching immunizing provision such as Article 31-B. It was unanimously held, that:

> "109. *It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in Kesavananda Bharati case [(1973) 4 SCC 225] clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution. Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in Indira Gandhi case [1975 Supp SCC 1].*
> […]
> *141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure*

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[57] *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, (hereinafter "*S.R. Bommai*").
[58] (2007) 2 SCC 1

doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.

142. *There is also a difference between the 'rights test' and the 'essence of right test'. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test as applied in M. Nagaraj's case (supra) will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate. We may also note that in Minerva Mills and Indira Gandhi's cases, elimination of Part III in its entirety was not in issue. We are considering the situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunization at will by the Parliament which, in our view, is incompatible with the implied limitation of the power of the Parliament. In such a case, it is the rights test that is appropriate and is to be applied…"*

67. Observations in the cases referred to above, therefore, have outlined that certain provisions of the equality code – rather the ideas – and principles intrinsic to Articles 14 and 15, and the rights in Articles 19 and 21, are part of the basic structure of the Constitution.

68. Speaking of the general right to equality, this court in *Vikas Sankhala & Ors. v. Vikas Kumar Agarwal & Ors*[59] stated that

"65. Going by the scheme of the Constitution, it is more than obvious that the framers had kept in mind social and economic conditions of the marginalized Section of the society, and in particular, those who were backward and discriminated against for centuries. Chapters on 'Fundamental Rights' as well as 'Directive Principles of State Policies' eloquently bear out the challenges of overcoming poverty, discrimination and inequality, promoting equal access to group quality education, health and housing, untouchability and exploitation of weaker section. In making such provisions with a purpose of eradicating the aforesaid ills with which marginalized Section of Indian society was suffering (in fact, even now continue to suffer in great measure), we, the people gave us the Constitution which is transformative in nature…"

It was also held that

*"*67. […] *when our Constitution envisages equal respect and concern for each individual in the society and the attainment of the goal requires special attention to be paid to some, that ought to be done. Giving of desired concessions to the reserved category persons, thus, ensures equality as a levelling process. At jurisprudential level, whether reservation policies are defended on compensatory principles, utilitarian principles or on the*

[59] *Vikas Sankhala v. Vikas Kumar Agarwal,* (2017) 1 SCC 350.

principle of distributive justice, fact remains that the very ethos of such policies is to bring out equality, by taking affirmative action…"

69. In *Samatha v. State of A.P. & Ors.*[60] this court underlined the unity of directive principles and fundamental rights, and the deep, intrinsic connection between equality, liberty, and fraternity:

> *"*72. […] *Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and interdependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good. The founding fathers with hind sight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also charged the State as its policy to remove obstacles, disabilities and inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and mirage."*

70. In a similar manner, *Indian Medical Association & Ors. v. Union of India & Ors.*[61] underscored the centrality of equality and the egalitarian principle, of the Constitution:

> *"*165. *It is now a well settled principle of our constitutional jurisprudence that Article 14 does not merely aspire to provide for our citizens mere formal equality, but also equality of status and of opportunity. The goals of the nation-state are the securing for all of its citizens a fraternity assuring the dignity of the individual and the unity of the nation. While Justice – social, economic and political is mentioned in only Article 38, it was also recognized that there can be no justice without equality of status and of opportunity (See M. Nagaraj). As recognized by Babasaheb Ambedkar, at the moment that –ur Constitution just set sail, that while the first rule of the ship, in the form of formal equality, was guaranteed, inequality in terms of access to social and economic resources was rampant and on a massive scale, and that so long as they individually, and the social groups they were a part of, continue to not access to social and economic resources that affords them dignity, they would always be on the margins of the ship, with the ever present danger of falling off that ship and thereby never partaking of the promised goals of that ship. Babasaheb Ambedkar with great foresight remarked that unless such more*

[60] *Samatha v. State of A.P*., (1997) 8 SCC 191; 1997 (Supp 2) SCR 305
[61] *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179

> *fundamental inequalities, that foster conditions of injustice, and limit liberty of thought and of conscience, are eradicated at the earliest, the ship itself would be torn apart.*
>
> […]
>
> 168. *An important and particular aspect of our Constitution that should always be kept in mind is that various aspects of social justice, and an egalitarian social order, were also inscribed, not as exceptions to the formal content of equality but as intrinsic, vital and necessary components of the basic equality code itself. To the extent there was to be a conflict, on account of scarcity, it was certainly envisaged that the State would step in to ensure an equitable distribution in a manner that would be conducive to common good; nevertheless, if the state was to transgress beyond a certain limit, whereby the formal content of equality was likely to be drastically abridged or truncated, the power of judicial review was to curtail it…"*

71. Therefore, the design of the Constitution, which by the Preamble, promises justice – social, economic, and political, liberty of thought and expression, equality, and fraternity; and the various provisions which manifest it (Articles 14-18, 19, 20-21, 23-24, 29, 38-39, 41 and 46) – articulate an organic and unbreakable bond between these concepts, which are guarantees. The idea of the twin assurance of non-discrimination and equality of opportunity, is to oblige the state to ensure that meaningful equality is given to all. Similarly, the fraternal principle binds both the state and the citizen, as without fraternity, liberty degenerates to individualistic indulgence. Without dignity, equality and liberty, are rendered hollow. This inviolable bond, therefore, is part of the core foundation of our republic. Freedom from colonial rule was with the agenda of creating a democratic republic, reflecting the unique genesis of its nation, holding the people with diverse languages, cultures, religions with a common bond of egalitarianism, fraternity, and liberties, assuring dignity to all – the State and the citizens were to ensure that these were preserved, at all times, for each individual.

72. This principle of equality – non-discrimination or non-exclusion, never had occasion to be considered in past decisions that examined amendments to

the Constitution which dealt with different facets of equality – such as the ceiling on land holding (*Waman Rao, Bhim Singhji v. Union of India*[62]) or omission of princely privileges (*Raghunath Ganpatrao)*. Thus the court did not adjudicate upon the non-discriminatory or non-exclusionary principle. In each case, the facet of equality alleged to have been violated by a constitutional amendment, limited or affected property. In other words, the focus of every instance where an amendment was struck down (barring those in *L. Chandra Kumar, P. Sambamurthy, Indira Gandhi,* and *Kihoto Hollohan*) were defining of excess property in the hands of the "haves" and the more fortunate, in possession of land exceeding ceilings (agrarian or otherwise), and dismantling of princely privileges deemed antithetical to republicanism and thereby promoting republicanism and equality. The court's caveat – be it in *Kesavananda Bharati, Waman Rao* or *Bhim Singhji* – were only to the extent that oversight, to ensure that the contents of the laws adhered to the directive principles and were not a mask or veneer to extinguish liberties enshrined in Articles 14 and 19, and were to be retained.

73. The effort of the State in each of these instances, was to create new avenues by expropriation of wealth, assets, and properties from the 'haves' and ensure distributive justice in furtherance of the objectives under Article 38 [particularly clause (2); and also Article 39 (particularly clause (b)] – that of minimising inequalities, and distribution of ownership and control of material resources, respectively. Thus, 263 entries out of the total of 284 entries in the IXth Schedule of the Constitution, are legislations relating to land reforms, land ceilings, and other agrarian reforms acts, of the States and Union Territories.

74. In the other class of amendments where the constitutional ethos was

[62] *Bhim Singhji v. Union of India*, (1981) 1 SCC 166, (hereinafter as "*Bhim Singhji*").

promoted [introduction of Article 21A, and Article 15(5) (to facilitate Article 21A)], this court's decisions (in *Pramati* and *Society for Unaided Schools of Rajasthan v. Union of India*[63] respectively) are telling, because these provisions did not practice discrimination in the sharing of new benefits or rights, and were *inclusive*. The court naturally upheld them. The only challenge dealing with equality – in *M. Nagaraj*, failed because the right to "catch up rule" was a derivative principle evolved by the court, in the context of the larger canvas that there was no right to promotion [Article 16(4) did not carry within it the right to promotion – a formulation in *Indra Sawhney*, which holds good even as on date, for all classes save the SCs and STs]. This court held that such rule did not negate the "essence" of equality or its "egalitarian" facet.

75. In juxtaposition to all this, for the first time, the constituent power has been invoked to practice exclusion of victims of social injustice, who are also amongst the poorest in this country, which stands in stark contradiction of the principle of egalitarianism and social justice for all. The earlier amendments were aimed at ensuring egalitarianism and social justice in an inherently unequal society, where the largest mass of people were impoverished, denied access to education, and other basic needs.

76. In every case, which implicates the right to equality, when the Court is asked to adjudge upon the validity of a Constitutional amendment, invariably what the Court focuses its gaze upon, is what is facet of equality. The debates which led to the framing of the Constitution, are emphatic that the equalizing principle is a foundational tenet "an article of faith" upon which our democratic republic rests. Equality - both as a principle, an idea, and as a provision is "so mixed" as to make it impossible to extricate the form from the substance, the idea from its expression. Likewise, equality -

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[63] *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, (hereinafter as "*Society for Unaided Schools of Rajasthan*").

of protection before the law, of opportunity - as a right not to be discriminated against on grounds enumerated in Articles 15(1) and 16(1) are engrained principles, nay, entrenched entitlements. The question which this court therefore addresses, in every case which complains of infractions of the essential features of the Constitution is - has that principle been undermined or the core idea (of equality) been distorted.

77. The bedrock value which enlivens Articles 14, 15, 16, 17, 18, 29(2), and 325, therefore, is *the principle of non-discrimination*. Alongside the generic principle of equality, captured by Article 14, is the idea that certain segments of society which had been historically stigmatised and discriminated on account of the caste identity of its members, should be the beneficiaries of *protective* discrimination to enable them proper access to public goods, facilities, spaces, and representation in public employment. The idea of equality, therefore, is tethered to another inseparable facet, i.e., non-discrimination, *that there cannot be any exclusion by the state in these vital spheres of human activity.* This principle of non-discrimination is what emerges from the history of the provisions (outlined previously), and the precedents of this court. Further, the manner in which these provisions have been interpreted reiterate that integral to that non-discriminatory facet, is the idea of positive discrimination in favour of hitherto discriminated communities ("Harijans", as termed in *N.M. Thomas,* or SC/STs). Consequently, the irresistible conclusion is that non-discrimination – especially the importance of the injunction not to exclude or discriminate against SC/ST communities [by reason of the express provisions in Articles 17 and 15] constitutes the essence of equality: that principle is the core value that transcends the provisions themselves; this can be said to be part of the basic

structure.

D. Impact/effect of the phrase "other than" in the impugned amendment

(i) Test of reasonable classification

78. At the outset, it is acknowledged that the doctrine of reasonable classification is not *per se* a part of the basic structure; it is *however*, a method evolved by this court to breathe life into and provide content to the right to equality under Article 14 – the latter being a part of the basic structure. The contention made by those supporting the amendment – that treating the SC, ST and OBC as a distinct class from those who are not covered under Article 15(4) and 16(4) is a reasonable classification, necessitates further scrutiny.

79. It was the submission of the learned Attorney General and Solicitor General, that SC/ST/OBC communities who have thus far enjoyed and will continue to enjoy special provision and reservation made in their favour (Articles 15(4) and 16(4)) constitute a homogenous class, the members of whose communities are beneficiaries of existing reservation [which also includes the poorer members among their group], whereas the beneficiaries of the new EWS reservation, were those who did not enjoy such benefits. Consequently, there was no deprivation of opportunity *within* the quota/silo set apart for the former category. That further opportunities are being denied to them on account of the creation of the 10% quota, marginally affects them[64]. Such adverse effect, it was argued, could not be characterized as a shocking breach of the equality code or that it affected the identity of the Constitution. It was submitted furthermore, that even in the existing reservation, the SC/ST/OBC candidate belonging to such

[64] By way of example, it was submitted that in Central Universities and Central services so far, the OBC communities could compete in 27% of the seats reserved for them and in addition also participated as open category candidates. The total available for them is 77% and with the introduction of the EWS category along with the exclusion class, the number has been reduced to 67% - which was argued as only margically affecting them, at best.

category, could compete in the quota set apart for their caste or class and not of the quota of each other. Thus, the SC candidates cannot compete in the quota set apart for SC or OBC. This, it was urged is reasonable classification by which unequals are not treated equally. This characterization of the classification, and justification for the impugned amendment, found favour in the judgments by Dinesh Maheshwari, Bela Trivedi, and J.B. Pardiwala, JJ. I respectfully disagree with this conclusion.

80. I am of the opinion that the application of the doctrine classification differentiating the poorest segments of the society, as one segment (i.e., the forward classes) *not being beneficiaries* of reservation, and the other, the poorest, who are subjected to *additional* disabilities due to caste stigmatization or social barrier based discrimination – the latter being *justifiably* kept out of the new reservation benefit, is an exercise in deluding ourselves that those getting social and educational backwardness based reservations are somehow more fortunate. This classification is plainly contrary to the essence of equal opportunity. If this Constitution means anything, it is that the Code of Articles 15(1), 15(2), 15(4), 16(1), 16(2), and 16(4) *are one indivisible whole.* This court has reiterated time and again that Articles 16(1) and 16(4) are *facets* of the same equality principle. That we need Article 15(4) and 16(4) to achieve equality of opportunity guaranteed to all in Articles 15(1) and 16(1) cannot now be undermined, through this reasoning, to hold that the theory of classification permits exclusion on this very basis.

81. In *State of West Bengal v. Anwar Ali Sarkar*[65], one of the earliest decisions to utilize the classification principle held (per Mahajan, J), that:

> "64. […] *The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which*

[65] *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCC 1; 1952 SCR 284.

have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves, but no one will claim that competency to contract can be made to depend upon the stature or colour of the hair. "Such a classification for such a purpose would be arbitrary and a piece of legislative despotism."

Per SR Das, J:

*"*85. *It is now well established that while Article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated for the purpose of being specially subjected to discriminating and hostile legislation, it does not insist on an "abstract symmetry" in the sense that every piece of legislation must have universal application. All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation. This classification may be on different bases. It may be geographical or according to objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation…"*

82. This court, in the *State of Jammu and Kashmir v. Triloki Nath Khosa & Ors.*[66] that classification,

*"*31. […] *is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints, or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."*

(emphasis supplied)

83. Again, in *Mohammad Shujat Ali and Ors. v. Union of India*[67] this court observed that the *"doctrine of classification should not be carried to a point where instead of being a useful servant, it becomes a dangerous master"*.

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[66] *State of J&K v. Triloki Nath Khosa*, (1974) 1 SCC 19.
[67] *Mohd. Shujat Ali v. Union of India*, (1975) 3 SCC 76.

84. The basis of classification in the impugned amendment, enacted in furtherance of Article 46 – is economic *deprivation*. Applying that criterion, it is either income, or landholding, or value of assets or the extent of resources controlled, which are classifiers. The social origins, or identities of the target *group* are thus irrelevant. That there is some basis for classification, whether relevant or irrelevant, which is sufficient to differentiate between members of an otherwise homogenous group, is no justification. This was highlighted most recently by this court in *Pattali Makkal Katchi v. A. Mayilerumperumal and Ors*[68]:

> ***"79.*** *Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. Articles 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservation of appointments and posts for them to secure adequate representation. These provisions are intended to bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). However, it is to be noted that equality under Articles 15 and 16 could not have a different content from equality under Article 14 [State of Kerala v. N.M Thomas (1976) 2 SCC 310]. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial [Subramanian Swamy v. Director, Central Bureau of Investigation (2014) 8 SCC 682]."*
>
> (emphasis supplied)

85. Krishna Iyer, J, speaking in *Col. A.S. Iyer v. V. Balasubramanyam*[69] put the matter even more pithily:

> *"*57. […] *equality clauses in our constitutional ethic have an equalizing message and egalitarian meaning which cannot be subverted by discovering classification between groups and perpetuating the inferior-superior complex by a neo-doctrine…"*

[68] *Pattali Makkal Katchi v. A. Mayilerumperumal and Ors*, 2022 SCC Online SC 386.
[69] *Col. A.S. Iyer v. V. Balasubramanyam*, (1980) 1 SCC 634.

86. Classification, it is said, is a subsidiary rule, to give practical shape to the principle of equality. However, as emphasized by K. Subba Rao, J. in *Lachhman Das v. State of Punjab*[70]:

> *"*47. […] *Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basic for classification may gradually and imperceptibly deprive the Article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality; the fundamental right to equality before the law and the equal protection of the laws may be replaced by the doctrine of classification."*

87. The economic criteria, based on economic indicators, which distinguish between one individual and another, would be relevant for the purpose of classification, and grant of reservation benefit. The Union's concern that SC/ST/OBCs are beneficiaries of other reservations, which set apart the poorest among them, from the poorest amongst other communities which do not fall within Articles 15(4) and 16(4), cannot be a distinguishing factor, as to either constitute an *intelligible differentia* between the two, nor is there any *rational nexus* between that distinction and the object of the amendment, which is to eliminate poverty and further the goal of equity and economic justice.

88. There is a considerable body of past judgments enunciating the principle that any *exclusionary* basis, should be *rational*, and non-discriminatory. In *National Legal Services Authority v. Union of India & Ors.*[71] This court frowned upon the discrimination faced by transgender persons and held all practices which excluded their participation to be discriminatory. The court explained how treatment of equals and unequals as equals, is violative of *the basic structure*. Crucially, the court observed that:

> *"61. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws*

[70] *Lachhman Dass v. State of Punjab*, (1963) 2 SCR 353; [1963] 2 SCR 353.
[71] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

> *within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection…"*

89. The salience of the non-exclusionary precept as facets of non-discrimination (equality), liberty and dignity, was ruled in *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*[72] where it was emphasized that

> *"*300. […] *this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future-of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity."*

90. Similarly, in *Charu Khurana v. Union of India*[73] this court held that discrimination against women artistes in the cinema industry violated equality. It was held that dignity was an integral part of a person's identity:

> *"*33. […] *Be it stated, dignity is the quintessential quality of a personality and a human frames always desires to live in the mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to see that all citizens and they are not deprived of by reasons of economic disparity…"*

91. Can the fact that SC/ST and OBC communities are covered by reservations to *promote* their equality, to ensure that centuries old disadvantages and barriers faced by them (which are still in place, and is necessary to ensure their equal participation) be a ground for a *reasonable* classification? In my opinion, that cannot be the basis of classification. None of the materials placed on the record contain any suggestion that the SC/ST/OBC

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[72] *Indian Young Lawyers Assn. v. State of Kerala*, (2019) 11 SCC 1.
[73] *Charu Khurana v. Union of India*, (2015) 1 SCC 192.

categories should be excluded from the poverty or economic criteria-based reservation, on the justification that existing reservation policies have yielded such significant results, that a majority of them have risen above the circumstances which resulted in, or exacerbate, their marginalization and poverty. There is nothing to suggest, how, keeping out those who qualify for the benefit of this economic-criteria reservation, but belong to this large segment constituting 82% of the country's population (SC, ST and OBC together), will advance the object of economically weaker sections of society.

92. As an aside, it may also be noted that according to the figures available, 45 districts are fully declared, and 64, partially declared, as Fifth Schedule areas, out of 766 districts in the country. Majority of the population of these areas are inhabited by members of scheduled tribes. According to the Sinho Committee, 48.4% of all Scheduled Tribes are in the BPL (below poverty line) zone. This is 4.25 crores of the population. In this manner, the exclusion operates additionally, in a geographical manner, too, denying the poorest tribals, living in these areas, the benefit of reservation meant *for the poor*.

93. The reservations in favour of the poorest members of society, is not identity-based, or on past discrimination of the community concerned which shackled them within the confines of their caste (and what members of that caste could do). It is based on *persistent economic deprivation, or poverty*. The identifying characteristic is, therefore, entirely new. It has no connection with *social* or *educational* backwardness. The social or educational backwardness of the communities to which beneficiaries of the impugned amendments belong, are irrelevant. Therefore, caste or community is *not the identifying criteria or classifier*. In such eventuality, the wall of separation, so to say by which the exclusion clause ("other

than") keeps out the socially and educationally backward classes, particularly SC/STs *operates* to discriminate them, because overwhelming numbers of the poorest are from amongst them.

(ii) *Individual – as the beneficiary*

94. Further, in the case of economic deprivation, what is to be seen is that poverty – or its acute ill effects are equally felt by all, irrespective of which silos they are in. Thus, at an individual level, a tribal girl facing economic hardship, is as equally deprived of meaningful opportunity as a non-tribal, "non-backward"/forward class girl is. The characterization of existing reservations to SCs/STs/OBCs, as *benefits* or *privileges*, which disentitle them from accessing this *new resource*, of reservations based on economic deprivation, though they fall within the latter description, because "they are loaded with such benefits" (as contended by the respondents), with respect belittles their plight.

95. The problem with the "silo" argument furthered by the Union, is that it not only fails to locate the individual within a collective, reducing her visibility in the debate and robbing her of voice, but also further ignores the potentiality of each individual to excel, and cross the barriers of these very "silos". The polarity between "collective" rights and entitlements and "individual" is artificial. At the end of it all, the Constitution has to mean, and provide something, for the common individual/person; it has to provide the greatest good to all, not merely sections or collectives. Therefore, the view that the collective is the constitutive element, from whose prism the individual is viewed, diminishes the role and the focal point of inquiry, away from the individual, thereby affording a convenient way of placing people in different "silos".

96. This court's understanding, in the past too, has been that equality of opportunity is individual – likewise, the benefit of reservation too is made on the basis of the community's social and educational backwardness, or

they being victims of the practice of untouchability: yet the individuals are recipients. In *M. Nagaraj*, therefore, it was held that

> *"…the concept of "equality of opportunity" in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right Under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims."*

97. The object of reservations is to benefit the individual, in the case of enabling access to public goods such as education, whereas in the case of elective office or even public office, though the individual is the recipient of the reservation, the *community* is expected to benefit, due to its *representation* through her. This was emphasized by this court in *K. Krishna Murthy* in the following words:

> *"*55. *It must be kept in mind that there is also an inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political representation at the grassroots level on the other hand. While access to higher education and public employment increases the likelihood of the socio-economic upliftment of the individual beneficiaries, participation in local-self government is intended as a more immediate measure of empowerment for the community that the elected representative belongs to."*

This goal of empowerment through 'representation', is not applicable in the case of reservations on the basis of economic criteria – which as the petitioners laboriously contended, is transient, temporary, and rather than a discernible 'group', is an individualistic characteristic. This distinction on the question of Article 16(6), is elaborated on further in **Part V**.

98. Apart from the fact that reservations are made for or in favour of collectives, which are the building blocks of society such as castes, they are meant to benefit individuals. Castes are merely a convenient method of identifying the backward communities whose members are beneficiaries. The fact remains that it is citizens who are meant to benefit from it. The entire jurisprudence, or even the text of Articles 15 and 16, bear out this

aspect. To say, therefore, that collectively communities identified as Scheduled Castes and Scheduled Tribe, are beneficiaries and that is reason enough to exclude those castes/tribes from the benefit of new resources (created by the state through the amendment) though undisputedly a substantial number of members of these historically marginalised communities and castes also fulfil the eligibility criteria that entitles one as *deserving* of the new resource, is nothing but discrimination at an individual level. This undermines the very basis of the promise of equal opportunity and equality of status which the Constitution makers so painstakingly and carefully conceived of as a guarantee for all, particularly the members of the most discriminated and deprived sections of the community, i.e., the SC and ST communities. In these circumstances it is cold comfort, therefore, for the person who otherwise fulfils all the characteristics of an identifier such as poverty – which is not based on social identity, but on deprivation – to be told that she is poor, as desperately poor or even more so than members of other communities (who were not entitled to the reparative reservations under Article 15(4) and 16(4)), yet she is being kept out because she belongs to a scheduled caste or scheduled tribe.

(iii) *Violation of the basic structure*

99. Poverty debilitates all sections of society. In the case of members of communities which faced continual discrimination – of the most venial form, poverty afflicts in the most aggravated form. The exclusion of those sections of society, for whose benefit non-discriminatory provisions were designed, is an indefensible violation of the non-discrimination principle, a facet that is entwined in the Equality Code, and thus reaches to the level of offending or damaging the very identity of the Constitution. To use the terminology in *I.R. Coelho*, the *impact* of this amendment on the equality

code which is manifested in its non-discriminatory or non-exclusionary form, leads it to radically damage the identity of the Constitution. The promise of the Constitution that no one will be discriminated on the ground of caste-based practices and untouchability (which is the basis of identification of such backward class of citizens as scheduled castes), is plainly offended. Therefore, the exclusionary clauses in articles 15(6) and Articles 16(6) damage and violate the basic structure of the Constitution.

100. The characterisation of including the poor (i.e., those who qualify for the economic eligibility) among those covered under Articles 15(4) and 16(4), in the new reservations under Articles 15(6) and 16(6), as bestowing "double benefit" is incorrect. What is described as 'benefits' for those covered under Articles 15(4) and 16(4) by the Union, cannot be understood to be a free pass, but as a reparative and compensatory mechanism meant to level the field – where they are unequal due to their *social* stigmatisation. This exclusion violates the non-discrimination and the non-exclusionary facet of the equality code, which thereby violates the basic structure of the Constitution.

101. The impugned amendment creates paths, gateways, and opportunities to the poorest segments of our society, enabling them multiple access points to spaces they were unable to go to, places and positions they were unable to fill, and opportunities they could not hope, ever to ordinarily use, due to their destitution, economic deprivation, and penury. These: destitution, economic deprivation, poverty, are markers, or *intelligible differentia*, forming the basis of the classification on which the impugned amendment is entirely premised. To that extent, the amendment is constitutionally indefeasible. However, by excluding a large section of equally poor and destitute individuals – based on their social backwardness and legally acknowledged caste stigmatization – from the benefit of the

new opportunities created for the poor, the amendment *practices* constitutionally prohibited forms of discrimination. The overarching principles underlying Articles 15(1), 15(2), and Articles 16(1), 16(2) is that caste based or community-based exclusion (i.e., the practice of discrimination), is impermissible. Whichever way one would look at it, the Constitution is intolerant towards untouchability in all its forms and manifestations which are *articulated* in Articles 15(1), (2), Articles 16, 17, 23 and 24. It equally prohibits exclusion based on past discriminatory practices. The exclusion made through the "other than" exclusionary clause, negates those principles and strikes at the heart of the equality code (specifically the non-discriminatory principle) which is a part of the core of the Constitution.

IV. Re Question No. 1: permissibility of special provisions (including reservation) based on economic criteria

102. At the outset, it is clarified that I am in agreement with the other members of this bench, that 'economic criteria' for the purpose of Article 15 is permissible and have provided my additional reasoning and analysis in this section; however, I diverge with regards to Article 16 for the purpose of reservations in appointment to public employment, which is elaborated in **Part V**.

A. Judicial observations on economic criteria

103. Repeated decisions of this court have iterated that caste alone could not be the criteria for determining social and educational backwardness. *M.R. Balaji* was the first to articulate this proposition. This was accepted in later decisions. The Union and other respondents in the present

challenge, relied on Article 46 and certain other provisions of Part IV of the Constitution. The text of Article 46 is extracted again for reference:

> *"46. 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."*

104. This court, in both *N.M. Thomas* and *Indra Sawhney* propounded the idea that preferential treatment based on classification, to further affirmative action, could be traced to Articles 15(1) and 16(1). However, it was emphasized that on the question of *reservation* for socially and educationally backward classes, scheduled castes and scheduled tribes, the field was occupied by Articles 15(4) and 16(4). At the same time, their location did not prevent the State from making classification for other groups. The question of whether the economic criterion alone could be the basis of such reservation was squarely addressed in *Indra Sawhney*. The court held that such reservation based *solely* on the application of the economic criterion was not justified. B.P. Jeevan Reddy, J. who authored the majority judgement on this aspect, observed that the office memorandum in question did not recite the concerned provision, and then proceeded to reason why it was unsustainable:

> *"845. ...Evidently, this classification among a category outside clause (4) of Article 16 is not and cannot be related to clause (4) of Article 16. If at all, it is relatable to clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of*

> *Article 16. On this ground alone, the said clause in the Office Memorandum dated May 25, 1991 fails and is accordingly declared as such."*

105. It is quite evident that the economic criterion as the basis for reservations, was not upheld on account of the *existing* structure and phraseology in Articles 15(1) and 16(1). There is nothing in the judgment in *Indra Sawhney* suggestive of this court's omnibus disapproval of the idea of rooting affirmative action (including reservation) on the basis of economic criteria. Nor did this court comment (or could have commented) on a possible future amendment to the Constitution, introducing the economic criteria as the basis for reservation or special provisions.

106. One of the questions considered in *Indra Sawhney* was whether reservations contemplated could be confined to what existed, in the form of Articles 15 and 16. This court, having regard to the existing structure of those provisions, answered the question as follows:

> "*744. The aspect next to be considered is whether clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside clause (4) i.e., under clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, — and not for all and sundry reasons — that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for*

free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do."

107. It is apparent that the court was considering the issue through the prism of the provisions as they existed. The court did not – and correctly, could not have visualized what may be become a necessity, perhaps even a compelling one in the future, of the need to bridge the ever-widening gap between the affluent and comfortable on the one hand, and the desperately poor, on the other. The need to ensure that those suffering the adverse effects of abject poverty – illiteracy, marginal income, little or no access to basic amenities such as shelter, hygiene, nutrition, or crucially, education (which has transformational value) – are given a modicum of access to achieve basic goals which the Preamble assures, and Part IV provisions directs the State to achieve, therefore, is another dimension which Parliament thought appropriate to achieve, while introducing the economic criteria. Therefore, the judgment in *Indra Sawhney*, howsoever authoritative, cannot be considered as the last word, when considering the introduction of the *new* criteria for affirmative action. That judgment is authoritative, for its determination of what is permissible, and what should be the constitutional *method* of implementing, backwardness-based affirmative action. However, it cannot be considered as exhaustive of new criteria, which may be brought about by constitutional amendments (thus, removing the basis of the judgment itself). Therefore, to say that *Indra Sawhney* or any other judgment does not permit reservations or affirmative action, based on economic criteria, alone, is incorrect. That judgment cannot restrain Parliament from introducing constitutional amendments that enact such criteria, as the basis of reservation benefits, or other special provisions. Further, existing criteria for reservations, cannot be the only way in which the state is permitted to achieve social and economic justice

goals: those criteria must be followed, but cannot preclude the introduction of new criteria, or new methods, through amendment to the Constitution.

B. State's obligations under Directive Principles to fulfil mandate of substantive equality

108. A perusal of the Directive Principles of State Policy, reveals the State's obligations, as intended by the Constituent Assembly. The State, through Article 38(1), is obligated to establish a social order to promote welfare of people by extending to them justice – social, economic and political. It also has the responsibility of minimising income inequalities and the elimination of inequalities in status, facilities and opportunities, by virtue of Article 38(2) specifically. Article 39 not only postulates the right to an adequate means of livelihood, and redistribution of material resources for common good, it further directs the State to ensure that there is no concentration of wealth and means of production in hands of the few, to the common detriment. Articles 38 and 39 read with Articles 41, 42, 43, 45, 46, 47 and 48, holistically, contribute to economic justice.

109. Social justice implies removing all inequalities and affording equal opportunities to citizens in social as well as in economic affairs.[74] Directive Principles of State Policy, through Articles 38, 39, 41 and 43, mandate the state to establish an *"economically just"* social order. The Preambular aims of justice (economic, social and political), and equality of status and opportunity, find articulation in both Part III and Part IV of the Constitution. Till now, the State pursued the goal of achieving equality of status and opportunity, *substantively*, by employing some form of protective discrimination, to *eliminate* past discrimination, which had set

[74] Gokulesh Sharma, Human rights and Social Justice Fundamental Rights vis-à-vis Directive Principles, Deep and Deep Publication Ltd (1997).

up barriers to the most marginalised sections of society, thereby denying them access to resources and public employment. The structuring of enabling provisions [Articles 15(4) and 16(4)] is such that the target group were only those who fell within the description of classes that suffered social and educational backwardness. These included the most disadvantaged among the disadvantaged and oppressed, i.e., scheduled castes and scheduled tribes. The inclusion of any other people therefore, could not be contemplated in the context of the Constitution, as well as its text, as it stood.

110. The aim of creating a uniform, egalitarian, casteless society is to be seen as a paramount objective. Reservation was deemed as one of the principal means of achieving that goal. Such measures have worked, and their retention underlines that as a nation, we have miles to go, before we are anywhere near the promise we have given onto ourselves. In this journey, if it is discerned that alongside these hitherto oppressed communities, who were hostilely treated on account of their caste status, there are also a substantial number of people, who have not progressed due to their economic deprivation; the state is duty bound to take remedial measures to address their plight.

C. Flexibility of constitutional amendments to enable substantive equality

111. Constitutions being charters of governance, carry within them delineation of powers, of various branches of government, and numerous constituent units, at the same time, guaranteeing liberties, assuring equality. To be vibrant and relevant, they are to be sufficiently flexible to allow experimentation. This experimentation is vital, to enable the assimilation of felt needs of the society – for change: in view of developments in interpretation, efficacy of provisions of the charter, unmet or new aspirations, etc. The need to ensure that the fruits of progress reach

all, especially the poor, who are marginalized, is an important constitutional obligation, which finds voice in several provisions of the Directive Principles of State Policy. The existence, or rather, the express recognition of discrimination which prevented large segments of the population, access to institutions, or participation in public affairs and offices cannot, therefore, imply the *preclusion* of recognition of any other criteria, for providing means to other disadvantaged groups, based on other factors. In this case, the factor, or basis chosen, is economic deprivation.

112. In *Kihoto Hollohan* this court noted that a Constitution *"outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances – a distinction which differentiates a statue from a Charter under which all statutes are made."*. This court quoted from Cooley on '*Constitutional Limitations'*[75] that an amendment, to the constitution, upon its adoption becomes a part thereof; as much so as if it had been originally incorporated in the Constitution and *"it is to be construed accordingly"*.

113. Constitutions are meant to endure; they outline the broad contours of governance of the society which creates them. Modern constitutions typically delineate power: legislative, executive and judicial and, depending upon the genius of the individual society, set up systems of checks and balances to limit the zones of operation of each branch. Where the Constitution governs a large territory, comprising of provincial or constituent units, the delineation of legislative power is also indicated. Furthermore, in every Constitution, limitations on state power, in the form of a Bill of Rights (by whatever name called) are engrafted to safeguard individual liberties and ensure that there is equality in all spheres of activity. Constitutions also indicate the manner of their amendment:

[75] 8th Edn. Vol. 1 page 129.

essentially regarding the special procedures needed for the purpose, and in some instances, the limitation upon the amending power, in regard to certain subjects, which are deemed beyond the pale of that power.

114. The *rationale* for such amending power is that no matter how exhaustive a constitution is, how deeply its framers have deliberated, it may possibly not provide for all situations. There may be need to re-align legislative heads, in the light of subsequent changes dictated by social or political consensus, or compromise. Societies are constantly, in a state of flux. In the words of Thomas Jefferson, considered to be the Founding Father of the United States:

> *"I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."*[76]

115. The opinion of Khanna, J, too recognizes this aspect, in *Kesavananda Bharati.* He said that constitutions provide

> *"*1437. […] *for the framework of the different organs of the State viz. the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come…"*

Commenting that it cannot be regarded as *"a mere legal document"* the learned judge further noted that the

> *"*1437. […] *Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must*

[76] In a letter to Samuel Kerceval on July 12, 1816.

> *therefore contain ample provision for experiment and trial in the task of administration…"*

116. Such being the case, the concerns which emerge from changing time, are usually met within the framework of a flexible constitutional document. However, occasionally, that document needs to be re-examined, and if necessary, amended to accommodate the challenges that are unmet and beyond the contemplation of that foundational charter.

117. It is axiomatic that the wisdom of a legislation is not within the domain of the courts. Speaking of constitutional amendments, Sikri, CJ., in *Kesavananda Bharati* observed:

> *"288. It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment."*

118. Shelat and Grover, JJ. stated the same idea, and added that it is the consequences of the provision, having regard to the *width* of the power, which properly falls for judicial consideration:

> *"532. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution-makers or for the Parliament or the legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power."*[77]

119. Whether the circumstances justified the move, or that some measure was better than what was conceived and enacted is not what can be gone into by the courts. This is even more so, in the case of constitutional amendments, where the facts which impelled the Parliament to draw upon its extraordinary power, a *constituent power*, no less, and amend the

[77] In *Kihoto Hollohon* too, the court adverted to Parliamentary wisdom, which results in an amendment, that cannot be questioned in by the court.

Constitution, are not matters of examination or deep consideration. Therefore, whether there is objective material to justify the economic criteria, or the sufficiency of it, are not relevant for the court to examine, while considering the validity of this constitutional amendment. Equally Parliament's motive (or of a legislative body), in enacting the legislative measure, or constitutional amendment, is an irrelevant factor. What the court can certainly consider is, the *purpose* which the amendment seeks to achieve, which is often discernible from the processes leading up to the passing of such an amendment, the discussions that arise, etc.

D. Purpose that the amendment seeks to achieve through introduction of economic criteria

120. The above discussion is conclusive on the question of relevance of materials to justify constitutional amendments. Nevertheless, since arguments were addressed by the petitioners and Union on this, it would be appropriate to deal with them. The materials relied on, in the form of the *Sinho Commission Report (2010)*, the Statement of Objects of the Bill when it was introduced, together with the parliamentary debates (brief as they are) before it fructified into the Amendment, are indicative of what Parliament wished to achieve, through the amendment.

121. The respondent-Union relied heavily upon the NITI Aayog Report on National Multidimensional Poverty Index (published in 2021). The issue of mapping poverty has consistently engaged the attention of the State - earlier, poverty was mapped using the "the poverty line", which has now given way to the "multi-dimensional" approach. By this latter methodology, various indicators are considered to look at a holistic picture of deprivation. The NITI Aayog Report considered – as poor, an individual spending less than ₹47 a day in cities as against one spending less than ₹32 a day in villages. The National Multidimensional Poverty Index ("NMPI")

based itself on three facets – education, health, and standard of living – each having a weightage of one-third, in the index. Each of these are further based on 12 sections – nutrition, child and adolescent mortality, antenatal care, years of schooling, school attendance, cooking fuel, sanitation, drinking water, electricity, housing, assets, and bank accounts.

122. There were deprived people by each of these criteria though some of them may not have been multidimensionally poor in 2015-16. The highest number of the deprived were identified on the indicators of cooking fuel (58.5%) and sanitation (52%). In other words, more than half the population were poor on these two facets, in terms of the report. Housing had a deprivation proportion of 45.6% of the population during 2015-16, followed by nutrition (37.6%), maternal health (22.6%), drinking water (14.6 %), assets (14%), years of schooling (13.9%), electricity (12.2%), bank account (9.7%), school attendance (6.4%) and child and adolescent mortality (2.7%).[78]

123. The Sinho Commission was set up to examine the condition of economically backward classes and suggested measures – including the feasibility of reservations – to improve their lot. The Report, published in July 2010, was based on the census of 2001, and later surveys, wherein the Commission took note of various factors such as employment, education, nutrition levels, housing, access to resources, etc. The statistics (NSSO 2004-05) which this Report is based on, disclosed that in all, 31.7 crore people were below the poverty line ("BPL"), of which the scheduled caste population was 7.74 crores (i.e., 38% of total scheduled castes), scheduled

[78] The NMPI assists in estimation of poverty at the level of the states and all the over 700 districts across the 12 indicators, capturing multitude of deprivations and indicator-wise contribution to poverty. Thus, in terms of NMPI, 51.91% population of Bihar is poor, followed by 42.16% in Jharkhand, 37.79% in Uttar Pradesh, with Madhya Pradesh (36.65%) as fourth in the index, and Meghalaya (32.67%) is at fifth place. Kerala, Goa, and Sikkim have the lowest percentage of population who are multidimensionally poor at 0.71%, 3.76% and 3.82%, respectively. Amongst Union Territories (UTs), Dadra and Nagar Haveli (27.36%), Jammu & Kashmir, and Ladakh (12.58%), Daman and Diu (6.82%) and Chandigarh (5.97%), are emerged as the poorest UTs. The proportion of poor in Puducherry at 1.72% is the lowest among the UTs, followed by Lakshadweep at 1.82%, Andaman & Nicobar Islands at 4.30% and Delhi at 4.79%.

tribe population was 4.25 crores (48.4% of total scheduled tribes), 13.86 crores of OBC population (which was 33.1% of total OBCs), and 5.85 crores of General Category (18.2% of total general category).

E. Conclusion on permissibility of economic criteria per se

124. Economic emancipation is a facet of economic justice which the Preamble, as well as Articles 38 and 46 promise to all Indians. It is intrinsically linked with distributive justice – ensuring a fair share of the material resources, and a share of the progress of society as a whole, to each individual. Without economic emancipation, liberty – indeed equality, are mere platitudes, empty promises tied to "*ropes of sand*"[79]. The break from the past – which was rooted on elimination of caste-based social discrimination, in affirmative action – to now include affirmative action based on *deprivation*, through the impugned amendment, therefore, does not alter, destroy or damage the basic structure of the Constitution. It adds a new dimension to the Constitutional project of uplifting the poorest segments of society.

V. <u>Consideration of Article 16(6)</u>

125. It is important to note that there are crucial supplementary reasons, why the reservation benefits introduced through Article 16(6) are to be examined from another point of view – apart from the point of exclusion.

126. The issue of providing reservations in public employment, was debated four times, by the Constituent Assembly, (30.11.1948, 09.12.1948, 23.08.1949 and 14.10.1949) which considered Draft Article 10(3). Several speakers emphasized that reservations in favour of backward classes of citizens was necessary to empower them and give voice to them in the

[79] *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1891), quoted in *State of West Bengal v. Anwar Ali Sarkar* 1952 (1) SCR 284 and *Nandini Satpathy v. PL Dani* 1978 (3) SCR 608.

administration of the country. The speech, by H.V. Kamath, on the content of what is now Article 16(4), is illustrative:

> *"This is not a more directive principle of state policy; this is in Chapter III, on Fundamental Rights. When this is guaranteed to them, no backward class of citizens need be apprehensive. If there is no representation for them in the services they can take the Government to task on that account. I think this would be an adequate safeguard for them so far as their share in the services is concerned. I hope that this article 10 guarantees that right to them, and so they need have no dispute or quarrel with the article before the House today."*

127. This aspect, of *representation,* was highlighted in *Indra Sawhney:*

> *"*694. […] *the objective behind Clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively 68onopolized by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted there into and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16 (4) is empowerment of the deprived backward communities – to give them a share in the administrative apparatus and in the governance of the community"*

The majority judgment again stated:

> *"*788. […] *It is a well known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr. Rajiv Dhawan may be right when he says that the object of Article 16 (4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16 (4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16 (4) should be both social and educational…"*

128. In *M. Nagaraj*, too, the idea of reservations under Article 16(4) being provided, to enable representation, was underlined:

> *"*55. […] *in The General Manager, Southern Railway and another 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."

129. It is clear, from the above discussion, that equality of opportunity in public employment – a specific facet of the equality code – is a guarantee to each citizen. The equally forthright prohibition in Article 16(2), enjoining discrimination on various grounds, including caste, is to reinforce the absoluteness of equality of opportunity, that it cannot be denied. The only departure through Article 16(4) is to give voice to hitherto unrepresented classes, discriminated against on the proscribed grounds. This link - between *providing equal opportunity*, and *representation* through reservations, was the only exception, permitted by the Constitution, to further equality *in public employment*.

130. The impugned amendment snaps the link between the idea of providing reservation for backward classes to ensure their *empowerment* and *representation* (who were, before the enactment of Article 16(4), absent from public employment). The entire philosophy of Article 16 is to ensure barrier-free equal opportunity in regard to public employment. Article 16(4) – as stated previously enables citizens belonging to backward classes access to public employment with the superadded condition that this is to ensure their *"adequate representation*". Important decisions of this court*: Indra Sawhney, M. Nagaraj, Jarnail Singh v. Lachhmi Narain Gupta*[80] and *BK Pavitra (II) v. Union of India*[81] have time and again emphasized that reservations under Article 16 are conditioned upon periodic adequate representation review.

131. The introduction of reservations for *economically weaker* sections of the society is not premised on their lack of representation (unlike backward classes); the absence of this condition implies that persons who

[80] *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396.
[81] *BK Pavitra (II) v. Union of India*, (2019) 16 SCC 129.

benefit from the EWS reservations can, and in all probability do belong to classes or castes, which are "forward" and are represented in public service, adequately. This additional reservation, by which a section of the population who are not socially backward, and whose communities are represented in public employment – violates the equality of opportunity which the Preamble assures, and Article 16(1) guarantees.

132. The impugned amendment results in treating those covered by reservations under Article 16(4) with a standard that is more exacting and stringent than those covered by Article 16(6). For instance, if the poorest citizens among a certain community or that entire community, is unrepresented, and the quota set apart for the concerned group (SC) as a whole is filled, the requirement of "representation" is deemed fulfilled, i.e., notwithstanding that the *specific* community has not been represented in public employment, no citizen belonging to it, would be entitled to claim reservation. However, in the case of non-SC/ST/OBCs, whether the individual belongs to a community which is represented or not, is entirely irrelevant. This vital dimension of *need to be represented, to be heard in the decision-making process*, has been entirely discarded by the impugned amendment in clause (6) of Article 16. Within the amended Article 16, therefore, lie two standards: representation as a relevant factor (for SC, ST and OBC under Article 16(4)), and representation as an irrelevant factor (for Article 16(6)).

133. Therefore, for the reasons already covered in Question 3, and as set out separately above, the introduction of this reservation in public employment violates the right to equal opportunity, in addition to the non-discriminatory facet of equality, both of which are part of the equality code and the basic structure.

VI. Re: Question 2: special provisions based on economic criteria, in relation to admission to private unaided institutions

134. The eleven-judge bench ruling in *T.M.A. Pai Foundation v. State of Karnataka*[82] has recognized that Article 19(1)(g) of the Constitution embraces the right to establish private educational institutions as an avocation. The insertion of Article 21A, and later Article 15(5) added a new dimension. These amendments are to be viewed as society's resolve that all institutions – public and private – have to join in the national endeavour to promote education at all levels. Education in this context is to be seen as a "material resource" of the society, meant to benefit all its segments.

135. The Right of Children to Free and Compulsory Education Act, 2009 by Section 12(a) in fact introduces an all-encompassing quota which is inclusive, under the broad rubric of "*economically weaker sections of the society*".[83] Parliament had this model, and was also aware that this Court had upheld it in *Society for Unaided Private Schools of Rajasthan* and further that Article 15(5) too was upheld in *Pramati.*

136. Unaided private institutions, including those imparting professional education, cannot be seen as standing out of the national mainstream. As held in the aforementioned judgments, reservations in private institutions is not *per se* violative of the basic structure. Thus, reservations as a concept cannot be ruled out in private institutions where education is imparted. They may not be State or State instrumentalities, yet the value that they add, is part of the national effort to develop skill and disseminate knowledge. These institutions therefore also constitute material resources

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[82] (2002) 8 SCC 481.

[83] Section 12. *Extent of school's responsibility for free and compulsory education.— (1) For the purposes of this Act, a school: (a) specified in sub-clause (i) of clause (n) of Section 2 shall provide free and compulsory elementary education to all children admitted therein.*

of the community in which the State has vital interest, and are not merely bodies set up to further private objective of their founders, unlike in case of the shareholders of a company. Such institutions are seen as part of the State's endeavour to bring educational levels of the country up, and foster fraternity, as held in *Pramati:*

> "*37.* […] *The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation*…"

137. Further, in *Indian Medical Association* on reservation of seats under Article 15(5) in Army College of Medical Sciences (ACMS), the court held:

> *"74. At this stage we wish to make a necessary and a primordially important observation that has troubled us right throughout this case. The primordial premise of the arguments by unaided educational institutions in claiming an ability to choose students of their own choice, in case after case before this Court, was on the ground that imposition of reservations by the State would impede their right to choose the most meritorious on the basis of marks secured in an objective test. It would appear that, having unhorsed the right of the State to impose reservations in favour of deprived segments of the population, even though such reservations would be necessary to achieve the constitutionally mandated goals of social justice and an egalitarian order, unaided institutions are now seeking to determine their own delimited "sources" of students to the exclusion of everybody else.*
> *75. The fine distinctions made…that an allocation when made by the State is reservation, as opposed to allocations made by private educational institutions in selecting a source do not relate to the fundamental issue here: when the State delimits, and excludes some students who have secured more marks, to achieve goals of national importance, it is sought to be projected as contrary to constitutional values, and impermissibly reducing national welfare by allowing those with lesser marks to be selected into professional colleges; and at the same time, such a delimitation by a private educational institution, is supposedly permissible under our Constitution, and we are not then to ask what happens to that very same national interest and welfare in selecting only those students who have secured the highest marks in a common entrance test. We are reminded of the story of the camel that sought to protect itself from the desert cold, and just wanted to poke its head into the tent. It appears that the camel is now ready to fully enter the tent, in the desert, and kick the original inhabitant out altogether.*
> *76. In any case we examine these propositions below, as <u>we are unable to convince ourselves that this Court would have advocated such an illogical position, particularly given our history of exclusion of people, on various invidious grounds, from portals of education and knowledge. Surely,</u>*

> *inasmuch as this Constitution has been brought into force, as a constitutive document of this nation, on the promise of justice—social, economic and political, and equality—of status and opportunity, for all citizens so that they could live with dignity and fraternal relations amongst groups of them, it would be surprising that this Court would have unhorsed the State to exclude anyone even though it would lead to greater social good, because marks secured in an entrance test were sacrosanct, and yet give the right to non-minority private educational institutions to do the same. The knots of legal formalism, and abandonment of the values that the Constitution seeks to protect, may lead to such a result. We cannot believe that this Court would have arrived at such an interpretation of our Constitution, and in fact below we find that it has not.*
>
> (emphasis supplied)

138. No better articulation than the aforementioned is warranted to hold the EWS reservation equally applicable to unaided private institutions. However, given that my analysis under question 3 on 'exclusion' holds the Amendment to be violative of the basic structure, the question herein has been rendered moot.

VII. Addressing other related challenges to, and justifications of the impugned Amendment

A. Possibility of reading down the exclusion

139. An argument made by some of the petitioners, was that the amendment could be sustained, if the phrase "other than" was read down, in such a manner so as to read as "in addition to" or in a manner that negates the *exclusionary* element, which offends the basic structure.

140. The doctrine of reading down, has been employed by this court, in the past, in numerous cases; however, in each instance, it has been clarified that it is to be used sparingly, and in limited circumstances. Additionally, it is clear from the jurisprudence of this court that the act of reading down a provision, must be undertaken only if doing so, can keep the operation of the statute "*within the purpose of the Act and constitutionally valid*"[84]. In

[84] *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600, para 326.

Delhi Transport Corporation v. DTC Mazdoor Congress[85] Sawant, J recounted the position on this doctrine succinctly:

> *"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible — one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the subject of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it…."*

141. Therefore, when the intention is clear, and the text unambiguous, the warning against employing this device of reading down, has been consistent. In *Minerva Mills*, this court was faced with the possibility of reading down to uphold a constitutional amendment, which was rejected as follows:

> 64. *[…] The device of reading down is not to be resorted to in order to save the susceptibilities of the law-makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment…*
> […]
> 65. *[…] If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends…"*

142. The intention of Parliament while exercising *constituent power* occupies a much higher threshold or operates in a higher plane, when compared to legislative intent of ordinary law, the latter being subject to

[85] 1991 Supp (1) SCC 600

different grounds of judicial scrutiny. Therefore, attractive as it may be – it is my considered opinion that the plea to *read down* the exclusion, is untenable because the intention of the Parliament in exercise of its *constituent power* is clear and unambiguous.

B. ***Absence of 'guardrails' to deny economic criteria per se***

143. The petitioners submitted that the Constitution has enacted "guardrails" to control reservations based on social and educational backwardness in the form of (1) mandating institutions; (2) tasking institutions with evolving principles for identification of backward classes, SC/STs; and (3) periodically reviewing lists of SC/STs and OBCs. These arguments-of lack of "guardrails" to counter economic criteria, *per se*, are in my opinion, insubstantial. As elaborated in **Part V**, I have accepted the contention that the guardrail of 'adequate representation' in Article 16, prohibits introduction of reservation based on economic criteria for the purpose of public employment. The other arguments on absence of guardrails, are dealt with presently.

144. The explanation to Article 15(6) enlists the broadest criteria of what constitutes "economically weaker sections" ("*shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantages*"), upon which legislation and executive policy can be built (and subject to subsequent challenge or scrutiny, if such a situation arises). The indicators of economic deprivation, enacted through the explanation are income, or such other criteria, including other traits which may be relevant. For the purpose of evolving economic criteria as a separate or a new basis for affirmative action, the indication of the broadest guideline of income, and other relevant criteria, are sufficient. The extent of income, relative to income earning capacity, having regard to the state in question, or areas in states, or extent of assets,

are matters of detail which can be factored into the policies of the state or the Union, having regard to the felt necessities of the time, or circumstances.

145. As far as the existence of institutional guarantees in the form of commissions or bodies, such as National Scheduled Caste and Scheduled Tribe Commissions, Backward Class Commissions, etc., which specific provisions (i.e., Articles 338, 338A, 338B, 340) of the Constitution provide for are concerned, it is for the Union, or the states as the case may be, to create these permanent bodies through appropriate legislation. In fact, the judgement of this court in *Indra Sawhney* had suggested the creation of a permanent body to determine OBCs which led to the setting up of the National Backward Class commission through a separate Parliamentary enactment. Therefore, the absence of any such provision enabling the setting up of a permanent institution *per se* cannot lead this court to conclude that the basic structure or essential features of the Constitution are violated.

C. Basic structure doctrine as a discernible concept

146. Having perused the other opinions authored by members of this bench, I am compelled to record my disagreement, and caution, relating to certain observations on the basic structure doctrine. In the myriad challenges based on basic structure, the ones that succeeded, have been based on violation of constitutional principles, such as judicial review (*Indira Gandhi*, Minerva *Mills, L. Chandra Kumar* and *P. Sambamurty*) independence of the judiciary (*SCAORA case*); rule of law, democracy and separation of powers (*Indira Gandhi*). To say that this court thwarted policies, or more seriously, that it dictated policy, is parlous, and tends to undermine the foundations of judicial functioning.[86] In each instance when

[86] J.B. Pardiwala, J cites with approval certain academic material in paragraph 124 of his draft opinion.

the court intervened and held an amendment to be violative of the basic structure, the rule of law triumphed. For instance, in *Kesavananda Bharati* itself, the court only held unconstitutional the part of a provision that upheld declaration in a law (whether made by Parliament or the State) which stated that its objectives were to promote Articles 38 and 39, thus excluding judicial scrutiny to discern whether the law actually promoted any value of those directive principles. Such wide and untrammelled power, to override Articles 14 and 19, were not left unchecked. On the other hand, the court upheld, in *Raghunathrao Ganpatrao,* deletion of two provisions, which an eleven judge bench had previously held to be *"integral"* to the formation of the nation, and the Constitution.

147. Furthermore, the basic structure is not as fluid as is made out to be; the contours of what it constitutes have emerged, broadly speaking, through various decisions. Can the value of democracy, be so nebulous, "amorphous" or transient, that it can be undermined by succeeding generations, as is suggested? Can the rule of law become rule by law, which is the essence of autocracy and authoritarianism? Can the Orwellian concept of an oligarchic equality be ever conceived as the essential principle of equality? Can liberty be subjected to indefinite incarceration without trial or charges and yet remain of the same content, as to mean what it means under Articles 21 and the Preamble? The answer has to be a resounding negative in each of the cases. The basic structure may not be a defined concept; it is however not indecipherable. The values which the court set out to guard, by the framing of that doctrine, are eternal to every democracy, every free society: liberty, equality, fraternity, social and economic justice.

148. The members of this bench, constituting the majority, have relied on the test of validity of a constitutional amendment evolved in *Bhim Singhji.* I find it pertinent to highlight that in this decision the only reference to the

said test was by Krishna Iyer J.[87] who himself did not indicate how Section 27 of the impugned Act (which was inserted as an enactment in the IXth Schedule), amounted to a *"shockingly unconscionable or unscrupulous travesty of quintessence of equal justice"*. Similarly, the common judgment of Chandrachud J., and Bhagwati J., also was silent on this aspect. Tulzapurkar J., judgment invalidated not only Section 27 but several other provisions of the Act also. In these circumstances, the observations of Krishna Iyer J., as to be the high threshold of violation of Article 14 in the context of insertions of an enactment in the Ninth Schedule i.e. *"shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice"*, has limited application.

149. It is noteworthy that this judgment was taken into account by the unanimous decision of a nine-judge bench in *I.R. Coelho* where the appropriate test to determine whether insertion of an enactment into the Ninth Schedule, was finally settled. The court not only took note of *Kesavananda Bharati, Minerva Mills* and *Bhim Singhji* but also *Waman Rao* and held that the appropriate test would be the "impact" on the right and also whether the "identity of the constitution" is changed by way of the amendment or the enactment which is inserted through an amendment. That aspect has been discussed in an earlier portion of this judgment. *I.R. Coelho* is also an authority that Article 14 and 15 principles underlying them are integral parts of the basic structure of the Constitution. In these circumstances, the test indicated by Krishna Iyer, J. has been altered, to a different one, by *I.R. Coelho*.

D. Whether an enabling provision can violate the basic structure

150. The Union and other respondents had submitted that the newly introduced provisions, through the impugned amendment, are merely

[87] *Bhim Singhji*, paragraph 20.

enabling, and confer power upon the state, to make special provisions and reservations, based on the economic criterion – thus, cannot violate the basic structure. This view has also been accepted in the opinion authored by Justice J.B. Pardiwala. I am of the considered opinion that the argument that the provisions are *enabling* and therefore, do not violate the basic structure (of the Constitution) is not substantial.

151. Previous decisions of this court have invalidated Constitutional Amendments, even when containing merely enabling provisions. In *L. Chandra Kumar*, the provisions in question were, *inter alia*, Articles 323A (2) (d) and 323B (3) (d), which read as follows:

> *"**Article 323A** (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.*
>
> *(147)A law made under clause (1) may-*
>
> *[....]*
>
> *(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);*
>
> ********** **********
>
> ***Article 323B (**1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.*
>
> *(2) The matters referred to in clause (1) are the following, namely:-*
>
> *[...]*
>
> *(3) A law made under clause (1) may-*
>
> *(a) provide for the establishment of a hierarchy of tribunals;*
>
> *(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;*
>
> *I provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;*
>
> *(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals..."*
>
> ********** **********

152. The court did not merely hold that the legal provisions, which enabled exclusion of jurisdiction of courts, violated any provision of the constitution. It proceeded to hold that the provision *which enabled the enactment of a law, that excluded jurisdiction of courts,* more particularly the High Courts, and thus, shut out judicial review, violated and destroyed the basic structure of the Constitution.

153. By the Constitution (Thirty Second Amendment) Act, 1973, Article 371D was introduced, which *inter alia,* enabled the President to set up Administrative Tribunals, in relation to areas in Andhra Pradesh. Article 371D(5) was the subject matter of challenge before this court in *P. Sambamurthy.* Article 371D(3) and (5) read as follow:

> *"The President may, by order, provide for the Constitution of an Administrative Tribunal for the State of Andhra Pradesh to exercise such jurisdiction, powers and authority including any jurisdiction, power and authority which immediately before the commencement of the Constitution (Thirty-Second Amendment) Act, 1973, was exercisable by any Court (other than the Supreme Court) or by any Tribunal or other authority as may be specified in the order with respect to the following matters, namely:-*
>
> *[...]*
>
> *(5) The order of the Administrative Tribunal finally dis- posing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order is made. whichever is earlier;*
>
> *Provided that the State Government may. by special order made in writing for reasons to be specified therein, modify or annul any order of the Administrative Tribunal before it becomes effective and in such a case, the order of the Administrative Tribunal shall have effect only in such modified form or be of no effect, as the case may ”e."*

154. This court held that the *power* under Article 371D(5), *per se*, and not merely the exercise of it, was shockingly subversive of the rule of law:

> *“*4. […] *this power of modifying or annulling an order of the Administrative Tribunal conferred on the State Government under the proviso to Clause (5) is violative of the rule of law which is clearly a basic and essential feature of the Constitution. It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned*

by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by over-tiding the decision given against it, it would sound the death/knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet get away with it..."

155. Likewise, in *R.C. Poudyal*, the controversy was with respect to reservations made in favour of a religious sect, i.e., the Buddhist *Sangha*. The provision which enabled this reservation, was in Article 371F (f) which *inter alia*, reads as follows:

*"**371F. Special provisions with respect to the State of Sikkim***
Notwithstanding anything in this Constitution,
(a) the Legislative Assembly of the State of Sikkim shall consist of not less than thirty members;
[...]

(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim;..."

156. The majority opinion upheld the amendment, and the provision- not because it was an enabling provision, but that it dealt with inclusion of new territory, and ensured historical continuity, of a state, with its past traditions, and was part of the compact through which it entered the Union. At the same time, the majority opinion, tellingly stated that

*"*129. *It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the Constitutional muster. But in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify in equality and special. Treatment..."*

Chief Justice L.M. Sharma, who wrote a dissenting opinion, held that the provision which enabled reservation on the basis of religion, was violative of the basic structure of the constitution.[88]

157. It is therefore, inaccurate to say that provisions that enable, exercise of power, would not violate the basic structure of the Constitution. The enabling provision in question's basic premise, its potential to overbear the constitutional ethos, or overcome a particular value, would be in issue. The court's inquiry therefore, cannot stop at the threshold, when an enabling provision is enacted. Its *potential* for violating the basic structure of the Constitution is precisely the power it confers, on the legislature, or the executive. To borrow a powerful simile from a dissenting opinion in a decision of the United States Supreme Court, that upheld broad use of emergency power, to incarcerate thousands of US citizens, such *enabling* powers, if left alone, can *"lie(s) about like a loaded weapon"*[89] with its potential to destroy core constitutional values.

158. In *S.R. Bommai,* although the validity of a Constitutional amendment was not in issue, the nine-judge Bench made certain crucial observations, with respect to use of *power*, under Article 356 of the Constitution. The court stated that

> *"*96. […] *The Constitution is essentially a political document and provisions such as Article 356 have a potentiality to unsettle and subvert the entire constitutional scheme. The exercise of powers vested under such provisions needs, therefore, to be circumscribed to maintain the fundamental constitutional balance lest the Constitution is defaced and destroyed. This can be achieved even without bending much less breaking the normal rules of interpretation, if the interpretation is alive to the other equally important provisions of the Constitution and its bearing on them. Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore help to preserve and not subvert their fabric…"*

[88] Paragraph 50 and 54 (SCC).
[89] *Korematsu v. United States*, 323 U.S. 214 (1944).

159. Therefore, the fact that impugned amendments have introduced provisions which are merely *enabling*, does not protect it from basic structure scrutiny. To view a newly added provision as only "enabling" can be an oversimplification in constitutional parlance. The court's concern is not with the conferment of power *per se*, but with the width of it, lack of constitutional control, and the direct impact it can have on principles constituting the basic structure.

E. Parallel with exclusion of creamy layer

160. Another assumption that the exclusion of the creamy layer can somehow be equated to, the exclusion that the impugned amendment perpetrates, necessitates correction. As discussed previously, the Constituent Assembly debates plainly show that Article 16(4) was included with the intention of permitting representation and diversity. The other parameter was that without such a provision, the rule of equality of opportunity [mandated by Article 16(1)] would not admit of positive discrimination. Therefore, the idea of positive or compensatory discrimination was intrinsic to the idea of equal opportunity – a fact recognised and acknowledged as late as in *M. Nagaraj*. The idea that Article 16(4) really is meant to ensure representation is also borne out textually, since the State is enjoined to ensure that "adequate representation" is given to members of the backward classes. These sections of society were hitherto barred access to public offices and denied opportunity to representation in public affairs. If one keeps this in mind, the matrix operating for reservation under Article 16(4) is one permitting diversity, representation, and eliminating discrimination.

161. The idea of introducing creamy layer, gained momentum for the first time in *K.C. Vasant Kumar v. State of Karnataka*[90] and was recognised as

[90] *K.C Vasanth Kumar v State of Karnataka*, (1985) Supp SCC 714.

a compulsion which the State had to adopt in carrying out the exercise of identifying socially and educational backward classes. The rationale for identification and consequent exclusion of creamy layer amongst the backward class is that there exists a segment or section among the backward classes who have gained reservations and have advanced socially and educationally. The criteria adopted by the States has been the level of advancement – reflected in the economic and social status of such segments of society. Thus, if in the application of such criteria, it is found that amongst the OBCs, sections have moved forward and gained affluence, they are to be treated as advanced sections of society. In other words, moving out of the grouping as backward classes are deemed to be "forward". Constitutionally speaking, *Indra Sawhney* is an authority on this issue, i.e., that identification of creamy layer among the OBCs is as such a duty of the State to ensure that meaningful opportunities are given to the really backward. The corollary is therefore, the caste status of those who form part of creamy layer becomes irrelevant; and hence, they are not entitled to reservation under 15(4) or 16(4). Keeping all this in mind, the fact that some amongst the OBCs (creamy layer) do not enjoy the benefit of reservation (under 15(4) and 16(4)) does not lend justification for excluding those who are entitled to reservations under 15(4) and 16(4), due to their caste or social/educational backwardness, for benefit under Articles 15(6) – which is a reservation based on a *different* criterion, despite them being equally, or even more deprived than those who belong to the forward caste.

F. Other justifications for the classification

162. I am unable to agree with the characterisation of the classification in the impugned amendment as accepted by Dinesh Maheshwari, Bela Trivedi, and J.B. Pardiwala, JJ), for reasons set out in **Part III (D)**. I shall

in this section, respond to specific conclusions arrived at by the judges that constitute the majority.

(i) <u>*Reasonable classification to prevent double benefits*</u>

163. The allusion to over-classification and under classification, as the bases for exclusion in the context of the *doctrine of classification* governing Article 14, cannot be denied as a matter of law. However, to say that the non-inclusion of SC/ST and OBC communities - though the largest segments of the poor are from amongst them, is mere *reasonable* under-inclusion, cannot be accepted - especially in the context of a constitutional amendment. Reliance has been placed on *State of Gujarat v. Shri Ambika Mills*[91] and *S. Seshachalam & Ors. v. Chairman Bar Council of TN*[92]. In *Ambica Mills*, the court upheld the legislative measure, which excluded establishment or persons, on the ground that the state's policies to cover establishments, having regard to the objects, was not defeated, and the classification, not fatal, because it left out some classes of establishments having regard to their size. In *Seshachalam*, the exclusion from payment of lump sum amount, under an Advocate's welfare scheme, of lawyers receiving pension from their erstwhile employers, was held to not offend Article 14. Each of these cases are not apt instances, for the purposes of this case. The use of the term "double benefit" is discernible in the latter case. If one considers that if pension was being introduced for professionals for the first time, who had no other means of livelihood, when they gave up their avocation, the exclusion of those who had their full run of employment, *enjoyed pension from their erstwhile employer,* and then joined the legal profession, was justifiable, given that the State was assuming a burden for the first time, and keeping apart resources for that purpose. This classification was justified also on the basis of the principle

[91] *State of Gujarat v. Shri Ambika Mills* (1974) 4 SCC 656 (hereinafter, "*Ambika Mills")*.
[92] *S. Seshachalam & Ors. v. Chairman Bar Council of TN* (2014) 16 SCC 72 (hereinafter, "*Seshachalam"*).

in *R.K. Garg v. Union of India*[93], that in matters concerning economic policy, the state has wider latitude.

164. It is worth recollecting that Mathew, J. in *Ambica Mills* cautioned that one has to look beyond the classification. Else, the mind boggles at the classification, resulting in its justification. As recognised in some of the earliest decisions, the rule of classification is not the right to equality (just as the rights are fundamental, not the restrictions). I wish to highlight at this juncture, what was said in *Roop Chand Adlakha v. Delhi Development Authority*[94] - *"To overdo classification is to undo equality."*

(ii) *Scope of Article 46*

165. In my considered opinion, it would be wrong to characterize that the classification made for upliftment of SC/STs for whom special mention is made, is a "classification" for the purpose of upliftment of economically weaker sections, under Article 46, which permits a later classification that excludes them. If anything, the intent of Article 46 is to ensure upliftment of *all* poor sections: the mention of SC/STs is to remind the state that especially those classes should not be left out. But ironically, that is exactly the result achieved by their exclusion.

166. There can be no debate that Article 46 is an injunction to the State to take all steps to ameliorate the lot of economically weaker sections of the society. That this injunction was not confined to only SCs/STs has been widely accepted. In *Indra Sawhney* this aspect was recognized and elaborated, by PB Sawant, J. who stated that economic backwardness may not be the result of social backwardness:

> "481. […] *The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not from a class and they may be weaker as individuals only. Secondly, their weakness may not be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an*

[93] (1981) 4 SCC 675
[94] 1989 Supp (1) SCC 116

identifiable class but that class is represented in the services of the State adequately, as individuals forming weaker section, they may be entitled to the benefits of the measures taken under Article 46, but not to the reservations under Article 16(4). Thus, not only the concept of "weaker sections" under Article 46 is different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4). While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true. If this is borne in mind, the reasons why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens under Article 16(4) would be more clear. To the consideration of that aspect we may now turn.

[…]

576. Economic backwardness is the bane of the majority of the people in this country. There are poor sections in all the castes and communities. Poverty runs across all barriers. The nature and degree of economic backwardness and its causes and effects, however, vary from section to section of the populace. Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social backwardness. The educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness. It is necessary to bear this vital distinction in mind to understand the true import of the expression "backward class of citizens" in Article 16(4)."

167. Therefore, that Article 46 covers a wider canvass, and includes people who are poor, and whose poverty is not the result of social backwardness, has been recognized *always.* To now say that the mention of SC/STs in Article 46, and provision of reservations for them, is sufficient to distinguish them as a separate class, within Article 46, ignoring the *rationale* for continued reservations in their favour, (i.e., due to social exclusion) is to ignore important legal realities:

(a) That Article 46 comprehends all economically weaker sections of people, including SC/STs and OBC;

(b) The mention of SC/STs in Article 46 is a reminder to the state never to ignore them from the reckoning whenever a measure towards economic emancipation under Article 46 is introduced by the State.

(c) Article 46 existed from the beginning, and has been resorted to for providing all manner of measures to assist the poorest segments of society, irrespective of whether they are SCs/STs OBCs, such as scholarships, freeships, amenities, and concessions.

(iii) *EWS as a 'compensatory' measure*

168. The characterisation of reservations for economically weaker sections of the population (EWS) as compensatory and on par with the existing reservations under Articles 15(4) and 16(4), in my respectful opinion, is without basis. The endeavour of the Constitution makers was to ensure that past discriminatory practices which had, so to say, eaten the vitals of the Indian society and distorted it to such an extent that when the republic was created, an equal society was merely an illusion, which compelled them to enact special provisions such as Article 16(4) – and later Article 15(4), to ensure equality. It was not compensatory but also reparatory. They continue to compensate, definitionally and in reality, because even as on date, the acknowledged position is that reservations are necessary for SCs/STs and OBCs who are not part of the creamy layer. On the other hand, the EWS category, was consciously not made beneficiaries of reservations at the time of the framing of the Constitution, because perhaps the framers felt that the enacted provisions (including the soon to be added Articles 31A and 31B) and the slew of economic reforms which were enacted were sufficient to remove economic disparities. That hope however, did not materialise. Economic disparities (unconnected with social and educational backwardness) continued – and perhaps were even

exacerbated to such an extent that as of now almost 25% of the population continue to live in abject poverty. *Indra Sawhney* acknowledged that measures taken for their purpose would only result in "poverty alleviation".

169. Therefore, to conclude that reservations for EWS based upon the economic criteria is on par with reservations which the Constitution mandated, and envisioned as a pledge to *create an equal society*, is constitutionally unsound. The amendment which introduces new reservations does not "compensate": unlike the protective and compensatory reservations for socially and educationally backward classes (and SC/STs) who were discriminated systemically and who needed the "push" which is sought to be addressed by reservations, the economically weaker sections who are conceived to be the targets (i.e., forward classes) were never consciously discriminated against. Nor is it anyone's case, that they faced social and other barriers which made it impossible for them to advance.

170. I am also of the opinion that the observations made in *Indra Sawhney* - especially in paragraph 743 (SCC Reports) with respect to other kinds of reservations, has to be read in the context of the observations in *N.M.Thomas* and by the majority of judges in *Indra Sawhney* itself, which is that Article 16(1) permits classification and that the category of reservations in accord with the than existing provisions of the Constitution, favouring backward classes were stood exhausted by reason of Article 16(4). Illustratively therefore, the reservations in favour of sections (such as persons with disabilities, transgenders etc.) would be covered by the affirmative content of Article 16(1). It is in that sense that the observations made in *Indra Sawhney* have to be understood rather than the court foreseeing an amendment to the Constitution which permitted an entirely new section of the persons not based on social grouping, but on an

economic criterion as a target or recipients of reservations. Therefore, these two categories of reservations cannot be compared.

171. I cannot persuade myself to be sanguine about the fact that the poorest of the poor do not comprise large sections of the backward classes and even larger segments of the SCs/STs. The *Sinho Commission Report* itself is a testimony to this fact, that amongst the entire population of STs, 48% are the poorest; amongst the entire population of Scheduled Castes 38% are the poorest and amongst the OBC's no less than 33% are the poorest.

172. The fact that different forms of discrimination and even untouchability still persists in society, impelled parliament as late as 2015 to amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, by Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act 2015. The statement of Object and Reasons to the amendment, *inter alia* reads as follows:

> *"2. Despite the deterrent provisions made in the Act, atrocities against the members of the Scheduled Castes and Scheduled Tribes continue at a disturbing level. Adequate justice also remains difficult for a majority of the victims and the witnesses, as they face hurdles virtually at every stage of the legal process. The implementation of the Act suffers due to (a) procedural hurdles such as non registration of cases; (b) procedural delays in investigation, arrests and filing of charge-sheets; and (c) delays in trial and low conviction rate.*
>
> *3. It is also observed that certain forms of atrocities, known to be occurring in recent years, are not covered by the Act. Several offences under the Indian Penal Code, other than those already covered under section 3(2) (v) of the Act, are also committed frequently against the members of the Scheduled Castes and the Scheduled Tribes on the ground that the victim was a member of a Scheduled Caste and Scheduled Tribe. It is also felt that the public accountability provisions under the Act need to be outlined in greater detail and strengthened."*

173. The amendment enlarged and added the definition of certain terms, and extended to discrimination on the grounds of economic boycott, social

boycott and even changed the provision dealing with presumption as to the offence making it more stringent.

174. It is also worth noting that according to the National Crime Record Bureau Report titled –"*Crime in India 2021*"[95]:

a) The total population of Scheduled Castes in entire country (according to 2011 census) – 2013.8 lakhs, i.e., 20.13 crores.
b) Total crimes against Scheduled Castes in 2019 was 45961 and 2020 it was 50291 and in 2021, 50900. Of this about 20% constituted crimes against Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
c) As per same report, the total population of Scheduled Tribes in the entire country (based on 2011 census report) is 1042.8 lakhs, i.e., 10.42 crores.
d) The total crime reported and registered against Scheduled Tribes in 2019 was 7570; increased to 8272 in 2020, and 8802 in 2021.
e) Bulk of the crimes reported against Scheduled Tribes were offences under Indian Penal Code, with a much smaller proportion of offences under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

This data is demonstrative, that crime against those marginalized and stigmatized by caste, continue till this date. These legal developments and statistics belie the perception that such classes which can benefit from compensatory discrimination can be rightfully *excluded* from the benefit of reservations for the poor. That view, in my opinion is indefensible, and ignores stark realities.

[95] Source: https://ncrb.gov.in/en/node/3721

175. If such explanations for the differentiations, or exclusions are to be accepted, then this court will be paving the way for future discriminations, through constitutional amendments, based on constitutionally proscribed grounds. Even through the present amendments, especially Article 15(6)(a), it is possible to create corporations, and policies (not merely reservations) which can result in benefits to specific target groups and communities in forward castes, which may far exceed the allocations for those covered by Articles 15(4) and 16(4). When challenged, excessive budgetary allocations can successfully be justified on the ground of classification, i.e. that those who receive reservation and benefits under Articles 15(4) and 16(4) are different. Likewise preferential treatment, of communities, based on *descent* may well be sanctioned through later constitutional amendments, that may also be justified as a different basis, a class apart from others. These possibilities cannot be ruled out, because what begins as a seemingly innocuous alteration, may result in the "emasculation" and ultimate annihilation of the grand principle of equality.

G. The breach of the 50% cap – A note of caution

176. In view of my conclusions as recorded in this opinion – that the impugned amendment is violative of the basic structure of the Constitution, I find that there is no need for a specific finding on the 50% cap, or its breach of the basic structure; however I deem it necessary to sound a note of caution, on the consequence of upholding the reservation, thereby, breaching the 50% limit.

177. It is pertinent to note that the breach of the 50% limit is the principal ground of attack, of the 76th Constitutional Amendment 1994 which inserted as Entry 257A – the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State)

Act, 1993 in the IXth Schedule. The validity of that enactment - and whether the inclusion by the constitutional amendment, violates basic structure, is directly in issue in a batch of cases pending before this court. The view of the members of this bench constituting the majority - that creation of another class which can be a recipient of up to 10% of the reservation, over and above 50%, which is permitted under Articles 15(4) or 16(4), in my considered opinion, therefore, has a direct bearing on the likely outcome in the challenge in that proceeding. I would therefore sound this cautionary note since this judgment may well seal the fate of the pending litigation - without the benefit of hearing in those proceedings.

178. The last reason why I find myself unpersuaded to agree with the opinion that the impugned amendments by creating a different kind of criteria, have to be viewed separately and that *Indra Sawhney* was confined to reservations in Articles 15(4) and 16 (4) is because permitting the breach of the 50% rule as it were through this reasoning, becomes a gateway for further infractions whereby which in fact would result in compartmentalization; the rule of reservation could dealt well become rule of equality or the right to equality, could then easily be reduced to right to reservation - leading us back to the days of *Champakam Dorairajan*. In this regard, the observations of Ambedkar have to be kept in mind that the reservations are to be seen temporary and exceptional or else they would "*eat up the rule of equality*"[96].

179. In view of the above discussion, and given my conclusion on the validity of the impugned amendment, I would respectfully prefer to keep the question of violation of 50% rule open.

VIII. **Conclusion**

[96] Constituent Assembly Debates, Vol. 7, 30th November 1948, 7.63.205.

180. In the light of the above discussion, it is held that the principles of non-discrimination, non-exclusion and equality of opportunity to all is manifested in the Constitution through the equality code, which is part of its basic structure. Their link with fraternity, which the Preamble assures is intrinsic to "dignity of the individual and unity and integrity of the nation", is inseparable. The framers of our constitution recognised that there can be no justice without equality of status, and that bereft of fraternity, even equality would be an illusion as existing divisions and "narrow domestic walls"[97] would fragment society.

A. The principles of non-discrimination and fraternity in the constitutional ethos

181. The fraternal principle is deeply embedded to this nation's ethos and culture. The specific provisions which form part of the Equality Code, are inextricably intertwined with fraternity as well. It is fraternity – and no other idea, which acknowledges that ultimately, all individuals are human beings, born through the same natural process, subjected to the same physical limitations, and finally leave this world at an unknown time, but are sure to leave. Fraternity as a concept awakens humans to the reality that despite our apparent or superficial differences – ethnic, religion, caste, gender, origin or economic status – the institutions we create need our collective cooperation and individual commitment. Every social order invariably contains individuals with differences – be it grounded in ethnicity, wealth, talent, or realisation of one's abilities; the diversities abound. The idea of fraternity is to awaken the consciousness of each member of society that the human institutions which they create, the ideas they seek to develop, and the progress they wish to achieve, cannot be in

[97] Rabindranath Tagore, 'Where the Mind is Without Fear', Gitanjali (1910).

isolation – by separation – but with cooperation and harmony.

182. Ours is a nation of multi-dimensional diversity. The Constitution forges unity, and instructs people of this country about its social goals, and the means to achieve it. By it, We the People, *"solemnly resolve to ... secure to all its citizens ... Justice, Liberty and Equality, and to promote ... Fraternity"*. It reinforces national *unity* re-emphasising the idea of oneness as people of India, first and foremost, regardless of our regional, linguistic, religious, ethnic, economic, etc., diversities. In this context, fraternity is brotherhood. It focuses on concern for others, and respect for and acceptance of differences of caste, gender, ethnicity, economic status, religion, etc. People cannot be assured of Justice, Liberty or Equality, unless Fraternity in one form or another, to some degree, is felt by individuals at each level of our social order, and economic system.

183. It is essential that for the unity of this great nation, that we all recognize that fraternity is the integrator, and unifier, which needs active propagation and practise, in tune with our preambular resolve to preserve our Republic. Therefore, divisiveness of any form: in the polity, social hierarchy, religion, origin, or regional destroys fraternity and undermines unity. Divisiveness tends to polarize people and is likely to foster distrust. Weakening fraternity therefore undermines justice, liberty, and equality.

184. On this, I want to highlight the words of two social reformers, which demonstrate that the principle of fraternity and the ideas and values connected to it, are not new, but in fact, transcend time. Swami Vivekananda's message, in his address at the World Parliament of Religions, in Chicago, on 11th September, 1893 had the theme of universal brotherhood of all, and that differences in religion, the exclusion of one of another, would fade. He evocatively said that:

> *"If anybody dreams of the exclusive survival of his own religion and the destruction of others, I pity him from the bottom of my heart, and point out to him that upon the banner of every religion will soon be written, in spite of resistance, 'Help and not fight', 'Assimilation and not Destruction', 'Harmony and Peace and not dissension'."*

Sri Aurobindo too, was conscious of the need for fraternity. In a speech delivered in Howrah, on 27 June, 1909, he presciently said:

> *"Again, there is fraternity. It is the last term of the gospel. It is the most difficult to achieve, still it is a thing towards which all religions call and human aspirations rise. There is discord in life, but mankind yearns for peace and love. This the reason why the gospels which preach brotherhood spread quickly and excite passionate attachment. This was the reason of the rapid spread of Christianity. This was the reason of Buddhism's spread in this country and throughout Asia. This is the essence of humanitarianism, the modern gospel of love for mankind. None of us have achieved our ideals, but human society has always attempted an imperfect and limited fulfilment of them. It is the nature, the dharma of humanity that it should be unwilling to stand alone. Every man seeks the brotherhood of his fellow and we can only live by fraternity with others. Through all its differences and discords humanity is striving to become one."*

185. Thus, one-ness, *inclusiveness*, humanism and the idea that not only are all equal, and should have equal opportunities, and the content of each one's rights be no different from the other, but also that all stand together, and for each other, is a powerful precept. This precept suffuses every provision of Part III of the Constitution, especially Articles 14-18, 38-39 and 46.

186. This intrinsic value of fraternity, its intricate connection with justice, liberty, and equality, assuring the dignity of the individual are steeped in the constitutional jurisprudence of this nation. The constitution does not merely bind the institutions it creates and regulate their action, confer rights on individuals, but it is also a "pact between people" and is a charter given on to themselves defining their conduct with each other.[98] In my opinion, this value of fraternity is as much a part of the equality code, and its facets – equality of opportunity, the principle of non-discrimination and the non-

[98] *Prathvi Raj Chauhan v. Union of India,* (2020) 4 SCC 727.

exclusionary principle, as it inextricably binds them with the concepts of liberty and freedom. Building upon the simile used by Chandrachud, J of the basic structure of the Constitution being "*woven out of the conspectus of the Constitution*" - equality and justice are the warp and weft of the constitutional fabric: with liberty, fraternity, and dignity, lending it richness in colour.

187. The exclusionary clause (in the impugned amendment) that keeps out from the benefits of economic reservation, backward classes and SC/STs therefore, strikes a death knell to the equality and fraternal principle which permeates the equality code and non-discrimination principle.

188. The concepts which our Constitution fosters, and the principles it engenders – equality, fraternity, egalitarianism, dignity, and justice (at individual and social levels) are all inclusive, all encompassing. The equality code in its majestic formulation (Article 14, 15, 16 and 17) promotes inclusiveness. Even provisions enabling reservations foster social justice and equality, to ensure inclusiveness and participation of all sections of society. These provisions assure representation, diversity, and empowerment. Conversely, exclusion, with all its negative connotation – is not a constitutional principle and finds no place in our constitutional ethos. Therefore, to admit now, that exclusion of people based on their backwardness, rooted in social practice, is permissible, destroys the constitutional ethos of fraternity, non-discrimination, and non-exclusion.

B. Summary of findings in Questions 1-3

189. On Question 1, it is held that the states' compelling interest to fulfil the objectives set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate. That reservation or special

provisions have so far been provided in favour of historically disadvantaged communities, cannot be the basis for contending that *other* disadvantaged groups who have not been able to progress due to the ill effects of abject poverty, should remain so and the special provisions should not be made by way of affirmative action or even reservation on their behalf. Therefore, special provisions based on objective economic criteria (for the purpose of Article 15), is *per se* not violative of the basic structure.

190. However, in answer to Question 3, I have highlighted that the framework in which it has been introduced by the impugned amendment – *by excluding* backward classes – is violative of the basic structure. The identifier for the new criteria-is based on deprivation faced by individuals. Therefore, which community the individual belongs to is irrelevant. An individual who is a target of the new 10% reservation may be a member of any community or class. The state does not – and perhaps justly so - will not look into her background. Yet in the same breath, the state is saying that members of certain communities who may be equally or desperately poor (for the purposes of classification identification) but will otherwise be beneficiaries of reservation of a different kind, would not be able to access this new benefit, since they belong to those communities. This dichotomy of on the one hand, using a *neutral identifier* entirely based on economic status and at the same time, for the purpose of exclusion, using social status, i.e., the castes or socially deprived members, on the ground that they are beneficiaries of reservations (under Article 15(4) and 16(4)) is entirely offensive to the Equality Code.

191. A universally acknowledged truth is that reservations have been conceived and quotas created, through provision in the Constitution, only to offset fundamental, deep rooted generations of wrongs perpetrated on entire communities and castes. Reservation is designed as a powerful tool

to enable equal access and equal opportunity. Introducing the economic basis for reservation – as a new criterion, is permissible. Yet, the "othering" of socially and educationally disadvantaged classes – including SCs/ STs/ OBCs by excluding them from this new reservation on the ground that they enjoy pre-existing benefits, is to heap fresh injustice based on past disability. The exclusionary clause operates in an utterly arbitrary manner. Firstly, it "others" those subjected to socially questionable, and outlawed practices – though they are amongst the poorest sections of society. Secondly, for the purpose of the new reservations, the exclusion operates against the socially disadvantaged classes and castes, absolutely, by confining them within their allocated reservation quotas (15% for SCs, 7.5% for STs, etc.). Thirdly, it denies the chance of mobility from the reserved quota (based on past discrimination) to a reservation benefit based only on economic deprivation. The net effect of the entire exclusionary principle is Orwellian, (so to say)[99] which is that all the poorest are entitled to be considered, regardless of their caste or class, yet only those who belong to forward classes or castes, would be considered, and those from socially disadvantaged classes for SC/STs would be ineligible. Within the narrative of the classification jurisprudence, the differentia (or marker) distinguishing one person from another is deprivation alone. The exclusion, however, is not based on deprivation but social origin or identity. This strikes at the essence of the non-discriminatory rule. Therefore, the total and absolute exclusion of constitutionally recognised backward classes of citizens - and more acutely, SC and ST communities, is nothing but discrimination which reaches to the level of undermining,

[99] George Orwell, *Animal Farm* where idea of equality is explained *allegorically*, through the example of a society comprising of animals who have seized control, by one of them saying that the rule 'All animals are equal' reads that *'All animals are equal but some animals are more equal than others'*.

and destroying the equality code, and particularly the principle of non-discrimination.

192. Therefore, on question 3, it is clear that the impugned amendment and the classification it creates, is arbitrary, and results in hostile discrimination of the poorest sections of the society that are socially and educationally backward, and/or subjected to caste discrimination. For these reasons, the insertion of Article 15(6) and 16(6) is struck down, is held to be violative of the equality code, particularly the principle of *non-discrimination* and *non-exclusion* which forms an inextricable part of the basic structure of the Constitution.

193. While this reasoning is sufficient to conclude that Article 16(6) is liable to be struck down, there are additional reasons (elaborated in **Part V**), due to which this court is compelled to clarify that while the 'economic criteria' *per se* is permissible in relation to *access* of public goods (under Article 15), the same is not true for Article 16, the goal of which is empowerment, through *representation* of the community.

194. On the point of Question 2, this court is in agreement that unaided private educational institutions would be bound under Article 15(6) to provide for EWS reservations. However, given that the analysis under Question 3 on 'exclusion' leads to the conclusion that the Amendment is violative of the basic structure, the question herein has been rendered moot.

195. For the above reasons, it is hereby declared that Sections 2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted clause (6) in Article 15 and clause (6) in Article 16, respectively, are unconstitutional and void on the ground that they are violative of the basic structure of the Constitution.

196. The writ petitions and other proceedings are consequently, disposed of, in the above terms. There shall be no order as to costs.

197. It would be in order to place my gratitude and appreciation for the valuable assistance rendered by all counsels who appeared and made submissions during the course of the hearings, i.e., K.K. Venugopal, Attorney General for India, Tushar Mehta, Solicitor General of India, Ms. Meenakshi Arora, Mr. Sanjay Parikh, Prof. Ravi Verma Kumar, Mr. Salman Khurshid, Mr. P. Wilson, Dr. K. S. Chauhan, Mr. Gopal Sankaranarayanan, Mr. Mahesh Jethmalani, Mr. Niranjan Reddy, Ms. Vibha Makhija, senior advocates; and Prof (Dr) G. Mohan Gopal, Mr. Yadav Narender Singh, Mr. Shadan Farasat, Ms. Diya Kapur, Dr. M. P. Raju, Mr. Kaleeswaram Raj, Mr. Pratik R. Bombarde, Mr. Akash Kakade, Mr. Kanu Agrawal, Mr. V.K. Biju, advocates; and all the other counsels that assisted them.

.....CJI.
[UDAY UMESH LALIT]

.....J.
[S. RAVINDRA BHAT]

New Delhi,
November 7, 2022.