CASE NO.:

Writ Petition (civil) 61 of 2002

PETITIONER:

M. Nagaraj & Others Petitioners

RESPONDENT:

Union of India & Others Respondents

DATE OF JUDGMENT: 19/10/2006

BENCH:

Y.K. SABHARWAL, K.G. BALAKRISHNAN & S.H. KAPADIA C.K. THAKKER P.K. BALASUBRAMANYAN

JUDGMENT:

J U D G M E N T

with

WP (C) Nos.62, 81, 111, 134, 135, 206, 226, 227, 255, 266,

269, 279, 299, 294, 295, 298, 250, 319, 375, 386, 387, 320,

322, 323, 338, 234, 340, 423, 440, 453, 460, 472, 482, 483,

484, 485, 550, 527 and 640 of 2002, SLP (C) Nos. 4915-4919

of 2003, W.P. (C) Nos.153/2003, C.P. (C) No. 404/2004 in

W.P.(C) No. 255/2002, C.P. (C) No.505/2002 in WP (C)

No.61/2002, C.P. (C) No.553/2002 in WP (C) No.266/2002,

C.P. (C) No.570/2002 in WP (C) No.255/2002, C.P. (C)

No.122/2003 in WP (C) No.61/2002, C.P. (C) No.127/2003 in

WP (C) No.61/2002, C.P. (C) No.85/2003 in WP (C)

No.255/2002, W.P. (C) Nos. 313 and 381 of 2003, CIVIL

APPEAL Nos. 12501-12503/1996, SLP (C) No.754/1997, WP

(C) No.460 of 2003, CIVIL APPEAL Nos. 7802/2001 and

7803/2001, W.P. (C) No.469/2003, SLP (C) No.19689/1996,

WP (C) No. 563/2003, WP (C) No.2/2003, WP (C) Nos.

515, 519 and 562 of 2004, WP (C) No. 413 of 1997,

WP (C) No.286 of 2004 and SLP (C) No.14518 of 2004.

KAPADIA, J.

The width and amplitude of the right to equal

opportunity in public employment, in the context of

reservation, broadly falls for consideration in these writ

petitions under Article 32 of the Constitution.

FACTS IN WRIT PETITION (CIVIL) NO.61 OF 2002:

The facts in the above writ petition, which is the

lead petition, are as follows.

Petitioners have invoked Article 32 of the

Constitution for a writ in the nature of certiorari to quash

the Constitution (Eighty-Fifth Amendment] Act, 2001

inserting Article 16(4A) of the Constitution retrospectively

from 17.6.1995 providing reservation in promotion with

consequential seniority as being unconstitutional and

violative of the basic structure. According to the

petitioners, the impugned amendment reverses the

decisions of this Court in the case of Union of India and

others v. Virpal Singh Chauhan and others , Ajit

Singh Januja and others v. State of Punjab and

others (Ajit Singh-I), Ajit Singh and others (II) v.

State of Punjab and others , Ajit Singh and others

(III) v. State of Punjab and others , Indra Sawhney

and others v. Union of India , and M. G.

Badappanavar and another v. State of Karnataka

and others . Petitioners say that the Parliament has

appropriated the judicial power to itself and has acted as

an appellate authority by reversing the judicial

pronouncements of this Court by the use of power of

amendment as done by the impugned amendment and is,

therefore, violative of the basic structure of the

Constitution. The said amendment is, therefore,

constitutionally invalid and is liable to be set aside.

Petitioners have further pleaded that the amendment also

seeks to alter the fundamental right of equality which is

part of the basic structure of the Constitution.

Petitioners say that the equality in the context of Article

16(1) connotes "accelerated promotion" so as not to

include consequential seniority. Petitioners say that by

attaching consequential seniority to the accelerated

promotion, the impugned amendment violates equality in

Article 14 read with Article 16(1). Petitioners further say

that by providing reservation in the matter of promotion

with consequential seniority, there is impairment of

efficiency. Petitioners say that in the case of Indra

Sawhney5 decided on 16.11.1992, this Court has held

that under Article 16(4), reservation to the backward

classes is permissible only at the time of initial

recruitment and not in promotion. Petitioners say that

contrary to the said judgment delivered on 16.11.1992,

the Parliament enacted the Constitution (Seventy-

Seventh Amendment) Act, 1995. By the said

amendment, Article 16(4A) was inserted, which

reintroduced reservation in promotion. The Constitution

(Seventy-Seventh Amendment) Act, 1995 is also

challenged by some of the petitioners. Petitioners say

that if accelerated seniority is given to the roster-point

promotees, the consequences would be disastrous. A

roster-point promotee in the graduate stream would

reach the 4th level by the time he attains the age of 45

years. At the age of 49, he would reach the highest level

and stay there for nine years. On the other hand, the

general merit promotee would reach the 3rd level out of 6

levels at the age of 56 and by the time, he gets eligibility

to the 4th level, he would have retired from service.

Petitioners say that the consequences of the impugned

85th Amendment which provides for reservation in

promotion, with consequential seniority, would result in

reverse discrimination in the percentage of representation

of the reserved category officers in the higher cadre.

BROAD ISSUES IN WRIT PETITION No.527 OF 2002:

The broad issues that arise for determination in this

case relate to the:

1. Validity

2. Interpretation

3. Implementation

of (i) the Constitution (Seventy-Seventh Amendment) Act,

1995, the Constitution (Eighty-First Amendment) Act,

2000, the Constitution (Eighty-Second Amendment) Act,

2000, and the Constitution (Eighty-Fifth Amendment)

Act, 2001; and, (ii) Action taken in pursuance thereof

which seek to reverse decisions of the Supreme Court in

matters relating to promotion and their application with

retrospective effect.

ARGUMENTS:

The substance of the arguments advanced on behalf

of the petitioners briefly is as follows:

Equality is a part of the basic structure and it is

impossible to conceive of the Constitution without

equality as one of its central components. That, equality

is the basic feature referred to in the preamble to our

Constitution. Petitioners further submit that Article 16 is

integral to equality; that, Article 16 has to be read with

Article 14 and with several Articles in Part-IV. According

to the petitioners, the Constitution places an important

significance on public employment and the rule of

equality, inasmuch as, a specific guarantee is given

under Article 16 protecting equality principles in public

employment. In this connection, reliance is also placed

on the provisions of Part XIV to show that the

Constitution makers had given importance to public

employment by making a special provision in the form of

Part XIV providing certain rights and protection to the

office holders in the services of the Union and the States.

These provisions are Articles 309, 311, 315, 316, 317

and 318 to 323. Special provisions have also been made

in Article 323-A which permits establishment of tribunals

as special and adjudicatory mechanism. That, Article

335 recognizes the importance of efficiency in

administration and the various provisions of the

Constitution indicate that public employment was and is

even today of central concern to the Constitution. It is

urged that equality in matters of public employment

cannot be considered as merely an abstract concept.

Petitioners say that over the years, this Court has

delivered many decisions laying down that principles of

'equality' and 'affirmative action' are the pillars of our

Constitution. These judgments also provide conclusions

based on principles which gave meaning to equality both

as an individual right and as group expectations. It is

submitted that clause (4) of Article 16 is an instance of

the classification implicit and permitted by Article 16(1)

and that this view of equality did not dilute the

importance of Article 16(1) or Article 16(2) but merely

treated Article 16(4) as an instance of the classification;

that this relationship of sub-clauses within Article 16 is

not an invitation for reverse discrimination and that,

equality of opportunity cannot be overruled by affirmative

action. It is submitted that "equality in employment"

consists of equality of opportunity [Article 16(1)], anti-

discrimination [Article 16(2)], special classification

[Article 16(3)], affirmative action [Article 16(4)] which

does not obliterate equality but which stands for

classification within equality], and lastly, efficiency

[Article 335]. As regards the words 'nothing in this

article' in Article 16(4), it is urged that these words

cannot wipe out Article 16(1) and, therefore, they have a

limited meaning. It is urged that the said words also

occur in Articles 16(4A) and 16(4B). It is urged that

equality in the Constitution conceives the individual right

to be treated fairly without discrimination in the matter

of equality of opportunity. It also conceives of affirmative

action in Article 15(4) and Article 16(4). It enables

classification as a basis for enabling preferences and

benefits for specific beneficiary groups and that neither

classification nor affirmative action can obliterate the

individual right to equal opportunity. Therefore, a

balance has to be evolved to promote equal opportunities

while protecting individual rights. It is urged that as an

individual right in Article 16(1), enforceability is provided

for whereas "group expectation" in Article 16(4) is not a

fundamental right but it is an enabling power which is

not coupled with duty. It is submitted that if the

structural balance of equality in the light of the efficiency

is disturbed and if the individual right is encroached

upon by excessive support for group expectations, it

would amount to reverse discrimination.

On the question of power of amendment, it is

submitted that the limited power of amendment cannot

become an unlimited one. A limited amendment power is

one of the basic features of our Constitution and,

therefore, limits on that power cannot be destroyed.

Petitioners submit that Parliament cannot under Article

368 expand its amending power so as to acquire for itself

the right to abrogate the Constitution and if the width of

the amendment invites abrogation of the basic structure

then such amendment must fail. Reliance is placed in

this connection on the judgment in Minerva Mills Ltd.

and others v. Union of India and others . On the

question of balancing of fundamental rights vis-`-vis

directive principles, it is submitted that directive

principles cannot be used to undermine the basic

structure principles underlying fundamental rights

including principles of equality, fundamental freedoms,

due process, religious freedom and judicial enforcement.

On the question of balancing and structuring of

equality in employment, it is urged that quotas are

subject to quantitative limits and qualitative exclusions;

that, there is a distinction between quota limits (example

15% to SCs) and ceiling-limits/maximum permissible

reservation limits (example 50%) which comes under the

category of quantitative limits. However, quotas are also

subject to qualitative exclusions like creamy layer. It is

urged that in numerous judgments and in particular in

Indra Sawhney5, M.G. Badaappanavar6, Ajit Singh

(II)3, the equality of opportunity in public employment is

clarified in order to structure and balance Articles 16(1)

and 16(4).

In answer to the respondents' contentions that

Articles 16(4A) and 16(4B) and the changes to Article 335

are merely enabling provisions and that in a given case if

the exercise undertaken by the appropriate Government

is found to be arbitrary, this Court will set it right, it is

contended that ingressing the basic structure is a per se

violation of the Constitution. In this connection, it is

alleged that the basis for impugned amendments is to

overrule judicial decisions based on holistic

interpretation of the Constitution and its basic values,

concepts and structure. In this connection, it is urged

that the 77th Amendment introducing Article 16(4A) has

the effect of nullifying the decision in the case of Indra

Sawhney5; that, the 81st Amendment introducing Article

16(4B) has been brought in to nullify the effect of the

decision in R.K. Sabharwal & Others v. State of

Punjab and others , in which it has been held that carry

forward vacancies cannot be filled exceeding 50% of the

posts. Petitioners say that similarly the Constitution

(Eighty-Second Amendment) Act, 2000 introducing the

proviso to Article 335 has been introduced to nullify the

effect of the decision in the case of Indra Sawhney5 and

a host of other cases, which emphasize the importance of

maintaining efficiency in administration. It is submitted

that, the 85th Amendment adding the words 'with

consequential seniority' in Article 16(4A) has been made

to nullify the decision in Ajit Singh (II)3.

Accordingly it is urged that the impugned

amendments are violative of the basic structure and the

fundamental values of the Constitution articulated in the

preamble and encapsulated in Articles 14, 16 and 19;

that, they violate the fundamental postulates of equality,

justice, rule of law and secularism as enshrined in the

Constitution and that they violate the fundamental role

of the Supreme Court as interpreter of the Constitution.

That, the impugned amendments create an

untrammelled, unrestrained and unconstitutional regime

of reservations which destroys the judicial power and

which undermines the efficacy of judicial review which is

an integral part of rule of law. It is argued that, Articles

14 and 16 have to be read with Article 335 as originally

promulgated; that, the impugned amendments invade the

twin principles of efficiency, merit and the morale of

public services and the foundation of good governance. It

is urged vehemently that the impugned amendments

open the floodgates of disunity, disharmony and

disintegration.

On behalf of the respondents, following arguments

were advanced. The power of amendment under Article

368 is a 'constituent' power and not a 'constituted

power'; that, that there are no implied limitations on the

constituent power under Article 368; that, the power

under Article 368 has to keep the Constitution in repair

as and when it becomes necessary and thereby protect

and preserve the basic structure. In such process of

amendment, if it destroys the basic feature of the

Constitution, the amendment will be unconstitutional.

Constitution, according to the respondents, is not merely

what it says. It is what the last interpretation of the

relevant provision of the Constitution given by the

Supreme Court which prevails as a law. The

interpretation placed on the Constitution by the Court

becomes part of the Constitution and, therefore, it is

open to amendment under Article 368. An interpretation

placed by the Court on any provision of the Constitution

gets inbuilt in the provisions interpreted. Such articles

are capable of amendment under Article 368. Such

change of the law so declared by the Supreme Court will

not merely for that reason alone violate the basic

structure of the Constitution or amount to usurpation of

judicial power. This is how Constitution becomes

dynamic. Law has to change. It requires amendments to

the Constitution according to the needs of time and

needs of society. It is an ongoing process of judicial and

constituent powers, both contributing to change of law

with the final say in the judiciary to pronounce on the

validity of such change of law effected by the constituent

power by examining whether such amendments violate

the basic structure of the Constitution. On every

occasion when a constitutional matter comes before the

Court, the meaning of the provisions of the Constitution

will call for interpretation, but every interpretation of the

Article does not become a basic feature of the

Constitution. That, there are no implied limitations on

the power of the Parliament under Article 368 when it

seeks to amend the Constitution. However, an

amendment will be invalid, if it interferes with or

undermines the basic structure. The validity of the

amendment is not to be decided on the touchstone of

Article 13 but only on the basis of violation of the basic

features of the Constitution.

It is further submitted that amendments for giving

effect to the directive principles cannot offend the basic

structure of the Constitution. On the contrary, the

amendments which may abrogate individual rights but

which promote Constitutional ideal of 'justice, social,

economic and political' and the ideal of 'equality of status'

are not liable to be struck down under Article 14 or

Article 16(1) and consequently, such amendments cannot

violate the basic structure of the Constitution. That, the

amendments to the Constitution which are aimed at

removing social and economic disparities cannot offend

the basic structure. It is urged that the concepts flowing

from the preamble to the Constitution constitute the

basic structure; that, basic structure is not found in a

particular Article of the Constitution; and except the

fundamental right to live in Article 21 read with Article

14, no particular Article in Part-III is a basic feature.

Therefore, it is submitted that equality mentioned in

Articles 14 and 16 is not to be equated to the equality

which is a basic feature of the Constitution.

It is submitted that the principle of balancing of

rights of the general category and reserved category in

the context of Article 16 has no nexus to the basic

feature of the Constitution. It is submitted that basic

feature consists of constitutional axioms like

constitutional supremacy, and democratic form of

government, secularism, separation of powers etc.

Respondents contend that Article 16(4) is a part of

the Constitution as originally enacted. The exercise of

the power by the delegate under Article 16(4) will override

Article 16(1). It is not by virtue of the power of the

delegate, but it is by virtue of constituent power itself

having authorized such exercise by the delegate under

Article 16(4), that article 16(1) shall stand overruled. The

only limitation on the power of delegate is that it should

act within four corners of Article 16(4), namely, backward

classes, which in the opinion of the State are not

adequately represented in public employment. If this

condition precedent is satisfied, a reservation will

override Article 16(1) on account of the words 'nothing in

this Article shall prevent the State'. It is urged that

jurisprudence relating to public services do not

constitute basic feature of the Constitution. That, the

right to consideration for promotion in service matters is

not a basic feature.

It is lastly submitted that Articles 16(4A) and 16(4B)

are only enabling provisions; that, the constitutionality of

the enabling power in Articles 16(4A) and 16(4B) is not to

be tested with reference to the exercise of the power or

manner of exercise of such power and that the impugned

amendments have maintained the structure of Articles

16(1) to 16(4) intact. In this connection, it is submitted

that the impugned amendments have retained

reservations at the recruitment level inconformity with

the judgment in Indra Sawhney5, which has confined

Article 16(4) only to initial appointments; that Article

16(4A) is a special provision which provides for

reservation for promotion only to SCs and STs. It is

urged that if SCs/STs and OBCs are lumped together,

OBCs will take away all the vacancies and, therefore,

Article 16(4A) has been inserted as a special provision.

That, in Indra Sawhney5, the focus was on Backward

Classes and not on SCs/STs and, therefore, there was no

balancing of rights of three groups, namely, general

category, other backward classes and scheduled

castes/scheduled tribes. It is, therefore, contended that

under Article 16(4A), reservation is limited. It is not to

the extent of 50% but it is restricted only to SCs and STs,

and, therefore, the "risk element" pointed out in Indra

Sawhney5 stands reduced. To carve out SCs/STs and

make a separate classification is not only constitutional,

but it is a constitutional obligation to do so under Article

46. That, Article 16(4) is an overriding provision over

Article 16(1) and if Article 16(4) cannot be said to

constitute reverse discrimination then Article 16(4A) also

cannot constitute reverse discrimination.

It is next submitted that this Court has taken care

of the interests of the general category by placing a

ceiling on filling-up of vacancies only to a maximum of

50% for reservation. The said 50% permitted by this

Court can be reserved in such manner as the appropriate

Government may deem fit. It is urged that if it is valid to

make reservation at higher levels by direct recruitment, it

can also be done for promotion after taking into account

the mandate of Article 335.

It is next submitted that the amendment made by

Article 16(4B) makes an exception to 50% ceiling-limit

imposed by Indra Sawhney5, by providing that the

vacancies of previous years will not be considered with

the current year's vacancies. In this connection, it was

urged that Article 16(4B) applies to reservations under

Article 16(4) and, therefore, if reservation is found to be

within reasonable limits, the Court would uphold such

reservations depending upon the facts of the case and if

reservation suffers from excessiveness, it may be

invalidated. Therefore, the enabling power under Article

16(4B) cannot be rendered invalid.

For the above reasons, respondents submit that

there is no infirmity in the impugned constitutional

amendments.

KEY ISSUE:

It is not necessary for us to deal with the above

arguments serially. The arguments are dealt with by us

in the following paragraphs subject-wise.

The key issue, which arises for determination in this

case is whether by virtue of the impugned

constitutional amendments, the power of the Parliament

is so enlarged so as to obliterate any or all of the

constitutional limitations and requirements?

STANDARDS OF JUDICIAL REVIEW OF

CONSTITUTIONAL AMENDMENTS:

Constitution is not an ephermal legal document

embodying a set of legal rules for the passing hour. It

sets out principles for an expanding future and is

intended to endure for ages to come and consequently to

be adapted to the various crisis of human affairs.

Therefore, a purposive rather than a strict literal

approach to the interpretation should be adopted. A

Constitutional provision must be construed not in a

narrow and constricted sense but in a wide and liberal

manner so as to anticipate and take account of changing

conditions and purposes so that constitutional provision

does not get fossilized but remains flexible enough to

meet the newly emerging problems and challenges.

This principle of interpretation is particularly

apposite to the interpretation of fundamental rights. It is

a fallacy to regard fundamental rights as a gift from the

State to its citizens. Individuals possess basic human

rights independently of any constitution by reason of

basic fact that they are members of the human race.

These fundamental rights are important as they possess

intrinsic value. Part-III of the Constitution does not

confer fundamental rights. It confirms their existence

and gives them protection. Its purpose is to withdraw

certain subjects from the area of political controversy to

place them beyond the reach of majorities and officials

and to establish them as legal principles to be applied by

the courts. Every right has a content. Every

foundational value is put in Part-III as fundamental right

as it has intrinsic value. The converse does not apply. A

right becomes a fundamental right because it has

foundational value. Apart from the principles, one has

also to see the structure of the Article in which the

fundamental value is incorporated. Fundamental right is

a limitation on the power of the State. A Constitution,

and in particular that of it which protects and which

entrenches fundamental rights and freedoms to which all

persons in the State are to be entitled is to be given a

generous and purposive construction. In the case of

Sakal Papers (P) Ltd. & Others v. Union of India and

others this Court has held that while considering the

nature and content of fundamental rights, the Court

must not be too astute to interpret the language in a

literal sense so as to whittle them down. The Court must

interpret the Constitution in a manner which would

enable the citizens to enjoy the rights guaranteed by it in

the fullest measure. An instance of literal and narrow

interpretation of a vital fundamental right in the Indian

Constitution is the early decision of the Supreme Court

in the case of A.K. Gopalan v. State of Madras .

Article 21 of the Constitution provides that no person

shall be deprived of his life and personal liberty except

according to procedure established by law. The Supreme

Court by a majority held that 'procedure established by

law' means any procedure established by law made by

the Parliament or the legislatures of the State. The

Supreme Court refused to infuse the procedure with

principles of natural justice. It concentrated solely upon

the existence of enacted law. After three decades, the

Supreme Court overruled its previous decision in A.K.

Gopalan10 and held in its landmark judgment in

Maneka Gandhi v. Union of India and another that

the procedure contemplated by Article 21 must answer

the test of reasonableness. The Court further held that

the procedure should also be in conformity with the

principles of natural justice. This example is given to

demonstrate an instance of expansive interpretation of a

fundamental right. The expression 'life' in Article 21 does

not connote merely physical or animal existence. The

right to life includes right to live with human dignity.

This Court has in numerous cases deduced fundamental

features which are not specifically mentioned in Part-III

on the principle that certain unarticulated rights are

implicit in the enumerated guarantees. For example,

freedom of information has been held to be implicit in the

guarantee of freedom of speech and expression. In India,

till recently, there is no legislation securing freedom of

information. However, this Court by a liberal

interpretation deduced the right to know and right to

access information on the reasoning that the concept of

an open government is the direct result from the right to

know which is implicit in the right of free speech and

expression guaranteed under Article 19(1)(a).

The important point to be noted is that the content

of a right is defined by the Courts. The final word on the

content of the right is of this Court. Therefore,

constitutional adjudication plays a very important role in

this exercise. The nature of constitutional adjudication

has been a subject matter of several debates. At one

extreme, it is argued that judicial review of legislation

should be confined to the language of the constitution

and its original intent. At the other end, non-

interpretivism asserts that the way and indeterminate

nature of the constitutional text permits a variety of

standards and values. Others claim that the purpose of

a Bill of Rights is to protect the process of decision

making.

The question which arises before us is regarding

nature of the standards of judicial review required to be

applied in judging the validity of the constitutional

amendments in the context of the doctrine of basic

structure. The concept of a basic structure giving

coherence and durability to a Constitution has a certain

intrinsic force. This doctrine has essentially developed

from the German Constitution. This development is the

emergence of the constitutional principles in their own

right. It is not based on literal wordings.

In S.R. Bommai & Others etc. v. Union of India

& Others etc. , the basic structure concept was

resorted to although no question of constitutional

amendment was involved in that case. But this Court

held that policies of a State Government directed against

an element of the basic structure of the Constitution

would be a valid ground for the exercise of the central

power under Article 356, that is, imposition of the

President's rule. In that case, secularism was held to be

an essential feature of the Constitution and part of its

basic structure. A State Government may be dismissed

not because it violates any particular provision of the

Constitution but because it acts against a vital principle

enacting and giving coherence to a number of particular

provisions, example: Articles 14, 15 and 25. In S.R.

Bommai12, the Court clearly based its conclusion not so

much on violation of particular constitutional provision

but on this generalized ground i.e. evidence of a pattern

of action directed against the principle of secularism.

Therefore, it is important to note that the recognition of a

basic structure in the context of amendment provides an

insight that there are, beyond the words of particular

provisions, systematic principles underlying and

connecting the provisions of the Constitution. These

principles give coherence to the Constitution and make it

an organic whole. These principles are part of

Constitutional law even if they are not expressly stated in

the form of rules. An instance is the principle of

reasonableness which connects Articles 14, 19 and 21.

Some of these principles may be so important and

fundamental, as to qualify as 'essential features' or part

of the 'basic structure' of the Constitution, that is to say,

they are not open to amendment. However, it is only by

linking provisions to such overarching principles that one

would be able to distinguish essential from less essential

features of the Constitution.

The point which is important to be noted is that

principles of federalism, secularism, reasonableness and

socialism etc. are beyond the words of a particular

provision. They are systematic and structural principles

underlying and connecting various provisions of the

Constitution. They give coherence to the Constitution.

They make the Constitution an organic whole. They are

part of constitutional law even if they are not expressly

stated in the form of rules.

For a constitutional principle to qualify as an

essential feature, it must be established that the said

principle is a part of the constitutional law binding on the

legislature. Only thereafter, the second step is to be

taken, namely, whether the principle is so fundamental

as to bind even the amending power of the Parliament,

i.e. to form a part of the basic structure. The basic

structure concept accordingly limits the amending power

of the Parliament. To sum up: in order to qualify as an

essential feature, a principle is to be first established as

part of the constitutional law and as such binding on the

legislature. Only then, it can be examined whether it is so

fundamental as to bind even the amending power of the

Parliament i.e. to form part of the basic structure of the

Constitution. This is the standard of judicial review of

constitutional amendments in the context of the doctrine

of basic structure.

As stated above, the doctrine of basic structure has

essentially emanated from the German Constitution.

Therefore, we may have a look at common constitutional

provisions under German Law which deal with rights,

such as, freedom of press or religion which are not mere

values, they are justiciable and capable of interpretation.

The values impose a positive duty on the State to ensure

their attainment as far as practicable. The rights,

liberties and freedoms of the individual are not only to be

protected against the State, they should be facilitated by

it. They are to be informed. Overarching and informing

of these rights and values is the principle of human

dignity under the German basic law. Similarly,

secularism is the principle which is the overarching

principle of several rights and values under the Indian

Constitution. Therefore, axioms like secularism,

democracy, reasonableness, social justice etc. are

overarching principles which provide linking factor for

principle of fundamental rights like Articles 14, 19 and

21. These principles are beyond the amending power of

the Parliament. They pervade all enacted laws and they

stand at the pinnacle of the hierarchy of constitutional

values. For example, under the German Constitutional

Law, human dignity under Article 1 is inviolable. It is

the duty of the State not only to protect the human

dignity but to facilitate it by taking positive steps in that

direction. No exact definition of human dignity exists. It

refers to the intrinsic value of every human being, which

is to be respected. It cannot be taken away. It cannot

give. It simply is. Every human being has dignity by

virtue of his existence. The Constitutional Courts in

Germany, therefore, see human dignity as a fundamental

principle within the system of the basic rights. This is

how the doctrine of basic structure stands evolved under

the German Constitution and by interpretation given to

the concept by the Constitutional Courts.

Under the Indian Constitution, the word 'federalism'

does not exist in the preamble. However, its principle

(not in the strict sense as in U.S.A.) is delineated over

various provisions of the Constitution. In particular, one

finds this concept in separation of powers under Articles

245 and 246 read with the three lists in the seventh

schedule to the Constitution.

To conclude, the theory of basic structure is based

on the concept of constitutional identity. The basic

structure jurisprudence is a pre-occupation with

constitutional identity. In Kesavananda Bharati

Sripadagalvaru and others v. State of Kerala and

another , 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

Bharati13, 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

Bharati13. 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.

Lastly, constitutionalism is about limits and

aspirations. According to Justice Brennan,

interpretation of the Constitution as a written text is

concerned with aspirations and fundamental principles.

In his Article titled 'Challenge to the Living Constitution'

by Herman Belz, the author says that the Constitution

embodies aspiration to social justice, brotherhood and

human dignity. It is a text which contains fundamental

principles. Fidelity to the text qua fundamental

principles did not limit judicial decision making. The

tradition of the written constitutionalism makes it

possible to apply concepts and doctrines not recoverable

under the doctrine of unwritten living constitution. To

conclude, as observed by Chandrachud, CJ, in Minerva

Mills Ltd.7, 'the Constitution is a precious heritage and,

therefore, you cannot destroy its identity'.

Constitutional adjudication is like no other

decision-making. There is a moral dimension to every

major constitutional case; the language of the text is not

necessarily a controlling factor. Our constitution works

because of its generalities, and because of the good sense

of the Judges when interpreting it. It is that informed

freedom of action of the Judges that helps to preserve

and protect our basic document of governance.

IS EQUALITY A PART OF THE FUNDAMENTAL

FEATURES OR THE BASIC STRUCTURE OF THE

CONSTITUTION?

At the outset, it may be noted that equality, rule of

law, judicial review and separation of powers are distinct

concepts. They have to be treated separately, though

they are intimately connected. There can be no rule of

law if there is no equality before the law; and rule of law

and equality before the law would be empty words if their

violation was not a matter of judicial scrutiny or judicial

review and judicial relief and all these features would lose

their significance if judicial, executive and legislative

functions were united in only one authority, whose

dictates had the force of law. The rule of law and

equality before the law are designed to secure among

other things justice both social and economic. Secondly,

a federal Constitution with its distribution of legislative

powers between Parliament and State legislatures

involves a limitation on legislative powers and this

requires an authority other than Parliament and State

Legislatures to ascertain whether the limits are

transgressed and to prevent such violation and

transgression. As far back as 1872, Lord Selbourne said

that the duty to decide whether the limits are

transgressed must be discharged by courts of justice.

Judicial review of legislation enacted by the Parliament

within limited powers under the controlled constitution

which we have, has been a feature of our law and this is

on the ground that any law passed by a legislature with

limited powers is ultra vires if the limits are transgressed.

The framers conferred on the Supreme Court the power

to issue writs for the speedy enforcement of those rights

and made the right to approach the Supreme Court for

such enforcement itself a fundamental right. Thus,

judicial review is an essential feature of our constitution

because it is necessary to give effect to the distribution of

legislative power between Parliament and State

legislatures, and is also necessary to give practicable

content to the objectives of the Constitution embodied in

Part-III and in several other Articles of our Constitution.

In the case of Minerva Mills7, Chandrachud, C.J.,

speaking for the majority, observed that Articles 14 and

19 do not confer any fanciful rights. They confer rights

which are elementary for the proper and effective

functioning of democracy. They are universally regarded

by the universal Declaration of Human Rights. If Articles

14 and 19 are put out of operation, Article 32 will be

rendered nugatory. In the said judgment, the majority

took the view that the principles enumerated in Part-IV

are not the proclaimed monopoly of democracies alone.

They are common to all polities, democratic or

authoritarian. Every State is goal-oriented and every

State claims to strive for securing the welfare of its

people. The distinction between different forms of

Government consists in the fact that a real democracy

will endeavour to achieve its objectives through the

discipline of fundamental freedoms like Articles 14 and

19. Without these freedoms, democracy is impossible. If

Article 14 is withdrawn, the political pressures exercised

by numerically large groups can tear the country apart

by leading it to the legislation to pick and choose

favoured areas and favourite classes for preferential

treatment.

From these observations, which are binding on us,

the principle which emerges is that "equality" is the

essence of democracy and, accordingly a basic feature of

the Constitution. This test is very important. Free and

fair elections per se may not constitute a basic feature of

the Constitution. On their own, they do not constitute

basic feature. However, free and fair election as a part of

representative democracy is an essential feature as held

in the Indira Nehru Gandhi v. Raj Narain (Election

case). Similarly, federalism is an important principle of

constitutional law. The word 'federalism' is not in the

preamble. However, as stated above, its features are

delineated over various provisions of the Constitution like

Articles 245, 246 and 301 and the three lists in the

seventh schedule to the Constitution.

However, there is a difference between formal

equality and egalitarian equality which will be discussed

later on.

The theory of basic structure is based on the

principle that a change in a thing does not involve its

destruction and destruction of a thing is a matter of

substance and not of form. Therefore, one has to apply

the test of overarching principle to be gathered from the

scheme and the placement and the structure of an Article

in the Constitution. For example, the placement of

Article 14 in the equality code; the placement of Article

19 in the freedom code; the placement of Article 32 in the

code giving access to the Supreme Court. Therefore, the

theory of basic structure is the only theory by which the

validity of impugned amendments to the Constitution is

to be judged.

WORKING TEST IN THE MATTER OF APPLICATION

OF THE DOCTRINE OF BASIC STRUCTURE:

Once it is held that fundamental rights could be

abridged but not destroyed and once it is further held

that several features of the Constitution can not be

destroyed, the concept of 'express limitation' on the

amending power loses its force for a precise formulation

of the basic feature of the Constitution and for the courts

to pronounce on the validity of a constitutional

amendment.

A working test has been evolved by Chandrachud,

J. in the Election Case14, in which the learned Judge

has rightly enunciated, with respect, that "for

determining whether a particular feature of the

Constitution is a part of its basic structure, one has per

force to examine in each individual case the place of the

particular feature in the scheme of the Constitution, its

object and purpose and the consequences of its denial on

the integrity of the Constitution as a fundamental

instrument of the country's governance."

Applying the above test to the facts of the present

case, it is relevant to note that the concept of 'equality'

like the concept of 'representative democracy' or

'secularism' is delineated over various Articles. Basically,

Part-III of the Constitution consists of the equality code,

the freedom code and the right to move the courts. It is

true that equality has several facets. However, each case

has to be seen in the context of the placement of an

Article which embodies the foundational value of

equality.

CONCEPT OF RESERVATION:

Reservation as a concept is very wide. Different

people understand reservation to mean different things.

One view of reservation as a generic concept is that

reservation is anti-poverty measure. There is a different

view which says that reservation is merely providing a

right of access and that it is not a right to redressal.

Similarly, affirmative action as a generic concept has a

different connotation. Some say that reservation is not a

part of affirmative action whereas others say that it is a

part of affirmative action.

Our Constitution has, however, incorporated the

word 'reservation' in Article 16(4) which word is not there

in Article 15(4). Therefore, the word 'reservation' as a

subject of Article 16(4) is different from the word

'reservation' as a general concept.

Applying the above test, we have to consider the

word 'reservation' in the context of Article 16(4) and it is

in that context that Article 335 of the Constitution which

provides for relaxation of the standards of evaluation has

to be seen. We have to go by what the Constitution

framers intended originally and not by general concepts

or principles. Therefore, schematic interpretation of the

Constitution has to be applied and this is the basis of the

working test evolved by Chandrachud, J. in the Election

Case14.

JUSTICE, SOCIAL, ECONOMIC AND POLITICAL IS

PROVIDED NOT ONLY IN PART-IV (DIRECTIVE

PRINCIPLES) BUT ALSO IN PART-III (FUNDAMENTAL

RIGHTS):

India is constituted into a sovereign, democratic

republic to secure to all its citizens, fraternity assuring

the dignity of the individual and the unity of the nation.

The sovereign, democratic republic exists to promote

fraternity and the dignity of the individual citizen and to

secure to the citizens certain rights. This is because the

objectives of the State can be realized only in and

through the individuals. Therefore, rights conferred on

citizens and non-citizens are not merely individual or

personal rights. They have a large social and political

content, because the objectives of the Constitution

cannot be otherwise realized. Fundamental rights

represent the claims of the individual and the restrictions

thereon are the claims of the society. Article 38 in Part-

IV is the only Article which refers to justice, social,

economic and political. However, the concept of justice is

not limited only to directive principles. There can be no

justice without equality. Article 14 guarantees the

fundamental right to equality before the law on all

persons. Great social injustice resulted from treating

sections of the Hindu community as 'untouchable' and,

therefore, Article 17 abolished untouchability and Article

25 permitted the State to make any law providing for

throwing open all public Hindu religious temples to

untouchables. Therefore, provisions of Part-III also

provide for political and social justice.

This discussion is important because in the present

case, we are concerned with reservation. Balancing a

fundamental right to property vis-`-vis Articles 39(b) and

39(c) as in Kesavananda Bharati13 and Minerva Mills7

cannot be equated with the facts of the present case. In

the present case, we are concerned with the right of an

individual of equal opportunity on one hand and

preferential treatment to an individual belonging to a

backward class in order to bring about equal level-

playing field in the matter of public employment.

Therefore, in the present case, we are concerned with

conflicting claims within the concept of 'justice, social,

economic and political', which concept as stated above

exists both in Part-III and Part-IV of the Constitution.

Public employment is a scarce commodity in economic

terms. As the supply is scarce, demand is chasing that

commodity. This is reality of life. The concept of 'public

employment' unlike right to property is socialistic and,

therefore, falls within the preamble to the Constitution

which states that WE, THE PEOPLE OF INDIA, having

solemnly resolved to constitute India into a SOVEREIGN

SOCIALIST SECULAR DEMOCRATIC REPUBLIC.

Similarly, the preamble mentions the objective to be

achieved, namely, justice, social, economic and political.

Therefore, the concept of 'equality of opportunity' in

public employment concerns an individual, whether that

individual belongs to general category or backward class.

The conflicting claim of individual right under Article

16(1) and the preferential treatment given to a backward

class has to be balanced. Both the claims have a

particular object to be achieved. The question is of

optimization of these conflicting interests and claims.

EQUITY, JUSTICE AND MERIT:

The above three concepts are independent variable

concepts. The application of these concepts in public

employment depends upon quantifiable data in each

case. Equality in law is different from equality in fact.

When we construe Article 16(4), it is equality in fact

which plays the dominant role. Backward classes seek

justice. General class in public employment seeks

equity. The difficulty comes in when the third variable

comes in, namely, efficiency in service. In the issue of

reservation, we are being asked to find a stable

equilibrium between justice to the backwards, equity for

the forwards and efficiency for the entire system. Equity

and justice in the above context are hard-concepts.

However, if you add efficiency to equity and justice, the

problem arises in the context of the reservation. This

problem has to be examined, therefore, on the facts of

each case. Therefore, Article 16(4) has to be construed in

the light of Article 335 of the Constitution. Inadequacy in

representation and backwardness of Scheduled Caste

and Scheduled Tribes are circumstances which enable

the State Government to act under Article 16(4) of the

Constitution. However, as held by this Court the

limitations on the discretion of the government in the

matter of reservation under Article 16(4) as well as Article

16(4A) come in the form of Article 335 of the

Constitution.

Merit is not a fixed absolute concept. Amartya Sen,

in a book, Meritocracy and Economic Inequality,

edited by Kenneth Arrow, points out that merit is a

dependent idea and its meaning depends on how a

society defines a desirable act. An act of merit in one

society may not be the same in another. The difficulty is

that there is no natural order of 'merit' independent of

our value system. The content of merit is context-

specific. It derives its meaning from particular conditions

and purposes. The impact of any affirmative action

policy on 'merit' depends on how that policy is designed.

Unfortunately, in the present case, the debate before us

on this point has taken place in an empirical vacuum.

The basic presumption, however, remains that it is the

State who is in the best position to define and measure

merit in whatever ways they consider it to be relevant to

public employment because ultimately it has to bear the

costs arising from errors in defining and measuring

merit. Similarly, the concept of "extent of reservation" is

not an absolute concept and like merit it is context-

specific.

The point which we are emphasizing is that

ultimately the present controversy is regarding the

exercise of the power by the State Government depending

upon the fact-situation in each case. Therefore, 'vesting

of the power' by an enabling provision may be

constitutionally valid and yet 'exercise of the power' by

the State in a given case may be arbitrary, particularly, if

the State fails to identify and measure backwardness and

inadequacy keeping in mind the efficiency of service as

required under Article 335.

RESERVATION AND AFFIRMATIVE ACTION:

Equality of opportunity has two different and

distinct concepts. There is a conceptual distinction

between a non-discrimination principle and affirmative

action under which the State is obliged to provide level-

playing field to the oppressed classes. Affirmative action

in the above sense seeks to move beyond the concept of

non-discrimination towards equalizing results with

respect to various groups. Both the conceptions

constitute "equality of opportunity".

It is the equality "in fact" which has to be decided

looking at the ground reality. Balancing comes in where

the question concerns the extent of reservation. If the

extent of reservation goes beyond cut-off point then it

results in reverse discrimination. Anti-discrimination

legislation has a tendency of pushing towards de facto

reservation. Therefore, a numerical benchmark is the

surest immunity against charges of discrimination.

Reservation is necessary for transcending caste and

not for perpetuating it. Reservation has to be used in a

limited sense otherwise it will perpetuate casteism in the

country. Reservation is under-written by a special

justification. Equality in Article 16(1) is individual-

specific whereas reservation in Article 16(4) and Article

16(4A) is enabling. The discretion of the State is,

however, subject to the existence of "backwardness" and

"inadequacy of representation" in public employment.

Backwardness has to be based on objective factors

whereas inadequacy has to factually exist. This is where

judicial review comes in. However, whether reservation

in a given case is desirable or not, as a policy, is not for

us to decide as long as the parameters mentioned in

Articles 16(4) and 16(4A) are maintained. As stated

above, equity, justice and merit (Article 335)/efficiency

are variables which can only be identified and measured

by the State. Therefore, in each case, a contextual case

has to be made out depending upon different

circumstances which may exist Statewise.

EXTENT OF RESERVATION:

Social justice is one of the sub-divisions of the

concept of justice. It is concerned with the distribution of

benefits and burdens throughout a society as it results

from social institutions property systems, public

organisations etc.

The problem is what should be the basis of

distribution? Writers like Raphael, Mill and Hume define

'social justice' in terms of rights. Other writers like

Hayek and Spencer define 'social justice' in terms of

deserts. Socialist writers define 'social justice' in terms of

need. Therefore, there are three criteria to judge the

basis of distribution, namely, rights, deserts or need.

These three criteria can be put under two concepts of

equality "formal equality" and "proportional equality".

"Formal equality" means that law treats everyone equal

and does not favour anyone either because he belongs to

the advantaged section of the society or to the

disadvantaged section of the society. Concept of

"proportional equality" expects the States to take

affirmative action in favour of disadvantaged sections of

the society within the framework of liberal democracy.

Under the Indian Constitution, while basic liberties

are guaranteed and individual initiative is encouraged,

the State has got the role of ensuring that no class

prospers at the cost of other class and no person suffers

because of drawbacks which is not his but social.

The question of extent of reservation involves two

questions:

1. Whether there is any upper limit beyond which

reservation is not permissible?

2. Whether there is any limit to which seats can

be reserved in a particular year; in other words

the issue is whether the percentage limit

applies only on the total number of posts in

the cadre or to the percentage of posts

advertised every year as well?

The question of extent of reservation is closely

linked to the issue whether Article 16(4) is an exception

to Article 16(1) or is Article 16(4) an application of Article

16(1). If Article 16(4) is an exception to Article 16(1) then

it needs to be given a limited application so as not to

eclipse the general rule in Article 16(1). But if Article

16(4) is taken as an application of Article 16(1) then the

two articles have to be harmonized keeping in view the

interests of certain sections of the society as against the

interest of the individual citizens of the society.

Maximum limit of reservation possible

Word of caution against excess reservation was first

pointed out in The General Manager, Southern

Railway and 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.

However, the question of extent of reservation was

not directly involved in Rangachari15. It was directly

involved in M.R. Balaji & Ors. V. The State of Mysore

& Ors. with reference to Article 15(4). In this case,

60% reservations under Article 15(4) was struck down as

excessive and unconstitutional. Gajendragadkar, J.

observed that special provision should be less than 50

per cent, how much less would depend on the relevant

prevailing circumstances of each case.

But in State of Kerala and another v. N.M.

Thomas and others Krishna Iyer, J. expressed his

concurrence to the views of Fazal Ali, J. who said that

although reservation cannot be so excessive as to destroy

the principle of equality of opportunity under clause (1) of

Article 16, yet it should be noted that the Constitution

itself does not put any bar on the power of the

Government under Article 16(4). If a State has 80%

population which is backward then it would be

meaningless to say that reservation should not cross

50%.

However, in Indra Sawhney5 the majority held that

the rule of 50% laid down in Balaji16 was a binding rule

and not a mere rule of prudence.

Giving the judgment of the Court in Indra

Sawhney5, Reddy, J. stated that Article 16(4) speaks of

adequate representation not proportionate representation

although proportion of population of backward classes to

the total population would certainly be relevant. He

further pointed out that Article 16(4) which protects

interests of certain sections of society has to be balanced

against Article 16(1) which protects the interests of every

citizen of the entire society. They should be harmonised

because they are restatements of principle of equality

under Article 14. (emphasis added)

Are reserved category candidates free to contest for

vacancies in general category

In Indra Sawhney5 Reddy, J. noted that

reservation under Article 16(4) do not operate on

communal ground. Therefore if a member from reserved

category gets selected in general category, his selection

will not be counted against the quota limit provided to

his class. Similarly, in R.K. Sabharwal8 the Supreme

Court held that while general category candidates are not

entitled to fill the reserved posts; reserved category

candidates are entitled to compete for the general

category posts. The fact that considerable number of

members of backward class have been

appointed/promoted against general seats in the State

services may be a relevant factor for the State

Government to review the question of continuing

reservation for the said class.

Number of vacancies that could be reserved

Wanchoo, J. who had given dissenting judgment in

Rangachari15 observed that the requirement of Article

16(4) is only to give adequate representation and since

Constitution-makers intended it to be a short-term

measure it may happen that all the posts in a year may

be reserved. He opined that reserving a fixed percentage

of seats every year may take a long time before

inadequacy of representation is overcome. Therefore, the

Government can decide to reserve the posts. After having

reserved a fixed number of posts the Government may

decide that till those posts are filled up by the backward

classes all appointments will go to them if they fulfil the

minimum qualification. Once this number is reached the

Government is deprived of its power to make further

reservations. Thus, according to Wanchoo, J. the

adequacy of representation has to be judged considering

the total number of posts even if in a single year or for

few years all seats are reserved provided the scheme is

short-term.

The idea given by Wanchoo, J. in Rangachari15 did

not work out in practice because most of the time even

for limited number of reservations, every year qualified

backward class candidates were not available. This

compelled the government to adopt carry-forward rule.

This carry-forward rule came in conflict with Balaji16

ruling. In cases where the availability of reserved

category candidates is less than the vacancies set aside

for them, the Government has to adopt either of the two

alternatives:

(1) the State may provide for carrying on the

unfulfilled vacancies for the next year or next to the next

year, or

(2) instead of providing for carrying over the

unfulfilled vacancies to the coming years, it may provide

for filling of the vacancies from the general quota

candidates and carry forward the unfilled posts by

backward classes to the next year quota.

But the problem arises when in a particular year

due to carry forward rule more than 50% of vacancies are

reserved. In T. Devadasan v. Union of India and

another , this was the issue. Union Public Service

Commission had provided for 17=% reservation for

Scheduled Castes and Scheduled Tribes. In case of non-

availability of reserved category candidates in a particular

year the posts had to be filled by general category

candidates and the number of such vacancies were to be

carried forward to be filled by the reserved category

candidate next year. Due to this, the rule of carry forward

reservation in a particular year amounted to 65% of the

total vacancies. The petitioner contended that reservation

was excessive which destroyed his right under Article

16(1) and Article 14. The court on the basis of decision in

Balaji16 held the reservation excessive and, therefore,

unconstitutional. It further stated that the guarantee of

equality under Article 16(1) is to each individual citizen

and to appointments to any office under the State. It

means that on every occasion for recruitment the State

should see that all citizens are treated equally. In order to

effectuate the guarantee each year of recruitment will

have to be considered by itself.

Thus, majority differed from Wanchoo's, J. decision

in Rangachari15 holding that a cent per cent reservation

in a particular year would be unconstitutional in view of

Balaji16 decision.

Subba Rao, J. gave dissenting judgment. He relied

on Wanchoo's, J. judgment in Rangachari15 and held

that Article 16(4) provides for adequate representation

taking into consideration entire cadre strength. According

to him, if it is within the power of the State to make

reservations then reservation made in one selection or

spread over many selections is only a convenient method

of implementing the provision of reservation. Unless it is

established that an unreasonably disproportionate part

of the cadre strength is filled up with the said castes and

tribes, it is not possible to contend that the provision is

not one of reservation but amounts to an extinction of

the fundamental right.

In the case of Thomas17 under the Kerala State and

Subordinate Services Rules, 1950 certain relaxation was

given to Scheduled Caste and Scheduled Tribe

candidates passing departmental tests for promotions.

For promotion to upper division clerks from lower

division clerks the criteria of seniority-cum-merit was

adopted. Due to relaxation in merit qualification in 1972,

34 out of 51 vacancies in upper division clerks went to

Scheduled Caste candidates. It appeared that the 34

members of SC/ST had become senior most in the lower

grade. The High Court quashed the promotions on the

ground that it was excessive. The Supreme Court upheld

the promotions. Ray, C.J. held that the promotions

made in services as a whole is no where near 50% of the

total number of the posts. Thus, the majority differed

from the ruling of the court in Devadasan19 basically on

the ground that the strength of the cadre as a whole

should be taken into account. Khanna, J. in his

dissenting opinion made a reference to it on the ground

that such excessive concession would impair efficiency in

administration.

In Indra Sawhney5, the majority held that 50%

rule should be applied to each year otherwise it may

happen that (if entire cadre strength is taken as a unit)

the open competition channel gets choked for some years

and meanwhile the general category candidates may

become age barred and ineligible. The equality of

opportunity under Article 16(1) is for each individual

citizen while special provision under Article 16(4) is for

socially disadvantaged classes. Both should be balanced

and neither should be allowed to eclipse the other.

However, in R.K. Sabharwal8 which was a case of

promotion and the issue in this case was operation of

roster system, the Court stated that entire cadre strength

should be taken into account to determine whether

reservation up to the required limit has been reached.

With regard to ruling in Indra Sawhney case5 that

reservation in a year should not go beyond 50% the

Court held that it applied to initial appointments. The

operation of a roster, for filling the cadre strength, by

itself ensures that the reservation remains within the

50% limit. In substance the court said that presuming

that 100% of the vacancies have been filled, each post

gets marked for the particular category of candidate to be

appointed against it and any subsequent vacancy has to

be filled by that category candidate. The Court was

concerned with the possibility that reservation in entire

cadre may exceed 50% limit if every year half of the seats

are reserved. The Constitution (Eighty-first Amendment)

Act, 2000 added Article 16(4B) which in substance gives

legislative assent to the judgment in R.K. Sabharwal8.

CATCH-UP RULE IS THE SAID RULE A

CONSTITUTIONAL REQUIREMENT UNDER ARTICLE

16(4):

One of the contentions advanced on behalf of the

petitioners is that the impugned amendments,

particularly, the Constitution (Seventy-Seventh

Amendment) and (Eight-Fifth Amendment) Acts,

obliterate all constitutional limitations on the amending

power of the Parliament. That the width of these

impugned amendments is so wide that it violates the

basic structure of equality enshrined in the Constitution.

The key issue which arises for determination is

whether the above "catch-up" rule and the concept of

"consequential seniority" are constitutional requirements

of Article 16 and of equality, so as to be beyond the

constitutional amendatory process. In other words,

whether obliteration of the "catch-up" rule or insertion of

the concept of "consequential seniority code", would

violate the basic structure of the equality code enshrined

in Articles 14, 15 and 16.

The concept of "catch-up" rule appears for the first

time in the case of Virpal Singh Chauhan1 . In the

category of Guards in the Railways, there were four

categories, namely, Grade 'C', Grade 'B', Grade 'A' and

Grade 'A' Special. The initial recruitment was made to

Gr. 'C'. Promotion from one grade to another was by

seniority-cum-suitability. The rule of reservation was

applied not only at the initial stage of appointment to

Grade 'C' but at every stage of promotion. The

percentage reserved for SC was 15% and for ST, it was

7.5%. To give effect to the rule of reservation, a forty-

point roster was prepared in which certain points were

reserved for SCs and STs respectively. Subsequently, a

hundred-point roster was prepared reflecting the same

percentages. In 1986, general candidates and members

of SCs/STs came within Grade 'A' in Northern-Railway.

On 1.8.1986, the Chief Controller promoted certain

general candidates on ad hoc basis to Grade 'A' Special.

Within three months, they were reverted and SCs and

STs were promoted. This action was challenged by

general candidates as arbitrary and unconstitutional

before the tribunal. The general candidates asked for

three reliefs, namely, (a) to restrain the Railways from

filling-up the posts in higher grades in the category of

Guards by applying the rule of reservation; (b) to restrain

the Railway from acting upon the seniority list prepared

by them; and (c) to declare that the general candidates

were alone entitled to be promoted and confirmed in

Grade 'A' Special on the strength of their seniority earlier

to the reserved category employees. The contention of

the general candidates was that once the quota

prescribed for the reserved group is satisfied, the forty-

point roster cannot be applied because that roster was

prepared to give effect to the rule of reservation. It was

contended by the general candidates that accelerated

promotion may be given but the Railways cannot give

consequential seniority to reserved category candidates

in the promoted category. (Emphasis added). In this

connection, the general category candidates relied upon

the decisions of the Allahabad and Madhya Pradesh High

Courts. It was contended by the general candidates that

giving consequential seniority in addition to accelerated

promotion constituted conferment of double benefit upon

the members of the reserved category and, therefore,

violated the rule of equality in Article 16(1). It was

further urged that accelerated promotion-cum-

accelerated seniority is destructive of the efficiency of

administration inasmuch as by this means the higher

echelons of administration would be occupied entirely by

members of reserved categories. This was opposed by the

reserved category candidates who submitted that for the

purposes of promotion to Grade 'A' Special, the seniority

list pertaining to Grade 'A' alone should be followed; that,

the administration should not follow the seniority lists

maintained by the administration pertaining to Grade 'C'

as urged by the general candidates and since SCs and

STs were senior to the general candidates in Grade 'A',

the seniority in Grade 'A' alone should apply. In short,

the general candidates relied upon the 'catch-up' rule,

which was opposed by the members of SC/ST. They also

relied upon the judgment of this Court in R.K.

Sabharwal8.

This Court gave following reasons for upholding the

decision of the tribunal. Firstly, it was held that a rule of

reservation as such does not violate Article 16(4).

Secondly, this Court opined, that there is no uniform

method of providing reservation. The extent and nature

of reservation is a matter for the State to decide having

regards to the facts and requirements of each case. It is

open to the State, if so advised, to say that while the rule

of reservation shall be applied, the candidate promoted

earlier by virtue of rule of reservation/roster shall not be

entitled to seniority over seniors in the feeder category

and that it is open to the State to interpret the 'catch-up'

rule in the service conditions governing the promotions

[See: para 24]. Thirdly, this Court did not agree with the

view expressed by the tribunal [in Virpal Singh

Chauhan1] that a harmonious reading of clauses (1) to

(4) of Article 16 should mean that a reserved category

candidate promoted earlier than his senior general

category candidates in the feeder grade shall necessarily

be junior in the promoted category to such general

category. This Court categorically ruled, vide para 27,

that such catch-up principle cannot be said to be implicit

in clauses (1) to (4) of Article 16 (emphasis supplied).

Lastly, this Court found on facts that for 11 vacancies,

33 candidates were considered and they were all SC/ST

candidates. Not a single candidate belonged to general

category. It was argued on behalf of the general

candidates that all top grades stood occupied exclusively

by the reserved category members, which violated the

rule of equality underlying Articles 16(1), 16(4) and 14.

This Court opined that the above situation arose on

account of faulty implementation of the rule of

reservation, as the Railways did not observe the principle

that reservation must be in relation to 'posts' and not

'vacancies' and also for applying the roster even after the

attainment of the requisite percentage reserved for

SCs/STs. In other words, this Court based its decision

only on the faulty implementation of the rule by the

Railways which the Court ordered to be rectified.

The point which we need to emphasize is that the

Court has categorically ruled in Virpal Singh Chauhan1

that the 'catch-up' rule is not implicit in clauses (1) to (4)

of Article 16. Hence, the said rule cannot bind the

amending power of the Parliament. It is not beyond the

amending power of the Parliament.

In Ajit Singh (I)2, the controversy which arose for

determination was whether after the members of

SCs/STs for whom specific percentage of posts stood

reserved having been promoted against those posts, was

it open to the administration to grant consequential

seniority against general category posts in the higher

grade. The appellant took a clear stand that he had no

objection if members of SC/ST get accelerated

promotions. The appellant objected only to the grant of

consequential seniority. Relying on the circulars issued

by the administration dated 19.7.1969 and 8.9.1969, the

High Court held that the members of SCs/STs can be

promoted against general category posts on basis of

seniority. This was challenged in appeal before this

Court. The High Court ruling was set aside by this Court

on the ground that if the 'catch-up' rule is not applied

then the equality principle embodied in Article 16(1)

would stand violated. This Court observed that the

'catch-up' rule was a process adopted while making

appointments through direct recruitment or promotion

because merit cannot be ignored. This Court held that

for attracting meritorious candidate a balance has to be

struck while making provisions for reservation. It was

held that the promotion is an incident of service. It was

observed that seniority is one of the important factors in

making promotion. It was held that right to equality is to

be preserved by preventing reverse discrimination.

Further, it was held that the equality principle requires

exclusion of extra-weightage of roster-point promotion to

a reserved category candidate (emphasis supplied). This

Court opined that without 'catch-up' rule giving

weightage to earlier promotion secured by roster-point

promotee would result in reverse discrimination and

would violate equality under Articles 14, 15 and 16.

Accordingly, this Court took the view that the seniority

between the reserved category candidates and general

candidates in the promoted category shall be governed by

their panel position. Therefore, this Court set aside the

factor of extra-weightage of earlier promotion to a

reserved category candidate as violative of Articles 14 and

16(1) of the Constitution.

Therefore, in Virpal Singh Chauhan1, this Court

has said that the 'catch-up' rule insisted upon by the

Railways though not implicit in Articles 16(1) and 16(4),

is constitutionally valid as the said practice/process was

made to maintain efficiency. On the other hand, in Ajit

Singh (I)2, this Court has held that the equality principle

excludes the extra-weightage given by the Government to

roster-point promotees as such weightage is against

merit and efficiency of the administration and that the

Punjab Government had erred in not taking into account

the said merit and efficiency factors.

In the case of Ajit Singh (II)3, three interlocutory

applications were filed by State of Punjab for clarification

of the judgment of this Court in Ajit Singh (I)2. The

limited question was whether there was any conflict

between the judgments of this Court in Virpal Singh

Chauhan1 and Ajit Singh (I)2 on one hand and vis-`-vis

the judgment of this Court in Jagdish Lal and others

v. State of Haryana and others . The former cases

were decided in favour of general candidates whereas

latter was a decision against the general candidates.

Briefly, the facts for moving the interlocutory applications

were as follows. The Indian Railways following the law

laid down in Virpal Singh Chauhan1 issued a circular

on 28.2.1997 to the effect that the reserved candidates

promoted on roster-points could not claim seniority over

the senior general candidates promoted later on. The

State of Punjab after following Ajit Singh (I)2 revised

their seniority list and made further promotions of the

senior general candidates following the 'catch-up' rule.

Therefore, both the judgments were against the reserved

candidates. However, in the later judgment of this Court

in the case of Jagdish Lal20, another three-Judge bench

took the view that under the general rule of service

jurisprudence relating to seniority, the date of

continuous officiation has to be taken into account and if

so, the roster-point promotees were entitled to the benefit

of continuous officiation. In Jagdish Lal20, the bench

observed that the right to promotion was a statutory right

while the rights of the reserved candidates under Article

16(4) and Article 16(4A) were fundamental rights of the

reserved candidates and, therefore, the reserved

candidates were entitled to the benefit of continuous

officiation.

Accordingly, in Ajit Singh (II)3, three points arose

for consideration:

(i) Can the roster point promotees count

their seniority in the promoted category

from the date of their continuous

officiation vis-`-vis general candidates,

who were senior to them in the lower

category and who were later promoted to

the same level?

(ii) Have Virpal1 and Ajit Singh (I)2 have

been correctly decided and has Jagdish

Lal20 been correctly decided?

(iii) Whether the catch-up principles are

tenable?

At the outset, this Court stated that it was not

concerned with the validity of constitutional amendments

and, therefore, it proceeded on the assumption that

Article 16(4A) is valid and is not unconstitutional.

Basically, the question decided was whether the 'catch-

up' principle was tenable in the context of Article 16(4).

It was held that the primary purpose of Article 16(4) and

Article 16(4A) is to give due representation to certain

classes in certain posts keeping in mind Articles 14, 16(1)

and 335; that, Articles 14 and 16(1) have prescribed

permissive limits to affirmative action by way of

reservation under Articles 16(4) and 16(4A) of the

Constitution; that, Article 335 is incorporated so that

efficiency of administration is not jeopardized and that

Articles 14 and 16(1) are closely connected as they deal

with individual rights of the persons. They give a positive

command to the State that there shall be equality of

opportunity of all citizens in public employment. It was

further held that Article 16(1) flows from Article 14. It

was held that the word 'employment' in Article 16(1) is

wide enough to include promotions to posts at the stage

of initial level of recruitment. It was observed that Article

16(1) provides to every employee otherwise eligible for

promotion fundamental right to be considered for

promotion. It was held that equal opportunity means the

right to be considered for promotion. The right to be

considered for promotion was not a statutory right. It

was held that Articles 16(4) and 16(4A) did not confer any

fundamental right to reservation. That they are only

enabling provisions. Accordingly, in Ajit Singh (II)3, the

judgment of this Court in Jagdish Lal20 case was

overruled. However, in the context of balancing of

fundamental rights under Article 16(1) and the rights of

reserved candidate under Articles 16(4) and 16(4A), this

Court opined that Article 16(1) deals with a fundamental

right whereas Articles 16(4) and 16(4A) are only enabling

provisions and, therefore, the interests of the reserved

classes must be balanced against the interests of other

segments of society. As a remedial measure, the Court

held that in matters relating to affirmative action by the

State, the rights under Articles 14 and 16 are required to

be protected and a reasonable balance should be struck

so that the affirmative action by the State does not lead

to reverse discrimination.

Reading the above judgments, we are of the view

that the concept of 'catch-up' rule and 'consequential

seniority' are judicially evolved concepts to control the

extent of reservation. The source of these concepts is in

service jurisprudence. These concepts cannot be

elevated to the status of an axiom like secularism,

constitutional sovereignty etc. It cannot be said that by

insertion of the concept of 'consequential seniority' the

structure of Article 16(1) stands destroyed or abrogated.

It cannot be said that 'equality code' under Article 14, 15

and 16 is violated by deletion of the 'catch-up' rule.

These concepts are based on practices. However, such

practices cannot be elevated to the status of a

constitutional principle so as to be beyond the amending

power of the Parliament. Principles of service

jurisprudence are different from constitutional

limitations. Therefore, in our view neither the 'catch-up'

rule nor the concept of 'consequential seniority' are

implicit in clauses (1) and (4) of Article 16 as correctly

held in Virpal Singh Chauhan1.

Before concluding, we may refer to the judgment of

this court in M.G. Badappanavar6. In that case the facts

were as follows. Appellants were general candidates.

They contended that when they and the reserved

candidates were appointed at Level-1 and junior reserved

candidates got promoted earlier on the basis of roster-

points to Level-2 and again by way of roster-points to

Level-3, and when the senior general candidate got

promoted to Level-3, then the general candidate would

become senior to the reserved candidate at Level-3. At

Level-3, the reserved candidate should have been

considered along with the senior general candidate for

promotion to Level-4. In support of their contention,

appellants relied upon the judgment of the Constitution

Bench in Ajit Singh (II)3. The above contentions raised

by the appellants were rejected by the tribunal.

Therefore, the general candidates came to this Court in

appeal. This Court found on facts that the concerned

Service Rule did not contemplate computation of

seniority in respect of roster promotions. Placing reliance

on the judgment of this Court in Ajit Singh (I)2 and in

Virpal Singh1, this court held that roster promotions

were meant only for the limited purpose of due

representation of backward classes at various levels of

service and, therefore, such roster promotions did not

confer consequential seniority to the roster-point

promotee. In Ajit Singh (II)3, the circular which gave

seniority to the roster-point promotees was held to be

violative of Articles 14 and 16. It was further held in M.

G. Badappanavar6 that equality is the basic feature of

the Constitution and any treatment of equals as

unequals or any treatment of unequals as equals violated

the basic structure of the Constitution. For this

proposition, this Court placed reliance on the judgment

in Indra Sawhney5 while holding that if creamy layer

among backward classes were given some benefits as

backward classes, it will amount to equals being treated

unequals. Applying the creamy layer test, this Court

held that if roster-point promotees are given

consequential seniority, it will violate the equality

principle which is part of the basic structure of the

Constitution and in which event, even Article 16(4A)

cannot be of any help to the reserved category

candidates. This is the only judgment of this Court

delivered by three-Judge bench saying that if roster-point

promotees are given the benefit of consequential

seniority, it will result in violation of equality principle

which is part of the basic structure of the Constitution.

Accordingly, the judgment of the tribunal was set aside.

The judgment in the case of M. G. Badappanavar6

was mainly based on the judgment in Ajit Singh (I)'2

which had taken the view that the departmental circular

which gave consequential seniority to the 'roster-point

promotee', violated Articles 14 and 16 of the

Constitution. In none of the above cases, the question of

the validity of the constitutional amendments was

involved. Ajit Singh (I)'2, Ajit Singh (II)'3 and M. G.

Badappanavar6 were essentially concerned with the

question of 'weightage'. Whether weightage of earlier

accelerated promotion with consequential seniority

should be given or not to be given are matters which

would fall within the discretion of the appropriate

Government, keeping in mind the backwardness,

inadequacy and representation in public employment

and overall efficiency of services. The above judgments,

therefore, did not touch the questions which are involved

in the present case.

SCOPE OF THE IMPUGNED AMENDMENTS

Before dealing with the scope of the constitutional

amendments we need to recap the judgments in Indra

Sawhney5 and R.K. Sabharwal8 . In the former case

the majority held that 50% rule should be applied to each

year otherwise it may happen that the open competition

channel may get choked if the entire cadre strength is

taken as a unit. However in R.K. Sabharwal8, this court

stated that the entire cadre strength should be taken into

account to determine whether the reservation up to the

quota-limit has been reached. It was clarified that the

judgment in Indra Sawhney5 was confined to initial

appointments and not to promotions. The operation of

the roster for filling the cadre strength, by itself, ensure

that the reservation remains within the ceiling-limit of

50%.

In our view, appropriate Government has to apply

the cadre strength as a unit in the operation of the roster

in order to ascertain whether a given class/group is

adequately represented in the service. The cadre

strength as a unit also ensures that upper ceiling-limit of

50% is not violated. Further, roster has to be post-

specific and not vacancy based.

With these introductory facts, we may examine the

scope of the impugned constitutional amendments.

The Supreme Court in its judgment dated 16.11.92

in Indra Sawhney5 stated that reservation of

appointments or posts under Article 16(4) is confined to

initial appointment and cannot extend to reservation in

the matter of promotion. Prior to the judgment in Indra

Sawhney5 reservation in promotion existed. The

Government felt that the judgment of this court in Indra

Sawhney5 adversely affected the interests of SCs and

STs in services, as they have not reached the required

level. Therefore, the Government felt that it was

necessary to continue the existing policy of providing

reservation in promotion confined to SCs and STs alone.

We quote hereinbelow Statement of Objects and Reasons

with the text of the Constitution (Seventy-Seventh

Amendment) Act, 1995 introducing clause (4A) in Article

16 of the Constitution:

"THE CONSTITUTION (SEVENTY-SEVENTH

AMENDMENT) ACT, 1995

STATEMENT OF OBJECTS AND REASONS

The Scheduled Castes and the Scheduled

Tribes have been enjoying the facility of

reservation in promotion since 1955. The

Supreme Court in its judgment dated 16th

November, 1992 in the case of

Indra Sawhney v. Union of India5,

however, observed that reservation of

appointments or posts under Article 16(4) of

the Constitution is confined to initial

appointment and cannot extent to

reservation in the matter of promotion. This

ruling of the Supreme Court will adversely

affect the interests of the Scheduled Castes

and the Scheduled Tribes. Since the

representation of the Scheduled Castes and

the Scheduled Tribes in services in the

States have not reached the required level, it is

necessary to continue the existing

dispensation of providing reservation in

promotion in the case of the Scheduled Castes

and the Scheduled Tribes. In view of the

commitment of the Government to protect the

interests of the Scheduled Castes and

the Scheduled Tribes, the Government have

decided to continue the existing policy of

reservation in promotion for the

Scheduled Castes and the Scheduled Tribes.

To carry out this, it is necessary to amend

Article 16 of the Constitution by inserting a

new clause (4A) in the said Article to provide

for reservation in promotion for the Scheduled

Castes and the Scheduled Tribes.

2. The Bill seeks to achieve the aforesaid

object.

THE CONSTITUTION (SEVENTY-SEVENTH

AMENDMENT) ACT, 1995

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

on 17.6.1995]

An Act further to amend the Constitution of India

BE it enacted by Parliament in the Forty-

sixth Year of the Republic of India as follows:-

1. Short title.- This Act may

be called the Constitution (Seventy-seventh

Amendment) Act, 1995.

2. Amendment of Article 16. - In

Article 16 of the Constitution, after clause (4),

the following clause shall be inserted, namely:-

"(4A) Nothing in this Article shall

prevent the State from making any

provision for reservation in matters of

promotion to any class or classes of posts in

the services under the State in favour of the

Scheduled Castes and the Scheduled Tribes

which, in the opinion of the State, are

not adequately represented in the

services under the State."

The said clause (4A) was inserted after clause (4) of

Article 16 to say that nothing in the said Article shall

prevent the State from making any provision for

reservation in matters of promotion to any class(s) of

posts in the services under the State in favour of SCs and

STs which, in the opinion of the States, are not

adequately represented in the services under the State.

Clause (4A) follows the pattern specified in clauses

(3) and (4) of Article 16. Clause (4A) of Article 16

emphasizes the opinion of the States in the matter of

adequacy of representation. It gives freedom to the State

in an appropriate case depending upon the ground reality

to provide for reservation in matters of promotion to any

class or classes of posts in the services. The State has to

form its opinion on the quantifiable data regarding

adequacy of representation. Clause (4A) of Article 16 is

an enabling provision. It gives freedom to the State to

provide for reservation in matters of promotion. Clause

(4A) of Article 16 applies only to SCs and STs. The said

clause is carved out of Article 16(4). Therefore, clause

(4A) will be governed by the two compelling reasons

"backwardness" and "inadequacy of representation", as

mentioned in Article 16(4). If the said two reasons do not

exist then the enabling provision cannot come into force.

The State can make provision for reservation only if the

above two circumstances exist. Further in Ajit Singh

(II)3 , this court has held that apart from 'backwardness'

and 'inadequacy of representation' the State shall also

keep in mind 'overall efficiency' (Article 335). Therefore,

all the three factors have to be kept in mind by the

appropriate Government by providing for reservation in

promotion for SCs and STs.

After the Constitution (Seventy-Seventh

Amendment) Act, 1995, this court stepped in to balance

the conflicting interests. This was in the case of Virpal

Singh Chauhan1 in which it was held that a roster-point

promotee getting the benefit of accelerated promotion

would not get consequential seniority. As such,

consequential seniority constituted additional benefit

and, therefore, his seniority will be governed by the panel

position. According to the Government, the decisions in

Virpal Singh1 and Ajit Singh (I)2 bringing in the

concept of "catch-up" rule adversely affected the interests

of SCs and STs in the matter of seniority on promotion to

the next higher grade.

In the circumstances, clause (4A) of Article 16 was

once again amended and the benefit of consequential

seniority was given in addition to accelerated promotion

to the roster-point promotees. Suffice it to state that, the

Constitution (Eighty-Fifth Amendment) Act, 2001 was an

extension of clause (4A) of Article 16. Therefore, the

Constitution (Seventy-Seventh Amendment) Act, 1995

has to be read with the Constitution (Eighty-Fifth

Amendment) Act, 2001.

We quote hereinbelow Statement of Objects and

Reasons with the text of the Constitution (Eighty-Fifth

Amendment) Act, 2001:

"THE CONSTITUTION (EIGHTY-FIFTH

AMENDMENT) ACT, 2001

STATEMENT OF OBJECTS AND REASONS

The Government servants belonging to

the Scheduled Castes and the Scheduled

Tribes had been enjoying the benefit of

consequential seniority on their promotion on

the basis of rule of reservation. The judgments

of the Supreme Court in the case of Union of

India v. Virpal Singh Chauhan (1995) 6 SCC

684 and Ajit Singh Januja (No.1) v. State of

Punjab AIR 1996 SC 1189, which led to the

issue of the O.M. dated 30th January, 1997,

have adversely affected the interest of the

Government servants belonging to the

Scheduled Castes and Scheduled Tribes

category in the matter of seniority on

promotion to the next higher grade. This has

led to considerable anxiety and

representations have also been received from

various quarters including Members of

Parliament to protect the interest of the

Government servants belonging to Scheduled

Castes and Scheduled Tribes.

2. The Government has reviewed the

position in the light of views received from

various quarters and in order to protect the

interest of the Government servants belonging

to the Scheduled Castes and Scheduled Tribes,

it has been decided to negate the effect of O.M.

dated 30th January 1997 immediately. Mere

withdrawal of the O.M. dated 30th will not meet

the desired purpose and review or revision of

seniority of the Government servants and

grant of consequential benefits to such

Government servants will also be necessary.

This will require amendment to Article 16(4A)

of the Constitution to provide for consequential

seniority in the case of promotion by virtue of

rule of reservation. It is also necessary to give

retrospective effect to the proposed

constitutional amendment to Article 16(4A)

with effect from the date of coming into force of

Article 16(4A) itself, that is, from the 17th day

of June, 1995.

3. The Bill seeks to achieve the

aforesaid objects.

THE CONSTITUTION (EIGHTY-FIFTH

AMENDMENT) ACT, 2001

The following Act of Parliament received

the assent of the President on the 4th January,

2002 and is published for general

information:-

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-

second Year of the Republic of India as

follows:-

1. Short title and commencement.- (1)

This Act may be called the Constitution

(Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into

force on the 17th day of June 1995.

2. Amendment of Article 16.- In Article

16 of the Constitution, in clause (4A), for the

words "in matters of promotion to any class",

the words "in matters of promotion, with

consequential seniority, to any class" shall be

substituted."

Reading the Constitution (Seventy-Seventh

Amendment) Act, 1995 with the Constitution (Eighty-

Fifth Amendment) Act, 2001, clause (4A) of Article 16

now reads as follows:

"(4A) Nothing in this article shall prevent the

State from making any provision for

reservation in matters of promotion, with

consequential seniority, to any class or classes

of posts in the services under the State in

favour of the Scheduled Castes and the

Scheduled Tribes which in the opinion of the

State are not adequately represented in the

services under the State."

The question in the present case concerns the width

of the amending powers of the Parliament. The key issue

is whether any constitutional limitation mentioned in

Article 16(4) and Article 335 stand obliterated by the

above constitutional amendments.

In R.K. Sabharwal8, the issue was concerning

operation of roster system. This court stated that the

entire cadre strength should be taken into account to

determine whether reservation up to the required limit

has been reached. It was held that if the roster is

prepared on the basis of the cadre strength, that by itself

would ensure that the reservation would remain within

the ceiling-limit of 50%. In substance, the court said

that in the case of hundred-point roster each post gets

marked for the category of candidate to be appointed

against it and any subsequent vacancy has to be filled by

that category candidate alone (replacement theory).

The question which remained in controversy,

however, was concerning the rule of 'carry-forward'. In

Indra Sawhney5 this court held that the number of

vacancies to be filled up on the basis of reservation in a

year including the 'carry-forward' reservations should in

no case exceed the ceiling-limit of 50%.

However, the Government found that total

reservation in a year for SCs, STs and OBCs combined

together had already reached 49=% and if the judgment

of this court in Indra Sawhney5 had to be applied it

became difficult to fill "backlog vacancies". According to

the Government, in some cases the total of the current

and backlog vacancies was likely to exceed the ceiling-

limit of 50%. Therefore, the Government inserted clause

(4B) after clause (4A) in Article 16 vide the Constitution

(Eighty-First Amendment) Act, 2000.

By clause (4B) the "carry-forward"/"unfilled

vacancies" of a year is kept out and excluded from the

overall ceiling-limit of 50% reservation. The clubbing of

the backlog vacancies with the current vacancies stands

segregated by the Constitution (Eighty-First Amendment)

Act, 2000. Quoted hereinbelow is the Statement of

Objects and Reasons with the text of the Constitution

(Eighty-First Amendment) Act, 2000:

"THE CONSTITUTION (EIGHTY FIRST

AMENDMENT) ACT, 2000

(Assented on 9th June, 2000 and came into

force 9.6.2000)

STATEMENT OF OBJECTS AND REASONS

Prior to August 29, 1997, the vacancies

reserved for the Scheduled Castes and the

Scheduled Tribes, which could not be filled up

by direct recruitment on account of non-

availability of the candidates belonging to the

Scheduled Castes or the Scheduled Tribes,

were treated as "Backlog Vacancies". These

vacancies were treated as a distinct group and

were excluded from the ceiling of fifty per cent

reservation. The Supreme Court of India in its

judgment in the Indra Sawhney versus Union

of India held that the number of vacancies to

be filled up on the basis of reservations in a

year including carried forward reservations

should in no case exceed the limit of fifty per

cent. As total reservations in a year for the

Scheduled Castes, the Scheduled Tribes and

the other Backward Classes combined together

had already reached forty-nine and a half per

cent and the total number of vacancies to be

filled up in a year could not exceed fifty per

cent., it became difficult to fill the "Backlog

Vacancies" and to hold Special Recruitment

Drives. Therefore, to implement the judgment

of the Supreme Court, an Official

Memorandum dated August 29, 1997 was

issued to provide that the fifty per cent limit

shall apply to current as well as "Backlog

Vacancies" and for discontinuation of the

Special Recruitment Drive.

Due to the adverse effect of the aforesaid

order dated August 29, 1997, various

organisations including the Members of

Parliament represented to the central

Government for protecting the interest of the

Scheduled castes and the Scheduled Tribes.

The Government, after considering various

representations, reviewed the position and has

decided to make amendment in the

constitution so that the unfilled vacancies of a

year, which are reserved for being filled up in

that year in accordance with any provision for

reservation made under clause (4) or clause

(4A) of Article 16 of the Constitution, shall be

considered as a separate class of vacancies to

be filled up in any succeeding year or years

and such class of vacancies shall not be

considered together with the vacancies of the

year in which they are being filled up for

determining the ceiling of fifty percent,

reservation on total number of vacancies of

that year. This amendment in the Constitution

would enable the State to restore the position

as was prevalent before august 29, 1997.

The Bill seeks to achieve the aforesaid

object.

THE CONSTITUTION (EIGHTY-FIRST

AMENDMENT) ACT, 2000

(Assented on 9th June, 2000 and came into

force 9.6.2000)

An Act further to amend the Constitution of

India.

BE it enacted by Parliament in the Fifty-

first Year of the Republic of India as follows:-

1. Short title: This Act may be called the

Constitution (Eighty-first Amendment) Act,

2000.

2. Amendment of Article 16: In Article

16 of the Constitution, after clause (4A), the

following clause shall be inserted, namely: -

"(4B) Nothing in this Article shall prevent

the State from considering any unfilled

vacancies of a year which are reserved for

being filled up in that year in accordance with

any provision for reservation made under

clause (4) or clause (4A) as a separate class of

vacancies to be filled up in any succeeding

year or years and such class of vacancies shall

not be considered together with the vacancies

of the year in which they are being filled up for

determining the ceiling of fifty per cent

reservation on total number of vacancies of

that year."

The Constitution (Eighty-First Amendment) Act,

2000 gives, in substance, legislative assent to the

judgment of this Court in R.K. Sabharwal8. Once it is

held that each point in the roster indicates a post which

on falling vacant has to be filled by the particular

category of candidate to be appointed against it and any

subsequent vacancy has to be filled by that category

candidate alone then the question of clubbing the

unfilled vacancies with current vacancies do not arise.

Therefore, in effect, Article 16(4B) grants legislative

assent to the judgment in R.K. Sabharwal8. If it is

within the power of the State to make reservation then

whether it is made in one selection or deferred selections,

is only a convenient method of implementation as long as

it is post based, subject to replacement theory and within

the limitations indicated hereinafter.

As stated above, clause (4A) of Article 16 is carved

out of clause (4) of Article 16. Clause (4A) provides

benefit of reservation in promotion only to SCs and STs.

In the case of S. Vinod Kumar and another v. Union of

India and others this court held that relaxation of

qualifying marks and standards of evaluation in matters

of reservation in promotion was not permissible under

Article 16(4) in view of Article 335 of the Constitution.

This was also the view in Indra Sawhney5.

By the Constitution (Eighty-Second Amendment)

Act, 2000, a proviso was inserted at the end of Article

335 of the Constitution which reads as under:

"Provided that nothing in this article shall

prevent in making of any provision in favour of

the members of the Scheduled Castes and the

Scheduled Tribes for relaxation in qualifying

marks in any examination or lowering the

standards of evaluation, for reservation in

matters of promotion to any class or classes of

services or posts in connection with the affairs

of the Union or of a State."

This proviso was added following the benefit of

reservation in promotion conferred upon SCs and STs

alone. This proviso was inserted keeping in mind the

judgment of this court in Vinod Kumar21 which took the

view that relaxation in matters of reservation in

promotion was not permissible under Article 16(4) in view

of the command contained in Article 335. Once a

separate category is carved out of clause (4) of Article 16

then that category is being given relaxation in matters of

reservation in promotion. The proviso is confined to SCs

and STs alone. The said proviso is compatible with the

scheme of Article 16(4A).

INTRODUCTION OF "TIME" FACTOR IN VIEW OF

ARTICLE 16(4B):

As stated above, Article 16(4B) lifts the 50% cap on

carry-over vacancies (backlog vacancies). The ceiling-

limit of 50% on current vacancies continues to remain.

In working-out the carry-forward rule, two factors are

required to be kept in mind, namely, unfilled vacancies

and the time factor. This position needs to be explained.

On one hand of the spectrum, we have unfilled

vacancies; on the other hand, we have a time-spread over

number of years over which unfilled vacancies are sought

to be carried-over. These two are alternating factors and,

therefore, if the ceiling-limit on the carry-over of unfilled

vacancies is removed, the other alternative time-factor

comes in and in that event, the time-scale has to be

imposed in the interest of efficiency in administration as

mandated by Article 335. If the time-scale is not kept

then posts will continue to remain vacant for years,

which would be detrimental to the administration.

Therefore, in each case, the appropriate Government will

now have to introduce the time-cap depending upon the

fact-situation. What is stated hereinabove is borne out

by Service Rules in some of the States where the carry-

over rule does not extend beyond three years.

WHETHER IMPUGNED CONSTITUTIONAL

AMENDMENTS VIOLATES THE PRINCIPLE OF BASIC

STRUCTURE:

The key question which arises in the matter of the

challenge to the constitutional validity of the impugned

amending Acts is - whether the constitutional limitations

on the amending power of the Parliament are obliterated

by the impugned amendments so as to violate the basic

structure of the Constitution.

In the matter of application of the principle of basic

structure, twin tests have to be satisfied, namely, the

'width test' and the test of 'identity'. As stated

hereinabove, the concept of the 'catch-up' rule and

'consequential seniority' are not constitutional

requirements. They are not implicit in clauses (1) and (4)

of Article 16. They are not constitutional limitations.

They are concepts derived from service jurisprudence.

They are not constitutional principles. They are not

axioms like, secularism, federalism etc. Obliteration of

these concepts or insertion of these concepts do not

change the equality code indicated by Articles 14, 15 and

16 of the Constitution. Clause (1) of Article 16 cannot

prevent the State from taking cognizance of the

compelling interests of backward classes in the society.

Clauses (1) and (4) of Article 16 are restatements of the

principle of equality under Article 14. Clause (4) of

Article 16 refers to affirmative action by way of

reservation. Clause (4) of Article 16, however, states that

the appropriate Government is free to provide for

reservation in cases where it is satisfied on the basis of

quantifiable data that backward class is inadequately

represented in the services. Therefore, in every case

where the State decides to provide for reservation there

must exist two circumstances, namely, 'backwardness'

and 'inadequacy of representation'. As stated above

equity, justice and efficiency are variable factors. These

factors are context-specific. There is no fixed yardstick to

identify and measure these three factors, it will depend

on the facts and circumstances of each case. These are

the limitations on the mode of the exercise of power by

the State. None of these limitations have been removed

by the impugned amendments. If the concerned State

fails to identify and measure backwardness, inadequacy

and overall administrative efficiency then in that event

the provision for reservation would be invalid. These

amendments do not alter the structure of Articles 14, 15

and 16 (equity code). The parameters mentioned in

Article 16(4) are retained. Clause (4A) is derived from

clause (4) of Article 16. Clause (4A) is confined to SCs

and STs alone. Therefore, the present case does not

change the identity of the Constitution. The word

"amendment" connotes change. The question is

whether the impugned amendments discard the original

constitution. It was vehemently urged on behalf of the

petitioners that the Statement of Objects and Reasons

indicate that the impugned amendments have been

promulgated by the Parliament to overrule the decision of

this court. We do not find any merit in this argument.

Under Article 141 of the Constitution the pronouncement

of this court is the law of the land. The judgments of this

court in Virpal Singh1, Ajit Singh (I)2 , Ajit Singh (II)3

and Indra Sawhney5, were judgments delivered by this

court which enunciated the law of the land. It is that law

which is sought to be changed by the impugned

constitutional amendments. The impugned

constitutional amendments are enabling in nature. They

leave it to the States to provide for reservation. It is well-

settled that the Parliament while enacting a law does not

provide content to the "right". The content is provided by

the judgments of the Supreme Court. If the appropriate

Government enacts a law providing for reservation

without keeping in mind the parameters in Article 16(4)

and Article 335 then this court will certainly set aside

and strike down such legislation. Applying the "width

test", we do not find obliteration of any of the

constitutional limitations. Applying the test of "identity",

we do not find any alteration in the existing structure of

the equality code. As stated above, none of the axioms

like secularism, federalism etc. which are overarching

principles have been violated by the impugned

constitutional amendments. Equality has two facets

"formal equality" and "proportional equality".

Proportional equality is equality "in fact" whereas formal

equality is equality "in law". Formal equality exists in the

Rule of Law. In the case of proportional equality the

State is expected to take affirmative steps in favour of

disadvantaged sections of the society within the

framework of liberal democracy. Egalitarian equality is

proportional equality.

The criterion for determining the validity of a law is

the competence of the law-making authority. The

competence of the law-making authority would depend

on the ambit of the legislative power, and the limitations

imposed thereon as also the limitations on mode of

exercise of the power. Though the amending power in

Constitution is in the nature of a constituent power and

differs in content from the legislative power, the

limitations imposed on the constituent power may be

substantive as well as procedural. Substantive

limitations are those which restrict the field of the

exercise of the amending power. Procedural limitations

on the other hand are those which impose restrictions

with regard to the mode of exercise of the amending

power. Both these limitations touch and affect the

constituent power itself, disregard of which invalidates its

exercise. [See: Kihoto Hollohan v. Zachillhu &

Others ].

Applying the above tests to the present case, there

is no violation of the basic structure by any of the

impugned amendments, including the Constitution

(Eighty-Second) Amendment Act, 2000. The

constitutional limitation under Article 335 is relaxed and

not obliterated. As stated above, be it reservation or

evaluation, excessiveness in either would result in

violation of the constitutional mandate. This exercise,

however, will depend on facts of each case. In our view,

the field of exercise of the amending power is retained by

the impugned amendments, as the impugned

amendments have introduced merely enabling provisions

because, as stated above, merit, efficiency, backwardness

and inadequacy cannot be identified and measured in

vacuum. Moreover, Article 16(4A) and Article 16(4B) fall

in the pattern of Article 16(4) and as long as the

parameters mentioned in those articles are complied-with

by the States, the provision of reservation cannot be

faulted. Articles 16(4A) and 16(4B) are classifications

within the principle of equality under Article 16(4).

In conclusion, we may quote the words of

Rubenfeld:

"ignoring our commitments may make us

rationale but not free. It cannot make us

maintain our constitutional identity".

ROLE OF ENABLING PROVISIONS IN THE CONTEXT

OF ARTICLE 14:

The gravamen of Article 14 is equality of treatment.

Article 14 confers a personal right by enacting a

prohibition which is absolute. By judicial decisions, the

doctrine of classification is read into Article 14. Equality

of treatment under Article 14 is an objective test. It is

not the test of intention. Therefore, the basic principle

underlying Article 14 is that the law must operate equally

on all persons under like circumstances. [Emphasis

added]. Every discretionary power is not necessarily

discriminatory. According to the Constitutional Law of

India, by H.M. Seervai, 4th Edn. 546, equality is not

violated by mere conferment of discretionary power. It is

violated by arbitrary exercise by those on whom it is

conferred. This is the theory of 'guided power'. This

theory is based on the assumption that in the event of

arbitrary exercise by those on whom the power is

conferred would be corrected by the Courts. This is the

basic principle behind the enabling provisions which are

incorporated in Articles 16(4A) and 16(4B). Enabling

provisions are permissive in nature. They are enacted to

balance equality with positive discrimination. The

constitutional law is the law of evolving concepts. Some

of them are generic others have to be identified and

valued. The enabling provisions deal with the concept,

which has to be identified and valued as in the case of

access vis-`-vis efficiency which depends on the fact-

situation only and not abstract principle of equality in

Article 14 as spelt out in detail in Articles 15 and 16.

Equality before the law, guaranteed by the first part of

Article 14, is a negative concept while the second part is

a positive concept which is enough to validate equalizing

measures depending upon the fact-situation.

It is important to bear in mind the nature of

constitutional amendments. They are curative by nature.

Article 16(4) provides for reservation for backward classes

in cases of inadequate representation in public

employment. Article 16(4) is enacted as a remedy for the

past historical discriminations against a social class.

The object in enacting the enabling provisions like

Articles 16(4), 16(4A) and 16(4B) is that the State is

empowered to identify and recognize the compelling

interests. If the State has quantifiable data to show

backwardness and inadequacy then the State can make

reservations in promotions keeping in mind maintenance

of efficiency which is held to be a constitutional limitation

on the discretion of the State in making reservation as

indicated by Article 335. As stated above, the concepts of

efficiency, backwardness, inadequacy of representation

are required to be identified and measured. That exercise

depends on availability of data. That exercise depends on

numerous factors. It is for this reason that enabling

provisions are required to be made because each

competing claim seeks to achieve certain goals. How best

one should optimize these conflicting claims can only be

done by the administration in the context of local

prevailing conditions in public employment. This is

amply demonstrated by the various decisions of this

Court discussed hereinabove. Therefore, there is a basic

difference between 'equality in law' and 'equality in fact'

(See: 'Affirmative Action' by William Darity). If Articles

16(4A) and 16(4B) flow from Article 16(4) and if Article

16(4) is an enabling provision then Articles 16(4A) and

16(4B) are also enabling provisions. As long as the

boundaries mentioned in Article 16(4), namely,

backwardness, inadequacy and efficiency of

administration are retained in Articles 16(4A) and 16(4B)

as controlling factors, we cannot attribute constitutional

invalidity to these enabling provisions. However, when

the State fails to identify and implement the controlling

factors then excessiveness comes in, which is to be

decided on the facts of each case. In a given case, where

excessiveness results in reverse discrimination, this

Court has to examine individual cases and decide the

matter in accordance with law. This is the theory of

'guided power'. We may once again repeat that equality

is not violated by mere conferment of power but it is

breached by arbitrary exercise of the power conferred.

APPLICATION OF DOCTRINE OF "GUIDED POWER"

ARTICLE 335 :

Applying the above tests to the proviso to Article

335 inserted by the Constitution (Eighty-Second

Amendment) Act, 2000, we find that the said proviso has

a nexus with Articles 16(4A) and 16(4B). Efficiency in

administration is held to be a constitutional limitation on

the discretion vested in the State to provide for

reservation in public employment. Under the proviso to

Article 335, it is stated that nothing in Article 335 shall

prevent the State to relax qualifying marks or standards

of evaluation for reservation in promotion. This proviso

is also confined only to members of SCs and STs. This

proviso is also conferring discretionary power on the

State to relax qualifying marks or standards of

evaluation. Therefore, the question before us is

whether the State could be empowered to relax qualifying

marks or standards for reservation in matters of

promotion. In our view, even after insertion of this

proviso, the limitation of overall efficiency in Article 335

is not obliterated. Reason is that "efficiency" is variable

factor. It is for the concerned State to decide in a given

case, whether the overall efficiency of the system is

affected by such relaxation. If the relaxation is so

excessive that it ceases to be qualifying marks then

certainly in a given case, as in the past, the State is free

not to relax such standards. In other cases, the State

may evolve a mechanism under which efficiency, equity

and justice, all three variables, could be accommodated.

Moreover, Article 335 is to be read with Article 46 which

provides that the State shall promote with special care

the educational and economic interests of the weaker

sections of the people and in particular of the scheduled

castes and scheduled tribes and shall protect them from

social injustice. Therefore, where the State finds

compelling interests of backwardness and inadequacy, it

may relax the qualifying marks for SCs/STs. These

compelling interests however have to be identified by

weighty and comparable data.

In conclusion, we reiterate that the object behind

the impugned Constitutional amendments is to confer

discretion on the State to make reservations for SCs/STs

in promotions subject to the circumstances and the

constitutional limitations indicated above.

TESTS TO JUDGE THE VALIDITY OF THE IMPUGNED

STATE ACTS:

As stated above, the boundaries of the width of the

power, namely, the ceiling-limit of 50% (the numerical

benchmark), the principle of creamy layer, the compelling

reasons, namely, backwardness, inadequacy of

representation and the overall administrative efficiency

are not obliterated by the impugned amendments. At the

appropriate time, we have to consider the law as enacted

by various States providing for reservation if challenged.

At that time we have to see whether limitations on the

exercise of power are violated. The State is free to

exercise its discretion of providing for reservation subject

to limitation, namely, that there must exist compelling

reasons of backwardness, inadequacy of representation

in a class of post(s) keeping in mind the overall

administrative efficiency. It is made clear that even if the

State has reasons to make reservation, as stated above, if

the impugned law violates any of the above substantive

limits on the width of the power the same would be liable

to be set aside.

Are the impugned amendments making an inroad

into the balance struck by the judgment of this court

in the case of Indra Sawhney5:

Petitioners submitted that equality has been

recognized to be a basic feature of our Constitution. To

preserve equality, a balance was struck in Indra

Sawhney5 so as to ensure that the basic structure of

Articles 14, 15 and 16 remains intact and at the same

time social upliftment, as envisaged by the Constitution,

stood achieved. In order to balance and structure the

equality, a ceiling-limit on reservation was fixed at 50% of

the cadre strength, reservation was confined to initial

recruitment and was not extended to promotion.

Petitioners further submitted that in Indra Sawhney5,

vide para 829 this Court has held that reservation in

promotion was not sustainable in principle. Accordingly,

petitioners submitted that the impugned constitutional

amendments makes a serious inroad into the said

balance struck in the case of Indra Sawhney5 which

protected equality as a basic feature of our Constitution.

We quote hereinbelow paragraph 829 of the majority

judgment in the case of Indra Sawhney5 which reads as

follows:

"829. It is true that Rangachari15 has been

the law for more than 30 years and that

attempts to re-open the issue were repelled in

Akhil Bharatiya Soshit Karamchari Sangh

(Railway) v. Union of India and others . It

may equally be true that on the basis of that

decision, reservation may have been provided

in the matter of promotion in some of the

Central and State services but we are

convinced that the majority opinion in

Rangachari15, to the extent it holds, that

Article 16(4) permits reservation even in the

matter of promotion, is not sustainable in

principle and ought to be departed from.

However, taking into consideration all the

circumstances, we direct that our decision on

this question shall operate only prospectively

and shall not affect promotions already made,

whether on temporary, officiating or

regular/permanent basis. It is further directed

that wherever reservations are already

provided in the matter of promotion - be it

Central Services or State Services, or for that

matter services under any corporation,

authority or body falling under the definition of

'State' in Article 12-such reservations shall

continue in operation for a period of five years

from this day. Within this period, it would be

open to the appropriate authorities to revise

modify or re-issue the relevant Rules to ensure

the achievement of the objective of Article

16(4). If any authority thinks that for ensuring

adequate representation of 'backward class of

citizens' in any service, class or category, it is

necessary to provide for direct recruitment

therein, it shall be open to it do so.

(emphasis supplied)

What are the outer boundaries of the amendment

process in the context of Article 16 is the question which

needs to be answered. Equality is the basic feature of the

Constitution as held in Indra Sawhney5. The content of

Article 14 was originally interpreted by this Court as a

concept of equality confined to the aspects of

discrimination and classification. It is only after the

rulings of this Court in Maneka Gandhi11 and Ajay

Hasia and others v. Khalid Mujib Sehravardi and

others , that the content of Article 14 got expanded

conceptually so as to comprehend the doctrine of

promissory estoppel, non arbitrariness, compliance with

rules of natural justice, eschewing irrationality etc.

There is a difference between "formal equality" and

"egalitarian equality". At one point of time Article 16(4)

was read by the Supreme Court as an exception to Article

16(1). That controversy got settled in Indra Sawhney5.

The words "nothing in this Article" in Article 16(4)

represents a legal device allowing positive discrimination

in favour of a class. Therefore, Article 16(4) relates to "a

class apart". Article 16(4), therefore, creates a field which

enables a State to provide for reservation provided there

exists backwardness of a class and inadequacy of

representation in employment. These are compelling

reasons. They do not exist in Article 16(1). It is only

when these reasons are satisfied that a State gets the

power to provide for reservation in matters of

employment. Therefore, Article 16(1) and Article 16(4)

operate in different fields. Backwardness and

inadequacy of representation, therefore, operate as

justifications in the sense that the State gets the power to

make reservation only if backwardness and inadequacy

of representation exist. These factors are not obliterated

by the impugned amendments.

The question still remains as to whether any of the

constitutional limitations are obliterated by way of the

impugned constitutional amendments. By way of the

impugned amendments Articles 16(4A) and 16(4B) have

been introduced.

In Indra Sawhney5 the equality which was

protected by the rule of 50%, was by balancing the rights

of the general category vis-`-vis the rights of BC en bloc

consisting of OBC, SC and ST. On the other hand, in the

present case the question which we are required to

answer is: whether within the egalitarian equality,

indicated by Article 16(4), the sub-classification in favour

of SC and ST is in principle constitutionally valid. Article

16(4A) is inspired by the observations in Indra

Sawhney5 vide para 802 and 803 in which this Court

has unequivocally observed that in order to avoid

lumping of OBC, SC and ST which would make OBC take

away all the vacancies leaving SC and ST high and dry,

the concerned State was entitled to categorise and sub-

classify SCs and STs on one hand vis-`-vis OBC on the

other hand. We quote hereinbelow paragraphs 802 and

803 of the judgment in Indra Sawhney5 :

"802. We are of the opinion that there is no

constitutional or legal bar to a State

categorizing the backward classes as backward

and more backward. We are not saying that it

ought to be done. We are concerned with the

question if a State makes such a

categorisation, whether it would be invalid? We

think not. Let us take the criteria evolved by

Mandal Commission. Any caste, group or class

which scored eleven or more points was

treated as a backward class. Now, it is not as if

all the several thousands of

castes/groups/classes scored identical points.

There may be some castes/groups/classes

which have scored points between 20 to 22

and there may be some who have scored

points between eleven and thirteen. It cannot

reasonably be denied that there is no

difference between these two sets of

castes/groups/classes. To give an illustration,

take two occupational groups viz., gold-smiths

and vaddes (traditional stone-cutters in

Andhra Pradesh) both included within Other

Backward Classes. None can deny that gold-

smiths are far less backward than vaddes. If

both of them are grouped together and

reservation provided, the inevitably result

would be that gold-smiths would take away all

the reserved posts leaving none for vaddes. In

such a situation, a State may think it

advisable to make a categorisation even among

other backward classes so as to ensure that

the more backward among the backward

classes obtain the benefits intended for them.

Where to draw the line and how to effect the

sub-classification is, however, a matter for the

Commission and the State - and so long as it

is reasonably done, the Court may not

intervene. In this connection, reference may be

made to the categorisation obtaining in Andhra

Pradesh. The Backward Classes have been

divided into four categories. Group-A

comprises "Aboriginal tribes, Vimukta jatis,

Nomadic and semi-nomadic tribes etc.".

Group-B comprises professional group like

tappers, weavers, carpenters, ironsmiths,

goldsmiths, kamsalins etc. Group-C pertains

to "Scheduled Castes converts to Christianity

and their progeny", while Group-D comprises

all other classes/communities/groups, which

are not included in groups A, B and C. The

25% vacancies reserved for backward classes

are sub-divided between them in proportion to

their respective population. This categorisation

was justified in Balram [1972] 3 S.C.R. 247 at

286. This is merely to show that even among

backward classes, there can be a sub-

classification on a reasonable basis.

(emphasis supplied)

"803. There is another way of looking at

this issue. Article 16(4) recognises only one

class viz., "backward class of citizens". It does

not speak separately of Scheduled Castes and

Scheduled Tribes, as does Article 15(4). Even

so, it is beyond controversy that Scheduled

Castes and Scheduled Tribes are also included

in the expression "backward class of citizens"

and that separate reservations can be provided

in their favour. It is a well-accepted

phenomenon throughout the country. What is

the logic behind it? It is that if Scheduled

Tribes, Scheduled Castes and Other Backward

Classes are lumped together, O.B.Cs. will take

away all the vacancies leaving Scheduled

Castes and Scheduled Tribes high and dry.

The same logic also warrants categorisation as

between more backward and backward. We do

not mean to say - we may reiterate - that this

should be done. We are only saying that if a

State chooses to do it, it is not impermissible

in law."

(emphasis supplied)

Therefore, while judging the width and the ambit of

Article 16(4A) we must ascertain whether such sub-

classification is permissible under the Constitution. The

sub-classification between "OBC" on one hand and "SC

and ST" on the other hand is held to be constitutionally

permissible in Indra Sawhney5. In the said judgment it

has been held that the State could make such sub-

classification between SCs and STs vis-`-vis OBC. It

refers to sub-classification within the egalitarian equality

(vide paras 802 and 803). Therefore, Article 16(4A)

follows the line suggested by this Court in Indra

Sawhney5 . In Indra Sawhney5 on the other hand vide

para 829 this Court has struck a balance between formal

equality and egalitarian equality by laying down the rule

of 50% (ceiling-limit) for the entire BC as "a class apart"

vis-`-vis GC. Therefore, in our view, equality as a

concept is retained even under Article 16(4A) which is

carved out of Article 16(4).

As stated above, Article 14 enables classification. A

classification must be founded on intelligible differential

which distinguishes those that are grouped together from

others. The differential must have a rational relation to

the object sought to be achieved by the law under

challenge. In Indra Sawhney5 an opinion was

expressed by this Court vide para 802 that there is no

constitutional or legal bar to making of classification.

Article 16(4B) is also an enabling provision. It seeks to

make classification on the basis of the differential

between current vacancies and carry-forward vacancies.

In the case of Article 16(4B) we must keep in mind that

following the judgment in R.K. Sabharwal8 the concept

of post-based roster is introduced. Consequently,

specific slots for OBC, SC and ST as well as GC have to

be maintained in the roster. For want of candidate in a

particular category the post may remain unfilled.

Nonetheless, that slot has to be filled only by the

specified category. Therefore, by Article 16(4B) a

classification is made between current vacancies on one

hand and carry-forward/backlog vacancies on the other

hand. Article 16(4B) is a direct consequence of the

judgment of this court in R.K. Sabharwal8 by which the

concept of post-based roster is introduced. Therefore, in

our view Articles 16(4A) and 16(4B) form a composite

part of the scheme envisaged. Therefore, in our view

Articles 16(4), 16(4A) and 16(4B) together form part of the

same scheme. As stated above, Articles 16(4A) and

16(4B) are both inspired by observations of the Supreme

Court in Indra Sawhney5 and R.K. Sabharwal8. They

have nexus with Articles 17 and 46 of the Constitution.

Therefore, we uphold the classification envisaged by

Articles 16(4A) and 16(4B). The impugned constitutional

amendments, therefore, do not obliterate equality.

The test for judging the width of the power and the

test for adjudicating the exercise of power by the

concerned State are two different tests which warrant two

different judicial approaches. In the present case, as

stated above, we are required to test the width of the

power under the impugned amendments. Therefore, we

have to apply "the width test". In applying "the width

test" we have to see whether the impugned amendments

obliterate the constitutional limitations mentioned in

Article 16(4), namely, backwardness and inadequacy of

representation. As stated above, these limitations are not

obliterated by the impugned amendments. However, the

question still remains whether the concerned State has

identified and valued the circumstances justifying it to

make reservation. This question has to be decided case-

wise. There are numerous petitions pending in this

Court in which reservations made under State

enactments have been challenged as excessive. The

extent of reservation has to be decided on facts of each

case. The judgment in Indra Sawhney5 does not deal

with constitutional amendments. In our present

judgment, we are upholding the validity of the

constitutional amendments subject to the limitations.

Therefore, in each case the Court has got to be satisfied

that the State has exercised its opinion in making

reservations in promotions for SCs and STs and for

which the concerned State will have to place before the

Court the requisite quantifiable data in each case and

satisfy the Court that such reservations became

necessary on account of inadequacy of representation of

SCs/ STs in a particular class or classes of posts without

affecting general efficiency of service as mandated under

Article 335 of the Constitution.

The constitutional principle of equality is inherent

in the Rule of Law. However, its reach is limited because

its primary concern is not with the content of the law but

with its enforcement and application. The Rule of Law is

satisfied when laws are applied or enforced equally, that

is, evenhandedly, free of bias and without irrational

distinction. The concept of equality allows differential

treatment but it prevents distinctions that are not

properly justified. Justification needs each case to be

decided on case to case basis.

Existence of power cannot be denied on the ground

that it is likely to be abused. As against this, it has been

held vide para 650 of Kesavananda Bharati13 that

where the nature of the power granted by the

Constitution is in doubt then the Court has to take into

account the consequences that might ensue by

interpreting the same as an unlimited power. However,

in the present case there is neither any dispute about the

existence of the power nor is there any dispute about the

nature of the power of amendment. The issue involved

in the present case is concerning the width of the power.

The power to amend is an enumerated power in the

Constitution and, therefore, its limitations, if any, must

be found in the Constitution itself. The concept of

reservation in Article 16(4) is hedged by three

constitutional requirements, namely, backwardness of a

class, inadequacy of representation in public employment

of that class and overall efficiency of the administration.

These requirements are not obliterated by the impugned

constitutional amendments. Reservation is not in issue.

What is in issue is the extent of reservation. If the extent

of reservation is excessive then it makes an inroad into

the principle of equality in Article 16(1). Extent of

reservation, as stated above, will depend on the facts of

each case. Backwardness and inadequacy of

representation are compelling reasons for the State

Governments to provide representation in public

employment. Therefore, if in a given case the court finds

excessive reservation under the State enactment then

such an enactment would be liable to be struck down

since it would amount to derogation of the above

constitutional requirements.

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 Sawhney5 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 Sawhney5 this Court has,

therefore, accepted caste as determinant of

backwardness and yet it has struck a balance with the

principle of secularism which is the basic feature of the

Constitution by bringing in the concept of creamy layer.

Views have often been expressed in this Court that caste

should not be the determinant of backwardness and that

the economic criteria alone should be the determinant of

backwardness. As stated above, we are bound by the

decision in Indra Sawhney5. 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 Sawhney5 has evolved

numerical benckmarks like ceiling-limit of 50% based

on post-specific roster coupled with the concept of

replacement to provide immunity against the charge

of discrimination.

CONCLUSION:

The impugned constitutional amendments by which

Articles 16(4A) and 16(4B) have been inserted flow from

Article 16(4). They do not alter the structure of Article

16(4). They retain the controlling factors or the

compelling reasons, namely, backwardness and

inadequacy of representation which enables the States to

provide for reservation keeping in mind the overall

efficiency of the State administration under Article 335.

These impugned amendments are confined only to SCs

and STs. They do not obliterate any of the constitutional

requirements, namely, ceiling-limit of 50% (quantitative

limitation), the concept of creamy layer (qualitative

exclusion), the sub-classification between OBC on one

hand and SCs and STs on the other hand as held in

Indra Sawhney5 , the concept of post-based Roster

with in-built concept of replacement as held in R.K.

Sabharwal8.

We reiterate that the ceiling-limit of 50%, the

concept of creamy layer and the compelling reasons,

namely, backwardness, inadequacy of representation

and overall administrative efficiency are all

constitutional requirements without which the

structure of equality of opportunity in Article 16

would collapse.

However, in this case, as stated, the main issue

concerns the "extent of reservation". In this regard

the concerned State will have to show in each case

the existence of the compelling reasons, namely,

backwardness, inadequacy of representation and

overall administrative efficiency before making

provision for reservation. As stated above, the

impugned provision is an enabling provision. The

State is not bound to make reservation for SC/ST in

matter of promotions. However if they wish to

exercise their discretion and make such provision,

the State has to collect quantifiable data showing

backwardness of the class and inadequacy of

representation of that class in public employment in

addition to compliance of Article 335. It is made

clear that even if the State has compelling reasons, as

stated above, the State will have to see that its

reservation provision does not lead to excessiveness

so as to breach the ceiling-limit of 50% or obliterate

the creamy layer or extend the reservation

indefinitely.

Subject to above, we uphold the constitutional

validity of the Constitution (Seventy-Seventh

Amendment) Act, 1995, the Constitution (Eighty-First

Amendment) Act, 2000, the Constitution (Eighty-Second

Amendment) Act, 2000 and the Constitution (Eighty-Fifth

Amendment) Act, 2001.

We have not examined the validity of individual

enactments of appropriate States and that question will

be gone into in individual writ petition by the appropriate

bench in accordance with law laid down by us in the

present case.

Reference is answered accordingly.