RESERVATION, BACKWARDNESS AND RULE OF EQUALITY

In Indra Sawhney case, it was held that caste could be the starting point for determining the socially and educationally backward classes of citizen.

In **Champakam Dorairajan AIR 1951 Mad 120, (1950) IIMLJ 404,** this Court struck down the classification made in the Communal G.O. of the then State of Madras. The G.O. was founded on the basis of religion and castes and was struck down on the ground that it is opposed to the Constitution and is in violation of the fundamental rights guaranteed to the citizens. The court held that Article 46 cannot override the provisions of Article 29(2) because of the Directive Principles of State Policy which were then taken subsidiary to fundamental rights. This decision led to the first constitutional amendment by which Article 15(4) was added to the Constitution.

M.R. Balaji v. State of Mysore 1963 AIR 649, it was held the classification of socially backward citizens on the basis of their caste alone is not permissible under Article 15(4).

In **K.C. Vasanth Kumar v. State of Karnataka AIR 1985 S.C. 1495**, it was further held that "Backward Class" in Article 16(4) cannot be read as "Backward Caste". And under Article 340 of the Constitution, the President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes of citizens within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove the difficulties and to improve their condition.

In Indra Sawhney case, the majority held that the ideal and wise method would be to mark out various occupations which on the lower level in many cases amongst Hindus would be their caste itself and find out their social acceptability and educational standard, weigh them in the balance of economic conditions and, the result would be backward class of citizens needing a genuine protective umbrella. And after having adopted occupation as the starting point, the next point should be to ascertain their social acceptability. The Court has cautioned that the backwardness should be traditional. Mere educational or social backwardness would not have been sufficient as it would enlarge the field thus frustrating the very purpose of the constitutional goal. It was pointed out that after applying these tests, the economic criteria or the means-test should be applied since poverty is the prime cause of all backwardness as it generates social and educational backwardness……..

In **Ashok Kr Thakur**, it was laid down that "A social class is therefore a homogeneous unit, from the point of view of status and mutual recognition; whereas a caste is a homogeneous unit from the point of view of common ancestry, religious rites and strict organizational control"

EXTENT OF RESERVATION

In **M.R. Balaji v. State of Mysore 1963 AIR 649** with reference to Article 15(4). In this case, 60% reservation under Article 15(4) was struck down as excessive and unconstitutional. Gajendragadkar, J. observed that special provision should be less than 50 per cent, how much less would depend on the relevant prevailing circumstances of each case.

In **T. Devadasan v. Union of India**, this was the issue. The Union Public Service Commission had provided for 17½% reservation for the Scheduled Castes and Scheduled Tribes. In case of non-availability of reserved category candidates in a particular year the posts had to be filled by general category candidates and the number of such vacancies were to be carried forward to be filled by the reserved category candidates next year. Due to this, the **rule of carry-forward** reservation in a particular year amounted to 65% of the total vacancies. The petitioner contended that reservation was excessive which destroyed his right under Article 16(1) and Article 14. The Court on the basis of decision in Balaji held the reservation excessive and, therefore, unconstitutional. It further stated that the guarantee of equality under Article 16(1) is to each individual citizen and to appointments to any office under the State. It means that on every occasion for recruitment the State should see that all citizens are treated equally. In order to effectuate the guarantee, each year of recruitment will have to be considered by itself.

But in **State of Kerala v. N M Thomas 1976 AIR 490,** Krishna Iyer, J. expressed his concurrence with the views of Fazal Ali, J. who said that although reservation cannot be so excessive as to destroy the principle of equality of opportunity under clause (1) of Article 16, yet it should be noted that the Constitution itself does not put any bar on the power of the Government under Article 16(4). If a State has 80% population which is backward then it would be meaningless to say that reservation should not cross 50%.

However, in **Indra Sawhney v. Union of India 1992 Supp (3) SCC 217** the majority held that the rule of 50% laid down in Balaji was a binding rule and not a mere rule of prudence. Giving the judgment of the Court in Indra Sawhney, Jeevan Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of

Backward Classes to the total population would certainly be relevant. He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.

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

In **Indra Sawhney v. Union of India 1992 Supp (3) SCC 217**, Jeevan Reddy, J. noted that reservation under Article 16(4) does not operate on communal ground. Therefore, if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in R.K. Sabharwal, the Supreme Court held that while general category candidates are not entitled to fill the reserved posts, reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of Backward Class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class.

On 16 November 1992, a nine judge Bench of this Court delivered judgment in **Indra Sawhney v Union of India 1992 Supp (3) SCC 217**, Justice B P Jeevan Reddy speaking for a plurality of four judges held that:

(i) Reservations contemplated by Article 16 (4) of the Constitution should not exceed 50 per cent. While 50 per cent 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". But, any relaxation of the strict rule must be with extreme caution and on a special case being made out;

(ii) Reservations under Article 16 (4) could only be provided at the time of entry into government service but not in matters of promotion. However, this principle would operate only prospectively and not affect promotions already made. Moreover, reservations already provided in promotions shall continue in operation for a period of five years from the date of the judgment

(iii) The creamy layer can be and must be excluded. Justice B P Jeevan Reddy held : "792…While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

(iv) The adequacy of the representation of a backward class of citizens in services "is a matter within the subjective satisfaction of the State", since the requirement in Article 16 (4) is preceded by the words "in the opinion of the State". The basis of the standard of judicial review was formulated thus: "

> 798…This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in **Barium Chemicals v. Company Law Board [1966 Supp SCR 311 : AIR 1967 SC 295]** which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive."

(v) The backward class of citizens cannot be identified only and exclusively with reference to an economic criterion. It is permissible to identify a backward class of citizens with reference to occupation, income as well caste.

(vi)The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be.

We may summarise our answers to the various questions dealt with in **Indira Sawhney** and answered hereinabove: (1) (a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised.

(b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued.

(2) (a) Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1).

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment.

(c) Reservations can also be provided under clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' - as explained in this Judgment.

(3) (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does –what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming minority of the country's population, one can well begin with it and then go to other groups, sections and classes.

(c) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context.

(d) 'Creamy layer' can be, and must be excluded.

(e) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes.

(f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority.

(4) (a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria.

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised.

(5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories.

(6) (a) and (b) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. 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 far-flung 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 the conditions peculiar to and characteristic of 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.

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be.

(d) Devadasan was wrongly decided and is accordingly over-ruled to the extent it is inconsistent with this judgment.

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State'

in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

(8) While the rule of reservation cannot be called anti-meritarian, there are certain services and posts to which it may not be advisable to apply the rule of reservation.

(9) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4).

(10) The distinction made in the impugned Office Memorandum dated September 25, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as Other Backward Classes, as explained in paras 843-844 of this Judgment.

(11) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned Office Memorandum dated September 25, 1991 is constitutionally invalid and is accordingly struck down.

(13) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism - in the nature of a Commission - for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of OBCs and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor.

(14) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission.

Answers question-wise are:

(1) Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under clause (1) of Article 16.

(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', SCs, STs and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to in Article 46 do include SEBCs referred to in Article 340 and covered by Article 16(4).

(3) Even under Article 16(1), reservations cannot be made on the basis of economic criteria alone.

(4) The reservations contemplated in clause

(4) of Article 16 should not exceed 50%. 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 far-flung 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 the conditions peculiar to and characteristic of 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. For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate. To the extent, Devadasan is inconsistent herewith, it is over-ruled.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay, necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward

classes high and dry. For excluding 'creamy layer', an economic criterion can be adopted as measure of social advancement.

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4). It is not possible or necessary to say more than this under this question.

(8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 –such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so.

The following Directions are given to the Government of India, the State Governments and the Administration of Union Territories

(A) The Government of India, each of the State Governments and the Administrations of Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government.

(B) Within four months from today the Government of India shall specify the bases, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections ('creamy layer') from 'Other Backward Classes'. The implementation of the impugned O.M. dated August 13, 1990 shall be subject to exclusion of such socially advanced persons ('creamy layer'). This direction shall not however apply to States where the reservations in favour of backward

classes are already in operation. They can continue to operate them. Such States shall however evolve the said criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated 'Other Backward Classes'.

(C) It is clarified and directed that any and all objections to the criteria that may be evolved by the Government of India and the State Governments in pursuance of the direction contained in clause (B) of para 861 as well as to the classification among backward classes and equitable distribution of the benefits of reservations among them that may be made in terms of and as contemplated by clause (i) of the Office Memorandum dated September 25, 1991, as explained herein, shall be preferred only before this Court and not before or in any other High Court or other Court or Tribunal. Similarly, any petition or proceeding questioning the validity, operation or implementation of the two impugned Office Memorandums, on any grounds whatsoever, shall be filed or instituted only before this Court and not before any High Court or other Court or Tribunal.

On 10 February 1995, a Constitution Bench of this Court rendered a judgment in **R K Sabharwal v State of Punjab (1995) 2 SCC 745** and held that:

(i) Once the prescribed percentage of posts is filled by reserved category candidates by the operation of the roster, the numerical test of adequacy is satisfied and the roster would cease to operate;

(ii) The percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of vacancy has no relevance in operating the percentage of reservation; and

(iii) The interpretation placed on the working of the roster shall operate prospectively from 10 February 1995.

Constitution (Seventy-seventh Amendment) Act, 1995

Contrary to the said judgment of Indira Sahney, Parliament on 17th June, 1995 enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By the said amendment, Article 16(4A) was inserted, which reintroduced reservation in promotion. Clause (4A) to article 16 was inserted:

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

On 1 October 1995, a two judge Bench of this Court held in **Union of India v Virpal Singh Chauhan (1995) 6 SCC 684** that the state could provide that even if a candidate belonging to the SC or ST is promoted earlier on the basis of reservation and on the application of the roster, this would entitle such a person to seniority over a senior belonging to the general category in the feeder cadre. However, a senior belonging to the general category who is promoted to a higher post subsequently would regain seniority over the reserved candidate who was promoted earlier. This rule came to be known as the **catch-up rule**. This Court held that roster-point promotees who were given the benefit of accelerated promotion would not get **consequential seniority**.

Six months after the decision in Virpal Singh, on 1 March 1996, a three judge Bench of this Court in **Ajit Singh Januja v State of Punjab (1996) 2 SCC 715** ("Ajit Singh I"), adopted the catch-up rule propounded in Virpal Singh, to the effect that the seniority between reserved category candidates and general candidates in the promoted category shall continue to be governed by their inter se seniority in the lower grades. This Court held that a balance has to be maintained so as to avoid "reverse discrimination" and, a rule or circular which gives seniority to a candidate belonging to the reserved category promoted on the basis of roster points would violate Articles 14 and 16 of the Constitution.

Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons - "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in **Ajit Singh (II) v. State of Punjab (1999) 7 SCC 209** this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.

The Constitution (Eighty-first Amendment) Act, 2000

A number of vacancies which were reserved for SCs and STs could not be filled up due to non-availability of candidates belonging to these categories. Such of these vacancies which were not filled up were treated as "backlog vacancies" and were carried forward. In Indra Sawhney (supra), this Court held that reservations contemplated in a year under Article 16(4) shall not exceed 50 per cent. In practice, backlog vacancies were not included within the ceiling of 50 per cent reservation in a year. Thereafter, several representations were made to the Central Government, which led to a further amendment to Article 16 of the Constitution of India, by insertion of Article 16(4-B) by the Constitution (Eighty-first Amendment) Act, 2000. Article 16(4-B) reads as under: -

> "(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 of reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

The Constitution (Eighty-second Amendment) Act, 2000

A proviso was inserted at the end of Article 335 of the Constitution which reads:

> "Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

Constitution (Eighty-fifth Amendment) Act 2001

As the Government was of the opinion that the concept of "catch-up" rule was not in the interest of SCs and STs in the matter of seniority on promotion, Article 16(4-A) was further amended by the Constitution (Eighty-fifth Amendment) Act, 2001 to give the benefit of consequential seniority in addition to accelerated promotion. At present, **Article 16(4-A)** reads as follows:-

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

The validity of the above amendments made to Article 16 (4) was considered by this Court in **M Nagaraj v Union of India (2006) 8 SCC 212**. The key issue that was identified and decided in M. Nagaraj (supra) is whether any constitutional limitation mentioned in Article 16(4) and Article 335 stood obliterated by the constitutional amendments resulting in Articles 16(4-A) and 16(4-B). The amendments were held to be enabling provisions. This Court observed that the State is not bound to make reservation for SCs and STs in matters of promotion. However, if it wishes to exercise its discretion, the State has to collect quantifiable data showing the backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution of India.

The Constitution Bench of five judges analysed whether the replacement of the catch-up rule with consequential seniority violated the basic structure and equality principle under the Constitution. Upholding the constitutional validity of the amendments, this Court held that the catch-up rule and consequential seniority are judicially evolved concepts based on service jurisprudence. Hence, the exercise of the enabling power under Article 16 (4A) was held not to violate the basic features of the Constitution:

> "79. Reading the above judgments, we are of the view that the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view

neither the "catch-up" rule nor the concept of "consequential seniority" is implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan.

117… in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

123. … In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

The Constitution Bench in **Nagraj** held that Article 16 (4A) is an enabling provision. The state is not bound to make reservations for the SCs and STs in promotions. But, if it seeks to do so, it must collect quantifiable data on three facets:

(i) The backwardness of the class;

(ii) The inadequacy of the representation of that class in public employment; and

(iii) The general efficiency of service as mandated by Article 335 would not be effected.

It was held in **E.V. Chinnaiah v. State of Andhra Pradesh [(2005) 1 SCC 394]** that the SCs and STs form a single class.

It was held in **Ashoka Kumar Thakur v. Union of India (2008) 6 SCC 1** that the observations in **Nagaraj** case cannot be construed as requiring exclusion of creamy layer in SCs and STs. Creamy layer principle was applied for the identification of backward classes of citizens. And it

was specifically held in Indra Sawhney case, that the above discussion was confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes. The observations of the Supreme Court in Nagaraj case should not be read as conflicting with the decision in Indra Sawhney case. The observations in Nagaraj case as regards SCs and STs are obiter. In regard to SCs and STs, there can be no concept of creamy layer. Creamy Layer principle is not applicable to Scheduled Castes and Scheduled Tribes.

The Constitution (Ninety-Third Amendment) Act, 2005

By the **Constitution (Ninety-Third Amendment) Act, 2005**, Clause (5) was inserted in Article 15 of the Constitution which reads as under:

> 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 the 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.

In **Unni Krishnan, J.P. v. State of Andhra Pradesh [1993 (1) SCC 645]**, it was held that right to establish educational institutions can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g).

This was overruled in **T.M.A. Pai Foundation v. State of Karnataka [(2002) 8 SCC 481]**, wherein it was held that all citizens have the fundamental right to establish and administer educational institutions under Article 19(1)(g) and the term "occupation" in Article 19(1)(g) comprehends the establishment and running of educational institutions and State regulation of admissions in such institutions would not be regarded as an unreasonable restriction on that fundamental right to carry on business under Article 19(6) of the Constitution. Education is primarily the responsibility of the State Governments.

The **Constitution (93rd Amendment) act, 2005** was challenged in **Ashok Thakur** case. The Union Government also has certain responsibility specified in the Constitution on matters relating to institutions of national importance and certain other specified institutions of higher education

and promotion of educational opportunities for the weaker sections of society. The Parliament introduced Article 15(5) by The **Constitution (Ninety-Third Amendment) Act, 2005** to enable the State to make such provision for the advancement of SC, ST and Socially and Educationally Backward Classes (SEBC) of citizens in relation to a specific subject, namely, admission to educational institutions including private educational institutions whether aided or unaided by the State **notwithstanding the provisions of Article 19(1)(g)**.

Clause (1) of Article 30 provides the right to all minorities to establish and administer educational institutions of their choice. It is essential that the rights available to minorities are protected in regard to institutions established and administered by them. Accordingly, institutions declared by the State to be minority institutions under Clause (1) of Article 30 are omitted from the operation of the proposal.

To promote the educational advancement of the socially and educationally backward classes of citizens i.e., the OBCs or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable the Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

Fundamental Rights and Directive Principles are both complementary and supplementary to each other. Preamble is a part of the Constitution and the edifice of our Constitution is built upon the concepts crystallized in the Preamble.

The Fundamental Rights in Part III are not to be read in isolation. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part III. The Directive Principles of State Policy in Part IV of the Constitution are equally as important as Fundamental Rights. Part IV is made not enforceable by Court for the reason inter alia as to financial implications and priorities. Principles of Part IV have to be gradually transformed into fundamental rights depending upon the economic capacity of the State.

Article 45 is being transformed into a fundamental right by 86th Amendment of the Constitution by inserting Article 21A. **Clause 2 of Article 38** says that, "the State shall, in particular, strive to minimize 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". Under **Article 46**, "the State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation". Access to education is important in order to ensure advancement of persons belonging to the Scheduled Castes, the Scheduled Tribes and the socially and educationally backward classes also referred to as the OBCs.

It was pointed out that the observations in **Champakam Dorairajan** that the Directive Principles are subordinate to the Fundamental Rights is no longer good law after the decision of the **Kesavanda Bharati** case and other decisions of this Court.

As regards exemption of minority educational institutions in Article 15(5), it was contended that this was done to conform with the Constitutional mandate of additional protection for minorities under Article 30. It was argued that Article 15(5) does not override Article 15(4). They have to be read together as supplementary to each other and Article 15(5) being an additional provision, there is no conflict between Article 15(4) and Article 15(5). Article 15(4), 15(5), 29(2), 30(1), and 30(2) all together constitute a Code in relation to admission to educational institutions. They have to be harmoniously construed in the light of the Preamble and Part IV of the Constitution. It was also contended that the Article 15(5) does not interfere with the executive power of the State and there is no violation of the proviso to Article 368.

The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the Fundamental Rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the Basic Structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.

For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution. It may be noticed that the majority in **Kesavananda Bharati** case did not hold that all facets of Article 14 or any of the fundamental rights would form part of the basic structure of the Constitution. The majority upheld the validity of the first part of Article 30(1)(c) which would show that the constitutional amendment which takes away or abridges the right to challenge the validity of an arbitrary law or violating a fundamental right under that Article would not destroy or damage the basic structure. Equality is a multi-coloured 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 Article 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 farreaching change that is objectionable, rather it is the content of this change in so far as it implicates the question of constitutional identity.

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 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' that the present Constitutional 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 page 240 are relevant:

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

It has been held in many decisions that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the Directive Principles of State Policy as the 'Book of Interpretation'. The Preamble embodies the hopes and aspirations of the people and Directive Principles set out the proximate grounds in the governance of this country.

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 Ninety-Third Constitutional 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 Ninety-Third Constitutional 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.

The **Ninety-Third Constitutional Amendment** does not specifically or impliedly make any change in Article 162. Article 15(5) does not seek to make any change in Article 162 either directly or indirectly. The field of legislation as to "education" was in Entry 11 of List II. By virtue of the 42nd Amendment of the Constitution, "education", which was in Entry 11 in List II, was deleted

and inserted as Entry 25 in List III. The executive power of the State is not touched by the present Constitutional Amendment. Article 15(5) does not abrogate the fundamental right enshrined under Article 19(1)(g). If at all there is an abridgement of Fundamental Right, it is in a limited area of admission to educational institutions and such abridgement does not violate the basic structure of the Constitution. In any way, Constitutional Amendments giving effect to Directive Principles of the State Policy would not offend the basic structure of the Constitution.

Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of **Reservation (to the Posts in the Civil Services of the State) Act, 2002** provided for grant of consequential seniority to the government servants belonging to the Scheduled Castes and the Scheduled Tribes promoted under reservation policy. In **B K Pavitra v Union of India (2017) 4 SCC 620, ("B K Pavitra I")**, two judge Bench of this Court (consisting of Justice Adarsh Kumar Goel and Justice U U Lalit) held Sections 3 and 4 of the **Reservation Act 2002** to be ultra vires Articles 14 and 16 of the Constitution on the ground that an exercise for determining "inadequacy of representation", "backwardness" and the impact on "overall efficiency" had not preceded the enactment of the law. Such an exercise was held to be mandated by the decision of a Constitution Bench of this Court in **Nagaraj**.

Constitution (One Hundred and Second) Amendment Act, 2018

This amendment gave the National Commission for Backward Classes (NCBC) a constitutional status. The Commission was originally set up in 1993.

The 102nd Amendment Act received the presidential assent and came into effect in August 2018. The amendment inserted Articles 338B, 342A and 366(26C) into the Indian Constitution. Article 338B deals with the structure, duties and powers of the National Commission for Backward Classes (NCBC). Article 342A deals with the power of the President of India to notify a particular caste as a Socially and Educationally Backward Class (SEBC) and the power of the Parliament to change the list. The amendment also brings about changes in Article 366 by inserting clause (26C).

In **Mukesh Kumar vs The State Of Uttarakhand (2020) 3 SCC 1**, Article 16 (4) and 16 (4-A) empower the State to make reservation in matters of appointment and promotion in favour of the Scheduled Castes and Scheduled Tribes 'if in the opinion of the State they are not adequately represented in the services of the State'. It is for the State Government to decide whether reservations are required in the matter of appointment and promotions to public posts. The

language in clauses (4) and (4-A) of Article 16 is clear, according to which, the inadequacy of representation is a matter within the subjective satisfaction of the State. The State can form its own opinion on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. As such, collection of data regarding the inadequate representation of members of the Scheduled Castes and Schedules Tribes, as noted above, is a pre requisite for providing reservations, and is not required when the State Government decided not to provide reservations.

UPHOLDING OF 50 % RULE

Paragraphs 809 and 810 of **Indra Sawhney** are to following effect:

> "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 far flung 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.

Admittedly, reservations in excess of 50% do exist in some exceptional cases, when it comes to the domain of political representation. For instance, the Legislative Assemblies of the States of Arunachal Pradesh, Nagaland, Meghalaya, Mizoram and Sikkim have reservations that are far in excess of the 50% limit. However, such a position is the outcome of exceptional considerations in relation to these areas. Similarly, vertical reservations in excess of 50% are permissible in the composition of local self-government institutions located in the Fifth Schedule Areas. In **Union of India v. Rakesh Kumar, (2010) 1 SCALE 281**, this Court has explained why it may be necessary to provide reservations in favour of Scheduled Tribes that exceed 50% of the seats in panchayats located in Scheduled Areas.

However, such exceptional considerations cannot be invoked when we are examining the quantum of reservations in favour of backward classes for the purpose of local bodies located in general areas. In such circumstances, the vertical reservations in favour of SC/ST/OBCs cannot exceed the

upper limit of 50% when taken together. It is obvious that in order to adhere to this upper ceiling, some of the States may have to modify their legislations so as to reduce the quantum of the existing quotas in favour of OBCs.

In **Dr. K. Krishna Murthy v. Union of India (2010) 7 SCC 202,** it was held that :

(1) 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.

(2) Identification of "backward classes" under Article 243D(6) and Article 243T(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).

(3) 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.

In **Vikas Kishanrao Gawali v. State Of Maharashtra & Ors. Writ Petition (Civil) No. 981 of 2019,** The writ petition under Article 32 of the Constitution of India seek a declaration that Section 12(2)(c) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, is ultra vires the provisions of Articles 243-D and 243-T including Articles 14 and 16 of the Constitution of India. In addition, the validity of the notifications dated 27.7.2018 and 14.2.2020 issued by the State Election Commission, Maharashtra providing for reservation exceeding 50 per cent in respect of Zilla Parishads and Panchayat Samitis of districts Washim, Akola, Nagpur and Bhandara have been questioned and it is prayed that the same be quashed and set aside. Relying on **Dr. K. Krishna Murthy v. Union of India (2010) 7 SCC 202** dictum, the petitioners would urge that it is no more open to the respondents to reserve more than 50 per cent (aggregate) seats in the concerned local bodies by providing reservation for Scheduled Castes/Scheduled Tribes/Other Backward Classes. The reservation for OBCs is only a statutory dispensation to be provided by the State legislations unlike the constitutional reservation regarding SCs/STs which is linked to the proportion of population. The State legislations providing for reservation of seats in respect of OBCs, it must ensure that in no case the aggregate vertical reservation in respect of SCs/STs/OBCs taken together should exceed 50 per cent of the seats in the concerned local bodies. Besides this inviolable

quantitative limitation, the State Authorities are obliged to fulfil the requirement to collate adequate materials or documents that could help in identification of backward classes for the purpose of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the concerned local bodies through an independent dedicated Commission established for that purpose.

It was imperative for the State to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of backwardness and on the basis of recommendations of that Commission take follow up steps including to amend the existing statutory dispensation, such as to amend Section 12(2)(c) of the 1961 Act.

it is indisputable that the triple test/conditions required to be complied by the State before reserving seats in the local bodies for OBCs has not been done so far. To wit, (1) to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness qua local bodies, within the State; (2) to specify the proportion of reservation required to be provisioned local body wise in light of recommendations of the Commission, so as not to fall foul of overbreadth; and (3) in any case such reservation shall not exceed aggregate of 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together.

In conclusion, the Court held that Section 12(2)(c) of the 1961 Act is an enabling provision and needs to be read down to mean that it may be invoked only upon complying with the triple conditions before notifying the seats as reserved for OBC category in the concerned local bodies. Further, Supreme Court quashed and set aside the impugned notifications to the extent they provide for reservation of seats for OBCs being void and non est in law including the follow up actions taken on that basis.

Chebrolu Leela Prasad Rao & Ors. V. State Of A.P. & Ors April, 2020

Coram: Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah and Aniruddha Bose JJ.

The Court quashed the Government Order dated January 10, 2000 issued by the erstwhile State of Andhra Pradesh providing 100% reservation to Scheduled Tribe candidates in posts of teachers in schools located in scheduled areas is unconstitutional. Further, the Court also concluded that that there was no rhyme or reason for the State government to resort to 100% reservation. The Governor of then undivided Andhra Pradesh had cited Schedule V of the Constitution, which provides for

administration of Scheduled Areas in states other than Assam, Meghalaya, Tripura and Mizoram, to pass the government order. The court held 100 per cent reservation unconstitutional as it was "discriminatory" against not just „open" category candidates, but also against Scheduled Castes and Other Backward Classes.

EXCLUSION OF CREAMY LAYER FROM SC / ST

In **Jarnail Singh v. Lachhmi Narayan Gupta [(2018) 10 SCC 396] (Jarnail Singh I)**, Attorney General KK Venugopal argued (rightly) that the Constitution determined the Scheduled Castes and the Scheduled Tribes to be "backward", and no further tests could be imposed to verify their "backwardness". The requirement of proof to show the backwardness is invalid in nature as the backward castes are presumed to be backward for the deep-rooted reasons of the harassment faced by them. He also contended that the concept of "creamy layer" applied to the Other Backward Classes, not to the Scheduled Castes and the Scheduled Tribes. The Nagaraj verdict had added these riders wrongly, Venugopal argued, so the matter needed to be referred to a larger bench. The Supreme Court accepted his first point but not the second, refusing to refer the Nagaraj judgement to a larger bench of seven judges.

The **Constitution bench judgement**, authored by Justice Rohinton Nariman, holds that reservation in promotions does not require the state to collect quantifiable data on the **backwardness** of the Scheduled Castes and the Scheduled Tribes, yet makes the "creamy layer" in either group ineligible for the benefit.

However, while the judgment modified the further backwardness criterion, it also added that the principle of **creamy layer exclusion** applies to SC/STs. Previously creamy layer exclusion only applied to Other Backward Classes (OBCs) in matters of reservation.

The Court held that creamy layer exclusion is a principle of equality. It held that failing to apply the exclusion of creamy layer principle would violate right to equality in two ways. Firstly, it held that doing so treats equals differently, namely the general classes and the forward among Backward Classes (SC/ST). Second, it held that doing so treat unequals the same, namely backward classes and the forward among backward classes. Thus, the Court held that the exclusion of creamy layer principle is essential to safeguard the right to equality.

Nariman J observed "the whole object of reservation is to see that backward classes of citizens move forward so that they march hand in hand with other citizens of India on an equal basis. This

will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were."

Justice Nariman clarified that in applying the creamy layer principle to Scheduled Castes and Scheduled Tribes, the Court does not in any manner tinker with the Presidential list under Article 341 and 342 of the Constitution. Justice Nariman wrote, the Castes and groups mentioned under Presidential Order is not altered, but those persons of the group who have come out of untouchability or backwardness by virtue of belonging to creamy layer are excluded from the benefit of reservation in promotion.

On 5 May 2017, the **Ratna Prabha Committee** submitted a report, titled as the 'Report on Backwardness, Inadequacy of Representation and Administrative Efficiency in Karnataka'. On the basis of the Ratna Prabha Committee report, the Government of Karnataka enacted Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act 2018. The validity of this act was challenged in **B.K. Pavitra Vs Union of India, (2019) 16 SCC 129 (B K Pavitra II).** The enactment provides, among other things, for consequential seniority to persons belonging to the Scheduled Castes and Scheduled Tribes promoted under the reservation policy of the State of Karnataka. The law protects consequential seniority from 24 April 1978.

The Supreme Court bench of Justices U.U. Lalit and D.Y. Chandrachud held that The Reservation Act 2018 does not amount to a usurpation of judicial power by the state legislature. It is **Nagaraj** and **Jarnail** compliant. The Reservation Act 2018 is a valid exercise of the enabling power conferred by Article 16 (4A) of the Constitution. Following the decision in B K Pavitra I, the State government duly carried out the exercise of collating and analysing data on the compelling factors adverted to by the Constitution Bench in Nagaraj. The Reservation Act 2018 has cured the deficiency which was noticed by B K Pavitra I in respect of the Reservation Act 2002.

The Ratna Prabha Committee cannot be held to have acted arbitrarily in adopting recourse to sampling methodologies or to have based its conclusions on any extraneous or irrelevant material. If sampling is a valid methodology for collection of data, the exercise cannot be invalidated only on the ground that data pertaining to a particular department or of some entities was not analysed. The data which was collected pertained to 31 departments which are representative in character. The state has analysed the data which is both relevant and representative, before drawing its

conclusions. There are limitations on the power of judicial review in entering upon a factual arena involving the gathering, collation and analysis of data, the bench held.

Once an opinion has been formed by the state government on the basis of the report submitted by an expert committee which collected, collated and analysed relevant data, it is impossible for the court to hold that the compelling reasons which Nagaraj requires the state to demonstrate have not been established. Even if there were to be some errors in data collection, that will not justify the invalidation of a law which the competent legislature was within its power to enact, the bench further clarified.

In **Jarnail Singh & Ors. Vs. Lachhmi Narain Gupta & Ors. [Civil Appeal No. 629 of 2022, (Jarnail Singh II), t**he 3-judge bench of L. Nageswara Rao, Sanjiv Khanna and BR Gavai has answered following 6 crucial questions in relation to quantifiable data showing inadequacy of representation in promotional posts:

1)What is the yardstick by which, according to M. Nagaraj v. Union of India, (2006) 8 SCC 212, one would arrive at quantifiable data showing inadequacy of representation of SCs and STs in public employment?

In **M. Nagaraj**, the Court held that *the State is not bound to make reservation for SCs and STs in matters of promotion. However, if it wishes to exercise its discretion, the State has to collect quantifiable data showing the backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution of India*.

It was further made clear that the validity of law made by the State Governments providing reservation in promotions shall be decided on a case-to-case basis for the purpose of establishing whether the inadequacy of representation is supported by quantifiable data.

Determination of inadequate representation of SCs and STs in services under a State is left to the discretion of the State, as the determination depends upon myriad factors which this Court cannot envisage. Hence, **no yardstick** can be laid down for determining the adequacy of representation of SCs and STs in promotional posts for the purpose of providing reservation.

2)What is the unit with respect to which quantifiable data showing inadequacy of representation is required to be collected?

The State should justify reservation in promotions with respect to the cadre to which promotion is made. Taking into account the data pertaining to a 'group', which would be an amalgamation of certain cadres in a service, would not give the correct picture of the inadequacy of representation

of SCs and STs in the cadre in relation to which reservation in promotions is sought to be made. Rosters are prepared cadre-wise and not group-wise. Sampling method which was adopted by the Ratna Prabha Committee might be a statistical formula appropriate for collection of data. However, for the purpose of collection of quantifiable data to assess representation of SCs and STs for the purpose of providing reservation in promotions, cadre, which is a part of a 'group', is the unit and the data has to be collected with respect to each cadre. Therefore, we hold that the conclusion of this Court in **B.K. Pavitra II** approving the collection of data on the basis of 'groups' and not cadres is contrary to the law laid down by this Court in **M. Nagaraj** and **Jarnail Singh**.

3)Whether proportion of the population of SCs and STs to the population of India should be taken to be the test for determining adequacy of representation in promotional posts for the purposes of Article 16(4-A)?

In **M. Nagaraj**, the Court held that the exercise of collecting quantifiable data depends on numerous factors, with conflicting claims to be optimised by the administration in the context of local prevailing conditions in public employment. As equity, justice and efficiency are variable factors and are context-specific, how these factors should be identified and counter-balanced will depend on the facts and circumstances of each case. Therefore, in the present case the Supreme Court refused to express any opinion on this aspect and reiterated that it is for the State to assess the inadequacy of representation of SCs and STs in promotional posts, by taking into account relevant factors.

4)Should there be a time period for reviewing inadequacy of representation?

The Court did not express any view on discontinuation of reservations in totality, which is completely within the domain of the legislature and the executive but it agreed with the submission that the data collected to determine inadequacy of representation for the purpose of providing reservation in promotions needs to be reviewed periodically. *The period for review should be reasonable and is left to the Government to set out.*

5)Whether the judgment in M. Nagaraj can be said to operate prospectively?

The judgment of **M. Nagaraj** was delivered in 2006, interpreting Article 16(4-A) of the Constitution which came into force in 1995. As making the principles laid down in **M. Nagaraj** effective from the year 1995 would be detrimental to the interests of a number of civil servants and would have an effect of unsettling the seniority of individuals over a long period of

time, it is necessary that the judgment of **M. Nagaraj** should be declared to have prospective effect.

6)Whether quantifiable data showing inadequacy of representation can be collected on the basis of sampling methods, as held by this Court in B.K. Pavitra v. Union of India, (2019) 16 SCC 129 ("B.K. Pavitra II")?

In **BK Pavitra II**, it was held that the expression 'cadre' has no fixed meaning in service jurisprudence and hence, the collection of data on the basis of 'groups' is valid. On the contrary, in **M. Nagaraj** it was held that the unit for collection of quantifiable data is cadre, and not services as has been held in B.K. Pavitra II**.**

The State should justify reservation in promotions with respect to the cadre to which promotion is made. Taking into account the data pertaining to a 'group', which would be an amalgamation of certain cadres in a service, would not give the correct picture of the inadequacy of representation of SCs and STs in the cadre in relation to which reservation in promotions is sought to be made. Rosters are prepared cadre-wise and not group-wise.

Sampling method which was adopted by the Ratna Prabha Committee might be a statistical formula appropriate for collection of data. However, for the purpose of collection of quantifiable data to assess representation of SCs and STs for the purpose of providing reservation in promotions, cadre, which is a part of a 'group', is the unit and the data has to be collected with respect to each cadre.

Therefore, the conclusion in **B.K. Pavitra II** approving the collection of data on the basis of 'groups' and not cadres is contrary to the law laid down by this Court in **M. Nagaraj** and **Jarnail Singh v. Lachhmi Narain Gupta,** (2018) 10 SCC 396.