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. 178/2019, W.P.(C) No. 182/2019, W.P.(C) No. 146/2019, W.P. (C) No. 168/2019, W.P.(C) No. 212/2019, W.P.(C) No. 162/2019, W.P.(C) No. 419/2019, W.P.(C) No. 473/2020, W.P.(C) No. 493/2019]

JUDGMENT

DINESH MAHESHWARI, J.

Contents

Preliminary and Brief Outline

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

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

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

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

[6] 'SEBC', for short.

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

The Referral and the Questions Formulated

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

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

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

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

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

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

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

Rival Submissions

In challenge to the amendment in question

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] 'DPSP', for short.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In part challenge to the amendment in question

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

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

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

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

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

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

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

In support of the amendment in question

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Points for Determination

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

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

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

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

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

Relevant Constitutional Provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) the representation of States in Parliament, or

(e) the provisions of this article,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"STATEMENT OF OBJECTS AND REASONS

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

2. The directive principles of State policy contained in article 46 of the Constitution enjoins that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*** *** ***

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

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

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

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

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

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

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

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

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

*** *** ***

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

Doctrine of Basic Structure and Constitutional Amendments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sikri, C.J.

"209…..In other words, the expression 'Amendment of this Constitution" does not include a revision of the whole Constitution. If this is true — I say that the concession was rightly made — then which is that meaning of the word "Amendment" that is most appropriate and fits in with the whole scheme of the Constitution. **In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble**.

284. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.

395. It was said that if Parliament cannot increase its power of amendment clause *(d)* of Section 3 of the 24th Amendment which makes Article 13 inapplicable to an amendment of the Constitution would be bad. I see no force in this contention. Article 13(2) as

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

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

Shelat, J. and Grover, J.

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

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

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

Hegde, J. and Mukherjea, J.

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

Khanna, J.

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

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

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

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

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

(emphasis supplied)

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

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

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

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

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

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

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

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

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

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

(emphasis supplied)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

108. Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-second Amendment) Act, 2000 we find that the said proviso has a nexus with Articles 16(4-A) and 16(4-B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is—whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that “efficiency” is a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.

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

Conclusion

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

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

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

(emphasis supplied)

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

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

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

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

> "*19.* The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."

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

(emphasis supplied)

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

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

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

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

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

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

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

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

(emphasis supplied)

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

Khehar, J.

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

> "308. **Articles 124-A(1)(*a*) and (*b*) do not provide for an adequate representation in the matter to the judicial component to ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary, and therefore, the same are liable to be set aside and struck down as being violative of the "basic structure" of the Constitution of India. Thus viewed, we are satisfied that the "basic structure" of the Constitution would be clearly violated if the process of selection of Judges to the higher judiciary was to be conducted in the manner contemplated through NJAC.** The impugned constitutional amendment being ultra vires the "basic structure" of the Constitution is liable to be set aside.
>
> **Lokur,J.**
>
> 928. The 99th Constitution Amendment Act and the NJAC Act not only reduce the Chief Justice of India to a number in NJAC but also convert the mandatory consultation between the President and the Chief Justice of India to a dumb charade with NJAC acting as an intermediary. On earlier occasions, Parliament enhanced its power through constitutional amendments, which were struck down, inter alia, in *Indira Nehru Gandhi* and *Minerva Mills*. **The 99th Constitution Amendment Act unconstitutionally minimises the role of the Chief Justice of India and the judiciary to a vanishing point in the appointment of Judges. It also considerably downsizes the role of the President. This effaces the basic structure of the independence of the judiciary by sufficiently altering the process of appointment of Judges to the Supreme Court and the High Court, or at least alters it unconstitutionally thereby striking at the very basis of the independence of the judiciary**."
>
> (emphasis supplied)

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

> **"1196.** An analysis of the judgments of the abovementioned cases commencing from *Kesavananda case* yields the following propositions:
>
> **1196.1.** Article 368 enables Parliament to amend any provision of the Constitution.

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

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

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

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

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

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

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

(emphasis supplied)

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

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

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

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

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

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

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

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

Bhushan, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Expanding Doctrine of 'Equality'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "**102 …… Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation.** Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. **Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation".** As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State…….. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid…….Equality has two facets - "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. **In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy.** Egalitarian equality is proportional equality.
> *** *** ***
> 104…… As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case….."
>
> (emphasis supplied)

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

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

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

Economic Disabilities and Affirmative Action

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

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

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

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

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

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

(i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that

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

60. H.M. Seervai writes: -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

K.K. Mathew, J.

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

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

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

*** *** ***

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

M.H. Beg, J.

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

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

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

V.R. Krishna Iyer, J.

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

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

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

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

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

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

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

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

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

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

Sawant, J.

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

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

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

*** *** ***

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

B.P. Jeevan Reddy, J.

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

*** *** ***

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

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

(emphasis supplied)

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

S.H. Kapadia, J.

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

> equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In *Indra Sawhney* all the Judges except Pandian, J. held that the "means test" should be adopted to exclude the creamy layer from the protected group earmarked for reservation. **In *Indra Sawhney* this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney*.** The question as to the "determinant" of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney* has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination."
>
> (emphasis supplied)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Krishna Iyer, J.

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

(emphasis supplied)

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

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

Chinnappa Reddy, J.

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

Krishna Iyer, J.

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

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

(emphasis supplied)

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

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

Chinnappa Reddy, J.

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

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

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

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

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

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

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

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

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

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

> "102 …… Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State…….. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid…….Equality has two facets - "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. **In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality**.
>
> *** *** ***
>
> 104…..**As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case**…..
>
> *** *** ***
>
> **Conclusion**
>
> 121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the

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

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

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

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

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

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

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

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

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

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

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

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

Other Factors and General Summation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

Acknowledgments

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

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

……..…….J.
(DINESH MAHESHWARI)

NEW DELHI;
NOVEMBER 07,2022.