REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO(S). 55 OF 2019

JANHIT ABHIYAN …PETITIONER(S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

WITH

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

J U D G M E N T

S. RAVINDRA BHAT, J.

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1. I regret my inability to concur with the views expressed by the majority opinion on the validity of the 103rd Amendment on Question No. 3, since I feel - for reasons set out elaborately in the following opinion - that this court has for the first time, in the seven decades of the republic, sanctioned an avowedly exclusionary and discriminatory principle. Our Constitution does not speak the language of exclusion. In my considered opinion, the amendment, by the language of exclusion, undermines the fabric of social justice, and thereby, the basic structure.

2. At the outset, I must state that I am in agreement that the addition, or insertion of the 'economic criteria' for affirmative action in aid of the section of population who face deprivation due to poverty, in furtherance of Article 46, does not *per se* stray from the Constitutional principles, so as to alter, violate, or destroy its basic structure. As long as the State addresses deprivation resulting from discriminatory social practices which have kept the largest number of our populace in the margins, and continues its ameliorative policies and laws, the introduction of such deprivation-based affirmative action, is consistent with constitutional goals. What, however, needs further scrutiny, (which this opinion proposes to address

presently) is whether the manner of implementing – i.e., the *implicit* exclusion of those covered under Art. 15(4) and 16(4) [Scheduled Castes ("SC"), Scheduled Tribes ("ST"), and socially and educationally backward classes ("SEBC")], cumulatively referred to as 'backward classes'] violates, or damages the basic structure or essential features of the Constitution.

3. Therefore, I will first address the point of my disagreement – Question 3 [**Part III**] followed by a discussion on Question 1 [**Part IV**]; I have also separately considered economic criteria vis-a-vis Article 16, specifically [**Part V**]. I have given my additional reasoning on Question 2 [**Part VI**]. Since all three questions framed by this court, entail an examination under the doctrine of basic structure, I find it necessary to lay out the contours of this doctrine, the standard of review for identifying the essential feature or principle, and for application of the doctrine itself [**Part II**].

I. Context and history of reservations

4. Given that it has been exhaustively recounted in the judgment of Justice Dinesh Maheshwari - it is unnecessary for the purpose of this opinion to retrace the history of how affirmative action and reservations in India have been worked out; I have briefly outlined what is relevant to my analysis.
5. Aside from the allusion to Maharaja Chhatrapati Shahuji's reservation of 50% (in 1902), the kind of affirmative action one sees today, can be traced to the 1931 census which separately determined the "depressed classes". Premised on this, the *Government of India (Scheduled Castes) Order, 1936*[1] enlisted a large number of communities which faced the brunt of caste stigma and other socially evil practices. Parallelly, in several princely

[1] Government of India (Scheduled Castes) Order, 1936 <https://socialjustice.gov.in/writereaddata/UploadFile/GOI-SC-ORDER-1936.pdf>.

states disparate efforts were made to ameliorate the lot of such communities and castes, that had been discriminated against and marginalised for centuries. This history informs a large part of the Constituent Assembly debates, during which, member after member, reiterated the fledgling nation's determination not only to ensure equality before law, and equal protection of the law, but travelling beyond that, to ensuring *substantive* equality of *opportunity* and *access* to public places, goods, employment, etc.

6. One of the first cases that this court decided was *State of Madras v. Champakam Dorairajan*[2], where this court held to be unconstitutional, a communal reservation which fixed quotas for different communities and castes – this led to insertion of Article 15(4) by the Constitution (First Amendment) Act. The next important case was *M.R. Balaji v. State of Mysore*[3] where this court held that reservations cannot be solely based on caste, and rather would have to satisfy the test of social and educational backwardness, as per the (then) text of the Constitution. It was held that the result of poverty, to a large extent, was that the poor class of citizens automatically became socially backward. They did not enjoy a status in society and were therefore, forced to take a backward seat. Other decisions followed the law declared in *M.R. Balaji* – In *T. Devadasan v. Union of India*[4], too, a rule enabling carrying forward of SC vacancies which resulted in almost 2/3rd of the vacancies being earmarked for SC candidates, was adversely commented upon and held to be unconstitutional. The majority remarked importantly that the reason for backwardness of SC/ST communities was due to *"historical causes"* and that the *"purpose of Article 16(4) is to ensure that such people, because of*

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[2] *State of Madras v. Champakam Dorairajan*, 1951 SCC 351, (hereinafter, "*Champakam Dorairajan*").
[3] *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439 (hereinafter, "*M.R. Balaji*"), See para 21.
[4] *T. Devadasan v. Union of India* (1964) 4 SCR 680 (hereinafter, "*T. Devadasan")*.

their backwardness should not be unduly handicapped in the matter of securing employment in the services of the State". Reservations is therefore *"in favour of backward classes who are not adequately represented in the services under the State".* The court also said that a rule for reservation and posts for such backward classes *"cannot be said to have violated Article 14"*, as advanced classes cannot be considered for appointment to such posts because *"they may be equally or even more meritorious than the members of the backward classes"*.

7. However, in an illuminating dissenting, Subba Rao, J, highlighted the linkages between Articles 14, 15 and 16, stressing on the fact that Article 16(4) was a facet of Article 16(1):

> *"*26. *Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only an utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. Two horses are set down to run a race—one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause (4) in Art. 16. The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article.*"

8. A majority of the 7-judge bench in *State of Kerala v. N.M. Thomas*[5], accepted this dissenting view of K. Subba Rao, J. (in *T. Devadasan)*. In *N.M. Thomas*, a rule exempting SC candidates from qualifying in a departmental examination for a longer duration than others, was upheld by the Supreme Court. The court noted that:

(i) The basic content of Articles 14, 15(1) and 16(1) constituted a code in that Articles 15(4) and 16(4) was to enable equality of opportunity for class which would otherwise have been excluded from appointment. Hence, any preferential rule for backward classes, could not be unconstitutional;

(ii) Article 16(1) permits classification and Article 16(4) is not an exception to Article 16(1);

(iii) A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose[6];

(iv) Article 16(1) sets out a positive aspect of equality of opportunity in matters of public employment and Article 16(2) negatively prohibits discrimination on the enumerated grounds in the area covered by Article 16(1);

(v) But for Article 16(4), 16(1) would have prevented preferential treatment for reservations for backward classes of citizens.

It was held that Article 16(4) was introduced to reconcile Article 16(1) [representing the dynamics of 'justice' conceived as 'equality', in conditions under which candidates actually competing for posts in the Government] and Articles 46 and 335 embodying the duties of the State so as to protect them from the inequities of social injustice. These

[5] *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 (hereinafter "*N.M. Thomas*")
[6] para 83 per Mathew, J.

encroachments in the field of Article 16(1) can only be permitted if they are warranted under Article 16(4).

9. The most authoritative decision on the point of reservations was the nine-Judge ruling in *Indra Sawhney v. Union of India*[7]. The court also had the occasion to consider the validity of an office memorandum which introduced a 27% quota in favour of other backward classes in relation to Central Government posts and services. The verdict was not a unanimous one. There were six opinions. The broadest summary of those opinions:

(i) the reference to backward classes of citizens within Article 16(4) refers to social and educational backwardness;

(ii) Article 16(4) is a facet and part of Article 16(1), and not an exception to the latter. The judgment of Jeevan Reddy, J explains the ruling in *N.M. Thomas* on this point approvingly at paragraph 713 (SCC p. 672-674);

(iii) Caste alone cannot be the determining factor to decide social and educational backwardness and that a caste can be and can often be a social class in India;

(iv) The economic criterion alone for determining backwardness of classes or groups is impermissible, because the indicators are social and educational backwardness having regard to the express terms of Articles 15(4) and 16(4);

(v) There can be sub-classification amongst backward classes of citizens for the purpose of ensuring that most vulnerable groups benefit;

(vi) There can be no reservations in promotions under Article 16(4); and

(vii) The “creamy layer” or more affluent sections of other backward classes had to be identified by the state to ensure that the most

[7] *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, (hereinafter, "*Indra Sawhney*").

deprived sections were not kept out. Such categories could not claim the benefit of reservation.

10. *M. Nagaraj* v. *Union of India*[8], *Ashok Kumar Thakur v. Union of India*[9], *K. Krishna Murthy v. Union of India*[10], *Pramati Educational & Cultural Trust v. Union of India*[11], *Chebrolu Leela Prasad Rao v. State of A.P*[12], and *Jaishri Laxmanrao Patil v. State of Maharashtra*[13], are the other significant decisions, rendered by Constitution Benches, after *Indra Sawhney* on this. In *M. Nagaraj*, the court negatived a challenge to Article 16(4-A and B) introduced by a Constitutional amendment on the ground that it violated the basic structure principle. The court held that though facets of equality were part of the basic structure, the provision Article 16(4A) permitting reservations in promotion for SC/STs did not violate the basic structure. The amendment in fact, restored the situation which existed due to prior court rulings that such reservations in promotion were permissible. The court also held that the "catch-up rule"[14] was not an rule of equality, or a constitutional principle that could not be overborne.[15] The court, in *M. Nagaraj,* discussed the principles underlying the basic structure doctrine, as well as the applicable tests to determine it (which I have referred to in the following section).

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[8] *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, (hereinafter, "*M. Nagaraj*").
[9] *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 (hereinafter, "*Ashok Kumar Thakur*").
[10] *K. Krishna Murthy v. Union of India*, (2010) 7 SCC 202, (hereinafter as "*K. Krishna Murthy*").
[11] *Pramati Educational & Cultural Trust v. Union of India*, (2014) 8 SCC 1, ("*Pramati*").
[12] *Chebrolu Leela Prasad Rao v. State of A.P.*, (2021) 11 SCC 401, ("*Chebrolu Leela Prasad* ").
[13] *Jaishri Laxmanrao Patil v. State of Maharashtra*, (2021) 8 SCC 1, (hereinafter, "*Jaishri Laxmanrao Patil*").
[14] So described, in view of the previous decisions of the court, which had declared that senior employees in a cadre, overlooked for promotion on account of quotas in promotion in favour of SC/STs were entitled to "catch up" their seniority in the lower cadre, when they were promoted. This was to balance their equities, or off-set the disadvantage they were placed in due to reservations in promotions, which enabled junior officials in a cadre to steal a march and secure promotions earlier.
[15] The court stated that
"As stated hereinabove, the concept of the 'catch-up' rule and 'consequential seniority' are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles."

II. Dealing with the basic structure

11. I agree with the judgment of Justice Dinesh Maheshwari in its tracing of the doctrine of basic structure, and its journey, through past precedents spanning nearly five decades. I will however, record a few additional conclusions based upon my reading.

A. Important cases on the doctrine

12. The court's polyvocal majority in *Kesavananda Bharati v. State of Kerala*[16], did not offer unanimity on the key elements of the constitution, or the values underlying it, as essential features. What however, the judges constituting the majority were clear, was that the power of amendment needed *regulation,* or control, through the basic structure doctrine. For the purpose of brevity – and compactness, it would be sufficient to notice the analysis and summary[17] of the majority in *Kesavananda Bharati,* made by the majority opinion of Chandrachud, CJ, in *Minerva Mills v. Union of India*[18] (paragraph 7-11, SCC).

13. In *Indira Nehru Gandhi v. Raj Narain*[19], this court invalidated provisions of the 39th Constitutional Amendment (which resulted in taking away the court's adjudicatory powers and vesting it in a tribunal, which was to decide legality of elections of four specified functionaries), as violative of

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[16] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; 1973 Supp SCR 1 (hereinafter, "*Kesavananda Bharti*").

[17] Salient aspects are that: Sikri, CJ stated that the *"fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence"* and enumerated some of the essential features - supremacy of the constitution, republican and democratic form of Government, secular character of the Constitution; separation of powers between the Legislature, the executive and the judiciary, and the federal character of the Constitution. Shelat and Grover, JJ too indicated that the Preamble contained the key to the basic structure, which rested on a harmony between Parts III and IV and that the amendments could not result in *"changing the identity of the Constitution."* Hegde and Mukherjea, JJ stated similarly that the basic structure was *"delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements or fundamental features".* Reddy, J draws analogy from the Preamble to say that the features *"are justice, freedom of expression and equality of status and opportunity"*. Khanna, J emphasises survival of the Constitution *"without loss of its identity"*.

[18] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, (hereinafter as "*Minerva Mills*")

[19] *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1. ("*Indira Gandhi*").

the basic structure doctrine – specifically the principle of rule of law, and the doctrine of separation of powers. Chandrachud, J. in his judgment made pertinent observations about what constitutes the basic structure, and how equality is an integral part of it. Speaking about the basic structure, he said:

> *"664. I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and that (iv) the nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."*
> […]
> 6*91. […] The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features — this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."*

14. K. K Mathew, J. made general observations with regard to the fact that the basic structure should be rooted in some provisions of the Constitution and also importantly, flagged the equality code as one of the basic features of the Constitution.

15. This court's decision in *Minerva Mills* marks a watershed moment in the journey of the basic structure doctrine. The court had to decide on the validity of Sections 4 and 55 of the 42nd Amendment Act[20] which sought to nullify the basic structure doctrine itself, by amending Article 368[21]; and

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[20] Constitution (Forty-second Amendment) Act 1976.

[21] Introducing two clauses (4) and (5), which read as follows:
"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.
(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article"

amendment to Article 31C which sought to immunize all laws which declared that they were made to advance all or any of the provisions of Part IV of the Constitution. The court reiterated the basic structure doctrine, and held that the amendment to Article 368, which sought to fetter the court's inquiry into the validity of constitutional amendments, violated the basic structure. By a majority decision of 4:1, the court held that the amendment to Article 31C too violated the basic structure.

16. Judicial review was the value, which the court held to be violated in other decisions as well – such as in *P. Sambamurthy v. State of A.P*[22], *Kihoto Hollohan v. Zachillhu*[23], in *L. Chandra Kumar v. Union of India*[24]. In the latter, it was held that judicial review, through Articles 32 and 226 are part of the basic structure of the Constitution. Thus, here, for the first time, specific provisions were held to be part of the basic structure. *Raghunathrao Ganpatrao v. Union of India*[25] held that the *deletion* of provisions – held to be an "integral" part of the constitution (by the judgment of a 11-judge bench, when the basic structure doctrine was not recognized), did not violate the basic structure, or lead to loss of its identity. The majority judgment in *Kihoto Hollohon* is narrowly premised[26]; it severed a part of the offending portion of the 52nd Amendment, to the extent it excluded judicial review, since its deletion was procedurally unsustainable, given the text of Article 368, which requires that such

[22] *P. Sambamurthy v. State of A.P.*, (1987) 1 SCC 362, (hereinafter as "*P. Sambamurthy*").
[23] *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651, (hereinafter "*Kihoto Hollohan*").
[24] *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, (hereinafter "*L. Chandra Kumar*").
[25] *Raghunathrao Ganpatrao v. Union of India*, 1994 Supp (1) SCC 191, (hereinafter "*Raghunathrao Ganpatrao*").
[26] The minority opinion of Verma, J. (see para 181-182) struck down the provision on the ground that it violated the rule of law, which is a basic feature of the Constitution.[26] The majority judgment, by Venkatachaliah, J also struck down the offending provision, but for different reasons *(procedural lapses)*.

amendments need ratification by the legislatures of one half of the total states forming the Union.

17. Next, in *M. Nagaraj*, this court tersely stated that the standard to be applied in evaluating whether an amendment has also modified the overarching principles, that inform each and every fundamental right and link them, is to find whether due to such change we have a completely different Constitution. In particular, after summarising various opinions in *Kesavananda Bharati*, the court observed that *"[t]he basic structure jurisprudence is a preoccupation with constitutional identity."* The object of which is *"continuity"* within which *"continuity of identity, changes are admissible"*. The court, however refused to strike down Article 16(4B) [which had sought to overrule decisions of this court, to the effect that when reservations are resorted to in promotions, leading to accelerated promotions, the non-reserved category of employees, upon their promotions should be permitted to retain or "catch up" their previous seniority]. The court made certain general observations which are relevant, and are extracted below:

> *"102 ... Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets— "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.*

18. The other decisions in *I.R. Coelho* and *Pramati*, too dealt with facets of basic structure. I shall be discussing *I.R. Coelho* and *M. Nagaraj*, later,

more elaborately, when dealing with the equality code, and its facets being intrinsic to the basic structure of the Constitution.

B. Test for determining basic structure

19. It was remarked in *Indira Gandhi* that:

> *"*661.*...The subject-matter of constitutional amendments is a question of high policy and Courts are concerned with the implementation of laws, not with the wisdom of the policy underlying them...."*[27]*

It is axiomatic that a constitutional provision cannot be construed in the same manner as a legislative enactment, delegated legislation, or executive measure. All those can be subjected to judicial review on distinct heads such as legislative competence, constitutional limitations (such as in Part III or Part XI of the Constitution), *ultra vires* the parent enactment or constitutional limitation (delegated legislation), illegality, conflict with provisions of the constitution, Wednesbury unreasonableness, unfair procedure, proportionality, or other grounds of administrative law review (executive action).

20. Logically, then, the applicable standard of review of constitutional amendments should be higher – also because the procedure adopted to amend, under Article 368, is special, and requires two-third majority in favour of any proposed amendment, with the super-added provision in case of amendments to certain enumerated provisions, of resolutions approving the amendment by a majority of the legislatures of all states as well. This exercise of *constituent* power, therefore, cannot be subjected to the same standard of review, as in the case of legislative or executive actions. The clearest enunciation of this was in Chandrachud, J's opinion in *Indira Gandhi*:

> *"*691. […] *Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not*

[27] *Indira Gandhi*, para 661.

> *offend against the provisions of Articles 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. ... 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features'—this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."*

At another place, the same learned judge (Chandrachud, J) observed that:

> *"*663. […] *For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance…"*[28]
>
> […]
>
> *"*692. […] *There is no paradox, because certain limitations operate upon the higher power for the reason that it is a higher power. A constitutional amendment has to be passed by a special majority and certain such amendments have to be ratified by the legislatures of not less than one-half of the States as provided by Article 368(2). An ordinary legislation can be passed by a simple majority. The two powers, though species of the same genus, operate in different fields and are therefore subject to different limitations."*[29]

21. In *M. Nagaraj* upon review of previous authorities, this court indicated the methodology of determining whether a constitutional amendment violates the basic structure:

> *"24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.*
>
> *25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up : in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to*

[28] *Indira Gandhi*, para 663.
[29] *Indira Gandhi*, para 692.

bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

26. […] secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values. For example, under the German constitutional law, human dignity under Article 1 is inviolable. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence. The constitutional courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by interpretation given to the concept by the constitutional courts.

27. Under the Indian Constitution, the word "federalism" does not exist in the Preamble. However, its principle (not in the strict sense as in USA) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the Seventh Schedule to the Constitution.

28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In Kesavananda Bharati v. State of Kerala [(1973) 4 SCC 225] it has been observed that "one cannot legally use the Constitution to destroy itself". It is further observed "the personality of the Constitution must remain unchanged". Therefore, this Court in Kesavananda Bharati [(1973) 4 SCC 225] while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in Kesavananda Bharati [(1973) 4 SCC 225] . To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. Secularism in India has acted as a balance between socio-economic reforms which limits religious options and communal developments. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day."

(emphasis supplied)

Thus, the test of "identity" which some of the judges in *Kesavananda Bharati* indicated, as of the core of the basic structure doctrine, was re-

stated, and elaborated upon in *M. Nagaraj* as the concept or doctrine of 'constitutional identity'. The standard of review, it was held was that *firstly*, the essential feature must be a constitutional law principle, which is binding on the legislature and *secondly*, the analysis is whether such principle is so *fundamental* that it must restrict even the Parliament's amending power (see paragraph 25, extracted above).

22. This court has, in applying the test, followed the historical approach in conducting substantive basic structure review. This method was indicated by Chandrachud, J in *Waman Rao v. Union of India*[30]. In this case, Articles 31-A, 31-B, and 31-C which had been introduced to advance the land reform programmes were challenged as violations of the basic structure of the Constitution. Chandrachud, J observed that the *"questions have a historical slant and content: and history can furnish a safe and certain clue to their answer".* After considering the history of the newly inserted provision (by the first Amendment Act, 1951) it was held that

> *"24. ...Looking back over the past thirty years of constitutional history of our country, we as lawyers and Judges, must endorse the claim made ... that if Article 31-A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated and that by the 1st Amendment, the constitutional edifice was not impaired but strengthened."*

23. An independent justification for the amendments was of implementing the constitutional purposes as outlined in Article 39(b) and (c), i.e., *"that the ownership and control of the material resources of the community are so distributed as best to subserve the common good".* The historical approach was also apparent, when this court considered the amendments which

[30] *Waman Rao v. Union of India*, (1981) 2 SCC 362, (hereinafter, "*Waman Rao*").

deleted Articles 291 and 362 of the Constitution in *Raghunathrao Ganpatrao*, as well as in *Kihoto Hollohon.*

24. Likewise, in *R.C. Poudyal v. Union of India*[31], where this court, speaking through three different judgments (one of them a dissenting judgment, by L.M. Sharma, CJ) used history of the amendment, and contrasted it with the history of the provisions of the Constitution. The impugned provision, Article 371F(f) enabled representation of members of the Buddhist Monasteries, in the Sikkim Legislature. The dissenting view held that the provisions for reservation in state assembly, based upon religion, violated the basic structure of the Constitution. The majority judgment upheld the amendment, as necessary because of *historical continuity*, and the need to assimilate Sikkimese society within the republic. However, the majority at the same time, also stated that such a conclusion might not have been the same, if such reservation were introduced elsewhere:

> *"*128. […] *These adjustments and accommodations reflect a political expediencies for the maintenance of social equilibrium. The political and social maturity and of economic development might in course of time enable the people of Sikkim to transcend and submerge these ethnic apprehensions and imbalances and might in future -- one hopes sooner -- usher-in a more egalitarian dispensation. Indeed, the impugned provisions, in their very nature, contemplate and provide for a transitional phase in the political evolution of Sikkim and are thereby essentially transitional in character.*
> 129. *It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the Constitutional muster". But in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify in equality and special treatment..."*
>
> (emphasis supplied)

25. Judicial review of legislation on the touchstone of their validity vis-à-vis fundamental rights, is an analogy closest to constitutional amendment review, on the ground of its conformity to the basic structure. It is an entirely different kind of review that *"imposes substantive limits on the*

[31] *R. C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, (hereinafter "*R.C. Poudyal*").

scope of constitutional amendment. However, these limits or basic features are identified as constitutional principles which are distinct from the constitutional provisions which embody these principles"[32]. Drawing from the remarks in *Minerva Mills* and *Indira Gandhi.* Dr. Krishnaswamy notes in his work that this form of basic structure review has to account for the distinction between

> *"ordinary democratic law making and higher level democratic law making, it must rightly identify the different limits on these two forms of law making. Only an independent model of basic structure review which ensures that constitutional amendments do not destroy core constitutional principles can fulfil this requirement."*[33]

26. It also needs to be noticed that when the court conducts a constitutional amendment validity review, to consider if it violates the basic structure, apart from the standard, the discussion is rooted in the lexicology of *judicial review*, developed from the jurisprudence of past precedents. In other words, the difference in standard which this court adopts does not result in a difference in the approach, to consider if the amendment violates the basic structure. In judicial review, of a legislation, which violates the provisions of the constitution, the court considers the law, its impact on the fundamental right, its object and its *reasonableness* or *proportionality.* In basic structure review, likewise, the subject of scrutiny is the amendment, its content, its impact on the overarching value or principle, which is part of the basic structure, and whether that impact destroys or violates the identity of the Constitution. Illustratively, in *Kihoto Hollohon*, the court dealt with the constitutionality of amendments, introducing the Xth Schedule to the Constitution and considered past cases, interpreting the Constitution to see if the newly added provisions accorded with the

[32] Dr. Sudhir Krishnaswamy, '3 Applying Basic Structure Review: The Limits of State Action and the Standard of Review', Democracy and Constitutionalism in India - A Study of the Basic Structure doctrine, Oxford University Press (2009).
[33] *Ibid.*, p. 88.

existing Constitution. In *R.C. Poudyal*, the court upheld reservation in favour of Buddhist monasteries, and explained that it was for continuity. The court drew upon the equality jurisprudence. The minority and dissenting views also relied heavily upon past judicial precedents to underscore the importance of prohibition against religion-based discrimination and reservation not necessarily dealing with the validity of constitutional amendments alone, but to bring out the idea of judicial review. The same goes for the five judge decision in *Supreme Court Advocates on Record Association (SCAORA) v. Union of India*[34] in which the value of an independent judiciary, and what it is expected to achieve in a democracy was underlined, by reference to past cases which did not deal with constitutionality of amendments. Hence, even while judicial review of constitutional amendments carries with it a standard higher than judicial review of law or executive action, and uses a particular methodology or test to discern whether the amendment changes or damages the basic structure, the court at the same time, draws upon past precedents its exercise of judicial review, and the resulting interpretation of the Constitution, as it exists.

27. This idea – of a distinct category of judicial review, which deals with constitutional amendment review, was also voiced in *M. Nagaraj*.[35] In basic structure review parlance, the legitimate role of the court is to evaluate whether, in the given case, the "identity" of the Constitution is

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[34] (2016) 5 SCC 1

[35] "*103. The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power. Though the amending power in the Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise." (See Kihoto Hollohan v. Zachillhu [1992 Supp (2) SCC 651] .)*

affected so as to violate the basic structure and to apply the *"direct impact"* test (as propounded in *I.R. Coelho*).

28. It is evident that at different points in time, different *values* that underlie the Constitution and are manifested - either directly in the form of express provisions, or what can be inferred as basic *"overarching"* principles (*Nagaraj*) or what impacts the *identity* (*Kesavananda Bharati, Raghunathrao Ganpatrao, M. Nagaraj*, and *I.R. Coelho*) or takes away the *"essence"* of certain core principles, through amendment were examined. *Raghunathrao Ganpatrao* echoed the idea of *identity*, and the idea of *"basic form or in its character"* of the Constitution. *I.R. Coelho* went on to say that *"it cannot be held that essence of the principle behind Article 14 is not part of the basic structure"* and also that "*doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values"* – which, if allowed to be altered, would change the "*nature"* of the Constitution. The court also stated that *"in judging the validity of constitutional amendment we have to be guided by the impact test"*.

29. It is therefore clear that the appropriate test or standard of judicial review of constitutional amendments is not the same as in the case of ordinary laws; the test is whether the amendment challenged destroys, abrogates, or damages the "*identity"*, or *"nature*" or *"character"* or *"personality"* of the Constitution, by *directly impacting* one or some of the *"overarching principles"* which inform its express provisions. Further in constitutional amendment judicial review, the court would consider the history of the

provision amended, or the way the new provision impacts the identity, or character, or nature of the Constitution.

30. The standard of judicial review of constitutional amendments, draws upon distinct terminologies – *identity*, *personality*, *nature* and *character* to see if the *constitutional identity* undergoes a fundamental change, as to alter the Constitution into something it can never be. Or, differently put, the test is whether the *impact* of the amendment is to change the Constitution, into something it could never be considered to be. Each of the terms, i.e. identity, nature, personality, character, and so on, are methods of expressing the idea that some part of the Constitution, either through its express provisions, or its general scheme, and yet transcending those provisions, are embedded as overarching principles, which cannot be destroyed or damaged.

31. Having laid out the test of basic structure assessment in the paragraphs above, I will now apply this standard of review to the impugned amendment in the following sections.

III. Re Question 3: analyzing the exclusionary clause "other than" and whether it offends the basic structure

32. The insertion of clause (6) in Article 15 and 16, introduces a new class i.e., "economically weaker sections" which are defined to be *"other than"* the classes covered in Article 15(4) [i.e., other than socially and educationally backward classes including Scheduled Castes and Scheduled Tribes, which coincides with "backward class of citizens" covered in Article 16(4)]. The plain interpretation of this new expression, read along with the Statement of Objects and Reasons brings home the idea that this allusion to "special provision" - including reservations, is meant only for the newly created class and *excludes* the classes described under Article 15(4) and 16(4).

This is the base on which the petitioners' mount their challenge, contending that the exclusion falls foul of the equality code and amounts to a violation of basic structure.

33. The Union's position was that objections to the exclusion of SC/ST/OBC communities could not be countenanced; at any rate, such exclusion did not reach to the level of damaging the basic structure of the Constitution. It was contended that the mechanism of reservation itself *per se*, carries within it the idea of exclusion. Consequently, the "set apart" by way of reservation for SC/ST/OBC collectively to the tune of 50% by itself, implies that others are kept apart and cannot question such reservation for the weaker sections of society (as settled in *Indra Sawhney*). It was submitted that the exclusion of all categories except the target groups [i.e, exclusion of SC/ST/OBC and the general category who do not fulfil the economic criteria] was not discriminatory, let alone violative of the basic structure of the Constitution.

34. Clearly there is no dispute, in the manner that the phrase "other than" appearing in Articles 15(6) and 16(6), is to be read – either on the side of the petitioners, or the respondents. That *exclusion* is implicit, is agreed upon – the point of divergence is only on whether such an exclusion is *permissible* or not. To examine this, it is necessary to trace the history of the provisions that constitute the Equality Code and its content, and the cases that have interpreted them, in order to cull out the principle(s), relevant for a basic structure assessment. For this, I will *firstly* trace the history of the provisions that constitute the Equality Code, *secondly* discuss the content of this Code; *thirdly*, how this Equality Code is in itself, a part of the basic structure; and *lastly* how the impugned amendment violates the basic structure on the ground of exclusion.

A. Historical analysis of the Equality Code

(i) Article 15

35. The original draft Constitution contained a provision that comprehensively encompassed the idea of non-discrimination, in draft Article 9, which later emerged as Article 15. This article, and more specifically Article 15(2), prohibited discrimination in various spheres and commended that access be made available to a range of facilities, spaces, and resources on a non-discriminatory basis.

36. The history and evolution of this Article as it stands today, is revealing. The Motilal Nehru Report 1928[36], had recommended, in the demand for self-rule a charter of governance and basic human rights. The relevant provision, Clause 4 (v), (vi), (xiii) and (xiv) read as follows:

> *(v) All citizens in the Commonwealth of India have the right to free elementary education without any distinction of caste or creed in the matter of admission into any educational institutions, maintained or aided by the state, and such right shall be enforceable as soon as due arrangements shall have been made by competent authority. Provided that adequate provisions shall be made by the State for imparting public instruction in primary schools to the children of members of minorities of considerable strength in the population through the medium of their own language and in such script as in vogue among them. Explanation:- This provision will not prevent the State from making the teaching of the language of the Commonwealth obligatory in the said schools.*
>
> *(vi) All citizens are equal be for the law and possess equal civic rights.*
>
> ********** **********
>
> *(xiii) No person shall by reason of his religion, caste or creed be prejudiced in any way in regard to public employment, office of power or honour and the exercise of any' trade or calling.*
>
> *(xiv) All citizens have an equal right of access to, and use of, public roads, public wells and all other places of public resort."*

37. Similarly, the historic Poona Pact[37] contained the seeds of what are now Articles 15 and 16:

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[36] Motilal Nehru Report, 1928 <https://www.constitutionofindia.net/historical_constitutions/nehru_report__motilal_nehru_1928__1st%20January%201928>

[37] Poona Pact, Agreed to by Leaders of Caste-Hindus and of Dalits, at Poona on 24-1932 <https://www.constitutionofindia.net/historical_constitutions/poona_pact_1932__b_r_ambedkar_and_m_k_gandhi__24th%20September%201932>

> *"…8. There shall be no disabilities attached to any one on the ground of his being a member of the Depressed Classes in regard to any election to local bodies or appointment to the public services. Every endeavour shall be made to secure a fair representation of the Depressed Classes in these respects, subject to such educational qualifications as may be laid down for appointment to the Public Services.*
> *9. In every province out of the educational grant an adequate sum shall be ear-marked for providing educational facilities to the members of Depressed Classes,"*

38. Dr. Ambedkar[38] and Sh. K.M. Munshi[39], had drafted two versions, on similar lines. These two drafts were discussed by the Sub-Committee on Fundamental Rights and an amended form, was included in their draft report:

> *(1) All persons within the Union shall be equal before the law. No personal shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on grounds of religion, race, caste, language or sex.*
> *In particular –*
> (a) *There shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public*.[40]

39. After discussions, the Advisory Committee recommended that the non-discrimination provision would be an <u>independent clause</u> protecting a 'citizen', and the ground of 'language' was dropped. Members of the

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[38] Art. II(1)(4) in Dr. B. R. Ambedkar's draft, available in B. Shiva Rao, *'The Framing of India's Constitution: Select Documents'*, vol. II, 4(ii)(d), p. 86:

> "*Whoever denies to any person, except for reasons by law applicable to persons of all classes and regardless of their social status, the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutions, roads, paths, streets, tanks, wells, and other watering places, public conveyances on land, air or water, theatres, or other places of public amusement, resort or convenience, where they are dedicated to or maintained or licensed for the use of the public, shall be guilty of an offence".*

[39] Art. III (1), (3), (4)(b) in K.M. Munshi's draft available in B. Shiva Rao, *'The Framing of India's Constitution: Select Documents'*, vol. II, 4(ii)(b), p. 74-75.

> *"All persons irrespective of religion, race, colour, caste, language, or sex are equal before the law and are entitled to the same rights and are subject to the same duties.*
> *Women citizens are the equal of men citizens in all spheres of political, economic, social and cultural life and are entitled to the same civil rights and are subject to the same civil duties unless where exception is made in such rights or duties by the law of the Union on account of sex.*
> ***
> *All persons shall have the right to the enjoyment of equal facilities in public places subject only to such laws as impose limitations on all persons, irrespective of religion, race, colour, caste or language.*"

[40] Draft report, Annexure, clause 4 available in B. Shiva Rao, *'The Framing of India's Constitution: Select Documents'*, vol. II, 4(iv), p. 138.

Minority Sub-Committee, then considered this clause and made further recommendations – including, that education and schools should not be within the purview of this provision. A four-member sub-committee including Dr. Ambedkar was constituted and tasked to draw a specific provision in this regard. This resulted in a general provision which reads as follows: "*the State shall make no discrimination against any citizens on grounds of religion, race, caste or sex*", but it was clarified that with regard to access to trading establishments, restaurants, etc., '*sex'* would not be a prohibited ground. This too, did not pass muster and therefore, the re-drafted clause[41] had a general principle prohibiting discrimination, with a separate articulation within the provision which allowed for separate amenities for the benefit of women and children. With minor changes, this was included as clause 11 in the Draft Constitution of October 1947, and was later accepted by the Drafting Committee without change, as Article 9. The debates in the Constituent Assembly leading to the framing of Articles 15(1) and 15(2) clearly point to the overarching idea of *non-discrimination* as one of the basic facets of equality [which is reflected clearly in the jurisprudence of this court; elaborated more in **Part III (A)**].

40. Laws or executive action that further discrimination, directly or *indirectly*, on proscribed grounds, have also been recognised as violative of the right to equality, and consequently have been struck down, routinely by this court[42].

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[41] *"(1) The State shall make no discrimination against any citizen on the grounds of religion, race, caste or sex.*
(2) There shall be no discrimination against any citizen on any ground of religion, race, caste, or sex in regard to –
(a) Access to trading establishments including public restaurants and hotels;
(b) The use of wells, tanks, roads, and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public:
Provided that nothing contained in this clause shall prevent separate provision being made for women and children".
Advisory Committee Proceedings, April 21-22, 1947; and Interim Report of the Advisory Committee, Annexure. *Select Documents*, vol. II, 6(iv) and 7(i), p. 221, 253, 254-4, 296

[42] *Air India v. Nargesh Mirza* (1981) SC 1829, 1982 SCR (1) 438; *Vishaka v. State of Rajasthan* (1997) 6 SCC 241: 1997 SCC (Cri) 932; *Anuj Garg and Others v. Hotel Association of India and Others,* (2008) 3 SCC 1;

(ii)<u>*Article 16*</u>

41. As far as Article 16 goes, the idea behind that provision was to achieve the goal of equal opportunity (as appearing in the Preamble) in matters of public employment. The difference between Articles 15(1) and 16(1) is that the former applies generally and prohibits the State from discriminating on enumerated grounds in diverse activities – including access to educational institutions, amenities, and other public goods, which are to be made available without regard to caste, religion, or sex, etc. Article 16(1) is a positive right declaring that all are equal in terms of opportunity for public employment. Article 16(2) goes on to enumerate grounds such as caste, race, religion, caste, sex, descent, place of birth and residence [few of which are different from the proscribed ground under Article 15(1)] as grounds on which the *state cannot discriminate*. Article 16(3) empowers Parliament (to the exclusion of State legislatures) to enact law, prescribing requirements as to residence within a State or Union Territory, for a class or classes of employment or appointment to local or other authorities, within a State or Union Territory. The Constitution makers did not wish to arm the State legislature with the power of prescribing local residential qualifications for employment within the State or local authorities and preferred to entrust that power with the Parliament which were expected to lay down principles of general application in that regard. Article 16(4) is the only provision in the original Constitution which enabled *reservation* – in favour of any backward class of citizens that were not adequately represented in the services under the State.

National Legal Services Authority v UOI and Others (2014) 5 SCC 438; *Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.* (2019) 11 SCC 1; *Vineeta Sharma v. Rakesh Sharma & Others*, (2020) 9 SCC 1; *Secretary, Ministry of Defence v. Babita Puniya & Others* (2020) 7 SCC 469; *Lt. Col. Nitisha & Others v. Union of India & Others*, 2021 SCC OnLine SC 261.

42. In this context, in that part of the debate dealing with "backward classes" in draft Article 10(1)- in the Constituent Assembly Debates, Dr. Ambedkar spoke about the three points of view which recommended reconciliation to a workable proposition: firstly, that every individual qualified for a particular post should be free to apply and compete for it; secondly, that the fullest operation of the first rule would mean that there ought to be no reservation for any class or community at all; and the third significant point that though theoretically, equality of opportunity should be available to all, at the same time, some provision should be made for entry of certain community "*which have so far been outside the administration*"[43].

43. Proposing Article 10(3), Dr. Ambedkar stated that Article 10(1) (precursor to Article 16(4) and 16(1) respectively) is a *"generic principle"*:

> "*At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now—for historical reasons—been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services."*

Dr. Ambedkar then went on to say that reservation should operate ideally for a minority of posts and that the identifying principle for positive discrimination would be use of a "*qualifying phrase such as backward*"[44] in whose favour an exception could be made without which the exception could ultimately eat up the rule.

44. The idea or dominant theme behind the entire scheme of Article 16, right through Article 16(4) - is <u>*equality of opportunity*</u> in matters of public employment. At the same time, the Constitution framers realised that <u>substantive equality</u> would not be achieved unless allowance were made through some special provision ensuring representation of the most backward class of citizens who were hitherto, on account of caste practices,

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[43] Constituent Assembly Debates, Vol. 7, 30th November 1948, 7.63.205.
[44] *Ibid.*

or such constraints, barred from public employment. Therefore, the idea of Section 16(4) essentially is to enable representation, the controlling factor being *adequacy* of representation. That apart, the other control which the Constitution envisioned was the *identification* of backward classes of citizens through entrenched provisions that set up institutions which were to function in an objective manner based on certain norms – Articles 340, 341 and 342, which relate to Identification of SC/ST/BC- and the newly added Article 342A.

(iii) Article 17

45. The anxiety of the Constitution framers in outlawing untouchability in all forms (without any reference to religion or community), resulted in its express manifestation as Article 17, wherein the expression "untouchability" was left undefined. The debates of the Assembly suggest that this was intentional. B. Shiva Rao's treatise[45] discloses that proceedings of the Sub-Committee on Fundamental Rights, which undertook the task of preparing the draft provisions on fundamental rights suggested a clause enabling for the abolition of "untouchability"- this was Clause 4(a) of Article III of K.M. Munshi's draft of fundamental rights:

> *"Untouchability is abolished and the practice thereof is punishable by the law of the Union."*

And similarly, Article 11(1) of Dr Ambedkar's draft provided that:

> *"any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom is abolished."*

46. Considerable deliberations took place since there was unanimity among all sections of representatives in the Constituent Assembly that the practice of untouchability (in all its forms) had to be outlawed. The Assembly

[45] B. Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at p. 202.

bestowed its attention to the *minutiae* of what constitutes untouchability, whether its forms of practice in the Hindu religion alone qualified for prohibition, or also inter-communally, etc. Dr. Ambedkar, K.M. Munshi, Sardar Patel, and B.N. Rau, participated in all these deliberations. Shiva Rao observes that the Committee came to the general conclusion that "*the purpose of the clause was to abolish untouchability in all its forms—whether it was untouchability within a community or between various communities*"[46]. Attempts made to amend the article were deemed unnecessary due to the careful and extensive deliberations, and the unanimity amongst members; there was actually no change in the draft, which survived to become a part of the Constitution:

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

47. The result was an all-encompassing provision which Article 17 is as it stands, outlawing untouchability in all its forms - by the State, individuals, and other entities. The reach and sweep of this provision – like Article 15(2) is wide; it is truly horizontal in its application.

48. Given that the case law relating to Article 15 and 16 has substantially been covered in the judgment of Justice Dinesh Maheshwari, I have not reiterated the same. However, it is my considered opinion, that due weightage was not given to Article 17, which as argued by some of the petitioners, is also a part of the Equality Code; I have included some judgments which underscore the importance of this injunction and its continued need.

49. The social evil - of untouchability and its baleful effect of untouchability based discrimination was recounted by this court, in *State of Karnataka v.*

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[46] *Ibid.*

Appa Balu Ingale[47] :

> *"21. Thus it could be concluded that untouchability has grown as an integral facet of socio-religious practices being observed for over centuries; keeping the Dalits away from the mainstream of the society on diverse grounds, be it of religious, customary, unfounded beliefs of pollution etc. It is an attitude and way of behaviour of the general public of the Indian social order towards Dalits. Though it has grown as an integral part of caste system, it became an institution by itself and it enforces disabilities, restrictions, conditions and prohibitions on Dalits for access to and the use of places of public resort, public means, roads, temples, water sources, tanks, bathing ghats, etc., entry into educational institutions or pursuits of avocation or profession which are open to all and by reason of birth they suffer from social stigma. Untouchability and birth as a Scheduled Caste are thus intertwined root causes. Untouchability, therefore, is founded upon prejudicial hatred towards Dalits as an independent institution. It is an attitude to regard Dalits as pollutants, inferiors and outcastes. It is not founded on mens rea. The practice of untouchability in any form is, therefore, a crime against the Constitution. The Act also protects civil rights of Dalits. The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the Dalits in the national mainstream."*

50. The criterion for determining communities or castes as scheduled castes has been recognized as those who suffered on account of the practice of untouchability, and its pernicious effects, in *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College & Ors.*[48]*:*

> *"9. It appears that Scheduled Castes and Scheduled Tribes in some States had to suffer the social disadvantages and did not have the facilities for development and growth. It is, therefore, necessary in order to make them equal in those areas where they have so suffered and are in the state of underdevelopment to have reservations or protection in their favour so that they can compete on equal terms with the more advantageous or developed Sections of the community. Extreme social and economic backwardness arising out of traditional practices of untouchability is normally considered as criterion for including a community in the list of Scheduled Castes and Scheduled Tribes…."*

51. That SC communities are victims of the practise of untouchability, and the equality code was meant to provide them opportunities, and eliminate

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[47] 1995 Supp (4) SCC 469
[48] (1990) 3 SCC 130

discrimination, was narrated in the earlier decision in *Valsamma Paul & Ors. V. Cochin University & Ors*[49]*:*

> *"*7. […] *The practice of untouchability, which had grown for centuries, denuded social and economic status and cultural life of the Dalits and the programmes evolved under Articles 14 15(2) 15(4) and 16(4) aimed to bring Dalits into national mainstream by providing equalitarian facilities and opportunities. They are designated as "Scheduled Castes" by definition under Article 366(24) and "Scheduled Tribes" under Article 366(25) read with Articles 341 and 342 respectively. The constitutional philosophy, policy and goal are to remove handicaps, disabilities, suffering restrictions or disadvantages to which Dalits/ Tribes are subjected, to bring them into the national mainstream by providing facilities and opportunities for them…"*

52. In *Abhiram Singh and Ors. v. C.D. Commachen*[50] this court again revisited the "central theme" of elimination of discrimination of SCs:

> *"*118. […] *The Constitution is not oblivious to the history of discrimination against and the deprivation inflicted upon large segments of the population based on religion, caste and language. Religion, caste and language are as much a symbol of social discrimination imposed on large segments of our society on the basis of immutable characteristics as they are of a social mobilisation to answer centuries of injustice. They are part of the central theme of the Constitution to produce a just social order..."*

53. The Constitution Bench ruling in *Indian Young Lawyers Assn. (Sabarimala Temple) v. State of Kerala*[51] took note of the fact that the evil of untouchability, which kept out large swathes of Indian population in the thrall of caste-based exclusion, was sought to be dismantled, and real equality was sought to be achieved:

> *"386. The rights guaranteed under Part III of the Constitution have the common thread of individual dignity running through them. There is a degree of overlap in the Articles of the Constitution which recognise fundamental human freedoms and they must be construed in the widest sense possible. To say then that the inclusion of an Article in the Constitution restricts the wide ambit of the rights guaranteed, cannot be sustained. Article 17 was introduced by the Framers to incorporate a specific provision in regard to untouchability. The introduction of Article 17 reflects the transformative role and vision of the Constitution. It brings focus upon centuries of discrimination*

[49] (1996) 3 SCC 545
[50] (2017) 2 SCC 629
[51] (2019) 11 SCC 1

> *in the social structure and posits the role of the Constitution to bring justice to the oppressed and marginalised. The penumbra of a particular Article in Part III which deals with a specific facet of freedom may exist elsewhere in Part III. That is because all freedoms share an inseparable connect. They exist together and it is in their co-existence that the vision of dignity, liberty and equality is realised. As noted in Puttaswamy [K.S. Puttaswamy (Privacy-9 J.) v. Union of India, (2017) 10 SCC 1], "the Constituent Assembly thought it fit that some aspects of liberty require a more emphatic declaration so as to restrict the authority of the State to abridge or curtail them…"*

54. The centrality of Article 17 and the constitutional resolve to eliminate untouchability in all forms to any debate on equality involving SC/ST communities is undeniable. Other provisions such as Article 15 (2), Article 23 and 24 also contain links to Article 17, because the constitution aimed not merely at outlawing untouchability, but ensuring access to public amenities and also guaranteeing that the stigma of caste discrimination should not result in exploitation.

(iv) *Other provisions in the Constitution*

55. Apart from Article 16, the other provisions which expressly talked of *reservations* are not in regard to public employment but are in respect of elective offices – Articles 330 and 332 – both of which enabled reservation in favour of SCs and STs in proportion to their population in the concerned States legislative or Parliamentary constituencies.

56. The other provisions which expressly forbid and injunct the state from practising discrimination are Article 29(2) and Article 325. Article 29 (2) enacts that

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

Article 325 reads as follows:

> ***"325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex:*** *There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any*

such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

B. Content of Equality Code

57. The *equality code* (Articles 14, 15, 16, and 17), so referred to in various previous decisions of this court) does not merely visualize a bland statement of equality before law and equal protection of law but also contains specific injunctions against state from discriminating on proscribed grounds [such as caste, race, sex, place of birth, religion, or any of them, in Article 15; and caste, sex, religion, place of residence, descent, place of birth, or any of them, in Article 16]. The engraining of these specific heads – enjoining the State *not* to discriminate on such specific heads, such as *caste, religion or sex* is therefore, as much part of equality code, as the principle of equality enacted in general terms, in Article 14. The inclusion of Article 17 – as an unequivocal injunction, against untouchability, of any form, enjoins the state to forbear caste discrimination, overtly, or through classification, and looms large as a part of the equality code and indeed the entire framework of the Constitution.

58. Joseph Raz described this dimension as *"the ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives*".[52] Dr. Ambedkar put the issue very poignantly, saying that systematic caste discrimination was akin to slavery, since such subjugation *"means a state of society in which some men are forced to accept from others the purposes which control their conduct*"[53]. In caste based hierarchal societies, which discriminated against a significant segment of society, the extent of deprivation – *of choice* was such that those born into those castes or

[52] Joseph Raz, The Morality of Freedom (OUP, 1986), p. 369.
[53] Dr. B.R. Ambedkar, Annihilation of Caste (1939).

communities were not part of the community and were termed "outcastes". This exclusion was specifically *targeted against*, and sought to be *eliminated*, by the Constitution.It is inconceivable that the deletion of caste (as long as Indian society believes in and practices the caste system) as a proscribed ground through a constitutional amendment would stand scrutiny. This example is given to illustrate that the *value of proscribing caste discrimination is rooted in the express provision of the Constitution, as a part of the equality code*. Equally, one cannot visualize an amendment which promotes or even permits discrimination of other proscribed grounds, such as gender, descent, or religion. All this would *per se* violate equality - both textually, as well as the *principle* of equality, which the Constitution propounds. The *rationale* for enacting these as proscribed grounds either under Article 15 or 16 (or both) was that the framers of the Constitution were aware that courts could use these markers to determine when reasonable classification is permissible. Thus, for instance, if the proscribed ground of 'gender' was absent, it could have been argued that gender is a basis for an *intelligible differentia*, in a given case. To ensure that such classifications and arguments were ruled out, these proscribed grounds were included as specific injunctions against the State. The provisions, and the code, therefore, are not only about the grand declaratory sweep of equality: but equally about the absolute prohibition against exclusion from participation in specified, enumerated activities, through entrenched provisions.

59. A closer look at Article 15, especially Article 15(2), would further show that likewise most of the proscribed grounds in Article 15(1) were engrafted to ensure that access to public resources – in some cases not even maintained by the state, but available to the public generally, could not be barred. This provision too was made to right a *historical wrong*, i.e., denial of access to the most deprived sections of society of the most basic

resources, such as water, food, etc. The injunction against untouchability under Article 17, ensuring that such practice is outlawed is strengthened by taking away the subject matter from state domain and placing it as an exclusive legislative head to the Parliament through Article 35. In a similar vein, Articles 23 and 24 (although seemingly unconnected with the issue of equality), enact very special rights – which are enforceable against both the State agencies and others. Through these articles, the forms of discrimination, i.e., exploitation, trafficking, and forced labour (which was resorted to against the most deprived classes of society described as SCs and STs) was sought to be outlawed.

60. The elaborate design of the Constitution makers, who went to great lengths to carefully articulate provisions, such that all forms of discrimination were eliminated - was to ensure that there was no scope for discrimination of the kind that the society had caused in its most virulent form in the past, before the dawn of the republic. These, together with the affirmative action provisions - initially confined to Articles 15(3) and 16(4), and later expanded to Article 15(4) and 15(5) - was to guarantee that not only facial discrimination was outlawed but also that the existing inequalities were ultimately eliminated. To ensure the latter, only one segment, i.e., socially and educationally backward classes were conceived as the target group, i.e., or its beneficiaries. Therefore, in this Court's opinion, the basic framework of the constitution or the idea and *identity* of equality was that:

(i) There ought to be no discrimination in any form, for any reason whatsoever on the proscribed grounds, including in matters of public employment;

(ii) That the provision for affirmative action was an intrinsic part of the framework and value of equality, i.e., to ensure that the equality of classes hitherto discriminated and ostracized, was eventually redressed.

61. This was recognized in *Jaishri Laxmanrao Patil* as "the obligation or duty to equalize those sections of the population" on the States' part.[54] Likewise, the observations of Sahai, J. in *Indra Sawhney* characterize Article 15(4) and 16(4) as 'obligations'.

C. Equality Code is a part of the basic structure

62. That the principle of equality is the most important indispensable feature of the Constitution and destruction thereof will amount to changing the basic structure of the Constitution has been held in numerous cases. That it is an inextricable part of the basic structure, is clearly enunciated in *Kesavananda Bharati* (para 1159, SCC), *Minerva Mills* (para 19), *Raghunath Ganpatrao* (para 142), *R. C. Poudyal* (para 54), *Indra Sawhney* (para 260-261), *Indra Sawhney (2) v. Union of India*[55] (para 64-65), *M. Nagaraj* (para 31-32) *and I.R. Coelho* (para 105), among others.

63. In *Indira Gandhi,* Y.V. Chandrachud, J. identified "*equality of status and opportunity*" to all its citizens, as an unamendable basic feature of the Constitution. In the same case, K. K. Mathew, J. identified specific provisions of the Constitution, relating to the equality principle, as a part of the basic structure:

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

64. In a five-judge bench decision, through his concurring opinion, S.B. Sinha, J stated, in *Saurabh Chaudri & Ors. v. Union of India & Ors.*[56] That:

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[54] See paragraph 23-24, SCC.
[55] (2000) 1 SCC 168
[56] (2003) 11 SCC 146; 2003 (Supp 5) SCR 152

> *"*82. *Article 14 of the Constitution of India prohibits discrimination in any form. Discrimination at its worst form would be violative of the basic and essential feature of the Constitution. It is trite that even the fundamental rights of a citizen must conform to the basic feature of the Constitution. Preamble of the Constitution in no uncertain terms lays emphasis on equality."*

65. A nine-judge bench of this court, in *S.R. Bommai v. Union of India*[57], though not dealing with a constitutional amendment, opined that "*these fundamental rights enshrined in Articles 15, 16, and 25 to 30 leave no manner of doubt that they form part of the basic structure of the Constitution*....". Again, in *M. Nagaraj*, it was opined that *"...the principle which emerges is that "equality" is the essence of democracy and, accordingly a basic feature of the Constitution*."

66. *I.R. Coelho v. State of Tamil Nadu*[58] is the next important decision, of note, by a nine-judge bench decision. The court, undoubtedly was not concerned with the *direct* impact of an amendment on Article 14 or equality, but with the effect of an overarching immunizing provision such as Article 31-B. It was unanimously held, that:

> "109. *It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in Kesavananda Bharati case [(1973) 4 SCC 225] clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution. Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in Indira Gandhi case [1975 Supp SCC 1].*
> […]
> *141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure*

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[57] *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, (hereinafter "*S.R. Bommai*").
[58] (2007) 2 SCC 1

doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.

142. *There is also a difference between the 'rights test' and the 'essence of right test'. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test as applied in M. Nagaraj's case (supra) will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate. We may also note that in Minerva Mills and Indira Gandhi's cases, elimination of Part III in its entirety was not in issue. We are considering the situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunization at will by the Parliament which, in our view, is incompatible with the implied limitation of the power of the Parliament. In such a case, it is the rights test that is appropriate and is to be applied…"*

67. Observations in the cases referred to above, therefore, have outlined that certain provisions of the equality code – rather the ideas – and principles intrinsic to Articles 14 and 15, and the rights in Articles 19 and 21, are part of the basic structure of the Constitution.

68. Speaking of the general right to equality, this court in *Vikas Sankhala & Ors. v. Vikas Kumar Agarwal & Ors*[59] stated that

"65. Going by the scheme of the Constitution, it is more than obvious that the framers had kept in mind social and economic conditions of the marginalized Section of the society, and in particular, those who were backward and discriminated against for centuries. Chapters on 'Fundamental Rights' as well as 'Directive Principles of State Policies' eloquently bear out the challenges of overcoming poverty, discrimination and inequality, promoting equal access to group quality education, health and housing, untouchability and exploitation of weaker section. In making such provisions with a purpose of eradicating the aforesaid ills with which marginalized Section of Indian society was suffering (in fact, even now continue to suffer in great measure), we, the people gave us the Constitution which is transformative in nature…"

It was also held that

*"*67. […] *when our Constitution envisages equal respect and concern for each individual in the society and the attainment of the goal requires special attention to be paid to some, that ought to be done. Giving of desired concessions to the reserved category persons, thus, ensures equality as a levelling process. At jurisprudential level, whether reservation policies are defended on compensatory principles, utilitarian principles or on the*

[59] *Vikas Sankhala v. Vikas Kumar Agarwal,* (2017) 1 SCC 350.

principle of distributive justice, fact remains that the very ethos of such policies is to bring out equality, by taking affirmative action…"

69. In *Samatha v. State of A.P. & Ors.*[60] this court underlined the unity of directive principles and fundamental rights, and the deep, intrinsic connection between equality, liberty, and fraternity:

> *"*72. […] *Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and interdependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good. The founding fathers with hind sight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also charged the State as its policy to remove obstacles, disabilities and inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and mirage."*

70. In a similar manner, *Indian Medical Association & Ors. v. Union of India & Ors.*[61] underscored the centrality of equality and the egalitarian principle, of the Constitution:

> *"*165. *It is now a well settled principle of our constitutional jurisprudence that Article 14 does not merely aspire to provide for our citizens mere formal equality, but also equality of status and of opportunity. The goals of the nation-state are the securing for all of its citizens a fraternity assuring the dignity of the individual and the unity of the nation. While Justice – social, economic and political is mentioned in only Article 38, it was also recognized that there can be no justice without equality of status and of opportunity (See M. Nagaraj). As recognized by Babasaheb Ambedkar, at the moment that –ur Constitution just set sail, that while the first rule of the ship, in the form of formal equality, was guaranteed, inequality in terms of access to social and economic resources was rampant and on a massive scale, and that so long as they individually, and the social groups they were a part of, continue to not access to social and economic resources that affords them dignity, they would always be on the margins of the ship, with the ever present danger of falling off that ship and thereby never partaking of the promised goals of that ship. Babasaheb Ambedkar with great foresight remarked that unless such more*

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[60] *Samatha v. State of A.P*., (1997) 8 SCC 191; 1997 (Supp 2) SCR 305
[61] *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179

> *fundamental inequalities, that foster conditions of injustice, and limit liberty of thought and of conscience, are eradicated at the earliest, the ship itself would be torn apart.*
>
> […]
>
> 168. *An important and particular aspect of our Constitution that should always be kept in mind is that various aspects of social justice, and an egalitarian social order, were also inscribed, not as exceptions to the formal content of equality but as intrinsic, vital and necessary components of the basic equality code itself. To the extent there was to be a conflict, on account of scarcity, it was certainly envisaged that the State would step in to ensure an equitable distribution in a manner that would be conducive to common good; nevertheless, if the state was to transgress beyond a certain limit, whereby the formal content of equality was likely to be drastically abridged or truncated, the power of judicial review was to curtail it…"*

71. Therefore, the design of the Constitution, which by the Preamble, promises justice – social, economic, and political, liberty of thought and expression, equality, and fraternity; and the various provisions which manifest it (Articles 14-18, 19, 20-21, 23-24, 29, 38-39, 41 and 46) – articulate an organic and unbreakable bond between these concepts, which are guarantees. The idea of the twin assurance of non-discrimination and equality of opportunity, is to oblige the state to ensure that meaningful equality is given to all. Similarly, the fraternal principle binds both the state and the citizen, as without fraternity, liberty degenerates to individualistic indulgence. Without dignity, equality and liberty, are rendered hollow. This inviolable bond, therefore, is part of the core foundation of our republic. Freedom from colonial rule was with the agenda of creating a democratic republic, reflecting the unique genesis of its nation, holding the people with diverse languages, cultures, religions with a common bond of egalitarianism, fraternity, and liberties, assuring dignity to all – the State and the citizens were to ensure that these were preserved, at all times, for each individual.

72. This principle of equality – non-discrimination or non-exclusion, never had occasion to be considered in past decisions that examined amendments to

the Constitution which dealt with different facets of equality – such as the ceiling on land holding (*Waman Rao, Bhim Singhji v. Union of India*[62]) or omission of princely privileges (*Raghunath Ganpatrao)*. Thus the court did not adjudicate upon the non-discriminatory or non-exclusionary principle. In each case, the facet of equality alleged to have been violated by a constitutional amendment, limited or affected property. In other words, the focus of every instance where an amendment was struck down (barring those in *L. Chandra Kumar, P. Sambamurthy, Indira Gandhi,* and *Kihoto Hollohan*) were defining of excess property in the hands of the "haves" and the more fortunate, in possession of land exceeding ceilings (agrarian or otherwise), and dismantling of princely privileges deemed antithetical to republicanism and thereby promoting republicanism and equality. The court's caveat – be it in *Kesavananda Bharati, Waman Rao* or *Bhim Singhji* – were only to the extent that oversight, to ensure that the contents of the laws adhered to the directive principles and were not a mask or veneer to extinguish liberties enshrined in Articles 14 and 19, and were to be retained.

73. The effort of the State in each of these instances, was to create new avenues by expropriation of wealth, assets, and properties from the 'haves' and ensure distributive justice in furtherance of the objectives under Article 38 [particularly clause (2); and also Article 39 (particularly clause (b)] – that of minimising inequalities, and distribution of ownership and control of material resources, respectively. Thus, 263 entries out of the total of 284 entries in the IXth Schedule of the Constitution, are legislations relating to land reforms, land ceilings, and other agrarian reforms acts, of the States and Union Territories.

74. In the other class of amendments where the constitutional ethos was

[62] *Bhim Singhji v. Union of India*, (1981) 1 SCC 166, (hereinafter as "*Bhim Singhji*").

promoted [introduction of Article 21A, and Article 15(5) (to facilitate Article 21A)], this court's decisions (in *Pramati* and *Society for Unaided Schools of Rajasthan v. Union of India*[63] respectively) are telling, because these provisions did not practice discrimination in the sharing of new benefits or rights, and were *inclusive*. The court naturally upheld them. The only challenge dealing with equality – in *M. Nagaraj*, failed because the right to "catch up rule" was a derivative principle evolved by the court, in the context of the larger canvas that there was no right to promotion [Article 16(4) did not carry within it the right to promotion – a formulation in *Indra Sawhney*, which holds good even as on date, for all classes save the SCs and STs]. This court held that such rule did not negate the "essence" of equality or its "egalitarian" facet.

75. In juxtaposition to all this, for the first time, the constituent power has been invoked to practice exclusion of victims of social injustice, who are also amongst the poorest in this country, which stands in stark contradiction of the principle of egalitarianism and social justice for all. The earlier amendments were aimed at ensuring egalitarianism and social justice in an inherently unequal society, where the largest mass of people were impoverished, denied access to education, and other basic needs.

76. In every case, which implicates the right to equality, when the Court is asked to adjudge upon the validity of a Constitutional amendment, invariably what the Court focuses its gaze upon, is what is facet of equality. The debates which led to the framing of the Constitution, are emphatic that the equalizing principle is a foundational tenet "an article of faith" upon which our democratic republic rests. Equality - both as a principle, an idea, and as a provision is "so mixed" as to make it impossible to extricate the form from the substance, the idea from its expression. Likewise, equality -

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[63] *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, (hereinafter as "*Society for Unaided Schools of Rajasthan*").

of protection before the law, of opportunity - as a right not to be discriminated against on grounds enumerated in Articles 15(1) and 16(1) are engrained principles, nay, entrenched entitlements. The question which this court therefore addresses, in every case which complains of infractions of the essential features of the Constitution is - has that principle been undermined or the core idea (of equality) been distorted.

77. The bedrock value which enlivens Articles 14, 15, 16, 17, 18, 29(2), and 325, therefore, is *the principle of non-discrimination*. Alongside the generic principle of equality, captured by Article 14, is the idea that certain segments of society which had been historically stigmatised and discriminated on account of the caste identity of its members, should be the beneficiaries of *protective* discrimination to enable them proper access to public goods, facilities, spaces, and representation in public employment. The idea of equality, therefore, is tethered to another inseparable facet, i.e., non-discrimination, *that there cannot be any exclusion by the state in these vital spheres of human activity.* This principle of non-discrimination is what emerges from the history of the provisions (outlined previously), and the precedents of this court. Further, the manner in which these provisions have been interpreted reiterate that integral to that non-discriminatory facet, is the idea of positive discrimination in favour of hitherto discriminated communities ("Harijans", as termed in *N.M. Thomas,* or SC/STs). Consequently, the irresistible conclusion is that non-discrimination – especially the importance of the injunction not to exclude or discriminate against SC/ST communities [by reason of the express provisions in Articles 17 and 15] constitutes the essence of equality: that principle is the core value that transcends the provisions themselves; this can be said to be part of the basic

structure.

D. Impact/effect of the phrase "other than" in the impugned amendment

(i) Test of reasonable classification

78. At the outset, it is acknowledged that the doctrine of reasonable classification is not *per se* a part of the basic structure; it is *however*, a method evolved by this court to breathe life into and provide content to the right to equality under Article 14 – the latter being a part of the basic structure. The contention made by those supporting the amendment – that treating the SC, ST and OBC as a distinct class from those who are not covered under Article 15(4) and 16(4) is a reasonable classification, necessitates further scrutiny.

79. It was the submission of the learned Attorney General and Solicitor General, that SC/ST/OBC communities who have thus far enjoyed and will continue to enjoy special provision and reservation made in their favour (Articles 15(4) and 16(4)) constitute a homogenous class, the members of whose communities are beneficiaries of existing reservation [which also includes the poorer members among their group], whereas the beneficiaries of the new EWS reservation, were those who did not enjoy such benefits. Consequently, there was no deprivation of opportunity *within* the quota/silo set apart for the former category. That further opportunities are being denied to them on account of the creation of the 10% quota, marginally affects them[64]. Such adverse effect, it was argued, could not be characterized as a shocking breach of the equality code or that it affected the identity of the Constitution. It was submitted furthermore, that even in the existing reservation, the SC/ST/OBC candidate belonging to such

[64] By way of example, it was submitted that in Central Universities and Central services so far, the OBC communities could compete in 27% of the seats reserved for them and in addition also participated as open category candidates. The total available for them is 77% and with the introduction of the EWS category along with the exclusion class, the number has been reduced to 67% - which was argued as only margically affecting them, at best.

category, could compete in the quota set apart for their caste or class and not of the quota of each other. Thus, the SC candidates cannot compete in the quota set apart for SC or OBC. This, it was urged is reasonable classification by which unequals are not treated equally. This characterization of the classification, and justification for the impugned amendment, found favour in the judgments by Dinesh Maheshwari, Bela Trivedi, and J.B. Pardiwala, JJ. I respectfully disagree with this conclusion.

80. I am of the opinion that the application of the doctrine classification differentiating the poorest segments of the society, as one segment (i.e., the forward classes) *not being beneficiaries* of reservation, and the other, the poorest, who are subjected to *additional* disabilities due to caste stigmatization or social barrier based discrimination – the latter being *justifiably* kept out of the new reservation benefit, is an exercise in deluding ourselves that those getting social and educational backwardness based reservations are somehow more fortunate. This classification is plainly contrary to the essence of equal opportunity. If this Constitution means anything, it is that the Code of Articles 15(1), 15(2), 15(4), 16(1), 16(2), and 16(4) *are one indivisible whole.* This court has reiterated time and again that Articles 16(1) and 16(4) are *facets* of the same equality principle. That we need Article 15(4) and 16(4) to achieve equality of opportunity guaranteed to all in Articles 15(1) and 16(1) cannot now be undermined, through this reasoning, to hold that the theory of classification permits exclusion on this very basis.

81. In *State of West Bengal v. Anwar Ali Sarkar*[65], one of the earliest decisions to utilize the classification principle held (per Mahajan, J), that:

> "64. […] *The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which*

[65] *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCC 1; 1952 SCR 284.

have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves, but no one will claim that competency to contract can be made to depend upon the stature or colour of the hair. "Such a classification for such a purpose would be arbitrary and a piece of legislative despotism."

Per SR Das, J:

*"*85. *It is now well established that while Article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated for the purpose of being specially subjected to discriminating and hostile legislation, it does not insist on an "abstract symmetry" in the sense that every piece of legislation must have universal application. All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation. This classification may be on different bases. It may be geographical or according to objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation…"*

82. This court, in the *State of Jammu and Kashmir v. Triloki Nath Khosa & Ors.*[66] that classification,

*"*31. […] *is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints, or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."*

(emphasis supplied)

83. Again, in *Mohammad Shujat Ali and Ors. v. Union of India*[67] this court observed that the *"doctrine of classification should not be carried to a point where instead of being a useful servant, it becomes a dangerous master"*.

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[66] *State of J&K v. Triloki Nath Khosa*, (1974) 1 SCC 19.
[67] *Mohd. Shujat Ali v. Union of India*, (1975) 3 SCC 76.

84. The basis of classification in the impugned amendment, enacted in furtherance of Article 46 – is economic *deprivation*. Applying that criterion, it is either income, or landholding, or value of assets or the extent of resources controlled, which are classifiers. The social origins, or identities of the target *group* are thus irrelevant. That there is some basis for classification, whether relevant or irrelevant, which is sufficient to differentiate between members of an otherwise homogenous group, is no justification. This was highlighted most recently by this court in *Pattali Makkal Katchi v. A. Mayilerumperumal and Ors*[68]:

> ***"79.** Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. Articles 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservation of appointments and posts for them to secure adequate representation. These provisions are intended to bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). However, it is to be noted that equality under Articles 15 and 16 could not have a different content from equality under Article 14 [State of Kerala v. N.M Thomas (1976) 2 SCC 310]. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial [Subramanian Swamy v. Director, Central Bureau of Investigation (2014) 8 SCC 682]."*
>
> (emphasis supplied)

85. Krishna Iyer, J, speaking in *Col. A.S. Iyer v. V. Balasubramanyam*[69] put the matter even more pithily:

> *"*57. […] *equality clauses in our constitutional ethic have an equalizing message and egalitarian meaning which cannot be subverted by discovering classification between groups and perpetuating the inferior-superior complex by a neo-doctrine…"*

[68] *Pattali Makkal Katchi v. A. Mayilerumperumal and Ors*, 2022 SCC Online SC 386.
[69] *Col. A.S. Iyer v. V. Balasubramanyam*, (1980) 1 SCC 634.

86. Classification, it is said, is a subsidiary rule, to give practical shape to the principle of equality. However, as emphasized by K. Subba Rao, J. in *Lachhman Das v. State of Punjab*[70]:

> *"*47. […] *Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basic for classification may gradually and imperceptibly deprive the Article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality; the fundamental right to equality before the law and the equal protection of the laws may be replaced by the doctrine of classification."*

87. The economic criteria, based on economic indicators, which distinguish between one individual and another, would be relevant for the purpose of classification, and grant of reservation benefit. The Union's concern that SC/ST/OBCs are beneficiaries of other reservations, which set apart the poorest among them, from the poorest amongst other communities which do not fall within Articles 15(4) and 16(4), cannot be a distinguishing factor, as to either constitute an *intelligible differentia* between the two, nor is there any *rational nexus* between that distinction and the object of the amendment, which is to eliminate poverty and further the goal of equity and economic justice.

88. There is a considerable body of past judgments enunciating the principle that any *exclusionary* basis, should be *rational*, and non-discriminatory. In *National Legal Services Authority v. Union of India & Ors.*[71] This court frowned upon the discrimination faced by transgender persons and held all practices which excluded their participation to be discriminatory. The court explained how treatment of equals and unequals as equals, is violative of *the basic structure*. Crucially, the court observed that:

> *"61. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws*

[70] *Lachhman Dass v. State of Punjab*, (1963) 2 SCR 353; [1963] 2 SCR 353.
[71] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

> *within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection…"*

89. The salience of the non-exclusionary precept as facets of non-discrimination (equality), liberty and dignity, was ruled in *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*[72] where it was emphasized that

> *"*300. […] *this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future-of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity."*

90. Similarly, in *Charu Khurana v. Union of India*[73] this court held that discrimination against women artistes in the cinema industry violated equality. It was held that dignity was an integral part of a person's identity:

> *"*33. […] *Be it stated, dignity is the quintessential quality of a personality and a human frames always desires to live in the mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to see that all citizens and they are not deprived of by reasons of economic disparity…"*

91. Can the fact that SC/ST and OBC communities are covered by reservations to *promote* their equality, to ensure that centuries old disadvantages and barriers faced by them (which are still in place, and is necessary to ensure their equal participation) be a ground for a *reasonable* classification? In my opinion, that cannot be the basis of classification. None of the materials placed on the record contain any suggestion that the SC/ST/OBC

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[72] *Indian Young Lawyers Assn. v. State of Kerala*, (2019) 11 SCC 1.
[73] *Charu Khurana v. Union of India*, (2015) 1 SCC 192.

categories should be excluded from the poverty or economic criteria-based reservation, on the justification that existing reservation policies have yielded such significant results, that a majority of them have risen above the circumstances which resulted in, or exacerbate, their marginalization and poverty. There is nothing to suggest, how, keeping out those who qualify for the benefit of this economic-criteria reservation, but belong to this large segment constituting 82% of the country's population (SC, ST and OBC together), will advance the object of economically weaker sections of society.

92. As an aside, it may also be noted that according to the figures available, 45 districts are fully declared, and 64, partially declared, as Fifth Schedule areas, out of 766 districts in the country. Majority of the population of these areas are inhabited by members of scheduled tribes. According to the Sinho Committee, 48.4% of all Scheduled Tribes are in the BPL (below poverty line) zone. This is 4.25 crores of the population. In this manner, the exclusion operates additionally, in a geographical manner, too, denying the poorest tribals, living in these areas, the benefit of reservation meant *for the poor*.

93. The reservations in favour of the poorest members of society, is not identity-based, or on past discrimination of the community concerned which shackled them within the confines of their caste (and what members of that caste could do). It is based on *persistent economic deprivation, or poverty*. The identifying characteristic is, therefore, entirely new. It has no connection with *social* or *educational* backwardness. The social or educational backwardness of the communities to which beneficiaries of the impugned amendments belong, are irrelevant. Therefore, caste or community is *not the identifying criteria or classifier*. In such eventuality, the wall of separation, so to say by which the exclusion clause ("other

than") keeps out the socially and educationally backward classes, particularly SC/STs *operates* to discriminate them, because overwhelming numbers of the poorest are from amongst them.

(ii) *Individual – as the beneficiary*

94. Further, in the case of economic deprivation, what is to be seen is that poverty – or its acute ill effects are equally felt by all, irrespective of which silos they are in. Thus, at an individual level, a tribal girl facing economic hardship, is as equally deprived of meaningful opportunity as a non-tribal, "non-backward"/forward class girl is. The characterization of existing reservations to SCs/STs/OBCs, as *benefits* or *privileges*, which disentitle them from accessing this *new resource*, of reservations based on economic deprivation, though they fall within the latter description, because "they are loaded with such benefits" (as contended by the respondents), with respect belittles their plight.

95. The problem with the "silo" argument furthered by the Union, is that it not only fails to locate the individual within a collective, reducing her visibility in the debate and robbing her of voice, but also further ignores the potentiality of each individual to excel, and cross the barriers of these very "silos". The polarity between "collective" rights and entitlements and "individual" is artificial. At the end of it all, the Constitution has to mean, and provide something, for the common individual/person; it has to provide the greatest good to all, not merely sections or collectives. Therefore, the view that the collective is the constitutive element, from whose prism the individual is viewed, diminishes the role and the focal point of inquiry, away from the individual, thereby affording a convenient way of placing people in different "silos".

96. This court's understanding, in the past too, has been that equality of opportunity is individual – likewise, the benefit of reservation too is made on the basis of the community's social and educational backwardness, or

they being victims of the practice of untouchability: yet the individuals are recipients. In *M. Nagaraj*, therefore, it was held that

> *"…the concept of "equality of opportunity" in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right Under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims."*

97. The object of reservations is to benefit the individual, in the case of enabling access to public goods such as education, whereas in the case of elective office or even public office, though the individual is the recipient of the reservation, the *community* is expected to benefit, due to its *representation* through her. This was emphasized by this court in *K. Krishna Murthy* in the following words:

> *"*55. *It must be kept in mind that there is also an inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political representation at the grassroots level on the other hand. While access to higher education and public employment increases the likelihood of the socio-economic upliftment of the individual beneficiaries, participation in local-self government is intended as a more immediate measure of empowerment for the community that the elected representative belongs to."*

This goal of empowerment through 'representation', is not applicable in the case of reservations on the basis of economic criteria – which as the petitioners laboriously contended, is transient, temporary, and rather than a discernible 'group', is an individualistic characteristic. This distinction on the question of Article 16(6), is elaborated on further in **Part V**.

98. Apart from the fact that reservations are made for or in favour of collectives, which are the building blocks of society such as castes, they are meant to benefit individuals. Castes are merely a convenient method of identifying the backward communities whose members are beneficiaries. The fact remains that it is citizens who are meant to benefit from it. The entire jurisprudence, or even the text of Articles 15 and 16, bear out this

aspect. To say, therefore, that collectively communities identified as Scheduled Castes and Scheduled Tribe, are beneficiaries and that is reason enough to exclude those castes/tribes from the benefit of new resources (created by the state through the amendment) though undisputedly a substantial number of members of these historically marginalised communities and castes also fulfil the eligibility criteria that entitles one as *deserving* of the new resource, is nothing but discrimination at an individual level. This undermines the very basis of the promise of equal opportunity and equality of status which the Constitution makers so painstakingly and carefully conceived of as a guarantee for all, particularly the members of the most discriminated and deprived sections of the community, i.e., the SC and ST communities. In these circumstances it is cold comfort, therefore, for the person who otherwise fulfils all the characteristics of an identifier such as poverty – which is not based on social identity, but on deprivation – to be told that she is poor, as desperately poor or even more so than members of other communities (who were not entitled to the reparative reservations under Article 15(4) and 16(4)), yet she is being kept out because she belongs to a scheduled caste or scheduled tribe.

(iii) *Violation of the basic structure*

99. Poverty debilitates all sections of society. In the case of members of communities which faced continual discrimination – of the most venial form, poverty afflicts in the most aggravated form. The exclusion of those sections of society, for whose benefit non-discriminatory provisions were designed, is an indefensible violation of the non-discrimination principle, a facet that is entwined in the Equality Code, and thus reaches to the level of offending or damaging the very identity of the Constitution. To use the terminology in *I.R. Coelho*, the *impact* of this amendment on the equality

code which is manifested in its non-discriminatory or non-exclusionary form, leads it to radically damage the identity of the Constitution. The promise of the Constitution that no one will be discriminated on the ground of caste-based practices and untouchability (which is the basis of identification of such backward class of citizens as scheduled castes), is plainly offended. Therefore, the exclusionary clauses in articles 15(6) and Articles 16(6) damage and violate the basic structure of the Constitution.

100. The characterisation of including the poor (i.e., those who qualify for the economic eligibility) among those covered under Articles 15(4) and 16(4), in the new reservations under Articles 15(6) and 16(6), as bestowing "double benefit" is incorrect. What is described as 'benefits' for those covered under Articles 15(4) and 16(4) by the Union, cannot be understood to be a free pass, but as a reparative and compensatory mechanism meant to level the field – where they are unequal due to their *social* stigmatisation. This exclusion violates the non-discrimination and the non-exclusionary facet of the equality code, which thereby violates the basic structure of the Constitution.

101. The impugned amendment creates paths, gateways, and opportunities to the poorest segments of our society, enabling them multiple access points to spaces they were unable to go to, places and positions they were unable to fill, and opportunities they could not hope, ever to ordinarily use, due to their destitution, economic deprivation, and penury. These: destitution, economic deprivation, poverty, are markers, or *intelligible differentia*, forming the basis of the classification on which the impugned amendment is entirely premised. To that extent, the amendment is constitutionally indefeasible. However, by excluding a large section of equally poor and destitute individuals – based on their social backwardness and legally acknowledged caste stigmatization – from the benefit of the

new opportunities created for the poor, the amendment *practices* constitutionally prohibited forms of discrimination. The overarching principles underlying Articles 15(1), 15(2), and Articles 16(1), 16(2) is that caste based or community-based exclusion (i.e., the practice of discrimination), is impermissible. Whichever way one would look at it, the Constitution is intolerant towards untouchability in all its forms and manifestations which are *articulated* in Articles 15(1), (2), Articles 16, 17, 23 and 24. It equally prohibits exclusion based on past discriminatory practices. The exclusion made through the "other than" exclusionary clause, negates those principles and strikes at the heart of the equality code (specifically the non-discriminatory principle) which is a part of the core of the Constitution.

IV. Re Question No. 1: permissibility of special provisions (including reservation) based on economic criteria

102. At the outset, it is clarified that I am in agreement with the other members of this bench, that 'economic criteria' for the purpose of Article 15 is permissible and have provided my additional reasoning and analysis in this section; however, I diverge with regards to Article 16 for the purpose of reservations in appointment to public employment, which is elaborated in **Part V**.

A. Judicial observations on economic criteria

103. Repeated decisions of this court have iterated that caste alone could not be the criteria for determining social and educational backwardness. *M.R. Balaji* was the first to articulate this proposition. This was accepted in later decisions. The Union and other respondents in the present

challenge, relied on Article 46 and certain other provisions of Part IV of the Constitution. The text of Article 46 is extracted again for reference:

> *"46. The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."*

104. This court, in both *N.M. Thomas* and *Indra Sawhney* propounded the idea that preferential treatment based on classification, to further affirmative action, could be traced to Articles 15(1) and 16(1). However, it was emphasized that on the question of *reservation* for socially and educationally backward classes, scheduled castes and scheduled tribes, the field was occupied by Articles 15(4) and 16(4). At the same time, their location did not prevent the State from making classification for other groups. The question of whether the economic criterion alone could be the basis of such reservation was squarely addressed in *Indra Sawhney*. The court held that such reservation based *solely* on the application of the economic criterion was not justified. B.P. Jeevan Reddy, J. who authored the majority judgement on this aspect, observed that the office memorandum in question did not recite the concerned provision, and then proceeded to reason why it was unsustainable:

> *"845. ...Evidently, this classification among a category outside clause (4) of Article 16 is not and cannot be related to clause (4) of Article 16. If at all, it is relatable to clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of*

> *Article 16. On this ground alone, the said clause in the Office Memorandum dated May 25, 1991 fails and is accordingly declared as such."*

105. It is quite evident that the economic criterion as the basis for reservations, was not upheld on account of the *existing* structure and phraseology in Articles 15(1) and 16(1). There is nothing in the judgment in *Indra Sawhney* suggestive of this court's omnibus disapproval of the idea of rooting affirmative action (including reservation) on the basis of economic criteria. Nor did this court comment (or could have commented) on a possible future amendment to the Constitution, introducing the economic criteria as the basis for reservation or special provisions.

106. One of the questions considered in *Indra Sawhney* was whether reservations contemplated could be confined to what existed, in the form of Articles 15 and 16. This court, having regard to the existing structure of those provisions, answered the question as follows:

> "*744. The aspect next to be considered is whether clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside clause (4) i.e., under clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, — and not for all and sundry reasons — that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for*

free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do."

107. It is apparent that the court was considering the issue through the prism of the provisions as they existed. The court did not – and correctly, could not have visualized what may be become a necessity, perhaps even a compelling one in the future, of the need to bridge the ever-widening gap between the affluent and comfortable on the one hand, and the desperately poor, on the other. The need to ensure that those suffering the adverse effects of abject poverty – illiteracy, marginal income, little or no access to basic amenities such as shelter, hygiene, nutrition, or crucially, education (which has transformational value) – are given a modicum of access to achieve basic goals which the Preamble assures, and Part IV provisions directs the State to achieve, therefore, is another dimension which Parliament thought appropriate to achieve, while introducing the economic criteria. Therefore, the judgment in *Indra Sawhney*, howsoever authoritative, cannot be considered as the last word, when considering the introduction of the *new* criteria for affirmative action. That judgment is authoritative, for its determination of what is permissible, and what should be the constitutional *method* of implementing, backwardness-based affirmative action. However, it cannot be considered as exhaustive of new criteria, which may be brought about by constitutional amendments (thus, removing the basis of the judgment itself). Therefore, to say that *Indra Sawhney* or any other judgment does not permit reservations or affirmative action, based on economic criteria, alone, is incorrect. That judgment cannot restrain Parliament from introducing constitutional amendments that enact such criteria, as the basis of reservation benefits, or other special provisions. Further, existing criteria for reservations, cannot be the only way in which the state is permitted to achieve social and economic justice

goals: those criteria must be followed, but cannot preclude the introduction of new criteria, or new methods, through amendment to the Constitution.

B. State's obligations under Directive Principles to fulfil mandate of substantive equality

108. A perusal of the Directive Principles of State Policy, reveals the State's obligations, as intended by the Constituent Assembly. The State, through Article 38(1), is obligated to establish a social order to promote welfare of people by extending to them justice – social, economic and political. It also has the responsibility of minimising income inequalities and the elimination of inequalities in status, facilities and opportunities, by virtue of Article 38(2) specifically. Article 39 not only postulates the right to an adequate means of livelihood, and redistribution of material resources for common good, it further directs the State to ensure that there is no concentration of wealth and means of production in hands of the few, to the common detriment. Articles 38 and 39 read with Articles 41, 42, 43, 45, 46, 47 and 48, holistically, contribute to economic justice.

109. Social justice implies removing all inequalities and affording equal opportunities to citizens in social as well as in economic affairs.[74] Directive Principles of State Policy, through Articles 38, 39, 41 and 43, mandate the state to establish an *"economically just"* social order. The Preambular aims of justice (economic, social and political), and equality of status and opportunity, find articulation in both Part III and Part IV of the Constitution. Till now, the State pursued the goal of achieving equality of status and opportunity, *substantively*, by employing some form of protective discrimination, to *eliminate* past discrimination, which had set

[74] Gokulesh Sharma, Human rights and Social Justice Fundamental Rights vis-à-vis Directive Principles, Deep and Deep Publication Ltd (1997).

up barriers to the most marginalised sections of society, thereby denying them access to resources and public employment. The structuring of enabling provisions [Articles 15(4) and 16(4)] is such that the target group were only those who fell within the description of classes that suffered social and educational backwardness. These included the most disadvantaged among the disadvantaged and oppressed, i.e., scheduled castes and scheduled tribes. The inclusion of any other people therefore, could not be contemplated in the context of the Constitution, as well as its text, as it stood.

110. The aim of creating a uniform, egalitarian, casteless society is to be seen as a paramount objective. Reservation was deemed as one of the principal means of achieving that goal. Such measures have worked, and their retention underlines that as a nation, we have miles to go, before we are anywhere near the promise we have given onto ourselves. In this journey, if it is discerned that alongside these hitherto oppressed communities, who were hostilely treated on account of their caste status, there are <u>also</u> a substantial number of people, who have not progressed due to their economic deprivation; the state is duty bound to take remedial measures to address their plight.

C. Flexibility of constitutional amendments to enable substantive equality

111. Constitutions being charters of governance, carry within them delineation of powers, of various branches of government, and numerous constituent units, at the same time, guaranteeing liberties, assuring equality. To be vibrant and relevant, they are to be sufficiently flexible to allow experimentation. This experimentation is vital, to enable the assimilation of felt needs of the society – for change: in view of developments in interpretation, efficacy of provisions of the charter, unmet or new aspirations, etc. The need to ensure that the fruits of progress reach

all, especially the poor, who are marginalized, is an important constitutional obligation, which finds voice in several provisions of the Directive Principles of State Policy. The existence, or rather, the express recognition of discrimination which prevented large segments of the population, access to institutions, or participation in public affairs and offices cannot, therefore, imply the *preclusion* of recognition of any other criteria, for providing means to other disadvantaged groups, based on other factors. In this case, the factor, or basis chosen, is economic deprivation.

112. In *Kihoto Hollohan* this court noted that a Constitution *"outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances – a distinction which differentiates a statue from a Charter under which all statutes are made."*. This court quoted from Cooley on '*Constitutional Limitations'*[75] that an amendment, to the constitution, upon its adoption becomes a part thereof; as much so as if it had been originally incorporated in the Constitution and *"it is to be construed accordingly"*.

113. Constitutions are meant to endure; they outline the broad contours of governance of the society which creates them. Modern constitutions typically delineate power: legislative, executive and judicial and, depending upon the genius of the individual society, set up systems of checks and balances to limit the zones of operation of each branch. Where the Constitution governs a large territory, comprising of provincial or constituent units, the delineation of legislative power is also indicated. Furthermore, in every Constitution, limitations on state power, in the form of a Bill of Rights (by whatever name called) are engrafted to safeguard individual liberties and ensure that there is equality in all spheres of activity. Constitutions also indicate the manner of their amendment:

[75] 8th Edn. Vol. 1 page 129.

essentially regarding the special procedures needed for the purpose, and in some instances, the limitation upon the amending power, in regard to certain subjects, which are deemed beyond the pale of that power.

114. The *rationale* for such amending power is that no matter how exhaustive a constitution is, how deeply its framers have deliberated, it may possibly not provide for all situations. There may be need to re-align legislative heads, in the light of subsequent changes dictated by social or political consensus, or compromise. Societies are constantly, in a state of flux. In the words of Thomas Jefferson, considered to be the Founding Father of the United States:

> *"I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."*[76]

115. The opinion of Khanna, J, too recognizes this aspect, in *Kesavananda Bharati.* He said that constitutions provide

> *"*1437. […] *for the framework of the different organs of the State viz. the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come…"*

Commenting that it cannot be regarded as *"a mere legal document"* the learned judge further noted that the

> *"*1437. […] *Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must*

[76] In a letter to Samuel Kerceval on July 12, 1816.

> *therefore contain ample provision for experiment and trial in the task of administration…"*

116. Such being the case, the concerns which emerge from changing time, are usually met within the framework of a flexible constitutional document. However, occasionally, that document needs to be re-examined, and if necessary, amended to accommodate the challenges that are unmet and beyond the contemplation of that foundational charter.

117. It is axiomatic that the wisdom of a legislation is not within the domain of the courts. Speaking of constitutional amendments, Sikri, CJ., in *Kesavananda Bharati* observed:

> *"288. It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment."*

118. Shelat and Grover, JJ. stated the same idea, and added that it is the consequences of the provision, having regard to the *width* of the power, which properly falls for judicial consideration:

> *"532. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution-makers or for the Parliament or the legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power."*[77]

119. Whether the circumstances justified the move, or that some measure was better than what was conceived and enacted is not what can be gone into by the courts. This is even more so, in the case of constitutional amendments, where the facts which impelled the Parliament to draw upon its extraordinary power, a *constituent power*, no less, and amend the

[77] In *Kihoto Hollohon* too, the court adverted to Parliamentary wisdom, which results in an amendment, that cannot be questioned in by the court.

Constitution, are not matters of examination or deep consideration. Therefore, whether there is objective material to justify the economic criteria, or the sufficiency of it, are not relevant for the court to examine, while considering the validity of this constitutional amendment. Equally Parliament's motive (or of a legislative body), in enacting the legislative measure, or constitutional amendment, is an irrelevant factor. What the court can certainly consider is, the *purpose* which the amendment seeks to achieve, which is often discernible from the processes leading up to the passing of such an amendment, the discussions that arise, etc.

D. Purpose that the amendment seeks to achieve through introduction of economic criteria

120. The above discussion is conclusive on the question of relevance of materials to justify constitutional amendments. Nevertheless, since arguments were addressed by the petitioners and Union on this, it would be appropriate to deal with them. The materials relied on, in the form of the *Sinho Commission Report (2010),* the Statement of Objects of the Bill when it was introduced, together with the parliamentary debates (brief as they are) before it fructified into the Amendment, are indicative of what Parliament wished to achieve, through the amendment.

121. The respondent-Union relied heavily upon the NITI Aayog Report on National Multidimensional Poverty Index (published in 2021). The issue of mapping poverty has consistently engaged the attention of the State - earlier, poverty was mapped using the "the poverty line", which has now given way to the "multi-dimensional" approach. By this latter methodology, various indicators are considered to look at a holistic picture of deprivation. The NITI Aayog Report considered – as poor, an individual spending less than ₹47 a day in cities as against one spending less than ₹32 a day in villages. The National Multidimensional Poverty Index ("NMPI")

based itself on three facets – education, health, and standard of living – each having a weightage of one-third, in the index. Each of these are further based on 12 sections – nutrition, child and adolescent mortality, antenatal care, years of schooling, school attendance, cooking fuel, sanitation, drinking water, electricity, housing, assets, and bank accounts.

122. There were deprived people by each of these criteria though some of them may not have been multidimensionally poor in 2015-16. The highest number of the deprived were identified on the indicators of cooking fuel (58.5%) and sanitation (52%). In other words, more than half the population were poor on these two facets, in terms of the report. Housing had a deprivation proportion of 45.6% of the population during 2015-16, followed by nutrition (37.6%), maternal health (22.6%), drinking water (14.6 %), assets (14%), years of schooling (13.9%), electricity (12.2%), bank account (9.7%), school attendance (6.4%) and child and adolescent mortality (2.7%).[78]

123. The Sinho Commission was set up to examine the condition of economically backward classes and suggested measures – including the feasibility of reservations – to improve their lot. The Report, published in July 2010, was based on the census of 2001, and later surveys, wherein the Commission took note of various factors such as employment, education, nutrition levels, housing, access to resources, etc. The statistics (NSSO 2004-05) which this Report is based on, disclosed that in all, 31.7 crore people were below the poverty line ("BPL"), of which the scheduled caste population was 7.74 crores (i.e., 38% of total scheduled castes), scheduled

[78] The NMPI assists in estimation of poverty at the level of the states and all the over 700 districts across the 12 indicators, capturing multitude of deprivations and indicator-wise contribution to poverty. Thus, in terms of NMPI, 51.91% population of Bihar is poor, followed by 42.16% in Jharkhand, 37.79% in Uttar Pradesh, with Madhya Pradesh (36.65%) as fourth in the index, and Meghalaya (32.67%) is at fifth place. Kerala, Goa, and Sikkim have the lowest percentage of population who are multidimensionally poor at 0.71%, 3.76% and 3.82%, respectively. Amongst Union Territories (UTs), Dadra and Nagar Haveli (27.36%), Jammu & Kashmir, and Ladakh (12.58%), Daman and Diu (6.82%) and Chandigarh (5.97%), are emerged as the poorest UTs. The proportion of poor in Puducherry at 1.72% is the lowest among the UTs, followed by Lakshadweep at 1.82%, Andaman & Nicobar Islands at 4.30% and Delhi at 4.79%.

tribe population was 4.25 crores (48.4% of total scheduled tribes), 13.86 crores of OBC population (which was 33.1% of total OBCs), and 5.85 crores of General Category (18.2% of total general category).

E. Conclusion on permissibility of economic criteria per se

124. Economic emancipation is a facet of economic justice which the Preamble, as well as Articles 38 and 46 promise to all Indians. It is intrinsically linked with distributive justice – ensuring a fair share of the material resources, and a share of the progress of society as a whole, to each individual. Without economic emancipation, liberty – indeed equality, are mere platitudes, empty promises tied to "*ropes of sand*"[79]. The break from the past – which was rooted on elimination of caste-based social discrimination, in affirmative action – to now include affirmative action based on *deprivation*, through the impugned amendment, therefore, does not alter, destroy or damage the basic structure of the Constitution. It adds a new dimension to the Constitutional project of uplifting the poorest segments of society.

V. <u>Consideration of Article 16(6)</u>

125. It is important to note that there are crucial supplementary reasons, why the reservation benefits introduced through Article 16(6) are to be examined from another point of view – apart from the point of exclusion.

126. The issue of providing reservations in public employment, was debated four times, by the Constituent Assembly, (30.11.1948, 09.12.1948, 23.08.1949 and 14.10.1949) which considered Draft Article 10(3). Several speakers emphasized that reservations in favour of backward classes of citizens was necessary to empower them and give voice to them in the

[79] *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1891), quoted in *State of West Bengal v. Anwar Ali Sarkar* 1952 (1) SCR 284 and *Nandini Satpathy v. PL Dani* 1978 (3) SCR 608.

administration of the country. The speech, by H.V. Kamath, on the content of what is now Article 16(4), is illustrative:

> *"This is not a more directive principle of state policy; this is in Chapter III, on Fundamental Rights. When this is guaranteed to them, no backward class of citizens need be apprehensive. If there is no representation for them in the services they can take the Government to task on that account. I think this would be an adequate safeguard for them so far as their share in the services is concerned. I hope that this article 10 guarantees that right to them, and so they need have no dispute or quarrel with the article before the House today."*

127. This aspect, of *representation,* was highlighted in *Indra Sawhney:*

> *"*694. […] *the objective behind Clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively 68onopolized by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted there into and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16 (4) is empowerment of the deprived backward communities – to give them a share in the administrative apparatus and in the governance of the community"*

The majority judgment again stated:

> *"*788. […] *It is a well known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr. Rajiv Dhawan may be right when he says that the object of Article 16 (4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16 (4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16 (4) should be both social and educational…"*

128. In *M. Nagaraj*, too, the idea of reservations under Article 16(4) being provided, to enable representation, was underlined:

> *"*55. […] *in The General Manager, Southern Railway and another v. Rangachari Gajendragadkar, J. giving the majority judgment said that reservation under Article 16 (4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. A reasonable balance must be struck between the claims*

of backward classes and claims of other employees as well as the requirement of efficiency of administration."

129. It is clear, from the above discussion, that equality of opportunity in public employment – a specific facet of the equality code – is a guarantee to each citizen. The equally forthright prohibition in Article 16(2), enjoining discrimination on various grounds, including caste, is to reinforce the absoluteness of equality of opportunity, that it cannot be denied. The only departure through Article 16(4) is to give voice to hitherto unrepresented classes, discriminated against on the proscribed grounds. This link - between *providing equal opportunity*, and *representation* through reservations, was the only exception, permitted by the Constitution, to further equality *in public employment*.

130. The impugned amendment snaps the link between the idea of providing reservation for backward classes to ensure their *empowerment* and *representation* (who were, before the enactment of Article 16(4), absent from public employment). The entire philosophy of Article 16 is to ensure barrier-free equal opportunity in regard to public employment. Article 16(4) – as stated previously enables citizens belonging to backward classes access to public employment with the superadded condition that this is to ensure their *"adequate representation*". Important decisions of this court*: Indra Sawhney, M. Nagaraj, Jarnail Singh v. Lachhmi Narain Gupta*[80] and *BK Pavitra (II) v. Union of India*[81] have time and again emphasized that reservations under Article 16 are conditioned upon periodic adequate representation review.

131. The introduction of reservations for *economically weaker* sections of the society is not premised on their lack of representation (unlike backward classes); the absence of this condition implies that persons who

[80] *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396.
[81] *BK Pavitra (II) v. Union of India*, (2019) 16 SCC 129.

benefit from the EWS reservations can, and in all probability do belong to classes or castes, which are "forward" and are represented in public service, adequately. This additional reservation, by which a section of the population who are not socially backward, and whose communities are represented in public employment – violates the equality of opportunity which the Preamble assures, and Article 16(1) guarantees.

132. The impugned amendment results in treating those covered by reservations under Article 16(4) with a standard that is more exacting and stringent than those covered by Article 16(6). For instance, if the poorest citizens among a certain community or that entire community, is unrepresented, and the quota set apart for the concerned group (SC) as a whole is filled, the requirement of "representation" is deemed fulfilled, i.e., notwithstanding that the *specific* community has not been represented in public employment, no citizen belonging to it, would be entitled to claim reservation. However, in the case of non-SC/ST/OBCs, whether the individual belongs to a community which is represented or not, is entirely irrelevant. This vital dimension of *need to be represented, to be heard in the decision-making process*, has been entirely discarded by the impugned amendment in clause (6) of Article 16. Within the amended Article 16, therefore, lie two standards: representation as a relevant factor (for SC, ST and OBC under Article 16(4)), and representation as an irrelevant factor (for Article 16(6)).

133. Therefore, for the reasons already covered in Question 3, and as set out separately above, the introduction of this reservation in public employment violates the right to equal opportunity, in addition to the non-discriminatory facet of equality, both of which are part of the equality code and the basic structure.

VI. Re: Question 2: special provisions based on economic criteria, in relation to admission to private unaided institutions

134. The eleven-judge bench ruling in *T.M.A. Pai Foundation v. State of Karnataka*[82] has recognized that Article 19(1)(g) of the Constitution embraces the right to establish private educational institutions as an avocation. The insertion of Article 21A, and later Article 15(5) added a new dimension. These amendments are to be viewed as society's resolve that all institutions – public and private – have to join in the national endeavour to promote education at all levels. Education in this context is to be seen as a "material resource" of the society, meant to benefit all its segments.

135. The Right of Children to Free and Compulsory Education Act, 2009 by Section 12(a) in fact introduces an all-encompassing quota which is inclusive, under the broad rubric of "*economically weaker sections of the society*".[83] Parliament had this model, and was also aware that this Court had upheld it in *Society for Unaided Private Schools of Rajasthan* and further that Article 15(5) too was upheld in *Pramati.*

136. Unaided private institutions, including those imparting professional education, cannot be seen as standing out of the national mainstream. As held in the aforementioned judgments, reservations in private institutions is not *per se* violative of the basic structure. Thus, reservations as a concept cannot be ruled out in private institutions where education is imparted. They may not be State or State instrumentalities, yet the value that they add, is part of the national effort to develop skill and disseminate knowledge. These institutions therefore also constitute material resources

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[82] (2002) 8 SCC 481.

[83] Section 12. *Extent of school's responsibility for free and compulsory education.— (1) For the purposes of this Act, a school: (a) specified in sub-clause (i) of clause (n) of Section 2 shall provide free and compulsory elementary education to all children admitted therein.*

of the community in which the State has vital interest, and are not merely bodies set up to further private objective of their founders, unlike in case of the shareholders of a company. Such institutions are seen as part of the State's endeavour to bring educational levels of the country up, and foster fraternity, as held in *Pramati:*

> "*37.* […] *The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation*…"

137. Further, in *Indian Medical Association* on reservation of seats under Article 15(5) in Army College of Medical Sciences (ACMS), the court held:

> *"74. At this stage we wish to make a necessary and a primordially important observation that has troubled us right throughout this case. The primordial premise of the arguments by unaided educational institutions in claiming an ability to choose students of their own choice, in case after case before this Court, was on the ground that imposition of reservations by the State would impede their right to choose the most meritorious on the basis of marks secured in an objective test. It would appear that, having unhorsed the right of the State to impose reservations in favour of deprived segments of the population, even though such reservations would be necessary to achieve the constitutionally mandated goals of social justice and an egalitarian order, unaided institutions are now seeking to determine their own delimited "sources" of students to the exclusion of everybody else.*
> *75. The fine distinctions made…that an allocation when made by the State is reservation, as opposed to allocations made by private educational institutions in selecting a source do not relate to the fundamental issue here: when the State delimits, and excludes some students who have secured more marks, to achieve goals of national importance, it is sought to be projected as contrary to constitutional values, and impermissibly reducing national welfare by allowing those with lesser marks to be selected into professional colleges; and at the same time, such a delimitation by a private educational institution, is supposedly permissible under our Constitution, and we are not then to ask what happens to that very same national interest and welfare in selecting only those students who have secured the highest marks in a common entrance test. We are reminded of the story of the camel that sought to protect itself from the desert cold, and just wanted to poke its head into the tent. It appears that the camel is now ready to fully enter the tent, in the desert, and kick the original inhabitant out altogether.*
> *76. In any case we examine these propositions below, as <u>we are unable to convince ourselves that this Court would have advocated such an illogical position, particularly given our history of exclusion of people, on various invidious grounds, from portals of education and knowledge. Surely,</u>*

> *inasmuch as this Constitution has been brought into force, as a constitutive document of this nation, on the promise of justice—social, economic and political, and equality—of status and opportunity, for all citizens so that they could live with dignity and fraternal relations amongst groups of them, it would be surprising that this Court would have unhorsed the State to exclude anyone even though it would lead to greater social good, because marks secured in an entrance test were sacrosanct, and yet give the right to non-minority private educational institutions to do the same. The knots of legal formalism, and abandonment of the values that the Constitution seeks to protect, may lead to such a result. We cannot believe that this Court would have arrived at such an interpretation of our Constitution, and in fact below we find that it has not.*
>
> (emphasis supplied)

138. No better articulation than the aforementioned is warranted to hold the EWS reservation equally applicable to unaided private institutions. However, given that my analysis under question 3 on 'exclusion' holds the Amendment to be violative of the basic structure, the question herein has been rendered moot.

VII. Addressing other related challenges to, and justifications of the impugned Amendment

A. Possibility of reading down the exclusion

139. An argument made by some of the petitioners, was that the amendment could be sustained, if the phrase "other than" was read down, in such a manner so as to read as "in addition to" or in a manner that negates the *exclusionary* element, which offends the basic structure.

140. The doctrine of reading down, has been employed by this court, in the past, in numerous cases; however, in each instance, it has been clarified that it is to be used sparingly, and in limited circumstances. Additionally, it is clear from the jurisprudence of this court that the act of reading down a provision, must be undertaken only if doing so, can keep the operation of the statute "*within the purpose of the Act and constitutionally valid*"[84]. In

[84] *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600, para 326.

Delhi Transport Corporation v. DTC Mazdoor Congress[85] Sawant, J recounted the position on this doctrine succinctly:

> *"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible — one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the subject of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it…."*

141. Therefore, when the intention is clear, and the text unambiguous, the warning against employing this device of reading down, has been consistent. In *Minerva Mills*, this court was faced with the possibility of reading down to uphold a constitutional amendment, which was rejected as follows:

> 64. *[…] The device of reading down is not to be resorted to in order to save the susceptibilities of the law-makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment…*
> […]
> 65. *[…] If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends…"*

142. The intention of Parliament while exercising *constituent power* occupies a much higher threshold or operates in a higher plane, when compared to legislative intent of ordinary law, the latter being subject to

[85] 1991 Supp (1) SCC 600

different grounds of judicial scrutiny. Therefore, attractive as it may be – it is my considered opinion that the plea to *read down* the exclusion, is untenable because the intention of the Parliament in exercise of its *constituent power* is clear and unambiguous.

B. ***Absence of 'guardrails' to deny economic criteria per se***

143. The petitioners submitted that the Constitution has enacted "guardrails" to control reservations based on social and educational backwardness in the form of (1) mandating institutions; (2) tasking institutions with evolving principles for identification of backward classes, SC/STs; and (3) periodically reviewing lists of SC/STs and OBCs. These arguments-of lack of "guardrails" to counter economic criteria, *per se*, are in my opinion, insubstantial. As elaborated in **Part V**, I have accepted the contention that the guardrail of 'adequate representation' in Article 16, prohibits introduction of reservation based on economic criteria for the purpose of public employment. The other arguments on absence of guardrails, are dealt with presently.

144. The explanation to Article 15(6) enlists the broadest criteria of what constitutes "economically weaker sections" ("*shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantages*"), upon which legislation and executive policy can be built (and subject to subsequent challenge or scrutiny, if such a situation arises). The indicators of economic deprivation, enacted through the explanation are income, or such other criteria, including other traits which may be relevant. For the purpose of evolving economic criteria as a separate or a new basis for affirmative action, the indication of the broadest guideline of income, and other relevant criteria, are sufficient. The extent of income, relative to income earning capacity, having regard to the state in question, or areas in states, or extent of assets,

are matters of detail which can be factored into the policies of the state or the Union, having regard to the felt necessities of the time, or circumstances.

145. As far as the existence of institutional guarantees in the form of commissions or bodies, such as National Scheduled Caste and Scheduled Tribe Commissions, Backward Class Commissions, etc., which specific provisions (i.e., Articles 338, 338A, 338B, 340) of the Constitution provide for are concerned, it is for the Union, or the states as the case may be, to create these permanent bodies through appropriate legislation. In fact, the judgement of this court in *Indra Sawhney* had suggested the creation of a permanent body to determine OBCs which led to the setting up of the National Backward Class commission through a separate Parliamentary enactment. Therefore, the absence of any such provision enabling the setting up of a permanent institution *per se* cannot lead this court to conclude that the basic structure or essential features of the Constitution are violated.

C. Basic structure doctrine as a discernible concept

146. Having perused the other opinions authored by members of this bench, I am compelled to record my disagreement, and caution, relating to certain observations on the basic structure doctrine. In the myriad challenges based on basic structure, the ones that succeeded, have been based on violation of constitutional principles, such as judicial review (*Indira Gandhi*, Minerva *Mills, L. Chandra Kumar* and *P. Sambamurty*) independence of the judiciary (*SCAORA case*); rule of law, democracy and separation of powers (*Indira Gandhi*). To say that this court thwarted policies, or more seriously, that it dictated policy, is parlous, and tends to undermine the foundations of judicial functioning.[86] In each instance when

[86] J.B. Pardiwala, J cites with approval certain academic material in paragraph 124 of his draft opinion.

the court intervened and held an amendment to be violative of the basic structure, the rule of law triumphed. For instance, in *Kesavananda Bharati* itself, the court only held unconstitutional the part of a provision that upheld declaration in a law (whether made by Parliament or the State) which stated that its objectives were to promote Articles 38 and 39, thus excluding judicial scrutiny to discern whether the law actually promoted any value of those directive principles. Such wide and untrammelled power, to override Articles 14 and 19, were not left unchecked. On the other hand, the court upheld, in *Raghunathrao Ganpatrao,* deletion of two provisions, which an eleven judge bench had previously held to be *"integral"* to the formation of the nation, and the Constitution.

147. Furthermore, the basic structure is not as fluid as is made out to be; the contours of what it constitutes have emerged, broadly speaking, through various decisions. Can the value of democracy, be so nebulous, "amorphous" or transient, that it can be undermined by succeeding generations, as is suggested? Can the rule of law become rule by law, which is the essence of autocracy and authoritarianism? Can the Orwellian concept of an oligarchic equality be ever conceived as the essential principle of equality? Can liberty be subjected to indefinite incarceration without trial or charges and yet remain of the same content, as to mean what it means under Articles 21 and the Preamble? The answer has to be a resounding negative in each of the cases. The basic structure may not be a defined concept; it is however not indecipherable. The values which the court set out to guard, by the framing of that doctrine, are eternal to every democracy, every free society: liberty, equality, fraternity, social and economic justice.

148. The members of this bench, constituting the majority, have relied on the test of validity of a constitutional amendment evolved in *Bhim Singhji.* I find it pertinent to highlight that in this decision the only reference to the

said test was by Krishna Iyer J.[87] who himself did not indicate how Section 27 of the impugned Act (which was inserted as an enactment in the IXth Schedule), amounted to a *"shockingly unconscionable or unscrupulous travesty of quintessence of equal justice"*. Similarly, the common judgment of Chandrachud J., and Bhagwati J., also was silent on this aspect. Tulzapurkar J., judgment invalidated not only Section 27 but several other provisions of the Act also. In these circumstances, the observations of Krishna Iyer J., as to be the high threshold of violation of Article 14 in the context of insertions of an enactment in the Ninth Schedule i.e. *"shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice"*, has limited application.

149. It is noteworthy that this judgment was taken into account by the unanimous decision of a nine-judge bench in *I.R. Coelho* where the appropriate test to determine whether insertion of an enactment into the Ninth Schedule, was finally settled. The court not only took note of *Kesavananda Bharati, Minerva Mills* and *Bhim Singhji* but also *Waman Rao* and held that the appropriate test would be the "impact" on the right and also whether the "identity of the constitution" is changed by way of the amendment or the enactment which is inserted through an amendment. That aspect has been discussed in an earlier portion of this judgment. *I.R. Coelho* is also an authority that Article 14 and 15 principles underlying them are integral parts of the basic structure of the Constitution. In these circumstances, the test indicated by Krishna Iyer, J. has been altered, to a different one, by *I.R. Coelho*.

D. Whether an enabling provision can violate the basic structure

150. The Union and other respondents had submitted that the newly introduced provisions, through the impugned amendment, are merely

[87] *Bhim Singhji*, paragraph 20.

enabling, and confer power upon the state, to make special provisions and reservations, based on the economic criterion – thus, cannot violate the basic structure. This view has also been accepted in the opinion authored by Justice J.B. Pardiwala. I am of the considered opinion that the argument that the provisions are *enabling* and therefore, do not violate the basic structure (of the Constitution) is not substantial.

151. Previous decisions of this court have invalidated Constitutional Amendments, even when containing merely enabling provisions. In *L. Chandra Kumar*, the provisions in question were, *inter alia*, Articles 323A (2) (d) and 323B (3) (d), which read as follows:

> *"**Article 323A** (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.*
>
> *(147)A law made under clause (1) may-*
>
> *[....]*
>
> *(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);*
>
> ********** **********
>
> ***Article 323B (**1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.*
>
> *(2) The matters referred to in clause (1) are the following, namely:-*
>
> *[...]*
>
> *(3) A law made under clause (1) may-*
>
> *(a) provide for the establishment of a hierarchy of tribunals;*
>
> *(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;*
>
> *I provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;*
>
> *(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals..."*
>
> ********** **********

152. The court did not merely hold that the legal provisions, which enabled exclusion of jurisdiction of courts, violated any provision of the constitution. It proceeded to hold that the provision *which enabled the enactment of a law, that excluded jurisdiction of courts,* more particularly the High Courts, and thus, shut out judicial review, violated and destroyed the basic structure of the Constitution.

153. By the Constitution (Thirty Second Amendment) Act, 1973, Article 371D was introduced, which *inter alia,* enabled the President to set up Administrative Tribunals, in relation to areas in Andhra Pradesh. Article 371D(5) was the subject matter of challenge before this court in *P. Sambamurthy.* Article 371D(3) and (5) read as follow:

> *"The President may, by order, provide for the Constitution of an Administrative Tribunal for the State of Andhra Pradesh to exercise such jurisdiction, powers and authority including any jurisdiction, power and authority which immediately before the commencement of the Constitution (Thirty-Second Amendment) Act, 1973, was exercisable by any Court (other than the Supreme Court) or by any Tribunal or other authority as may be specified in the order with respect to the following matters, namely:-*
>
> *[...]*
>
> *(5) The order of the Administrative Tribunal finally dis- posing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order is made. whichever is earlier;*
>
> *Provided that the State Government may. by special order made in writing for reasons to be specified therein, modify or annul any order of the Administrative Tribunal before it becomes effective and in such a case, the order of the Administrative Tribunal shall have effect only in such modified form or be of no effect, as the case may ”e."*

154. This court held that the *power* under Article 371D(5), *per se*, and not merely the exercise of it, was shockingly subversive of the rule of law:

> *“*4. […] *this power of modifying or annulling an order of the Administrative Tribunal conferred on the State Government under the proviso to Clause (5) is violative of the rule of law which is clearly a basic and essential feature of the Constitution. It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned*

by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by over-tiding the decision given against it, it would sound the death/knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet get away with it..."

155. Likewise, in *R.C. Poudyal*, the controversy was with respect to reservations made in favour of a religious sect, i.e., the Buddhist *Sangha*. The provision which enabled this reservation, was in Article 371F (f) which *inter alia*, reads as follows:

*"**371F. Special provisions with respect to the State of Sikkim***
Notwithstanding anything in this Constitution,
(a) the Legislative Assembly of the State of Sikkim shall consist of not less than thirty members;
[...]

(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim;..."

156. The majority opinion upheld the amendment, and the provision- not because it was an enabling provision, but that it dealt with inclusion of new territory, and ensured historical continuity, of a state, with its past traditions, and was part of the compact through which it entered the Union. At the same time, the majority opinion, tellingly stated that

*"*129. *It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions <u>may not, if applied to the existing States of the Union, pass the Constitutional muster</u>. But in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify in equality and special. Treatment..."*

Chief Justice L.M. Sharma, who wrote a dissenting opinion, held that the provision which enabled reservation on the basis of religion, was violative of the basic structure of the constitution.[88]

157. It is therefore, inaccurate to say that provisions that enable, exercise of power, would not violate the basic structure of the Constitution. The enabling provision in question's basic premise, its potential to overbear the constitutional ethos, or overcome a particular value, would be in issue. The court's inquiry therefore, cannot stop at the threshold, when an enabling provision is enacted. Its *potential* for violating the basic structure of the Constitution is precisely the power it confers, on the legislature, or the executive. To borrow a powerful simile from a dissenting opinion in a decision of the United States Supreme Court, that upheld broad use of emergency power, to incarcerate thousands of US citizens, such *enabling* powers, if left alone, can *"lie(s) about like a loaded weapon"*[89] with its potential to destroy core constitutional values.

158. In *S.R. Bommai,* although the validity of a Constitutional amendment was not in issue, the nine-judge Bench made certain crucial observations, with respect to use of *power*, under Article 356 of the Constitution. The court stated that

> *"*96. […] *The Constitution is essentially a political document and provisions such as Article 356 have a potentiality to unsettle and subvert the entire constitutional scheme. The exercise of powers vested under such provisions needs, therefore, to be circumscribed to maintain the fundamental constitutional balance lest the Constitution is defaced and destroyed. This can be achieved even without bending much less breaking the normal rules of interpretation, if the interpretation is alive to the other equally important provisions of the Constitution and its bearing on them. Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore help to preserve and not subvert their fabric…"*

[88] Paragraph 50 and 54 (SCC).
[89] *Korematsu v. United States*, 323 U.S. 214 (1944).

159. Therefore, the fact that impugned amendments have introduced provisions which are merely *enabling*, does not protect it from basic structure scrutiny. To view a newly added provision as only "enabling" can be an oversimplification in constitutional parlance. The court's concern is not with the conferment of power *per se*, but with the width of it, lack of constitutional control, and the direct impact it can have on principles constituting the basic structure.

E. Parallel with exclusion of creamy layer

160. Another assumption that the exclusion of the creamy layer can somehow be equated to, the exclusion that the impugned amendment perpetrates, necessitates correction. As discussed previously, the Constituent Assembly debates plainly show that Article 16(4) was included with the intention of permitting representation and diversity. The other parameter was that without such a provision, the rule of equality of opportunity [mandated by Article 16(1)] would not admit of positive discrimination. Therefore, the idea of positive or compensatory discrimination was intrinsic to the idea of equal opportunity – a fact recognised and acknowledged as late as in *M. Nagaraj*. The idea that Article 16(4) really is meant to ensure representation is also borne out textually, since the State is enjoined to ensure that "adequate representation" is given to members of the backward classes. These sections of society were hitherto barred access to public offices and denied opportunity to representation in public affairs. If one keeps this in mind, the matrix operating for reservation under Article 16(4) is one permitting diversity, representation, and eliminating discrimination.

161. The idea of introducing creamy layer, gained momentum for the first time in *K.C. Vasant Kumar v. State of Karnataka*[90] and was recognised as

[90] *K.C Vasanth Kumar v State of Karnataka*, (1985) Supp SCC 714.

a compulsion which the State had to adopt in carrying out the exercise of identifying socially and educational backward classes. The rationale for identification and consequent exclusion of creamy layer amongst the backward class is that there exists a segment or section among the backward classes who have gained reservations and have advanced socially and educationally. The criteria adopted by the States has been the level of advancement – reflected in the economic and social status of such segments of society. Thus, if in the application of such criteria, it is found that amongst the OBCs, sections have moved forward and gained affluence, they are to be treated as advanced sections of society. In other words, moving out of the grouping as backward classes are deemed to be "forward". Constitutionally speaking, *Indra Sawhney* is an authority on this issue, i.e., that identification of creamy layer among the OBCs is as such a duty of the State to ensure that meaningful opportunities are given to the really backward. The corollary is therefore, the caste status of those who form part of creamy layer becomes irrelevant; and hence, they are not entitled to reservation under 15(4) or 16(4). Keeping all this in mind, the fact that some amongst the OBCs (creamy layer) do not enjoy the benefit of reservation (under 15(4) and 16(4)) does not lend justification for excluding those who are entitled to reservations under 15(4) and 16(4), due to their caste or social/educational backwardness, for benefit under Articles 15(6) – which is a reservation based on a *different* criterion, despite them being equally, or even more deprived than those who belong to the forward caste.

F. Other justifications for the classification

162. I am unable to agree with the characterisation of the classification in the impugned amendment as accepted by Dinesh Maheshwari, Bela Trivedi, and J.B. Pardiwala, JJ), for reasons set out in **Part III (D)**. I shall

in this section, respond to specific conclusions arrived at by the judges that constitute the majority.

(i) <u>*Reasonable classification to prevent double benefits*</u>

163. The allusion to over-classification and under classification, as the bases for exclusion in the context of the *doctrine of classification* governing Article 14, cannot be denied as a matter of law. However, to say that the non-inclusion of SC/ST and OBC communities - though the largest segments of the poor are from amongst them, is mere *reasonable* under-inclusion, cannot be accepted - especially in the context of a constitutional amendment. Reliance has been placed on *State of Gujarat v. Shri Ambika Mills*[91] and *S. Seshachalam & Ors. v. Chairman Bar Council of TN*[92]. In *Ambica Mills*, the court upheld the legislative measure, which excluded establishment or persons, on the ground that the state's policies to cover establishments, having regard to the objects, was not defeated, and the classification, not fatal, because it left out some classes of establishments having regard to their size. In *Seshachalam*, the exclusion from payment of lump sum amount, under an Advocate's welfare scheme, of lawyers receiving pension from their erstwhile employers, was held to not offend Article 14. Each of these cases are not apt instances, for the purposes of this case. The use of the term "double benefit" is discernible in the latter case. If one considers that if pension was being introduced for professionals for the first time, who had no other means of livelihood, when they gave up their avocation, the exclusion of those who had their full run of employment, *enjoyed pension from their erstwhile employer,* and then joined the legal profession, was justifiable, given that the State was assuming a burden for the first time, and keeping apart resources for that purpose. This classification was justified also on the basis of the principle

[91] *State of Gujarat v. Shri Ambika Mills* (1974) 4 SCC 656 (hereinafter, "*Ambika Mills")*.
[92] *S. Seshachalam & Ors. v. Chairman Bar Council of TN* (2014) 16 SCC 72 (hereinafter, "*Seshachalam"*).

in *R.K. Garg v. Union of India*[93], that in matters concerning economic policy, the state has wider latitude.

164. It is worth recollecting that Mathew, J. in *Ambica Mills* cautioned that one has to look beyond the classification. Else, the mind boggles at the classification, resulting in its justification. As recognised in some of the earliest decisions, the rule of classification is not the right to equality (just as the rights are fundamental, not the restrictions). I wish to highlight at this juncture, what was said in *Roop Chand Adlakha v. Delhi Development Authority*[94] - *"To overdo classification is to undo equality."*

(ii) *Scope of Article 46*

165. In my considered opinion, it would be wrong to characterize that the classification made for upliftment of SC/STs for whom special mention is made, is a "classification" for the purpose of upliftment of economically weaker sections, under Article 46, which permits a later classification that excludes them. If anything, the intent of Article 46 is to ensure upliftment of *all* poor sections: the mention of SC/STs is to remind the state that especially those classes should not be left out. But ironically, that is exactly the result achieved by their exclusion.

166. There can be no debate that Article 46 is an injunction to the State to take all steps to ameliorate the lot of economically weaker sections of the society. That this injunction was not confined to only SCs/STs has been widely accepted. In *Indra Sawhney* this aspect was recognized and elaborated, by PB Sawant, J. who stated that economic backwardness may not be the result of social backwardness:

> "481. […] *The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not from a class and they may be weaker as individuals only. Secondly, their weakness may not be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an*

[93] (1981) 4 SCC 675
[94] 1989 Supp (1) SCC 116

identifiable class but that class is represented in the services of the State adequately, as individuals forming weaker section, they may be entitled to the benefits of the measures taken under Article 46, but not to the reservations under Article 16(4). Thus, not only the concept of "weaker sections" under Article 46 is different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4). While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true. If this is borne in mind, the reasons why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens under Article 16(4) would be more clear. To the consideration of that aspect we may now turn.

[…]

576. Economic backwardness is the bane of the majority of the people in this country. There are poor sections in all the castes and communities. Poverty runs across all barriers. The nature and degree of economic backwardness and its causes and effects, however, vary from section to section of the populace. Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social backwardness. The educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness. It is necessary to bear this vital distinction in mind to understand the true import of the expression "backward class of citizens" in Article 16(4)."

167. Therefore, that Article 46 covers a wider canvass, and includes people who are poor, and whose poverty is not the result of social backwardness, has been recognized *always.* To now say that the mention of SC/STs in Article 46, and provision of reservations for them, is sufficient to distinguish them as a separate class, within Article 46, ignoring the *rationale* for continued reservations in their favour, (i.e., due to social exclusion) is to ignore important legal realities:

(a) That Article 46 comprehends all economically weaker sections of people, including SC/STs and OBC;

(b) The mention of SC/STs in Article 46 is a reminder to the state never to ignore them from the reckoning whenever a measure towards economic emancipation under Article 46 is introduced by the State.

(c) Article 46 existed from the beginning, and has been resorted to for providing all manner of measures to assist the poorest segments of society, irrespective of whether they are SCs/STs OBCs, such as scholarships, freeships, amenities, and concessions.

(iii) *EWS as a 'compensatory' measure*

168. The characterisation of reservations for economically weaker sections of the population (EWS) as compensatory and on par with the existing reservations under Articles 15(4) and 16(4), in my respectful opinion, is without basis. The endeavour of the Constitution makers was to ensure that past discriminatory practices which had, so to say, eaten the vitals of the Indian society and distorted it to such an extent that when the republic was created, an equal society was merely an illusion, which compelled them to enact special provisions such as Article 16(4) – and later Article 15(4), to ensure equality. It was not compensatory but also reparatory. They continue to compensate, definitionally and in reality, because even as on date, the acknowledged position is that reservations are necessary for SCs/STs and OBCs who are not part of the creamy layer. On the other hand, the EWS category, was consciously not made beneficiaries of reservations at the time of the framing of the Constitution, because perhaps the framers felt that the enacted provisions (including the soon to be added Articles 31A and 31B) and the slew of economic reforms which were enacted were sufficient to remove economic disparities. That hope however, did not materialise. Economic disparities (unconnected with social and educational backwardness) continued – and perhaps were even

exacerbated to such an extent that as of now almost 25% of the population continue to live in abject poverty. *Indra Sawhney* acknowledged that measures taken for their purpose would only result in "poverty alleviation".

169. Therefore, to conclude that reservations for EWS based upon the economic criteria is on par with reservations which the Constitution mandated, and envisioned as a pledge to *create an equal society*, is constitutionally unsound. The amendment which introduces new reservations does not "compensate": unlike the protective and compensatory reservations for socially and educationally backward classes (and SC/STs) who were discriminated systemically and who needed the "push" which is sought to be addressed by reservations, the economically weaker sections who are conceived to be the targets (i.e., forward classes) were never consciously discriminated against. Nor is it anyone's case, that they faced social and other barriers which made it impossible for them to advance.

170. I am also of the opinion that the observations made in *Indra Sawhney* - especially in paragraph 743 (SCC Reports) with respect to other kinds of reservations, has to be read in the context of the observations in *N.M.Thomas* and by the majority of judges in *Indra Sawhney* itself, which is that Article 16(1) permits classification and that the category of reservations in accord with the than existing provisions of the Constitution, favouring backward classes were stood exhausted by reason of Article 16(4). Illustratively therefore, the reservations in favour of sections (such as persons with disabilities, transgenders etc.) would be covered by the affirmative content of Article 16(1). It is in that sense that the observations made in *Indra Sawhney* have to be understood rather than the court foreseeing an amendment to the Constitution which permitted an entirely new section of the persons not based on social grouping, but on an

economic criterion as a target or recipients of reservations. Therefore, these two categories of reservations cannot be compared.

171. I cannot persuade myself to be sanguine about the fact that the poorest of the poor do not comprise large sections of the backward classes and even larger segments of the SCs/STs. The *Sinho Commission Report* itself is a testimony to this fact, that amongst the entire population of STs, 48% are the poorest; amongst the entire population of Scheduled Castes 38% are the poorest and amongst the OBC's no less than 33% are the poorest.

172. The fact that different forms of discrimination and even untouchability still persists in society, impelled parliament as late as 2015 to amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, by Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act 2015. The statement of Object and Reasons to the amendment, *inter alia* reads as follows:

> *"2. Despite the deterrent provisions made in the Act, atrocities against the members of the Scheduled Castes and Scheduled Tribes continue at a disturbing level. Adequate justice also remains difficult for a majority of the victims and the witnesses, as they face hurdles virtually at every stage of the legal process. The implementation of the Act suffers due to (a) procedural hurdles such as non registration of cases; (b) procedural delays in investigation, arrests and filing of charge-sheets; and (c) delays in trial and low conviction rate.*
>
> *3. It is also observed that certain forms of atrocities, known to be occurring in recent years, are not covered by the Act. Several offences under the Indian Penal Code, other than those already covered under section 3(2) (v) of the Act, are also committed frequently against the members of the Scheduled Castes and the Scheduled Tribes on the ground that the victim was a member of a Scheduled Caste and Scheduled Tribe. It is also felt that the public accountability provisions under the Act need to be outlined in greater detail and strengthened."*

173. The amendment enlarged and added the definition of certain terms, and extended to discrimination on the grounds of economic boycott, social

boycott and even changed the provision dealing with presumption as to the offence making it more stringent.

174. It is also worth noting that according to the National Crime Record Bureau Report titled –"*Crime in India 2021*"[95]:

a) The total population of Scheduled Castes in entire country (according to 2011 census) – 2013.8 lakhs, i.e., 20.13 crores.
b) Total crimes against Scheduled Castes in 2019 was 45961 and 2020 it was 50291 and in 2021, 50900. Of this about 20% constituted crimes against Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
c) As per same report, the total population of Scheduled Tribes in the entire country (based on 2011 census report) is 1042.8 lakhs, i.e., 10.42 crores.
d) The total crime reported and registered against Scheduled Tribes in 2019 was 7570; increased to 8272 in 2020, and 8802 in 2021.
e) Bulk of the crimes reported against Scheduled Tribes were offences under Indian Penal Code, with a much smaller proportion of offences under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

This data is demonstrative, that crime against those marginalized and stigmatized by caste, continue till this date. These legal developments and statistics belie the perception that such classes which can benefit from compensatory discrimination can be rightfully *excluded* from the benefit of reservations for the poor. That view, in my opinion is indefensible, and ignores stark realities.

[95] Source: https://ncrb.gov.in/en/node/3721

175. If such explanations for the differentiations, or exclusions are to be accepted, then this court will be paving the way for future discriminations, through constitutional amendments, based on constitutionally proscribed grounds. Even through the present amendments, especially Article 15(6)(a), it is possible to create corporations, and policies (not merely reservations) which can result in benefits to specific target groups and communities in forward castes, which may far exceed the allocations for those covered by Articles 15(4) and 16(4). When challenged, excessive budgetary allocations can successfully be justified on the ground of classification, i.e. that those who receive reservation and benefits under Articles 15(4) and 16(4) are different. Likewise preferential treatment, of communities, based on *descent* may well be sanctioned through later constitutional amendments, that may also be justified as a different basis, a class apart from others. These possibilities cannot be ruled out, because what begins as a seemingly innocuous alteration, may result in the "emasculation" and ultimate annihilation of the grand principle of equality.

G. The breach of the 50% cap – A note of caution

176. In view of my conclusions as recorded in this opinion – that the impugned amendment is violative of the basic structure of the Constitution, I find that there is no need for a specific finding on the 50% cap, or its breach of the basic structure; however I deem it necessary to sound a note of caution, on the consequence of upholding the reservation, thereby, breaching the 50% limit.

177. It is pertinent to note that the breach of the 50% limit is the principal ground of attack, of the 76th Constitutional Amendment 1994 which inserted as Entry 257A – the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State)

Act, 1993 in the IXth Schedule. The validity of that enactment - and whether the inclusion by the constitutional amendment, violates basic structure, is directly in issue in a batch of cases pending before this court. The view of the members of this bench constituting the majority - that creation of another class which can be a recipient of up to 10% of the reservation, over and above 50%, which is permitted under Articles 15(4) or 16(4), in my considered opinion, therefore, has a direct bearing on the likely outcome in the challenge in that proceeding. I would therefore sound this cautionary note since this judgment may well seal the fate of the pending litigation - without the benefit of hearing in those proceedings.

178. The last reason why I find myself unpersuaded to agree with the opinion that the impugned amendments by creating a different kind of criteria, have to be viewed separately and that *Indra Sawhney* was confined to reservations in Articles 15(4) and 16 (4) is because permitting the breach of the 50% rule as it were through this reasoning, becomes a gateway for further infractions whereby which in fact would result in compartmentalization; the rule of reservation could dealt well become rule of equality or the right to equality, could then easily be reduced to right to reservation - leading us back to the days of *Champakam Dorairajan*. In this regard, the observations of Ambedkar have to be kept in mind that the reservations are to be seen temporary and exceptional or else they would "*eat up the rule of equality*"[96].

179. In view of the above discussion, and given my conclusion on the validity of the impugned amendment, I would respectfully prefer to keep the question of violation of 50% rule open.

VIII. **Conclusion**

[96] Constituent Assembly Debates, Vol. 7, 30th November 1948, 7.63.205.

180. In the light of the above discussion, it is held that the principles of non-discrimination, non-exclusion and equality of opportunity to all is manifested in the Constitution through the equality code, which is part of its basic structure. Their link with fraternity, which the Preamble assures is intrinsic to "dignity of the individual and unity and integrity of the nation", is inseparable. The framers of our constitution recognised that there can be no justice without equality of status, and that bereft of fraternity, even equality would be an illusion as existing divisions and "narrow domestic walls"[97] would fragment society.

A. The principles of non-discrimination and fraternity in the constitutional ethos

181. The fraternal principle is deeply embedded to this nation's ethos and culture. The specific provisions which form part of the Equality Code, are inextricably intertwined with fraternity as well. It is fraternity – and no other idea, which acknowledges that ultimately, all individuals are human beings, born through the same natural process, subjected to the same physical limitations, and finally leave this world at an unknown time, but are sure to leave. Fraternity as a concept awakens humans to the reality that despite our apparent or superficial differences – ethnic, religion, caste, gender, origin or economic status – the institutions we create need our collective cooperation and individual commitment. Every social order invariably contains individuals with differences – be it grounded in ethnicity, wealth, talent, or realisation of one's abilities; the diversities abound. The idea of fraternity is to awaken the consciousness of each member of society that the human institutions which they create, the ideas they seek to develop, and the progress they wish to achieve, cannot be in

[97] Rabindranath Tagore, 'Where the Mind is Without Fear', Gitanjali (1910).

isolation – by separation – but with cooperation and harmony.

182. Ours is a nation of multi-dimensional diversity. The Constitution forges unity, and instructs people of this country about its social goals, and the means to achieve it. By it, We the People, *"solemnly resolve to ... secure to all its citizens ... Justice, Liberty and Equality, and to promote ... Fraternity"*. It reinforces national *unity* re-emphasising the idea of oneness as people of India, first and foremost, regardless of our regional, linguistic, religious, ethnic, economic, etc., diversities. In this context, fraternity is brotherhood. It focuses on concern for others, and respect for and acceptance of differences of caste, gender, ethnicity, economic status, religion, etc. People cannot be assured of Justice, Liberty or Equality, unless Fraternity in one form or another, to some degree, is felt by individuals at each level of our social order, and economic system.

183. It is essential that for the unity of this great nation, that we all recognize that fraternity is the integrator, and unifier, which needs active propagation and practise, in tune with our preambular resolve to preserve our Republic. Therefore, divisiveness of any form: in the polity, social hierarchy, religion, origin, or regional destroys fraternity and undermines unity. Divisiveness tends to polarize people and is likely to foster distrust. Weakening fraternity therefore undermines justice, liberty, and equality.

184. On this, I want to highlight the words of two social reformers, which demonstrate that the principle of fraternity and the ideas and values connected to it, are not new, but in fact, transcend time. Swami Vivekananda's message, in his address at the World Parliament of Religions, in Chicago, on 11th September, 1893 had the theme of universal brotherhood of all, and that differences in religion, the exclusion of one of another, would fade. He evocatively said that:

> *"If anybody dreams of the exclusive survival of his own religion and the destruction of others, I pity him from the bottom of my heart, and point out to him that upon the banner of every religion will soon be written, in spite of resistance, 'Help and not fight', 'Assimilation and not Destruction', 'Harmony and Peace and not dissension'."*

Sri Aurobindo too, was conscious of the need for fraternity. In a speech delivered in Howrah, on 27 June, 1909, he presciently said:

> *"Again, there is fraternity. It is the last term of the gospel. It is the most difficult to achieve, still it is a thing towards which all religions call and human aspirations rise. There is discord in life, but mankind yearns for peace and love. This the reason why the gospels which preach brotherhood spread quickly and excite passionate attachment. This was the reason of the rapid spread of Christianity. This was the reason of Buddhism's spread in this country and throughout Asia. This is the essence of humanitarianism, the modern gospel of love for mankind. None of us have achieved our ideals, but human society has always attempted an imperfect and limited fulfilment of them. It is the nature, the dharma of humanity that it should be unwilling to stand alone. Every man seeks the brotherhood of his fellow and we can only live by fraternity with others. Through all its differences and discords humanity is striving to become one."*

185. Thus, one-ness, *inclusiveness*, humanism and the idea that not only are all equal, and should have equal opportunities, and the content of each one's rights be no different from the other, but also that all stand together, and for each other, is a powerful precept. This precept suffuses every provision of Part III of the Constitution, especially Articles 14-18, 38-39 and 46.

186. This intrinsic value of fraternity, its intricate connection with justice, liberty, and equality, assuring the dignity of the individual are steeped in the constitutional jurisprudence of this nation. The constitution does not merely bind the institutions it creates and regulate their action, confer rights on individuals, but it is also a "pact between people" and is a charter given on to themselves defining their conduct with each other.[98] In my opinion, this value of fraternity is as much a part of the equality code, and its facets – equality of opportunity, the principle of non-discrimination and the non-

[98] *Prathvi Raj Chauhan v. Union of India,* (2020) 4 SCC 727.

exclusionary principle, as it inextricably binds them with the concepts of liberty and freedom. Building upon the simile used by Chandrachud, J of the basic structure of the Constitution being "*woven out of the conspectus of the Constitution*" - equality and justice are the warp and weft of the constitutional fabric: with liberty, fraternity, and dignity, lending it richness in colour.

187. The exclusionary clause (in the impugned amendment) that keeps out from the benefits of economic reservation, backward classes and SC/STs therefore, strikes a death knell to the equality and fraternal principle which permeates the equality code and non-discrimination principle.

188. The concepts which our Constitution fosters, and the principles it engenders – equality, fraternity, egalitarianism, dignity, and justice (at individual and social levels) are all inclusive, all encompassing. The equality code in its majestic formulation (Article 14, 15, 16 and 17) promotes inclusiveness. Even provisions enabling reservations foster social justice and equality, to ensure inclusiveness and participation of all sections of society. These provisions assure representation, diversity, and empowerment. Conversely, exclusion, with all its negative connotation – is not a constitutional principle and finds no place in our constitutional ethos. Therefore, to admit now, that exclusion of people based on their backwardness, rooted in social practice, is permissible, destroys the constitutional ethos of fraternity, non-discrimination, and non-exclusion.

B. Summary of findings in Questions 1-3

189. On Question 1, it is held that the states' compelling interest to fulfil the objectives set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate. That reservation or special

provisions have so far been provided in favour of historically disadvantaged communities, cannot be the basis for contending that *other* disadvantaged groups who have not been able to progress due to the ill effects of abject poverty, should remain so and the special provisions should not be made by way of affirmative action or even reservation on their behalf. Therefore, special provisions based on objective economic criteria (for the purpose of Article 15), is *per se* not violative of the basic structure.

190. However, in answer to Question 3, I have highlighted that the framework in which it has been introduced by the impugned amendment – *by excluding* backward classes – is violative of the basic structure. The identifier for the new criteria-is based on deprivation faced by individuals. Therefore, which community the individual belongs to is irrelevant. An individual who is a target of the new 10% reservation may be a member of any community or class. The state does not – and perhaps justly so - will not look into her background. Yet in the same breath, the state is saying that members of certain communities who may be equally or desperately poor (for the purposes of classification identification) but will otherwise be beneficiaries of reservation of a different kind, would not be able to access this new benefit, since they belong to those communities. This dichotomy of on the one hand, using a *neutral identifier* entirely based on economic status and at the same time, for the purpose of exclusion, using social status, i.e., the castes or socially deprived members, on the ground that they are beneficiaries of reservations (under Article 15(4) and 16(4)) is entirely offensive to the Equality Code.

191. A universally acknowledged truth is that reservations have been conceived and quotas created, through provision in the Constitution, only to offset fundamental, deep rooted generations of wrongs perpetrated on entire communities and castes. Reservation is designed as a powerful tool

to enable equal access and equal opportunity. Introducing the economic basis for reservation – as a new criterion, is permissible. Yet, the "othering" of socially and educationally disadvantaged classes – including SCs/ STs/ OBCs by excluding them from this new reservation on the ground that they enjoy pre-existing benefits, is to heap fresh injustice based on past disability. The exclusionary clause operates in an utterly arbitrary manner. Firstly, it "others" those subjected to socially questionable, and outlawed practices – though they are amongst the poorest sections of society. Secondly, for the purpose of the new reservations, the exclusion operates against the socially disadvantaged classes and castes, absolutely, by confining them within their allocated reservation quotas (15% for SCs, 7.5% for STs, etc.). Thirdly, it denies the chance of mobility from the reserved quota (based on past discrimination) to a reservation benefit based only on economic deprivation. The net effect of the entire exclusionary principle is Orwellian, (so to say)[99] which is that all the poorest are entitled to be considered, regardless of their caste or class, yet only those who belong to forward classes or castes, would be considered, and those from socially disadvantaged classes for SC/STs would be ineligible. Within the narrative of the classification jurisprudence, the differentia (or marker) distinguishing one person from another is deprivation alone. The exclusion, however, is not based on deprivation but social origin or identity. This strikes at the essence of the non-discriminatory rule. Therefore, the total and absolute exclusion of constitutionally recognised backward classes of citizens - and more acutely, SC and ST communities, is nothing but discrimination which reaches to the level of undermining,

[99] George Orwell, *Animal Farm* where idea of equality is explained *allegorically*, through the example of a society comprising of animals who have seized control, by one of them saying that the rule 'All animals are equal' reads that *'All animals are equal but some animals are more equal than others'*.

and destroying the equality code, and particularly the principle of non-discrimination.

192. Therefore, on question 3, it is clear that the impugned amendment and the classification it creates, is arbitrary, and results in hostile discrimination of the poorest sections of the society that are socially and educationally backward, and/or subjected to caste discrimination. For these reasons, the insertion of Article 15(6) and 16(6) is struck down, is held to be violative of the equality code, particularly the principle of *non-discrimination* and *non-exclusion* which forms an inextricable part of the basic structure of the Constitution.

193. While this reasoning is sufficient to conclude that Article 16(6) is liable to be struck down, there are additional reasons (elaborated in **Part V**), due to which this court is compelled to clarify that while the 'economic criteria' *per se* is permissible in relation to *access* of public goods (under Article 15), the same is not true for Article 16, the goal of which is empowerment, through *representation* of the community.

194. On the point of Question 2, this court is in agreement that unaided private educational institutions would be bound under Article 15(6) to provide for EWS reservations. However, given that the analysis under Question 3 on 'exclusion' leads to the conclusion that the Amendment is violative of the basic structure, the question herein has been rendered moot.

195. For the above reasons, it is hereby declared that Sections 2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted clause (6) in Article 15 and clause (6) in Article 16, respectively, are unconstitutional and void on the ground that they are violative of the basic structure of the Constitution.

196. The writ petitions and other proceedings are consequently, disposed of, in the above terms. There shall be no order as to costs.

197. It would be in order to place my gratitude and appreciation for the valuable assistance rendered by all counsels who appeared and made submissions during the course of the hearings, i.e., K.K. Venugopal, Attorney General for India, Tushar Mehta, Solicitor General of India, Ms. Meenakshi Arora, Mr. Sanjay Parikh, Prof. Ravi Verma Kumar, Mr. Salman Khurshid, Mr. P. Wilson, Dr. K. S. Chauhan, Mr. Gopal Sankaranarayanan, Mr. Mahesh Jethmalani, Mr. Niranjan Reddy, Ms. Vibha Makhija, senior advocates; and Prof (Dr) G. Mohan Gopal, Mr. Yadav Narender Singh, Mr. Shadan Farasat, Ms. Diya Kapur, Dr. M. P. Raju, Mr. Kaleeswaram Raj, Mr. Pratik R. Bombarde, Mr. Akash Kakade, Mr. Kanu Agrawal, Mr. V.K. Biju, advocates; and all the other counsels that assisted them.

.....CJI.
[UDAY UMESH LALIT]

.....J.
[S. RAVINDRA BHAT]

New Delhi,
November 7, 2022.