Trivializing Justice: Reservation Under Rule of Law

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INTRODUCTION

This paper is based on the assumption that the state arises out of an implicit and involuntary contract between the people. The contract is implicit because no one ever signs one and, it is involuntary because everyone must perforce become party to it without any choice in the matter. The contract places the reigned power in the hands of a ruling elite (or class), which claims to wield it in its own right (as the rulers of yore) or, as is the modern fashion, in the name of the ‘people’ over whom it exercises domain. It is also implicit in this contract that the power of the state shall be exercised for the common good and, even the most absolute or arbitrary of rulers cannot but profess to do so.

The consequences of the assumptions with respect to the manner in which the state is said to have come into being (and how it is ruled) can be ignored. The problem is with the term ‘common good’, or social justice, the expression that will be used in this essay. The Indian Constitution is divided into 22 parts containing 395 sections, called articles. The spirit of the Constitution is stated to be embodied in the Preamble, which constitutes the nation into a “sovereign socialist secular democratic republic”, promising to secure to all its citizens, justice, liberty, equality and fraternity. Patently, the meanings of all these terms are linked. A notion of justice is meaningless without liberty, equality and fraternity; true liberty is premised on equality, which in turn, is a virtual synonym for both fraternity and justice.¹

Each of the terms—justice, liberty, etc.—is further elaborated in the Preamble itself. Justice is explained as encompassing the “social, economic and political”. Liberty includes “of thought, expression, belief, faith and worship”. Equality is defined as “of status and opportunity”. Finally, fraternity is clarified as “assuring the dignity of the individual and the unity and integrity of the nation”.² Thus, the Preamble is an emphatic statement asserting that the raison d’être of the Indian State is social justice in all its aspects for all its citizens. It may be said to imbue the entire constitution with the spirit of social justice. Each and every decision and action of the State, its instrumentalities and its officials—elected and appointed—must, perforce, pass this test or be declared invalid and, void.

Strictly speaking, the Indian bill of rights, comprising civil and political rights guarantees usual to a liberal democracy, is contained in Part III of the Constitution, which is titled ‘Fundamental Rights’. However, with a preamble as described above such a truncated bill of rights could not have sufficed. Therefore, the constitution makers also devised a section called ‘The Directive Principles of State Policy’ contained in Part IV of the Constitution. These, as the name suggests, are precepts by which the State is expected
to rule. Together, the two parts are a detailed articulation of the ideals expressed in the Preamble.

Though the framers of the Constitution had placed Fundamental Rights and Directive Principles on different platforms, evolving notions of justice and governance have erased most of the key differences between them. Thus, a basic distinction—that the Fundamental Rights were justiciable while the Directive Principles were not—stands considerably diluted today. On the one hand, the view that government should be transparent and accountable has resulted in making many of the Directive Principles also justiciable, subject, of course, to reasonable limitations imposed by ‘real life’ constraints. On the other hand, many of the Fundamental Rights, such as the right to life, have evolved from being interpreted in a literal manner to become a metaphor for almost every aspect of the social, political and economic life of a person. Since many of these expansions of the meaning of “life” are also the ‘Directive Principles’ by which the State must govern (or, the social justice goals that it must strive for), once again these principles become justiciable.

A right without the power to enforce it is a farce. The Latin maxim—*Ubi Jus Ibi Remedium*—must therefore, find pride of place in any bill of rights worth its name. Recognizing the overwhelming importance of the maxim, the Indian bill of rights incorporates the remedy within itself, as a “right”. Article 32 of the Constitution, forming part of the Fundamental Rights guaranteed by the Constitution, makes it obligatory for the Supreme Court to act in defence of the guaranteed rights of the citizens. It is also settled law that the Court is not hamstrung by rules and procedure and, it is free to “fashion” the remedy to suit the need (*Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802). Looked at in conjunction, the rights and the remedy make it clear that the framers of the Constitution voted to give themselves (and all other Indians) a state that would strive to promote social justice with all the resources at its command, so as to arrive at a position of relative equality among its citizens at the earliest.

To sum up, from the right to equal representation in the legislatures to the right to food, clothing, shelter, health, education, etc., all are part of the Indian social justice agenda, as defined in the Constitution. Freedom of speech and expression, to assembly and association, to the practice of one’s profession and religion are also intrinsic to this agenda. Freedom from exploitation (whatever that means, given the completely exploitative nature of almost all social organization) is also integral to it. Finally, protection of weak/ vulnerable sections of the population, such as women, children, minorities (religious, ethnic, or other) and, special measures for promoting their welfare also form part of this agenda. The Constitution provides for all these and, also provides for the remedies necessary to ensure compliance/ prevent a breach of this agenda.

**EQUALITY FOR THE MASSES**

Article 14 of the Indian Constitution guarantees every person, equality before the law and equal protection of the law. This broad assurance of equality is the grundnorm
or the touchstone, which all equality statements must satisfy. Though the assurance is to every person, at all times, it is not of absolute equality, which is theoretically impossible, but of parity with those who are similarly situated. It is obvious that ensuring such equality is an extremely difficult task even when not complicated by the requirements of positive discrimination in favour of those sections of society who would be sidelined if only formal equality was enforced.

Given the nature of the equality statement, ensuring equality along with positive discrimination, or substantive equality, becomes a virtual impossibility. Since such laws, and the programs based upon them, are aimed at unsettling the status quo, it is inevitable that they should give rise to contestations and disputes. Such disputes generally claim that the impugned positive discrimination law (or program) violates the right to equality of the person (or persons) against whom the positive discrimination operates. In such circumstances it is the role of the Courts, particularly the Supreme Court to interpret and explain the meaning of the laws made by the Legislature and, to declare the intention of the Legislature in making such a law. The Court simultaneously rules on the validity of the law (or program) in question, i.e. whether it is consistent with the grundnorm of Article 14, thereby adjudicating upon the actual dispute raised. These elaborations, explanations and adjudications then become part of the law of the land. Thus, legislations promoting equality are only the first step in the chain that results in affirmative action.

The task of the courts is particularly difficult when the law in question is the Constitution, requiring it to chart a path through a veritable minefield, with blunders and unintended consequences peering at every turn. The manner in which this is to be approached is suggested by the following quotation from the Justice Krishna Iyer’s judgment in the State of Kerala v N.M. Thomas case (AIR 1976 SC 490):

*The important task of construing the articles of a Constitution is not an exercise in mere syllogism. It necessitates an effort to find the true purpose and object, which underlies that article. The historical background, the felt necessities of the time, the balancing of the conflicting interests must all enter into the crucible when the Court is engaged in the delicate task of construing the provisions of a Constitution.*

In the legal (or constitutional) sense equality does not mean absolute equality but an equality of opportunity. Formal equality of opportunity is the simplest form of equality of opportunity. This dispensation requires that positions and posts that confer superior advantages should be open to all applicants, who should be assessed on their merits, and the person deemed most qualified according to pre-stated criteria be offered the position. This notion of equality does not require either “democracy” or a private property based social system.

But formal equality can suffice to provide a level playing field only if the players are otherwise equal. In the Indian setting, where the vast majority of the population suffers millennia old hereditary handicaps, exacerbated by the fact that the benefits of western education and exposure were also sequestered almost entirely by those who enjoyed the hereditary advantages, such equality would not have gone far in promoting an
egalitarian ethos in society. For equality to be meaningful, provisions for substantive equality of opportunity were needed.

The Indian equality code, contained in Articles 14 to 18 of the Constitution, contains both elements of equality, formal and substantive, with the requirement of compensatory discrimination (Galanter 1991: 3) being incorporated in Articles 15 and 16. In one of the earliest cases in which the Supreme Court was required to interpret the Indian equality principle, the Court quoted an American jurist on the meaning and effect of the guaranty:

The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification, which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. The inhibition of the (fourteenth) amendment...was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation...It does not take from the states the power to classify...but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis...Many different classifications of persons have been upheld as constitutional. A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it.

Thus, a principle of classification, permitting differentiation between dissimilarly situated persons or groups of people, is used to bridge the gap between the ideal of formal equality and the reality of substantive inequality. The principle has been used to justify the constitutional mandate of compensatory discrimination in favour of Dalits, Adivasis, and several other categories of persons identified as needing help or support or the special attention of the State and its agencies. The sophistry inherent in using inequality to attain equality is illustrated by the following extract from the decision of the Supreme Court in the N.M. Thomas case:

Differentiation is inherent in the concept of equality. Equality can only be attained by devising a principle of classification or, parity of treatment under parity of conditions. But inequality is inherent in the very idea of classification. The court resolves this paradox by taking a middle path between the public demand for equality and the right of the legislature to classify.
The doctrine (of reasonable classification) assumes that the Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. However, a classification must rest upon distinctions that are substantial. The test is: whether the classification has a reasonable basis, free from artificiality and arbitrariness, and embraces all and omits none who naturally fall into that category created.

To sum up, while classification is seen as a desirable, even essential, attribute of the practice of equality, it is not free of problems. As will be seen below, these problems have contributed significantly to the failure of affirmative action programs aimed at generating adequate opportunities in public employment for Dalits.

**THE QUEST FOR EQUALITY: A PARADIGMATIC CASE**

**The Background**

Reservation, the most important form of compensatory discrimination in India, is applicable to elected bodies, public appointments and seats in educational institutions. Articles 330 to 333 provide for reservation in the various legislatures for the Scheduled Castes and Tribes and Anglo-Indians in the Parliament and the provincial legislatures. Articles 243D and 243T provide reservation in panchayats and municipalities. In addition to the electoral quotas prescribed in the Constitution itself, Articles 15 and 16 empowers the State to make “special provision” for women (and children).

Articles 15 and 16 both open with a prohibition against discrimination on grounds “only of religion, race, caste, sex, descent, place of birth, residence or any of them.” Article 15 operates both against the State and the public at large, prohibiting discrimination and denial of access “to public placers such as shops, public restaurants, hotels and places of public entertainment; or...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.” Article 16 affirms the principle of substantive equality in public employment. It also enables reservation 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. The power to make laws providing for reservations must be read along with Article 335, which provides that “The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.” Pursuant to Article 16, the Government of India has made rules providing for 15 per cent reservation of government posts in favour of the Scheduled Castes (Dalits) and 7.5 per cent reservation in favour of the Scheduled Tribes (Adivasis).
Galanter has called untouchability a problem whose solution was required to unlock India’s national destiny. The manner in which social justice for Dalits acquired a central place in the framework of constitutional governance in India is essential for understanding the efficacy of reservations as a tool for in increasing social justice. Till the early years of the twentieth century, the nationalist movement considered social justice issues, particularly the ‘problem’ of the Untouchables, secondary to the goal of political liberation from British rule. Many leaders of the nascent nationalist movement considered social reform a divisive issue (Galanter 1991). As late as 1910, some upper caste Hindus were demanding that Dalits should be excluded from the Hindu fold in the Census (Galanter 1991: 26). However, the politics of numbers in the context of the Hindu-Muslim divide forced them to bring the issue of Dalit (or Untouchable) social justice to the centre stage.

The first of two developments that forced a change their stance was the grant of the Muslim demand for separate electorates by the Minto-Morley reforms of 1909, and the second was the proposal of the Census Commissioner for 1911 that the Untouchables (then known as Depressed Classes), should be enumerated as a group separate from the Hindus (Galanter 1991: 26). Quick to see the advantage of such a development, the Muslim League promptly endorsed this suggestion (26). Almost overnight, the issue of integration of Dalits into the Hindu fold was transformed from a divisive issue into a unifying one (26). To quote Eleanor Zelliot:

_The grant of an electorate for Muslims in which they alone would vote brought the idea of communal electorates for minorities to the forefront in the minds of all communities …The granting …also made numbers important. Whether the vast numbers of Untouchables were truly Hindu and to be counted as such, or not, became an important question for the first time (Galanter 1991: 26)._21

The rise of Ambedkar on the political firmament was the next stage of the process. Unlike Gandhi, he believed that only vigorous government intervention and political action could overcome the denial of civil rights and economic opportunities to Dalits (Galanter 1991). Ambedkar’s struggle to obtain guarantees of a place for Dalits in the independent India does not bear repetition. Suffice to say that the evolving stand of the Dalits between 1928, when the Simon Commission came to India to discuss constitutional reforms, and 1932, when the Poona Pact was signed by Ambedkar, determined the shape that independent India’s commitment to social justice for the Dalits would take.

Seats in the legislatures were reserved for Dalits for the first time in the elections held in the wake of the Government of India Act of 1935. Thereafter, several “popular” governments installed in the various provinces passed legislations criminalizing denial of access to public facilities to Dalits. Small improvements in availability of educational opportunities and, steps to reserve some posts in government service also followed (Galanter 1991: 36).
The issue of how to bring about substantive equality for the marginal and deprived sections of India was extensively debated by the Constituent Assembly. In his speech moving the resolution for setting up of an advisory committee on the subject of fundamental rights and minorities, G.B. Pant spoke of the need to atone for “our omissions” so that (the Depressed Classes, the Scheduled Castes and the Backward Classes) are brought “up to the general level…as much in our interest as in theirs.”

Ambedkar, who was also a member of this committee, submitted draft articles on the rights of the minorities, which reflected his view that the Scheduled Castes were a minority. He proposed an elaborate structure of prescriptions and proscriptions to protect their rights, to enable them to lead a life of dignity and full self-expression. The provisions included a guaranteed right of representation in all legislative/elected bodies, reserved right of “minimum representation” in the Union and the State executives, and in service under the municipal and local bodies, financial support for the higher education of the Scheduled Castes, establishment of “separate villages” of the Scheduled Castes using the uncultivated lands of the State for this purpose, and special procedures for altering, amending or abrogating these safeguards, to put them beyond the reach of an ordinary majority in the legislatures.

Though the present constitutional provisions for Dalits and Adivasis are far less than what B.R. Ambedkar wanted, it cannot be gainsaid that the social justice and accountability agenda of the new nation would not have been spelt out to the extent it has been, but for Ambedkar. However, by forcing Ambedkar to give up his demand for separate electorates, mainstream Indian politics was able to indefinitely delay the emergence of Dalits as a significant force in Indian politics. Mayawati became the first Dalit Chief Minister of an Indian province only in 1995. She is also the only Dalit politician till now to acquire a national stature while openly espousing a Dalit agenda. The almost total success of mainstream politics in co-opting Dalit (and Adivasi) politics coupled with the provisions in the Constitution providing for reservations in public appointments and in educational institutions, paved the way for a significant degree of judicial participation in articulating major aspects of social justice for Dalits in post independence India. Since a very large percentage of the judicial pronouncements have been in connection with reservation in public employment, I shall focus on this aspect of the matter alone in this essay.

The Period Till 1990

The judicial debate on reservations has primarily revolved around two issues: the issue of a numerical limit on reservations, and the issue of reservations in promotion.

The first issue has two aspects. The first aspect is the extent of reservation or the percentage of posts in a cadre or a service that are required to be filled by reserved category appointees. Till 1990 reservation in government jobs was mainly for the
This was initially fixed at 17.5 per cent, which was subsequently raised to 22.5 per cent. While this reservation was resented/resisted by the generalists (those who did not avail of reservation quotas), its extent could never acquire the character of an issue since the Supreme Court was categorical in affirming the validity of the principle of reservations for Dalits and Adivasis and, since the prescribed percentages of reservation in their favour roughly approximated the numerical strength of Dalits and Adivasis, respectively, in the total population of the country. Besides, though nominally the general category posts and vacancies were open to all non-Dalit, non-Adivasi sections of the population they were, in fact, almost entirely cornered by the upper castes.

Thus, about 25 per cent of the population enjoyed access to about 75 per cent of the posts and vacancies. The extent of reservations, therefore, became an issue only after implementation of the Mandal Commission report in 1990, when reservations were introduced for Other Backward Castes (OBCs for short). With the implementation of reservation for OBCs the reservationists came to represent a majority of the total population. This fundamental change in the equation necessitated a recasting of the thesis that had been used till that date to both, enforce reservations and, to control it.

The second aspect of the first issue also pertains to a numerical limit but with reference to the maximum percentage of vacancies in a particular year that can be permitted to be reserved. This aspect was a result of the operation of the ‘carry forward rule’. This rule was applied because, despite reservations, the State found it impossible to fill the posts/vacancies reserved for Dalits and Adivasis, due to a lack of eligible candidates among these communities. Attempts to fill the reserved posts by permitting recruitment of lower ranked Dalit/Adivasi candidates also failed to serve the purpose. Thereafter, the government issued instructions providing that reserved quota vacancies that remained unfilled despite such relaxation would be carried forward to the next year. This rule, providing for carrying forward unfilled reserved vacancies for one year, was also a failure. By an Office Memorandum dated 7.5.1955 the government relaxed this rule to allow for unfilled reserved posts to be carried forward for two years instead of one. Though most reserved quota vacancies and posts continued to be, ultimately, filled with general category appointees, the operation of the carry forward rule frequently resulted in over 50 per cent of the vacancies in any given year being reserved for Dalits and Adivasis.

The bone of contention in the second issue is that of seniority. It arises from the grant of accelerated promotions to reserved category appointees, making them senior to the general category appointees to whom they were junior at the time of initial appointment. Till the decision of the Supreme Court in the General Manager, Southern Railway v Rangachari, (AIR 1962 SC 36) case the generally accepted position was that reservation was only permissible at the stage of recruitment. By this decision the Court interpreted the expression reservation of appointments or posts, used in Article 16(4) to mean that reservation was permissible not only at the stage of initial appointment but also...
in posts to be subsequently filled by such appointees by way of promotion. As stated, reservation in promotion resulted in Dalits and Adivasis getting promoted at a faster pace than their general category colleagues. As a consequence, persons who were junior to the general candidates at the time of recruitment become senior to them, resulting in intense heartburn among the latter.\textsuperscript{38}

In other words, the generalists as far as possible resisted even the trickle of jobs that the Dalits were able to garner.\textsuperscript{39} Over the last six decades tens of thousands of cases have been filed in the courts challenging the equally numerous rules, orders and notifications issued by the central and state governments for giving effect to the constitutional mandate of compensatory discrimination in their favour. Since jobs were few and aspirants many times more, the competition for each job was severe. In the circumstances, every advantage that could help secure a job (and a future) was worth fighting for, irrespective of larger ethical considerations.\textsuperscript{40} On the other hand, the continuing difficulty of finding sufficient number of eligible candidates for appointment to reserved vacancies advertised by the respective governments attests to the fact that even 57 years after reservations were introduced, measures to upgrade the skills of Dalits and Adivasis have, at best, met with only partial success.\textsuperscript{41}

The challenge to the ‘extent of reservations’ permissible in a particular process of recruitment (i.e. in a particular set of vacancies), arising out of the operation of the carry forward rule, illustrates a vital facet of equality, as it is understood and practiced in India. Vacancies can be carried forward in two ways. One method is to de-reserve the unfilled vacancies of the current year, fill them with eligible general category candidates and, add an equivalent number of vacancies in the subsequent year/s to the reserved category. The second method is to leave the unfilled vacancies as they were, re-advertising them in the succeeding years. In either case, the permissible ‘carry forward’ period has never been permitted to exceed two years. Thus, irrespective of the method used, if at the end of the third cycle of recruitment a reserved vacancy remained unfilled, it is de-reserved.\textsuperscript{42} Thus, during the first few decades much of the reservations regime was a paper exercise: of first reserving and then de-reserving vacancies.

Notwithstanding the general paucity of reserved quota candidates (and the resultant permanent loss of appointments to the reservationists), the carry forward rule did result in occasional instances where reserved quota candidates filled more than 50 per cent of the total vacancies in a given year. While it is impossible to state that the general quota candidates challenged such recruitment every time this happened, it would be safe to state that in most cases such recruitment was challenged by the generalists. The T. Devadasan v Union of India and Another (AIR 1964 SC 179) case was one such.

The Devadasan case is the first case before the Supreme Court in which the issue of a numerical limit on reservations under Article 16(4) was thrown up. The case arose because the operation of the carry forward rule for two years had resulted in 32 of the 48 vacant posts advertised in a particular year being reserved for Dalit and Adivasi candidates.\textsuperscript{43} The petitioner, Devadasan, argued that the operation of the carry forward
rule violated his fundamental right to equality, guaranteed under Articles 14 and 16(1). Because of it about 65 per cent of the vacancies to be filled fell into the reserved category, depriving him of an appointment even though he had secured 61 per cent marks while reserved quota candidates with as low as 35 per cent marks were appointed. He claimed that but for the carry forward rule, he would have been appointed to one of the posts to be filled.

Devadasan contended that reservation under Article 16(4) cannot be so extensive as to nullify or destroy the right conferred by Article 16(1). It was also argued that earlier decisions of the Supreme Court had held Article 16(4) to be merely an exception to Article 16(1) and, as such, it cannot be interpreted so as to render the main provision meaningless. Finally, it was argued that Article 16(4) must be read in conjunction with Article 335, which emphasizes that efficiency of administration must be maintained (and not allowed to suffer) while considering the claims of members of Scheduled Castes and Tribes to appointment to government posts. Devadasan also made two other arguments based on Article 14, which are not relevant to this discussion.

The Devadasan case was heard by a bench of five judges of the Supreme Court. The opinion of the Court was divided, with a majority of four judges declaring that the carry forward rule was unconstitutional and, striking it down. They held that reservation must always strike a reasonable balance between the claims of the backward classes and the claims of the other employees. They also held that reservation of more than 50 per cent of the vacancies in a given year, for whatever reason, would not be constitutional.

Expounding on the scope of the guarantee of equality under the Constitution, the majority decision of the Court reiterated the established position that Article 14 prohibits invidious (or arbitrary) discrimination by the State between a citizen and a citizen who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law. However, the majority decision said, reasonable classification is permissible. Thus, it acknowledged, by virtue of Article 16(4) a rule for reservation in favour of Dalits and Adivasis will not violate Article 14 “merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes.” However, the Court said, “[i]f the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would then be open for a member of a more advanced class to complain that he has been denied equality by the State.”

Constructing a numerical example to discuss the carry forward rule, the majority decision referred to an earlier decision of the Court in the case M.R. Balaji and Others v State of Mysore (AIR 1963 SC 649), which had held that reservation of more that 50 per cent of the seats in an educational institution (under Article 15(4) of the Constitution) to be unconstitutional. The Devadasan majority also pointed out that while so holding, the Balaji decision had declared that what is true in regard to Article 15(4) is equally true in regard to Article 16(4). The Devadasan majority went on to state that “(t)here can be no
doubt that the Constitution makers assumed, as they were entitled to, that while making adequate reservation under Art. 16(4) care would be taken not to provide unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency.  

The Devadasan majority then cited the Balaji decision as a precedent for the proposition that Article 16(4) is in the nature of a proviso or an exception to Article 16(1) and, cannot be interpreted so as to nullify or destroy the main provision. If unlimited reservation of appointments is permitted under Article 16(4), it would amount to effacing the guarantee contained in Article 16(1) or, at best, make it illusory. The Court said that “(n)o provision of the Constitution or of any enactment can be construed so as to destroy another provision contemporaneously enacted therein.”

Referring to the non-obstante clause with which Article 16(4) opens, namely, “Nothing in this Article shall prevent the State from making any provision for the reservation of appointments...” the Court said that “this does not mean that the provision made by the State should have the effect of virtually obliterating the rest of the Article...The overriding effect of 16 (4) on 16 (1) and (2) can only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances. That is all.”

Thus, while declaring reservations to be the outcome of a permissible classification, the majority judges of the Devadasan Court sidestepped a direct answer to the question of whether the carry forward rule was also an instance of such, permissible classification. Instead they chose to indirectly deny validity to the classification implicit in that rule by declaring that Article 16(4) was an exception to Article 16(1) and, as such, only reasonable reservations could be countenanced under it.

Finally, in a significant exposition of the Court’s position on the equality principle, which can be said to epitomize the Supreme Court’s view of equality in the context of reservations, the Devadasan majority declared that:

We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

The above position colours everything that the Court has said or done in the context of reservations, notwithstanding stray sentences (or, even, positions) to the
contrary. Given the language of Article 14 this equality statement is not out of the ordinary. Further, in the context of notions of State and citizenship, it is quite natural to interpret equality as a guarantee personal to each individual citizen. However, the statement brings to the fore an unresolved problem with respect to equality or, as the Supreme Court has interpreted it, equality of opportunity.

The foregoing statement of equality implies that under the Constitution formal equality and substantive equality are to be viewed as two separate, discrete concepts, operating simultaneously but independently of each other. It sets up formal equality as an ideal and declares that while present circumstances militate against adherence to its principles, each application of the substantive equality norm is liable to be tested against the formal equality norm, for validity. That such a construction is not a (legal) necessity is patent from the judgement of the fifth judge in the Devadasan case, Justice Subba Rao, who delivered a separate, dissenting opinion. In which case the question arises, why has the Supreme Court not adopted the simpler and, in my view, far more rational view propounded by Justice Subba Rao? While it is patent that this failure, assuming it has been correctly identified as one, is collective to the Supreme Court, the majority judges in the Devadasan case bear a special responsibility on account of the fact that they had the benefit of a superior logic at hand.

The opinion delivered by the fifth judge in the Devadasan case, Justice Subba Rao, is a lucid and simple exposition of the principle of affirmative action (reservations) in the context of constitutionally guaranteed equality of opportunity. He held that the mere fact that more than 50 per cent of the vacancies in a given year were reserved for Dalits and Adivasis because of the operation of the carry forward rule (or for any other reason), cannot invalidate the rule in question. He felt that the only circumstance in which a provision for reservation could be invalidated was if it resulted in an unreasonably disproportionate part of the cadre strength being filled up with Dalits and Adivasis. In other words, Justice Subba Rao held that it was the total strength of the Dalits and Adivasis in a cadre or service, and not the percentage of vacancies (of that cadre or service) that were reserved for Dalits and Adivasis in a particular year, which was relevant for determining the constitutionality of a provision for reservations. If the reservation policy of the government (in itself or in its operation) resulted in more that the prescribed percentage of posts in a cadre or a service being filled by reserved quota appointees then that policy (or its operation) would be unconstitutional, and liable to be struck down.

Referring to the language of Article 16(4), Justice Subba Rao differed with his colleagues and declared that the non-obstante clause with which Article 16(4) begins is a legislative device to express the intention in a most emphatic way that the power conferred under it is not limited in any way by the main provision but falls outside it. The expression makes it clear that the framers of the Constitution wished to preserve an untrammeled power of reservation, rather than carve out an exception to Article 16(1). Further, he said, three expressions stand out in bold relief in Article 16(4), namely:

(1) any provision for the reservation of appointments (or posts)
(2) in favour of any backward class of citizens, and

(3) in the opinion of the State, is not adequately represented in the services under it.

He asserted that the word any in the expression any provision must intend to confer the widest amplitude, leaving the nature of the provision for reservation to be made by the State to its discretion. The only limitations (or conditions) that could operate on this discretion must be those that are to be found in Article 16(4) itself. In other words, the reservation must be for appointments or posts, it must be in favour of a backward class and, the State must be of the opinion that such backward class was not adequately represented in services under it. Once these conditions were satisfied, he said, “the State is at liberty to make any provision for the reservation of appointments or posts in favour of the said class of citizens and, such a provision for reservation (or having the object of ensuring reservation), of the prescribed percentage of appointments or posts can not be impugned on account of the manner in which it sought to achieve its object.”

Commenting on the facts of the Devadasan case, Justice Subba Rao said that it was not disputed that Dalits and Adivasis qualified for being called backward class of citizens. Nor was it in doubt that they were inadequately represented in government services. Once these two conditions have been satisfied, the only question that remains (for judicial review) is to examine whether the provision (the carry forward rule) was for the reservation of appointments or posts for the said backward classes of citizens. He declared that:

I find it difficult to say that the provision for “carry forward” is not for the reservation of appointments for the said Castes and Tribes. The reservation of appointments can be made in different ways. It is not for this Court to prescribe the mode of reservation.

He then addressed the argument that since the right to equality under Article 16(1) is personal to every citizen, the question—whether that right stands infringed or not—has to be decided afresh, in the context of every process of selection in which provision for reservation is made. He also noted that it was argued that in the view of this interpretation of the right to equality, a citizen cannot be deprived of his right on the ground that in a previous selection the community to which he belongs had more than its share of the appointments.

Rejecting this contention (and all its cognate arguments), Justice Subba Rao declared that injustice to individuals is inherent in any scheme of reservations. Dealing with both generalists and reservationists as communities, he reminded that the object of reservations is to ensure that the prescribed percentage of posts in all services and cadres of public employment are occupied by persons belonging to the categories (communities) for which the reservation has been made. Calling the carry forward rule an administrative measure to ensure the implementation of a declared policy, he rejected the rationale of impugning it as being destructive of the fundamental right to equality. To quote:
As the posts reserved in the first year for the said Castes and Tribes were filled up by non-Scheduled Caste and non-Scheduled Tribe applicants, the result was that in the next selection the posts available to the latter were proportionately reduced. This provision certainly caused hardship to the individuals who applied for the second or the third selection, as the case may be, though the non-Scheduled Castes and non-Scheduled Tribes, taken as one unit, were benefited in the earlier selection or selections. This injustice to individuals, which is inherent in any scheme of reservation, cannot, in my view, make the provision for reservation any the less a provision for reservation.

In other words, Justice Subba Rao pointed out that the carry forward rule was founded upon a valid classification, having a rational (and reasonable) nexus with the object sought to be achieved. It was, therefore, liable to be upheld. Article 14 does not guarantee absolute equality but parity with those who are similarly situated. Since it is undeniable that Dalits and Adivasis are not on par with the generalists, Article 14 permits special provision to be made for them; in this case reservation of appointments and posts in public employment, via Article 16(4). The object of such reservations is to bring the backward classes for whom the provision is made on a par with others. It was a matter of record that reservations were ineffective since sufficient numbers of qualified candidates from the communities in whose favour this provision had been made were not available for recruitment/appointment. Patently, if the State were to do nothing to remedy this situation then the reservations policy would be doomed to failure. The carry forward rule was, therefore, essential to give effect to the State’s policy of affirmative action by way of reservations in public employment and, hence, a valid exercise of legislative/executive power. Further, given that the rule was essential for preventing the failure of the State’s reservation policy it could not be called unreasonable by any stretch of imagination.

Justice Subba Rao’s judgement was not dependant for validity upon specially constructed numerical examples, though he did illustrate his thesis through them. Discussing such examples, he declared that it was open to the State to choose the most convenient (or expedient) method of achieving the prescribed percentage of reserved category officials in a cadre or a service. If the policy of reservation was being honestly implemented, the only difference that this choice would make is in the number of years that it took to achieve that percentage of reservation. He declared that it was within the power of the State to adopt that method which took the shortest possible time to achieve the desired strength of reserved category officials in a cadre or a service, i.e. by reserving all the posts (or appointments) that fell vacant, till the quota was completely filled. Any one of the said provisions (methods), however reasonably framed, would inevitably cause hardship to some candidates from the non-Scheduled Castes and non-Scheduled Tribes in the sense that some of them would have been selected but for the reservation, but that could not be a ground for striking (the method) down.” Nor could such a provision (or method) be struck down as being destructive of the fundamental right to equality since that would stand violated only if the reservation exceeded the prescribed percentage of the entire cadre strength of the service in question.
Justice Subba Rao also had a pithy but effective answer to the bogey of loss of efficiency. He said:

*If the provision deals with reservation—which I hold it does—I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad. Indeed, the State laid down the minimum qualifications and all the appointments were made from those who had the said qualifications. How far the efficiency of the administrations suffers by this provision is not for me to say; but it is for the State, which is certainly interested in the maintenance of standards of its administration.*

The Subba Rao judgement was also far more precise in its dissection of the Balaji decision, which loomed so large in the majority decision. He declared that “[i]f that decision decided to that effect, I would be bound by it.” Examining the reasons for which the Balaji decision had held against the order reserving 68 per cent seats in colleges for backward communities, he pointed out that "(t)he learned Judge traced the history of the order, considered all the relevant circumstances and held that reservation of 68 per centum in the circumstances of the case was a fraud on the constitutional power conferred on the State by Article 15(4) of the Constitution…therefore…the judgment…was based mainly upon two grounds, namely, the State had adopted a wrong criteria for ascertaining who were backward classes and also on the ground that the State committed a fraud on its constitutional power."

If one were to identify a single factor why Justice Subba Rao did not fall into the usual error of decisions on reservations, it would be because he viewed the equality guarantee contained in Articles 14 and 16(1) as being guarantees of substantive equality only, without casting upon them the wholly unnecessary mantle of being formal equality statements also. The understanding displayed by Justice Subba Rao’s judgement was unique, evolving a new paradigm of equality in the context of reservations (or affirmative action). Unfortunately, it has remained singularly so in the annals of the Supreme Court’s rulings on the issue of affirmative action. Curiously, despite being forced to acknowledge the correctness of his views in the Devadasan case, in substance, the Supreme Court continues to commit the error of ignoring the fundamental premise of Justice Subba Rao’s opinion even today.

Before moving on, I will briefly examine the position of the Supreme Court with respect to the second issue listed above: namely, the issue of reservation in promotions. When meeting the eligibility requirement for initial recruitment was so difficult for Dalits and Adivasis, the issue of promotions could hardly be a matter of significance. However, these too have been an arena of considerable litigation. The initial position was that reservation was only permissible at the stage of recruitment. Thereafter, in the Rangachari case, the Supreme Court upheld the principle of reservations in promotion, holding that the expression “appointment” used in Article 16 must be read to include appointment by direct recruitment or by promotion. However, even as it came down so
significantly on the side of the reservationists, the Court helped the generalists to minimize the impact of reservation in promotion by declaring that the *catch up rule*, which ensured that accelerated promotions for reservationists did not count towards seniority, was necessary to prevent *reverse discrimination*. The catch up rule stipulated that generalists who were senior to the reservationists in the lower post (but were promoted later on, due to the slower pace of general category promotions) would regain their seniority vis-à-vis the reservationists upon being promoted to the higher post, in due course. The battle against acceptance of the principle of “consequential seniority”, the obverse side of the catch up rule, is still being fought by the generalists. This will be discussed below.

To sum up, though reservation did redress the asymmetry for certain sections of the *Dalits* and *Adivasis* to some extent, instead of obliterating divides it concretized the negativity of the generalists towards reservationists. One of the many forms that the ire of the generalists took was their demand that the creamy layer should be excluded from reservation benefits in the future. The Supreme Court’s decisions on the issue of reservations reflect the discomfort of the nation’s elite. Thus, even as it affirmed the principle of reservations, it failed to adopt a rational view on the issue in practice, falling prey to both, a wholly untenable notion of equality and, to the anxieties of the generalists; who wished to ensure that reservations were limited as far as possible. The Court’s failure was heightened by the fact that one among its collegium had formulated a unique thesis with respect to equality in the context of reservations, which, if adopted, held the potential of ending all futile disputations of the issue.

Even as the generalists were poised to take their fight against reservations to another level by challenging the right of the, so called, creamy layer among the reservationists to the benefits of reservation, the central government introduced reservation for OBCs in 1990, as distinct from those for the *Dalits* and the *Adivasis*. The introduction of reservation for OBCs reopened many aspects of the reservation debate that may otherwise have been considered to be closed, by virtue of the fact that the Supreme Court had delivered a definitive pronouncement on them. Thus, many important decisions on reservations have been passed by the Supreme Court since 1990. The first, and most important, of these decisions was the Indra Sawhney case (AIR 1993 SC 477), which was decided by a specially constituted bench of 9 judges, to rule upon the constitutional validity of the Mandal Commission report and, the consequent implementation of reservations for OBCs on its basis. This case was decided in 1992.

While most of us are aware of the furore that the implementation of the Mandal Commission report caused, it is pertinent to note that with these reservations, the generalists suddenly became a minority while the reservationists became an overwhelming majority. This, metaphorically, turned the tables on the generalists, stripping them of a major justification for their battles against reservation, i.e. that they represent majority interests. The implementation of the Mandal Commission report amounted to an acknowledgement that though formally the general category consisted of all persons who were not *Dalits* or *Adivasis*, in fact the overwhelming majority of the general category posts/ vacancies were taken away by a minority of caste and class elites, who had westernized education and, who, by virtue of their being the only persons
eligible to fill most government posts for about 40 years, had established a network for the protection their privileges.\textsuperscript{68}

As was to be expected, these developments resulted in a significant sharpening of the focus in the battle against reservation. From challenges around the fringes of reservation, the carry forward rule, the catch up rule, the efficiency criterion, and other similar concepts became core contestations. It became crucial to affirm reservations as an exception to the rule of equality and, to limit them to some reasonable percentage of the total posts in a cadre and, the total vacancies in a particular process of selection. While the battles are not yet over, the honours have been divided till date, with the generalists having a definite edge but also several open positions, making them vulnerable in the future.

In the following sections I shall examine how the Supreme Court has dealt with reservations after the implementation of the Mandal Commission recommendations. This will be done with the aid of two decisions in the main, the \textit{Indra Sawhney and Others v Union of India and Others} (AIR 1993 SC 477), and \textit{M Nagaraj and Others v Union of India and Others} [2006 (8) SCC 212]. From the perspective of reservations for Dalits the M. Nagaraj case is more to the point but the Indra Sawhney case cannot be ignored since, as on date, it is the definitive statement of legal positions with respect to reservations generally.\textsuperscript{69}

Though much of the Indra Sawhney case has no bearing on the present discussion, that decision led to the introduction of four constitutional amendments, which are directly to the point. Article 16 (4A) was inserted into the Constitution in June 1995, empowering the State to provide for reservation in promotion for Dalits and Adivasis (77\textsuperscript{th} Amendment). Article 16 (4B) was inserted in June 2000 (81\textsuperscript{st} Amendment) empowering the State to close what was, perhaps, the most important loophole for defeating reservations, namely the practice of merging unfilled reserved quota posts of one year with the general pool posts of subsequent years. Article 335 was also amended in 2000 (82\textsuperscript{nd} Amendment) to permit “relaxation in qualifying marks in any examination or lowering the standards of evaluation”, in connection with reservation for Dalits and Adivasis in promotions. Finally, Article 16(4A) was amended in 2001 (85\textsuperscript{th} Amendment), with retrospective effect from June 1995, to empower the State to provide for “consequential seniority”, pursuant to accelerated promotion on the basis of reservation.

The Nagaraj case is the most recent decision of the Supreme Court, delivered on 19 October 2006. It deals with the challenge to the constitutional validity of the four constitutional amendments mentioned above, illustrating several aspects of law, justice and social justice that are relevant to this essay. It also sheds light on the real world considerations that condition the mode and manner of implementing constitutional injunctions to affirmative action. In conjunction with the decision in the Indra Sawhney case, it also provides an overview of the manner in which the concept has evolved over the last few decades. Thus, I shall first summarize the relevant portions of the decision in the Indra Sawhney case, followed by an analysis of the Nagaraj decision.
The Indra Sawhney Case Summarized

The Indra Sawhney case was actually filed by the Supreme Court Bar Association, challenging the implementation of Mandal Commission recommendations. The case was initially heard by a Constitution Bench of five judges, who referred it to a specially constituted bench of nine judges to “finally settle the legal position relating to reservations (because)...the several judgments of this Court have not spoken in the same voice on this issue.” Although the case did not pertain to reservation for Dalits and Adivasis the discussion covered almost the entire range of issues pertaining to reservations. Further, the decision of the Court with respect to three key aspects impinged directly on the reservation regime for Dalits and Adivasis then in place.

The lawyers for the parties appearing before the Court in this case framed eight questions that the Court was expected to answer. In turn, the Court reframed these questions for the sake of convenient discussion and in the interest of clarity. Of these, the questions that are germane to the discussion in this paper are:

2. (a) Whether clause (4) of Article 16 is an exception to clause (1) of Article 16?

3. (d) Whether the ‘means’ test can be applied in the course of identification of backward classes? And, if the answer is yes, whether providing such a test is obligatory?

6. To what extent can the reservation be made?

   (a) Whether the 50 per cent rule enunciated in Balaji is a binding rule or only a rule of caution or rule of prudence?

   (b) Whether the 50 per cent rule, if any, is confined to reservations made under clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?

   (c) Further while applying 50 per cent rule, if any, whether a year should be taken as a unit or whether the total strength of the cadre should be looked to?

   (d) Whether Devadasan, was correctly decided?

7. Whether Article 16 permits reservations being provided in the matter of promotions?

8. Whether reservations are anti-meritarian? To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?

9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?
The Court answered the questions as follows:

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). (Paragraphs 741-742)

3. (d) Creamy layer can be, and must be excluded. (Paragraphs 790-793)

6. (a) and (b) The reservations contemplated in clause (4) of Article 16 should not exceed 50 per cent, except in extraordinary situations. While relaxing this rule, extreme caution is to be exercised and a special case made out. (Paragraphs 804 to 813)

6. (c) The rule of 50 per cent 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. (Paragraph 814)

6. (d) Devadasan was wrongly decided and is accordingly overruled to the extent it is inconsistent with this judgment. (Paragraphs 815 to 818)

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. Further, wherever reservations are already provided in the matter of promotion—be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of ‘State’ in Article 12—such reservations shall be permitted to continue in operation for a period of five years from the date of passing of the judgement (16.11.1992). The “appropriate authorities” may “revise, modify or re-issue” the relevant rules within this period, to ensure that the “objective” of Article 16(4) is achieved. Further, if any authority thinks that for ensuring adequate representation of ‘backward class of citizens' in any service, it is necessary to provide for direct recruitment therein, it shall be open for it to do so. Lastly, 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. (Paragraphs 819 to 831)

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. (Paragraphs 832 to 841)

9. There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4). (Paragraph 842)

The Nagaraj Case Analysed

In the Nagaraj case the Supreme Court was asked to strike down the 77th, 81st, 82nd and 85th amendments to the Constitution (adding clauses 4A and 4B to Article 16 and
adding a proviso to Article 335) which, it was claimed, had undone the fundamental principle of equality enshrined in Articles 14 and 16 and were, therefore, destructive of the basic structure of the Constitution. It was argued that the basis for impugned amendments was to overrule judicial decisions based on a holistic interpretation of the Constitution and its basic values, concepts and structure. Finally, it was argued that clauses 4A and 4B of Article 16 ought to be struck down as violating the fundamental principles of equality, justice, rule of law and secularism. It was also argued that “the impugned amendments opened the floodgates of disunity, disharmony and disintegration.”

The judgement in the case was delivered by Justice S.H. Kapadia. His discussion of the issues raised by the parties was structured around the following topics, which are listed in the order in which they appear in the judgement.

1. Standards of judicial review of constitutional amendments;
2. Is equality a part of the fundamental features or the basic structure of the constitution? The test for determining whether a particular feature of the Constitution is a part of its basic structure;
3. Justice, social, economic and political is provided not only in Part IV (Directive Principles) but also in Part III (Fundamental Rights);
4. Equity, Justice and Merit;
5. Reservation and Affirmative Action;
6. Maximum limit of reservations possible;
7. Catch up rule is the said rule a constitutional requirement under Article 16(4);
8. Scope of the impugned amendments;
9. Whether the impugned constitutional amendments violate the principle of basic structure.

The first topic arose out of a question posed by the Court to itself. Topic numbers 2, 3, 8 and 9 pertain to the validity and the interpretation of the impugned constitutional amendments. The challenge in this regard was primarily based upon an attempt to differentiate between equality and affirmative action. Topic number 4 pertains to the impact of the said amendments on the balance between equity, justice and merit (or efficiency) established by the Supreme Court in its previous decisions. The discussion in this regard debated the maximum extent of reservations permissible, the validity of the carry forward and the catch up rules, the extent to which the efficiency criterion operates as a restriction upon the power to make reservations, etc. The remaining two topics explain themselves. For convenience of analysis the topics can be recast and grouped into the following questions.
• What is the basic structure of the Constitution and what is the test for determining whether a particular feature of the Constitution is a part of its basic structure?

• What is the standard of judicial review in matters pertaining to constitutional amendments?

• Is there a dichotomy between equality and affirmative action under the Constitution?

• What is the scope of the impugned amendments and, do they violate the basic structure of the Constitution?

• In what manner are Equity, Justice and Merit to be balanced? That is—

• How are the notions of reservations and affirmative action to be defined in the context of equality?

• What is the maximum limit of reservations permissible under the law?

• Is the catch up rule (and its obverse, the consequential seniority rule) a constitutional requirement under Article 16(4)?

The core issue was whether (or not) the impugned amendments violated the basic structure of the Constitution.\textsuperscript{77} If the answer was yes, then they were liable to be struck down. If no, then they would be upheld as an instance of permissible affirmative action.\textsuperscript{78}

As a first step, the Court re-asserted its own role as the final arbiter of the correctness of legislative and executive action, holding that judicial review is a vital component of rule of law and, therefore, part of the basic structure of the Constitution. It went on to state that a constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms, to which all persons in the State are to be entitled, must be given a generous and purposive construction, which anticipates and takes account of changing conditions and purposes.\textsuperscript{79} It added that not all fundamental rights are spelt out in the Fundamental Rights chapter. To illustrate, it gave the example of the freedom of information, which has been held to be implicit in the guarantee of freedom of speech and expression.\textsuperscript{80}

Tracing the evolution of the doctrine of basic structure to the German Constitution, it asserted that the concept gives coherence and durability to a Constitution. It said that the recognition that the Constitution has a basic structure is tantamount to saying that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution, which give it a distinct identity.\textsuperscript{81} These principles are part of constitutional law even if they are not expressly stated in the form of rules.\textsuperscript{82} It went on to say that “some of these principles may be so
important and fundamental, as to qualify as ‘essential features’ or part of the ‘basic structure’ of the Constitution, that is to say, they are not open to amendment.” Thus, the Court said, in order to qualify as an essential feature, a principle must first be established as part of the constitutional law and, as such, binding on the legislature. Next, the Court must examine whether the principle is so fundamental as to bind even the amending power of the Parliament i.e. to form part of the basic structure of the Constitution.

Moving on to defining a “standard of judicial review of constitutional amendments in the context of the doctrine of basic structure,” the Court said that in the Keshavananda Bharati case it had held that one cannot “legally use the constitution to destroy itself.” Thus, the word amendment must postulate change without loss of identity. In other words, the theory of constitutional identity is rooted in the possibility of change with continuity. It declared that while “[f]idelity to the text qua fundamental principles (does) not limit judicial decision making, if the change is destructive of the identity of the Constitution, it abrogates its basic structure.”

The first claim of the petitioners in the Nagaraj case was that Articles 14, 15 (1) and 16 (1), constituted the equality code, which was a basic feature of the Constitution, while Articles 16(4), (4A), (4B), and the proviso to Article 335, called the affirmative action provisions, were in the nature of an exception to the equality code or, “an enabling power which is not coupled with a duty,” and hence, not to be treated as a fundamental right on par with the right to equality. In other words, they argued, the individual right guaranteed by Article 16(1), cannot be equated with the group expectation contained in Article 16(4). The former is directly enforceable while the latter is merely an instance of the classification implicit and permitted by the former. Thus, they contended that equality in employment consists of equality of opportunity [Article 16(1)], anti-discrimination [Article 16(2)], special classification [Article 16(3)], and affirmative action [Article 16(4)], which does not obliterate equality but which stands for classification within equality and, with efficiency (Article 335). Arguing further in the same vein, they contended that social justice is mentioned only in Article 38, which is part of the Directive Principles, which are not enforceable. As such, the State cannot be permitted to violate the equality principle for the sake of social justice.

On the other hand, the State argued that amendments for giving effect to the Directive Principles cannot offend the basic structure of the Constitution even if they abrogate (or restrict) individual rights. In other words, provisions that promote the constitutional ideal of justice, social, economic and political and the ideal of equality of status cannot violate the basic structure of the Constitution and, can therefore not be struck down. It was also argued that the principle of balancing of rights of the general category and reserved category in the context of Article 16 cannot be called a basic feature of the Constitution. It also argued that neither the right to consideration for promotion nor the jurisprudence relating to public services form part of the basic features of the Constitution. It submitted that basic features of the Constitution consist of
axioms like constitutional supremacy, democratic form of government, secularism, separation of powers, etc., and are not to be construed as being embodied in any one (or more) article of the Constitution.

The arguments by the petitioners listed above give rise to an important question, the answer to which requires a little digression. The question is, despite the Indra Sawhney case having settled the issue once and for all by holding that Article 16(4) was not an exception to Article 16(1), what emboldened the petitioners in the Nagaraj case to once again argue that Articles 14, 15(1) and 16(1) constituted the equality code, which was a basic feature of the Constitution, while the affirmative action provisions of Articles 16(4), (4A), (4B), and the proviso to Article 335 were an exception to it and, hence, not to be treated on par with the right to equality?

For clarity on this issue it is necessary to trace the path by which Article 16(4) gained parity of status with Article 16(1), starting from the majority position in the Devadasan case, which held to the contrary. The parity, essentially a validation of the Subba Rao position – the minority judgement in the Devadasan case – was first adopted by the Court in the N.M. Thomas case, in which it held that “equality under Article 16 could not have a different content from equality under Article 14.” Thus, the Court held, if Article 14 permits classification having a rational nexus to the object of the legislation, so must Article 16(1) be held to permit it. By this interpretation Article 16(4) was enabled to become “an instance of the classification implicit in and permitted by Article 16(1).” The Indra Sawhney decision accepted the decision in the Thomas case, holding that:

In our respectful opinion, the view taken by the majority in Thomas is the correct one...For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy... Accordingly, we hold that clause (4) of Article 16 is not an exception to clause (1) of Article 16...It is a provision which must be read along with and in harmony with clause (1).”

However, in both these cases (N.M. Thomas and Indra Sawhney) the Court continued to be reluctant to view the equality principle (in the context of reservations) as involving communities on both sides, rather than individuals on one and communities on the other. It was, therefore, compelled to resort to the rather more cumbersome route of reinterpreting the whole of Article 16 as a facet of Article 14 to arrive at the Subba Rao position. Further, its refusal to fully embrace the Subba Rao position in the Devadasan case led to the error of the majority position in the Devadasan being reiterated in the Ajit Singh and Others (II) v State of Punjab and Others (AIR 1999 SC 3471) case, even though it was decided in 1999, several years after the decision in the Indra Sawhney case had ostensibly settled the issue once and for all. In the Ajit Singh case the Court again reverted back to the position of the majority in the Devadasan case, albeit with some
modifications since it could not have entirely ignored the stand of the Court in the Indra Sawhney case, which was binding upon it.

In the Devadasan case the majority of the Court was stampeded into postulating an erroneous view of the relationship between equality and affirmative action under the Constitution because of the carry forward rule, which threatened the generalists’ domination of the annual recruitment of persons to government jobs. In the Ajit Singh case the Court was similarly stampeded by the catch up rule (or the rule of consequential seniority), to commit an almost identical error. Though three factors can be said to have played a role in nudging the Court into the direction of this error: a) the failure to adhere to the communitarian principle propounded by Justice Subba Rao, b) the fact that Indra Sawhney had declared that reservation was not permissible in promotions (consequential seniority is an aspect of that reservation), and c) the fear (of the generalists) that grant of consequential seniority to reservationists would result in their swamping the higher echelons of the services—essentially the error can be attributed to the first factor.96 In other words, the majority decision in the Devadasan case and the Ajit Singh decision are proof the vital importance of not only affirming the parity of status between Article 16(4) and Articles 14 and 16(1) but of also affirming the logic by which it was arrived at by Justice Subba Rao in his minority judgement in the Devadasan case.

Thus, it was the reversal of the parity position (adopted in the N.M. Thomas and the Indra Sawhney cases) in the Ajit Singh case that permitted the petitioners in the Nagaraj case to once again argue that Article 16(4), and consequently, Articles 16(4A), (4B) and, the proviso to Article 335, must be seen as being exceptions to the rule of equality. In the Nagaraj case, the Court sought to retrace at least some of the ground back to the parity position enunciated in the N.M. Thomas and the Indra Sawhney cases. However, as is evident from the succeeding paragraphs, the Court’s position remained mired in the confusion of the individual rights versus community rights equation. The Court, once again, shied away from the Subba Rao logic, even though it was careful not to fall into the trap created by the Ajit Singh decision. It is reasonable to assume that the Court re-revised the interpretation of the status of Article 16(4) vis-à-vis Article 16(1) in the Nagaraj case because it realized that a de jure restriction of affirmative action as an exception to the equality principle, which was patently the path on which the Court had been moving after the Indra Sawhney case, was not tenable in the changed social and political climate of the country.

The Nagaraj Court affirmed equality as a part of the basic structure of the Constitution but cautioned against confusing formal equality with egalitarian equality.97 The Court acknowledged that it had earlier read Article 16(4) as an exception to Article 16(1) but asserted that this position had been revised in the Indra Sawhney case, where it came to the conclusion that the expression ‘nothing in this Article’98 in Article 16(4) converted it into a provision dealing with “a class apart”. In other words, the Court said, Article 16(4) enables the State to provide for reservation wherever there exist compelling reasons, namely backwardness of a class and inadequacy of representation in
employment. Since these compelling reasons do not exist in Article 16(1), the two clauses, Article 16(1) and Article 16(4), must be harmonized.99

The Nagaraj decision also avoided a polarization between Fundamental Rights and Directive Principles, by declaring that though social, political and economic justice is explicitly mentioned only in Article 38 (which lies in Part IV, The Directive Principles) it cannot be restricted to that provision (or that part) alone. Articles 14, 17 and 25 (all contained in Part III, The Fundamental Rights) were mentioned as vital components of any conception of social justice.100 Further, accepting the contention of the State with respect to the nature of service jurisprudence, it held that principles and practices emanating from it cannot be elevated to the level of basic features of the Constitution.101

While the fact that the Nagaraj Court reiterated that equality and affirmative action stand on an equal footing may be said to symbolize the distance that the nation has travelled on the road to social justice, the convoluted logic that it continues to choose to attain this parity is equally symbolic of the crisis that the quest for social justice throws the nation’s polity into, each time it is asked to affirm it commitment to this goal.102 That the Court shares in this crisis is reflected in its reluctance to make the nation adhere to its commitment to social justice for Dalits. A brief sequence of decisions, from the parity perspective, is useful for summarizing the agony.103

- In the Devadasan case the Court (majority decision) asserted the supremacy of individual equality over the promise of affirmative action, in the face of a patently correct, rational and logical exposition to the contrary by one of its own.

- In the N.M. Thomas case and in the Indra Sawhney case the Court corrected itself to place affirmative action on par with equality but failed to adopt the full parity position enunciated by Justice Subba Rao in the Devadasan case.

- In the case Union of India and Others v Virpal Singh Chauhan and Others (AIR 1996 SC 448), the Court stopped short of asserting that the catch up rule was implicit in a harmonious reading of clauses (1) to (4) of Article 16, which would have been tantamount to reverting back to the majority position in the Devadasan case but it declared that, since the relevant service rules affirmed the catch up rule they could (and must) be followed, without raising the spectre of unconstitutionality.104 In other words, though the Court adhered to the parity of Articles 16(1) and 16(4) as affirmed in the Indra Sawhney case, it simultaneously held that there was nothing unconstitutional in the service rules that, in effect, prescribed the earlier position, i.e. the one enunciated in the Devadasan case.105

- In the Ajit Singh cases106 the Court was once again confronted with the catch up rule. Here it went a step further and, virtually reversing the interpretation adopted in the N.M. Thomas and the Indra Sawhney cases, declared that Article 16(1) deals with
a Fundamental Right whereas Articles 16(4) and 16(4A) are only enabling provisions. Therefore, the Court held, in matters relating to affirmative action by the State, the rights under Articles 14 and 16 are required to be protected and a reasonable balance should be struck so that the affirmative action by the State does not lead to reverse discrimination.\textsuperscript{107}

- In the \textit{M. G. Badappanavar and Another v State of Karnataka and Others} (AIR 2001 SC 260) case the Court went even further. It declared that any treatment of equals as unequals or any treatment of unequals as equals would violate the basic structure of the Constitution. Classifying persons promoted on the basis of a policy of \textit{reservation in promotions} (or, as the Court called them, roster-point promotees) as being distinct from backward classes in general, the Court held that “if the creamy layer among backward classes were given the same benefits as backward classes, it will amount to equals being treated as un-equals.”\textsuperscript{108} In formulating this proposition, the Court placed reliance on the Indra Sawhney judgement, in which it had held that the \textit{creamy layer must be excluded}. Applying the creamy layer test the Court declared that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution, in which event, it said, “even Article 16(4A) cannot be of any help to the reserved category candidates.”\textsuperscript{109}

- In the Nagaraj case the Court, did a little bit of an about turn and again declared parity between Article 16(1) and 16(4). Further, it held that the \textit{catch up rule} and its obverse, the \textit{consequential seniority} rule, are judicially evolved concepts to control the extent of reservation, sourced in service jurisprudence. They cannot be elevated to the status of basic structure axioms like secularism, constitutional sovereignty, etc. Thus, the insertion of the concept of consequential seniority (the obverse of the catch up rule) into Article 16 [by way of Article 16(4A)] cannot be termed destructive of the structure of Article 16(1). Nor can it be said that the \textit{equality code} comprised in Article 14, 15 and 16 is violated by a deletion of the catch up rule. It declared that such concepts are based on practices, which “cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the Parliament.”

The fourth question pertains to the scope of the impugned amendments, and whether they violate the basic structure of the Constitution. The discussion on the \textit{scope}\ was confined to the ‘Objects and Reasons’ attached to each of the four amendments with some context being provided by reference to the changes introduced by successive judgements of the Court, starting with the Indra Sawhney case. While discussing the scope, the Court indicated the trend of its thinking, though it did not fully articulate the reasoning on the basis of which it would eventually uphold these amendments.

Pointing out that the Indra Sawhney decision had reversed a long standing position by holding that Article 16(4) did not permit reservation in promotions, the Court noted that the ‘Statement of Objects and Reasons’ attached to the 77\textsuperscript{th} Amendment expressed the concern of the government at the adverse effect of this reversal upon the interests of the \textit{Dalits} and \textit{Adivasis} in government services, who had \textit{not reached the}
required level.\textsuperscript{110} Therefore, it said, “the government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone,” by inserting Article 16(4A) into the Constitution.

Thereafter, noting that Article 16(4A) is carved out of Article 16(4), and follows the pattern specified in that provision [as well as in Article 16(3)], the Court declared the said Article to be an \textit{instance of permissible classification}, and hence, not in violation of the basic structure of the Constitution. It said that while Article 16(4A) gives the appropriate governments the freedom to provide for reservation in matters of promotion to Dalits and Adivasis, it continues to be governed by the two compelling reasons of backwardness and inadequacy of representation, as prescribed in Article 16(4) and, by the requirement of overall efficiency of the system, as required by Article 335. Reservation made in disregard of these three factors would be illegal, it said.

The Court then examined the 85\textsuperscript{th} Amendment, which further amended Article 16(4A), to include the power to grant consequential seniority to Dalits and Adivasis, along with promotion. It stated that this amendment was necessitated by the decision in the Virpal Singh Chauhan case and the Ajit Singh case, in which the Court had upheld the denial of consequential seniority by holding that it amounted to conferring an additional benefit upon the reservationists.\textsuperscript{111} Thus, the Court said, clause (4A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. “Suffice it to state (it said) that, the Constitution (Eighty-Fifth Amendment) Act, 2001 was an extension of clause (4A) of Article 16. Therefore, the Constitution (Seventy-Seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-Fifth Amendment) Act, 2001.”\textsuperscript{112}

Then the Nagaraj Court moved on to discuss the 81\textsuperscript{st} Amendment, introducing Article 16(4B) into the Constitution. The starting point for the Court’s task [of upholding Article 16(4B), even though it negated the rule laid down in Indra Sawhney] was suggested by the Indra Sawhney decision itself. As has been mentioned in the summary of that decision above, it held that the creamy layer (among the reservationists) can and must be excluded from the benefits of reservations.\textsuperscript{113} In the course of its discussion on this point the Court stated that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward.\textsuperscript{114} Further, in paragraph 803, the Court pointed out “if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry.” In other words, the Indra Sawhney Court said that when sub-classification was considered necessary to differentiate between the more backward among the larger category of reservationists, i.e. between the Dalits and Adivasis on the one hand, and OBCs on the other there was no reason why the same principle should not be adopted to a) differentiate between the more and less backward among the OBCs and, b) identify the creamy layer among the reservationists so as to focus the benefit of reservations upon those who really needed it.\textsuperscript{115}
The Nagaraj Court then noted that the Statement of Objects and Reasons attached to the 81st Amendment Act stated that the bar in the Indra Sawhney decision upon reservations beyond 50 per cent of the total number of vacancies in a given year, including backlog vacancies, made it difficult to fill backlog vacancies. As such, it became necessary to insert Article 16(4B), excluding carry-forward/unfilled vacancies of a year from the overall ceiling-limit of 50 per cent reservation.

Indicating the line of its thinking in this regard, the Court then referred to its decision in the R.K. Sabharwal case (infra), which had held that vacancies should be filled strictly in accordance with the roster, i.e. each vacancy should be filled by appointing a person from the category to which that post had been assigned under the roster prepared for that service or cadre. Thus, the Court said, “once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate…and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies does not arise.” Therefore, it declared, “The 81st Amendment, in substance, confers legislative assent to the judgment of this Court in R.K. Sabharwal case.”

Finally, taking recourse to the reasoning employed by Justice Subba Rao in the Devadasan case, the Nagaraj Court sought to justify the insertion of Article 16(4B) by declaring that “if it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.”

While seemingly leaning in favour of reservations, the statement above is actually meaningless. This becomes clear from the subsequent comments. The Court declared that while Article 16(4B) freed the State from the constraint of the 50 per cent limit on reservations in annual vacancies (by permitting the creation of a separate category of carry forward vacancies, all of which would be reserved), it was still required to keep the requirement of efficiency in administration, imposed by Article 335, in mind. Thus, the Court said, keeping posts “vacant for years…would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact-situation.”

In other words, the Court declared that reserved posts that remained unfilled for more than a reasonable number of years would have to be de-reserved, enabling them to be filled by general category candidates, in order to satisfy the requirement of efficiency of administration. Given the history of the manner in which the carry forward rule had worked it was patent that the sanction for the insertion of Article 16(4B) would remain a mere lip service to the problem of unfilled vacancies unless the State took steps to ensure that sufficient numbers of reserved category candidates are helped to attain the minimum eligibility requirements prescribed for the vacancies carried over.
This anxiety to minimize the significance of the issue of carry forward vacancies is evidence that such vacancies continued to loom large on the reservations horizon: proof, if any was needed, that reservations were not working in the manner that they ought to. Further proof was also available to the Court by way of the respective statements of objects and reasons attached to the four impugned amendments, which were nothing less than an admission by the State of the pathetic situation at the ground level. The Court’s failure to look at this aspect of the matter must be deemed a refusal. Given the considerable anxiety that the Court has always shown, to balance the equities in favour of the generalists, this indifference is telling of its actual keenness to ensure justice for the reservationists. Since malafides cannot be attributed to the Supreme Court, it is reiterated that it falls into this error (and remains there) primarily because of its refusal to take a correct view of the equality statement contained in the Constitution, in the context of reservations.\(^{122}\)

The Court also briefly discussed the 82\(^{nd}\) Amendment, inserting a proviso to Article 335. In this context it referred to its decision in the *S. Vinod Kumar and Another v Union of India* [1996 (6) SCC 580] case, wherein it had held that “relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution.” It noted that this was also the view in Indra Sawhney. Calling the proviso to Article 335, compatible with the scheme of Article 16(4A), the Court said that the two decisions mentioned above necessitated the introduction of the said proviso, along with the introduction of Article 16(4A), providing for reservation in promotion for Dalits and Adivasis. In other words, if the sub-classification enabling reservation in promotion for Dalits and Adivasis is valid then it is also permissible to provide that the said category be given relaxation in matters of eligibility for such promotion.

The question whether the impugned amendments violate the basic structure, or not, has two parts. The first part is linked to the parity issue and the Court’s answer has been discussed above. The second part of the question was based on the allegation that the amendments had been introduced in order to nullify the Supreme Court’s decisions, which, *ipso facto*, are part of the basic structure of the Constitution. It was thus argued that the fact that the impugned amendments were so aimed was, by itself, sufficient to vitiate the amendments and, make them liable to be struck down.\(^{123}\)

More specifically, the petitioners urged that the 77\(^{th}\) Amendment, introducing Article 16(4A), permitting reservation in promotion for Scheduled Castes and Tribes, had the effect of nullifying the decision in the case of Indra Sawhney, in which it had held that reservations must be restricted to the initial stage of recruitment only; that, the 85\(^{th}\) Amendment, adding the words “with consequential seniority” in Article 16(4A) had been made to nullify the decision in the case known as Ajit Singh II;\(^{124}\) that the 81\(^{st}\) Amendment, permitting the State to separate carry forward vacancies and fill them notwithstanding the 50 per cent limit on reservations in annual vacancies violated the decision in the Indra Sawhney case; and that that the 82\(^{nd}\) Amendment, relaxing the efficiency criterion contained in Article 335 by incorporating a proviso to the Article, had been introduced to nullify the effect of the decision in the Indra Sawhney case and a host of other cases that emphasise the importance of maintaining efficiency in administration.
The Court’s answer to this part of the challenge (that the impugned amendments have been introduced to nullify the Supreme Court’s decisions and, are therefore, bad) was two pronged. It first discussed the individual issues named above; that is, reservation in promotion, the 50 per cent limit on all reservations, and the efficiency criterion. Its answer on these issues was then dovetailed with an overall answer to the challenge, which was evolved with the aid of the classification rule.

The discussion on the individual issues can be covered under the rubric, balance; or, as the Court posed it, balance between justice, equity and merit. The Court concluded that these issues were not basic features of the Constitution and, hence, could not be said to be beyond the amending power of the Parliament. Thereafter, with the aid of the classification rule the Court not only declared the impugned amendments to be consistent with the overall scheme of Article 16(4) and, hence, with the basic structure of the Constitution, but also managed to arrive at the conclusion that the said amendments gave legislative sanction to the various decisions delivered by it. Thus, from both perspectives the Court declared the impugned amendments to be valid.

Before discussing the manner in which the Court dealt with the individual issues, it is useful to note the State’s response to the arguments in this regard by the petitioners. The State replied by contending that it did nothing wrong in bringing in the amendments in question because once the Supreme Court has interpreted a constitutional provision that interpretation becomes part of the Constitution (gets in-built in the provisions), and is therefore open to amendment under Article 368. In other words, a constitutional amendment cannot be said to violate the basic structure of the Constitution, or amount to usurpation of judicial power, merely for the reason that it changes a position enunciated by the Supreme Court in a previous judgement.

It is in this manner, the State argued, that the Constitution becomes a living document, with both the legislature and the judiciary contributing to the changes of law, and with the final say regarding the validity of the changes reposing in the judiciary. In other words, the State contended, every interpretation of the Constitution by the Court does not become a basic feature of the Constitution but on each occasion the Court is required to examine the actions of the legislature to determine whether they violate the basic structure.

Thus, the State argued, there are no implied limitations on the power of the Parliament to amend the Constitution but an amendment would be invalid if it interferes with or undermines the basic structure. Finally, neatly turning the Court’s position in the Ajit Singh II case (supra) to its own advantage, the State contended that Articles 16(4A) and 16(4B) only being enabling provisions, it was not permissible to test their constitutionality with reference to the exercise of the power (or manner of exercise of such power). The Court accepted almost all the contentions advanced by the State, though not precisely in the manner in which the State had presented them.

The Nagaraj Court first examined the issue of grant of reservation in promotion, and consequential seniority, to Dalits and Adivasis. The Indra Sawhney decision had
reversed a long standing position by holding that Article 16(4) did not permit reservation in promotion. The reversal was ordered with prospective effect and, the Court allowed the existing schemes for such reservation to continue for five years from the date of its judgement. It also permitted the respective governments liberty to appropriately to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4).  

In other words, even as it declared that Article 16(4) did not permit reservation in promotion, the Indra Sawhney Court recognized that such reservation did, in fact, fulfil a real need, which would have to be met by some other method. Whether this was that Court’s way of preserving the balance or merely recognition of the imperatives of real politics, it is not possible to say. But there seems to be little doubt that subsequent decisions on the related issues of the catch up–consequential seniority rule were influenced by the decision in the Indra Sawhney case barring reservation in promotion. The gist of some of the important subsequent decisions is given below.

• In the Virpal Singh Chauhan case the Court declared that it was for the government to decide the terms, mode and manner of granting promotions and, therefore, held the catch up rule to be constitutionally valid. However, it also held that the catch up rule was not implicit in any part of Article 16 and hence, cannot be called a basic feature of the Constitution.

• In the decision known as Ajit Singh II, however, the Court ruled that if the ‘catch up’ rule is not applied then the equality principle embodied in Article 16(1) would stand violated. In other words, the Court declared it to be a part of the equality principle, which was a basic feature of the Constitution.

• In the Jagdish Lal case, another bench of three judges held that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights and, therefore, the latter were entitled to the benefit of continuous officiating (or consequential seniority). Thus, this case declared in favour of the reservationists while the two previously mentioned cases had held in favour of the generalists.

• The conflict of decisions was resolved in the case known as Ajit Singh II. Overruling the Jagdish Lal case, the Court declared that Article 16(1) deals with a Fundamental Right whereas Articles 16(4) and 16(4A) are only enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. It emphasized that “in matters relating to affirmative action by the State, the rights (of the generalists) under Articles 14 and 16 are required to be protected and a reasonable balance should be struck so that the affirmative action by the State does not lead to reverse discrimination.”

• In the M.G. Badappanavar case, relying upon its decisions in the Ajit Singh I case and the Virpal Singh Chauhan case, the Court held that quotas in promotion (roster promotions) did not confer consequential seniority upon the promotee. Further, relying upon the Indra Sawhney decision, the Court held that treating the creamy layer among the backward classes at par with the rest of the backward classes would amount
to unequals being treated as equals, violating the equality principle; which was a basic feature of the Constitution. In such event, the Court said, even Article 16(4A) cannot be of any help.

The slant of the post Indra Sawhney Court against consequential seniority and in favour of the catch up rule is patent. However, as mentioned above, the Nagaraj Court declared that

> Reading the above judgements, 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... These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that 'equality code' under Article 14, 15 and 16 is violated by deletion of the 'catch up' rule... such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the Parliament... Therefore... neither the 'catch up' rule nor the concept of 'consequential seniority' are implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan.

Accordingly, distinguishing the contrary judgements listed above, the Nagaraj Court held that Article 16(4A) could not be deemed to be unconstitutional merely because it amended the existing position with respect to the consequential seniority rule, which, as stated, is the obverse of the catch up rule. In a display of opaque (and obscure) reasoning, the Nagaraj decision went on to say that the Badappanavar decision “is the only judgment of this Court delivered by three-Judge bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is part of the basic structure of the Constitution.” In a slightly more pertinent remark, the Court also noted, “In none of the cases cited (above) was the question of the validity of constitutional amendments involved.”

As stated, the Court relied upon the Virpal Singh Chauhan decision for support for its stance, which was delivered by a two-judge bench. The Nagaraj Court, being a constitution bench, was not bound to strictly follow the rule of binding precedent. However, the fact that it mentioned the Badappanavar decision as being rendered by a bench of three judges is indicative of the importance of precedent in its scheme of things. Why then did it prefer the reasoning of the Virpal Singh Chauhan case? The answer lies in the realm of politics, not law, notwithstanding that an elaborate legal justification must also exist for this choice.

The next issue that the Court discussed was much more problematic. The Court’s peregrinations in resolving this issue are therefore worth reproducing in greater detail. The first step is to briefly trace the roots of the numerical limit doctrine, as listed by the Court.

- In the Rangachari case the Court said that reservation under Article 16(4) is intended to give adequate representation to backward communities and cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees.

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• In the Balaji case, the Court held that 60 per cent reservation under Article 15(4) was 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.

• The Devadasan case (majority) held that what was true under Article 15(4) was equally true for Article 16(4).

• But in the N.M. Thomas case, Justice Krishna Iyer said that though reservation cannot be so excessive as to destroy the principle of equality of opportunity under Article 16(1), the Constitution does not put any limits in this regard. If 80 per cent of the population of a province is backward then it would be meaningless to say that reservation should not cross 50 per cent.

• However, in the Indra Sawhney case the majority held that the rule of 50 per cent laid down in the Balaji case was a binding rule and not a mere rule of prudence. Delivering the Court’s judgment, Justice Reddy stated, “Article 16(4) speaks of adequate representation not proportionate representation although the proportion of population of backward classes to the total population would certainly be relevant.” He declared that the 50 per cent cap on reservations would be applicable to the total number of vacancies in each year. He held this to be necessary on the basis of the same dichotomy, between the individual right to equality under Article 16(1) versus the interests of certain sections of society, protected by Article 16(4), which has been the hallmark of the Court’s position with respect to reservations.

Thus, the Nagaraj Court was faced with the task of justifying its decision to uphold the 81st Amendment, inserting Article 16(4B), which excluded carry forward vacancies from the ceiling imposed by the Court, in the face of a categorical position to the contrary expressed by the Indra Sawhney decision, which was binding on it since it had been rendered by a larger bench. In other words, the Court was required to disagree with the Indra Sawhney decision without appearing to disagree with it. This delicate task is called distinguishing a decision or, to be more precise, distinguishing the ratio of a decision. This is generally done by either declaring that the facts of the previous decision were so different that its ratio (which is that part of the judgement which is applicable de hors the facts) was inapplicable to the facts of the case under consideration or, simply, by holding that the ratio of the previous case was inapplicable to the issues (comprising the facts in the framework of the law/s in question) of the current one. In the Nagaraj case, however, the Court did not adopt either of these methods. Instead, it shifted the focus of the issue from the numerical limit requirement to the right of the legislature to classify, in order to meet rational and reasonable objectives, via its judgement in the R. K. Sabharwal and Others v State of Punjab and Others (AIR 1995
SC 1371) case. Simultaneously, as with the consequential seniority rule discussed above, the Court returned a finding that the carry forward rule was not a basic feature of the Constitution. The first step to understanding the semantics involved is to briefly examine the stand of the Indra Sawhney decision in this regard.

A reading of the relevant portion of Justice Reddy’s judgement in the Indra Sawhney case where he has dealt with this issue makes it clear that the 50 per cent limit was envisaged as being applicable to the totality of reservations. In other words, he looked at all possibilities, including the operation of the carry forward rule, while holding that reservations should never exceed 50 per cent of the total vacancies in a year. While doing so he specifically considered the possibility that the representation of Backward Classes, including Dalits and Adivasis, in a service was woefully below the required strength. He declared that even in such circumstance it was not permissible to reserve more than a reasonable maximum, which he set at 50 per cent, of vacancies. The only exception to the 50 per cent rule that he said would be acceptable was where

... (there existed) certain extraordinary situations inherent in the great diversity of this country and the people. ... 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 (sic) 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.

To make it even more abundantly clear that 50 per cent was an absolute limit Justice Reddy also examined the striking down of the carry forward rule by the Devadasan Court and declared that decision to be incorrect. Countering the numerical example used by the Devadasan Court to strike down the carry forward rule, Justice Reddy constructed a numerical example of his own to show how the striking down of the whole rule—rather than just the particular instance in which it had operated unjustly—had itself resulted in injustice. His example showed that the carry forward rule need not always result in excessive (more than 50 per cent) reservation. Justice Reddy also deprecated the practice of constructing numerical examples, relying upon the views of Justice Krishna Iyer in the Akhil Bharatiya Shoshit Karamchari Sangh v Union of India (AIR 1981 SC 298) case, in which he said that “mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced.” Justice Reddy expressed respectful agreement with this view. However, he was not averse to constructing (and using) numerical examples of his own, to startle without justification. Thus, while declaring the 50 per cent maximum limit on reservations would be applicable for the vacancies to be filled in each year, he used the following numerical example to justify his (and the Court’s) position in this regard.

Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50 per cent that means that out of the 1000 posts 500 must be held by the members of these classes, i.e. 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a short fall of 220. Similarly the
number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50 per cent a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

As mentioned above, the Nagaraj Court used the theme of balance to fabricate a way out of the stalemate presented by the Indra Sawhney decision. The Nagaraj Court declared that equity, justice and merit (efficiency) were the three variables that required to be balanced. Keeping aside systemic efficiency for ease of analysis, it said that the surest method of ensuring a balance between equity and justice is to have a numerical benchmark. Coming specifically to the carry forward rule, which was the object of the 81st Amendment, inserting Article 16(4B)] the Court declared that when confronted with unfilled reserved quota vacancies, the State has only two options. To carry forward the vacancies, unfilled, to the next year or the next to next year or, to fill the vacancies with general quota candidates and carry forward the quota to the next year. In either case, the Court said, the problem of exceeding the 50 per cent limit on reservations was liable to arise.

Thereupon, juxtaposing the numerical limit requirement with the issue of carry forward vacancies, the Court declared that “the question was whether annual vacancies should be taken as the unit of consideration or whether the entire cadre strength should be considered, while enforcing a numerical limit.” The Court traced two lines of thought in this regard, the Rangachari (supported by Subba Rao’s minority view in Devadasan) and N.M. Thomas line, which thought that the only numerical limit that could be imposed on reservations was with reference to the entire cadre strength and, the Devadasan (majority) and the Indra Sawhney line, which felt that unless the numerical limit was imposed on the annual vacancies the guarantee of equality of opportunity under Article 16(1) to each individual citizen would be negated.

Thereafter, with a series of disjointed statements, the Court linked the decision in the R.K. Sabharwal case to the issue and declared that “(t)he Constitution (Eighty-first Amendment) Act, 2000 added Article 16(4B) which in substance gives legislative assent to the judgment in R.K. Sabharwal.” While it is possible to fathom the Court’s reasoning with respect to this conclusion, after a fashion, the feat does not lend any credit to it. The sequence of statements referred to above was as follows:
• However, in R.K. Sabharwal (in) which...the issue... was operation of roster system, the Court stated that entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached.

• With regard to ruling in Indra Sawhney case that reservation in a year should not go beyond 50 per cent the (Sabharwal) Court held that it applied to initial appointments.

• The operation of a roster, for filling the cadre strength, by itself ensures that the reservation remains within the 50 per cent limit.

• In substance the court said that presuming that 100 per cent of the vacancies have been filled, each post gets marked for the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

• The Court was concerned with the possibility that reservation in entire cadre may exceed 50 per cent limit if every year half of the seats are reserved.

• The Constitution (Eighty-first Amendment) Act, 2000 added Article 16(4B), which in substance gives legislative assent to the judgment in R.K. Sabharwal.

The disjointedness of the above statements apart, in fact there is no link that connects the Indra Sawhney case, the R.K. Sabharwal case and, Article 16(4B). The petitioners in the R.K. Sabharwal case argued two issues. The first was, whether it is permissible to count reserved category officers who had been promoted to general category posts on the basis of consequential seniority (i.e. seniority consequent to accelerated promotion, based upon reservation in promotion), when determining whether the cadre in question had achieved the prescribed strength of reserved quota officers? This question was answered in the negative by the Court, which declared that there was no bar to reservationists holding general category posts, though the fact that a large number of such candidates had come to fill these posts would be a factor when the government decided to review the policy of reservation itself.142

The second question pertained to the point in time till when it is necessary to maintain a roster in a given cadre. It was contended by the petitioners that the roster should be maintained only till such point as the requisite number of reserved category roster points had been filled. Thereafter, it ought to be discontinued since all that was required to maintain the requisite strength of reserved category employees in the cadre was to ensure that each post that fell vacant should be filled by appointing a person from the category to which the said post was assigned as per the original roster. In other words, it was argued that the roster was linked to posts and not vacancies. It was argued that if the roster were linked to annual vacancies it would lead to over reservation in the cadre.143

During the course of discussing this question, the Sabharwal Court referred to the Indra Sawhney decision and extracted a quotation from Justice Jeevan Reddy’s judgement, which was made in connection with the need to maintain a balance between
reservationists and generalists with reference to annual vacancies rather than the total strength of the cadre or service. The Jeevan Reddy view was that if the entire cadre is treated as the unit relevant for the purpose of filling up backlog vacancies, then the open competition channel would get clogged up for many years since the number of posts falling vacant each year would be far fewer than the backlog of reserved posts that needed to be filled. Needless to add, this point was irrelevant to the issue before the R.K. Sabharwal Court, which was only concerned with the correct manner of operation of a roster, more specifically, a promotion roster. The Sabharwal Court rightly held that a roster could only operate till all the posts in a cadre had been filled in accordance with it. Be that as it may, in addition to referring to the Indra Sawhney decision during the course of this, the Sabharwal Court also chose to comment upon it. At best, it was a stray comment and ought to have been ignored. However, the Nagaraj Court chose to pick up the comment and, to convert it to its own purposes.

To sum up, the Sabharwal decision pertained to the manner in which a roster should be implemented in order to ensure that it does not lead to an excess of reservationists in a given cadre of government employees. While declaring the correct manner of operation of the roster, it clarified that the Indra Sawhney decision was not an authority to hold that “the roster survives after the cadre-strength is full and the percentage of reservation is achieved.” Thus, the Sabharwal decision did not pertain to the issue raised by the petitioners in the Nagaraj case with respect to the constitutional validity of the 81st Amendment. Nor did the decision in the Sabharwal case flow from (or, have any link with) the Indra Sawhney decision. To achieve this connection, howsoever absurd, the Nagaraj Court asserted that the R.K. Sabharwal decision introduced post-based rosters for the first time. It claimed that after the decision in the Sabharwal case, “specific slots for OBC, SC and ST as well as GC have to be maintained in the roster.” Further, it declared that if a candidate from the particular category to which that post has been assigned in the roster is not available the post may remain unfilled, since it can only be filled only by the specified category. This rule, the Nagaraj Court said, made it necessary to create “a classification between current vacancies on one hand and carry-forward/backlog vacancies on the other hand, which is what Article 16(4B) does.” Thus, Court said, the insertion of Article 16(4B) can be said to have been necessitated by the R.K. Sabharwal decision.

The reasoning of the Nagaraj Court is patently suspect. The concept of post-based rosters was not introduced by the Sabharwal decision. On the contrary, the roster has been in existence almost from the inception of the reservations regime in India and, has always been a post based concept though, inevitably, the notion of vacancies must also enter the picture. In fact, the roster cannot be anything but post based since reservations are post based. A roster is merely a method of distributing these posts between different categories of appointees, such as between the reserved and the general category appointees, or between the various sub-categories within the category of...
reserved posts. It thus makes no sense for the Nagaraj Court to have attributed this to be an invention of the Sabharwal Court.

The Nagaraj Court was also misconceived in asserting that operation of the roster in accordance with the interpretation it had imparted to the Sabharwal decision would assure that reservations did not exceed the prescribed limit. The only thing that adherence to the prescribed roster would ensure is that each appointee is assigned his (or her) proper place/position in the cadre or service in question. It cannot ensure that a sufficient number of suitably qualified candidates are found for the posts that are vacant. In other words, it cannot ensure that there are no carry forward vacancies. If that is so, then the vacancies that are carried forward to the next year will necessarily get added to the current year vacancies of that year. Given that the existing reservation quotas add up to 49.5 per cent, this means that the 50 per cent limit on reservations based on the vacancies (including carry forward vacancies) for a given year is bound to be breached the moment there are carry forward vacancies. In which case, the limit imposed by the Indra Sawhney decision is violated.

If that is so, then the R.K. Sabharwal decision does not operate to mitigate the effect of Article 16(4B) nullifying the Court’s decision in the Indra Sawhney case, in any manner. Further, if the Indra Sawhney case established a balance between equity and justice in the context of reservations, as asserted by the Nagaraj Court, then the impugned law does operate to destroy that balance. Further, since decisions of the Supreme Court are law, it is entirely possible that the law laid down by the Indra Sawhney case was important enough to be called a basic feature of the Constitution. If that is assumed, then the 81st Amendment did violate the basic structure of the Constitution, by introducing Article 16(4B) into the Constitution. It thus becomes important to understand the logic by which a body no less August than a five judge constitution bench of the Supreme Court arrived at a, seemingly, absurd conclusion.

To understand how the Nagaraj Court concluded that the R.K. Sabharwal case is relevant, and that the 81st Amendment gives legislative assent to that decision, one has to understand how the impugned amendments were, ipso facto, bad because they had been brought in to nullify Supreme Court decisions on those issues; namely, the answer based upon the overall analysis of the said amendments from the perspective of the classification rule.

We have noted above that in each case where the State provides for reservation Article 16(4) requires two circumstances to be in existence: backwardness and inadequacy of representation. Applying what it called the width test, the Nagaraj Court concluded that the impugned Articles—16(4A) and 16 (4B)—do not remove these limitations on the mode of the exercise of power by the State. As such, it said, the impugned amendments bringing them into being cannot be deemed invalid. Thus, the Court said, “applying the ‘width test’, we do not find obliteration of any of the constitutional limitations.”
Thereafter, the Court tested the impugned amendments against the test of identity. Stating that any amendment must bring about change, it posed the question “whether the impugned amendments discard the original constitution.” It pointed out that the impugned amendments do not violate any of the overarching principles of the Constitution, like secularism, federalism, equality, etc. On the other hand, the Court suggested, the impugned amendments are patently in furtherance of the preamblic mandate for equality “in fact”, as distinct from equality “in law” (or formal equality). As such, the Court said, “applying the test of ‘identity’, we do not find any alteration in the existing structure of the equality code.”

While holding thus, the Court acknowledged that the impugned amendments were actuated by the Court's decisions in the Virpal Singh Chauhan case, the Ajit Singh cases, and the Indra Sawhney case but asserted that they did not directly impinge upon these judgements. It held that the amendments merely enabled the various legislatures of the State (Central and Provincial) to make laws providing for certain kinds of reservation. Having held thus, the Court said that “it is well settled that the Parliament legislates (makes laws) but it is the judgements of the Supreme Court that provide the content to the ‘right’ conferred by that law.” Thus, it said, if any government makes a law providing for reservation which ignores the parameters laid down by Article 16(4) and Article 335, the Court would strike down the same.

In the circumstances, the Court said Articles 16(4A), 16(4B) are both instances of permissible classification, inherent in the notion of equality propounded by the equality code of the Constitution. Thus, the Court said, Article 16(4A) is inspired by the observations in paragraphs 802 and 803 of the Indra Sawhney decision, where the Court validated the notion of sub-classification between different backward class groups on the basis of their differing degrees of backwardness. Similarly, the Court said, Article 16(4B) makes a classification on the basis of the differential between current vacancies and carry-forward vacancies. This differentiation, the Court said, became permissible by virtue of the judgment in the R.K. Sabharwal case, which introduced the concept of post-based roster.

Therefore, the Court said, Articles 16(4), 16(4A) and 16(4B) form a composite part of the same scheme. Further, Articles 16(4A) and 16(4B) are both inspired by observations of the Supreme Court in Indra Sawhney and R.K. Sabharwal. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4A) and 16(4B). The impugned constitutional amendments, therefore, do not obliterating equality.

It is obvious that the Nagaraj Court was justified in asserting that Articles 16(4A) and 16(4B) were instances of permissible classification under the equality code. Had it left the matter at that there would have been no reason to complain about its reasoning. However, it needed to go a step further and, discover a link between these articles and the Indra Sawhney judgement, which would counter the argument by the Nagaraj petitioners that they nullified the Court’s decision in that case. Given the categorical assertion against both, reservation in promotions and, any transgression of the 50 per cent limit, in that judgement, there was no direct method of doing so. Therefore, it chose the Virpal
Singh Chauhan case to validate Article 16(4A) and the R.K. Sabharwal case to validate Article 16(4B).

But the question still remains. Given that Articles 16(4A and 16(4B) were, even otherwise, constitutionally valid, why did the Nagaraj Court need to assert that the impugned amendments to Article 16 were in furtherance of suggestions emanating from the two Supreme Court decisions mentioned above; even assuming that the Nagaraj petitioners were correct in their assertion that they nullified the Court’s decision in the Indra Sawhney case?

The answer to this question is complex, since the Court was operating at several levels. Further, the answer does not entail attribution of any malafides to the Court. In fact, the Nagaraj Court was probably actuated by the need to restore the balance between generalists and reservationists, which had got tilted in favour of the former, in the aftermath of the implementation of the Mandal Commission report. If that is so, then it is obvious that the Nagaraj Court was constrained by the nine-judge decision in the Indra Sawhney case, which was binding upon it. It could also be argued that, simultaneously, the Nagaraj Court also felt itself constrained to avoid explicitly upholding the right of the executive-legislature to legislate against its decisions. In other words, caught between the devil and the deep blue sea, the Court saw its only choice in giving short shrift to logic.

The adoption of the stratagem in question softened the Nagaraj Court’s deviations from the Indra Sawhney decision. The rule of stare decisis is a fundamental pillar of the edifice of common law justice. Thus, the five-judge bench of the Nagaraj Court was bound to follow the decisions of the nine-judge Indra Sawhney Court; more so when the latter Court was supposed to be the last word on all important issues pertaining to reservations. The only choice open to a Court inclined to disagree with such a decision is to call for the constitution of an even larger bench of judges, which would have been formally entitled to overrule the Indra Sawhney decision on any point on which it chose to differ with it. Why the Nagaraj Court did not exercise this option is not known, though some of the reasons can be guessed at. For one, referring the matter to an eleven-judge bench (the next larger size) would have delayed the decision considerably.

The other alternative, to explicitly uphold the right of the State (executive-legislature) to overturn the Supreme Court’s decisions by bringing in legislation with this specific object, would have been politically inexpedient. The Court currently enjoys a relatively high degree of ascendency vis-à-vis the legislature. Such a course of action would have been tantamount to surrendering some of that ascendency. Besides, even as the Nagaraj Court was pondering over its decision, the Supreme Court was locked in a battle with the State over the issue of legislation/ rules introduced to nullify its orders with respect to the sealing and demolition of illegal structures in Delhi. Thus, this course of action was also not open to the Nagaraj Court, in real politics terms.

It is unfortunate, however, that the Nagaraj Court chose to adopt illogic to thread a path out of the knotty maze of the Supreme Court’s own previous decisions rather than to cut through the tangle with the aid of the rational (and reasonable) Subba Rao position on reservations. In fact, a reading of Justice Kapadia’s judgement (in the Nagaraj case)
makes it seem that he might even have considered the possibility but then decided against it.

We may recall that the Court posed the issue of reservations as the balancing of equity, justice and merit. While equity and justice may be deemed to have been balanced in the manner described above, merit remains to be addressed. It was the case of the Nagaraj petitioners that by inserting a proviso into Article 335, the State had negated the importance of efficiency in administration. It was argued that a harmonious reading of various provisions of the Constitution indicate that efficient public service is a central concern of the Constitution.\textsuperscript{157} It was argued that the proviso to Article 335 has been introduced to nullify the effect of the decision in the case of Indra Sawhney and a host of other cases, which emphasize the importance of maintaining efficiency in administration. It was claimed “the impugned amendments invade the twin principles of efficiency, merit and the morale of public services and the foundation of good governance (sic).”

The State did not make any argument in response, specific to the issue of merit or efficiency. This is reflective of the peculiar position of these attributes in the scheme of things. On the one hand the merit-efficiency argument is invariably invoked by the generalists in every case concerning reservations. On the other hand, the Supreme Court has never considered merit-efficiency as standing in the way of the policy of reservation. However, it has repeatedly used the bogey of merit-efficiency to restrict, limit or, even, strike down provisions for reservation. Once again, the minority judgement of Justice Subba Rao in the Devadasan case stands out as an exception, displaying the courage to take a firm stand on this issue.\textsuperscript{158}

The Nagaraj Court’s position on merit-efficiency is consistent with the general position of the Supreme Court.\textsuperscript{159} While stating that the State is in the best position to define and measure merit in whatever ways it considers it (merit) to be relevant to public employment “because ultimately it has to bear the costs arising from errors in defining and measuring merit,” the Court simultaneously made it clear that the State’s failure to formulate justifiable schemes of reservation, based upon quantifiable data, would make a proposed scheme liable to be struck down as invalid and/ or unjustified.

Since the merit-efficiency argument was not considered deserving of independent treatment, in order to get a flavour of how the Nagaraj Court used it, the statements by the Court, connected with this issue, are listed below:\textsuperscript{160}

- Equity and justice in the above context are hard-concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case.

- Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution.\textsuperscript{161}

- Merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The
difficulty is that there is no natural order of ‘merit’ independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes.  

- The impact of any affirmative action policy on merit depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum.

- The point which we are emphasizing is that…‘vesting of the power’ by an enabling provision may be constitutionally valid and yet ‘exercise of the power’ by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.  

- (The) proviso (to Article 335) was…inserted keeping in mind the judgment of this court in Vinod Kumar [S. Vinod Kumar and Another v Union of India and Others, 1996 (6) SCC 580], which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of clause (4) of Article 16 [i.e. by virtue of Article 16(4A)] then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4A).  

- As stated above equity, justice and efficiency are…context-specific. There is no fixed yardstick to identify and measure (them), 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 concerned (government) fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid.  

- Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including (by the 82nd Amendment introducing a proviso to Article 335). The limitation under Article 335 is relaxed and not obliterated.

- The constitutional law is the law of evolving concepts. Some of them are generic others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-à-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 (sic).  

- As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4A) and 16(4B) as controlling factors, we cannot attribute constitutional invalidity to these
enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of ‘guided power’.\textsuperscript{168}

- However, the question still remains whether the concerned State has identified and valued the circumstances justifying it to make reservation. \textit{This question has to be decided case-wise}. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on facts of each case.\textsuperscript{169}

- Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the concerned State will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.\textsuperscript{170}

The Court concluded its judgement by declaring that while reservations were not an issue, their extent was. It reiterated that the State would have to abide by all the conditions and injunctions attending its power to make reservations, such as, the \textit{ceiling-limit} of 50 per cent, identification and exclusion of the \textit{creamy layer} and, in each case, it would be required to prove the existence of the \textit{compelling reasons}, namely, backwardness, inadequacy of representation. Further, in each case the State would have to show that it had taken the requirement of maintaining \textit{overall administrative efficiency} into consideration. Without adherence to these conditionalities, the Court said, \textit{the structure of equality of opportunity in Article 16 would collapse}.

\section*{A SUMMING UP}

\textbf{The Nagaraj Case}

The Nagaraj Court held that equality is a part of the \textit{basic structure} of the Constitution. It implied that confusion arises because people fail to distinguish between two aspects of equality, namely \textit{formal equality and egalitarian equality}, which is the same as equality of opportunity. While the distinction is clear enough, the Court seemed to lack conceptual clarity about the relationship between these two kinds of equality in the context of the constitutional promise of justice, liberty, equality and fraternity. Nor did it display any clarity about its own role in this grand design. It hid its discomfiture by delving into academic definitions of equality and equality of opportunity, splitting up the latter into its component parts.\textsuperscript{171} It also cited Justice Holmes of the American Supreme
Court to say that *life of law is not logic but experience*.\textsuperscript{172} However, the Court did not display the confidence either of its *logic* or of its 50 years of *experience* in affirmative action litigation. Instead, inextricably tangled in the knots of its own judgements, it was forced into a desperate scramble for *balance*.

The Court’s assertion that there is no dichotomy between equality and affirmative action—both being aspects of the notion of equality collectively affirmed in Parts III and IV of the Constitution—reflected the same lack of clarity. If the Supreme Court truly believed in this statement, it would treat of reservations (and would have so treated of them in the past) in a radically different manner. The most important implication of this assertion would be that the *Indian equality code does not affirm formal equality*, subsuming the notion in the conception of equality as substantive equality (or equality of opportunity).\textsuperscript{173} Had that been the case, instead of continually striving for *balance*, as the Court claims to be (between affirmative action and equality), it would have seen affirmative action as being the balance, or the balancing force. The need for affirmative action arises because there is an existing imbalance. Indubitably, while redressing this imbalance it is also necessary to ensure that the correction does not lead to a reversal of imbalance.\textsuperscript{174} However, this would be a minor consideration in a holistic conception of equality as substantive equality, which would come into play only when it became evident that the original imbalance stands redressed (or, is on the verge of it).

To state it more explicitly, the object of incorporating affirmative action in favour of *Dalits* and *Adivasis* was their grossly inadequate representation in government (public) employment. There is no dearth of evidence to establish that despite over 50 years of reservations in public employment these categories of persons continue to suffer significant under representation. In fact, there is overwhelming evidence to the effect that under representation in government jobs is only the tip of the iceberg of invidious discrimination that *Dalits* and *Adivasis* continue to suffer at the hands of their fellow citizens.\textsuperscript{175} What then is the sense of this constant striving for *balance*? In real terms, none at all. In terms of legalese, there is *sense* but only if the premise on which one operates is that of a dichotomy between equality and affirmative action.

In other words, had the Supreme Court actually believed that the constitutional equality code was a comprehensive assurance promising the enforcement of substantive equality alone (and not formal equality in the main, with substantive equality being an interim arrangement) it would have wholeheartedly embraced the *Subba Rao position* on reservations.\textsuperscript{176} To reiterate, Justice Subba Rao said that till such time as the *Dalits* and *Adivasis* become adequately represented in public employment, a provision for reservation of posts (or vacancies) for these categories of persons could not be impugned (or struck down) merely because such provision lessened the chances of non-*Dalit* and non-*Adivasi* candidates. He, further, asserted that the injustice to individual general category candidates was inevitable in the context of reservation. This could not be a ground for limiting a provision for reservations that was otherwise valid. However, the Nagaraj Court was content to adopt the empty shell of the *Subba Rao position*, declaring
that Article 16(4) is not an exception to Article 16(1). The non-obstante clause with which Article 16(4) begins, converts it into a class apart.

The *Subba Rao position* is a metaphor for the manner in which affirmative action must be viewed, in the context of the equality paradigm, in order to maximise social justice.\(^ {177}\) Since I have defined social justice as a *constant process of unsettling the status quo*, it is evident that this position would be required even after Dalits and Adivasis cease to need reservation (or other forms of affirmative action).

Could there be other (good) grounds for holding that the constitutional equality code comprises assurances of both formal and substantive equality. This may well be so, given the multifarious manners in which the power of the State impinges upon the citizen.\(^ {178}\) However, even if it so (i.e. it is *desirable* to include a notion of formal equality in the constitutional equality code) there is no reason why, at least with respect to *social justice* action, constitutional equality cannot be interpreted as being wholly comprised in substantive equality alone, as is implicit in the *Subba Rao position*.

The other assertions by the Nagaraj Court were specific to the issue of reservations. Since they have been amply discussed herein above, they need not detain us any further.\(^ {179}\)

The Court laid one more injunction upon the State—the requirement that it develop criteria for identifying the *creamy layer* among each of the backward classes for whom it makes reservations. These people, the Court said, should be excluded from the benefits of reservation. In principle, there can be no disagreement with the Court on this issue. However, the issue is extremely complicated and requires separate treatment. Despite acknowledging the considerable problem posed by such a requirement, the Indra Sawhney Court held that *‘creamy layer’ can be, and must be, excluded*, while implementing programs of reservation for the OBCs.\(^ {180}\) However, the Court made it clear that this direction was not applicable with respect to reservation for Dalits and Adivasis. The Nagaraj Court failed to clarify whether it was reiterating the Indra Sawhney position in this regard or, going a step forward and asserting that the creamy layer must be excluded even among Dalits and Adivasis.\(^ {181}\)

Before parting with this case, it is necessary to make one more criticism. The Nagaraj Court lamented the factual vacuum in which it was forced to hear and decide the issues raised before it, attributing (by implication) this dearth of empirical data to the failure of the State. What was the *dearth* that the Court was referring to? From newspapers to government reports, to reports by non-government agencies, all aspects of the situation of Dalits and Adivasis in India, including their level of representation in government jobs, is well documented.\(^ {182}\) Nothing prevented the Court from calling for this data and analysis, if it was so easily accessible? The answer is equally natural: the data would have vitiated the *balance* that the Court wished to establish. Further, the data...
would have compelled the Court to address itself to the issues before it in real terms, delivering a concrete adjudication, based on facts. Such and adjudication would have, at least metaphorically, taken the matter out of the Court’s hands. On the other hand, under this manner of adjudication, even as it declared the impugned amendments to be constitutionally valid, the Court made it clear that it had only cleared them, in principle; retaining the right, as it repeatedly emphasized, to adjudicate upon the facts of each case that was brought before it.\footnote{183} Could it be that the Court was inviting litigation? And, to whom could it be addressing this invitation? Clearly not the Dalits and the Adivasis.\footnote{184}

The history of affirmative action litigation makes it clear that challenges to reservations are mostly by generalists alleging excess in reservations. Comparatively, very few reservationists file petitions alleging denial of reservations. Taken at face value, this statistic would definitely indicate that the State has gone overboard in its attempts to redress Dalit and Adivasi deprivations. However, if these were actually so, it would also be reasonable to assume that nearly six decades of excess reservations would have resulted in Dalits and Adivasis gaining, at least, adequate representation in public employment. But even the Nagaraj Court does not dispute that this happy state of affairs does not subsist.

\textit{The Thesis Restated}

A notion of justice may be said to be inherent in the human condition.\footnote{185} The quest for justice is, essentially, a quest for power sufficient for the holder to be able to negate (or negotiate) injustice. Law comes into the picture as a necessary adjunct for the enforcement of justice, i.e. that without which justice cannot be actualized. This gives rise to the question: how effective is law (or rule of law) in facilitating the quest for justice (or social justice)?

In the course of discussing the foregoing proposition and question, this paper suggests that whatever be the other justifications of (for) law, its primary use is a cloak to legitimize (in the sense of: give it normative value) the exercise of power. To put it differently, since law is symbiotically linked with force and, since the need of justice to be enforceable compels it to link up with law, the link between justice and law (i.e. justice in accordance with law) is more to law’s advantage (and hence to the advantage of power) that to justice’s. For this reason, it is absurd to give law (and to rule of law) the attribute of being an instrument of justice. The other way around is more correct.

Assuming the validity of the foregoing propositions, it seems inevitable that law (and rule of law) should result in a great deal of tyranny; with justice being the veil (a la Rawls) that is used to keep the masses quiescent. In other words, to paraphrase Hayek, not just socialism but all isms, including capitalism and liberalism “must inevitably lead to totalitarianism.” Ironically, without accepting the Hayekian (the Liberal) position in any manner, this argument validates one of his main criticisms of the modern social justice regime, namely that it “has become an instrument of ideological intimidation, used primarily for gaining the power of legal coercion.” Moving on, in a passing critique of
Rawls the paper suggests that his theories of justice (and social justice) were instrumental to the birth and growth of neo-liberal (neo-left) ideas, which helped defeat socialism. By seeming to destroy the gulf between the left and the right, they must also be seen to have contributed significantly to the ‘end of history’ hypotheses.

To sum up, this paper seeks to skirt the edge of anarchy without falling into it. In other words, while it does not suggest anarchy as an alternative to rule of law it may be said to imply that in order to increase levels of justice in society, in the context of law and rule of law, it may be necessary to more closely examine the structure of anarchy, for deducing principles that can be usefully employed in sovereignty situations. This paper also, though only be remote implication, suggests that despite the great progress that seems to have been made in political theory, including in the theory of rights, notions of authority remain, essentially, feudal.

Finally, the paper acknowledges a seeming gulf between the theoretical position that it takes and the reality of social justice programs that work, at least to some extent. The gulf is ‘seeming’ because it is only visible if the theoretical position is (wrongly) seen as an attempt to deny a meaningful notion of social justice in the real world. Further, even assuming that—carried to its logical extreme—the paper’s theoretical position does so deny social justice, this position must, at the very least, be seen to posit the limits of social justice (or justice).

CONCLUSION

The paper started out to explore the politics of justice. To this end, after stating a few definitions and theoretical propositions, I have subjected the judgements of the Supreme Court to an intense, and harsh scrutiny. Inevitably, the scrutiny has revealed the warts beneath the makeup. Does that mean that the Court is bad? Or malicious? Deliberately intent on harming the cause of the Dalits and other backward classes? Does it mean that the rule of law is a fraud? That justice and social justice are false gods? Or, even, merely that the justice dispensed by the Supreme Court is fraudulent?

Fence sitting apart, there can be only two answers: yes, or no. I will assume that the answer is yes. Shockingly unpalatable though it would be to live under such a dispensation, I would still argue that the Scylla of justice is infinitely preferable to the Charybdis of the other arms of the State. To quote Circe:

No, hug Scylla's crag—sail on past her—top speed!

Better by far to lose six men and keep your ship

than lose your entire crew.
NOTES

1 Feminists would take exception to the term fraternity and have suggested community as a more appropriate alternative. See Gail Omvedt’s speech on the occasion of the 5th Babasaheb Ambedkar Memorial lecture, www.ambedkar.org.

2 The Preamble was amended in January 1977 (during the period of emergency imposed by Mrs. Gandhi in June 1975), vide the Constitution (Forty-second) Amendment Act, inserting the words “socialist, secular” in the first line and, adding “and unity and integrity of the Nation” to the explanation of the word fraternity, at the end.

3 In the Keshavananda Bharati case (AIR 1973 SC 1461, paragraphs 134, 139 and 174) the Supreme Court has said that they embody the concept of a welfare state.

4 However, as shall be seen in the sections below, the dichotomy between the Fundamental Rights and the Directive Principles continues to be aired, requiring repeated processes of harmonization.

5 Where there is a right (or a wrong) there is a remedy.

6 This is an aspect of judicial review, which will be discussed in the next section.

7 Selection through a competitive process of examinations plus interview, as is universally followed in India, conforms to this definition.

8 Theoretically, there is no impediment to formal equality of opportunity being implemented by an autocracy or a dictatorship or a communist regime.

9 See Galanter for a brief discussion on why he prefers to use this term as opposed to ‘affirmative action’, ‘reverse discrimination’, etc.

10 In a larger sense the entire Part III and Part IV of the Constitution may be construed as an equality statement.


12 Subsidy is an equally important mode of compensatory discrimination but it does not give rise to similar levels of public discussion and debate, perhaps because it is seen as a measure of charity. In contrast, reservations emphatically connote rights.

13 Article 334 provides that these special provisions would cease to operate upon the expiry of a specified period. Originally reservations were to cease after 10 years but have been extended from time to time, currently standing extended till 25 January 2010.

14 A proviso to Article 335 was inserted in 2000, stipulating that notwithstanding the efficiency criterion mentioned in the Article, the government would have the power to make rules relaxing “qualifying marks in any examination or lowering the standards of evaluation (or), for reservation in matters of promotion ...” in favour of the Scheduled Castes and the Scheduled Tribes.

15 Earlier 12.5 per cent.

16 Earlier 5 per cent.

17 The label “scheduled” got attached to all those groups (castes or tribes) that were listed in schedules attached to the Government of India Act 1935, as being eligible for reservation of seats in the central or provincial legislatures. Under the Indian constitution a list of scheduled castes and tribes is maintained in accordance with Articles 341 and 342. Constitutional Order No. 19 of 1950 notified the list of Scheduled
castes for each Province while Constitutional Order No. ..... of 1950 did the same for the scheduled tribes. The initial notification was issued by the President of India but subsequent changes are permitted to the Parliament only. Pertinently, the current lists of “scheduled” castes and tribes is virtually identical to the one attached to the 1935 Act, with relatively minor modifications.

18 The issue was perhaps more complex than Galanter poses it. Tilak, the most prominent nationalist of that period, is credited with saying that “If God were to tolerate untouchability, I would not recognize him as God at all” at a conference in Bombay in 1918. But he believed that no significant social progress was possible in a country that was not politically free. His opposition to the social reform platform also stemmed from the fact that most of its proponents were members of the elite who happily garnered all the benefits of British education, liberal social reforms and, stable government, while the British bled white the large mass of Indians. In these circumstances, Tilak was not wrong in holding that the refusal of the social reformists to back his call for poorna swaraj, arguing in favour of a gradual process, was duplicitous.


20 Galanter states that the untouchables were then about 50 to 60 million strong, “roughly the magnitude of the plurality of the Hindus in the population”. He also reproduces (page 33, fn. 45) a table showing a markedly declining percentage of Hindus between 1881 and 1941, based on Census data.


22 Galanter calls Gandhi the champion of the evangelical approach, and Ambedkar of the secular one, to the problem of Dalit rights.

23 Ambedkar’s demand for reserved seats for the Dalits was accepted by the Simon Commission but the rejection of its report by the “major contenders” forced the British Government to convene successive Round Table Conferences in London, both of which failed to agree on the mode and manner of representation for minorities. However, Ambedkar’s stand evolved from that taken before the Simon Commission to demand separate electorates for the Dalits. The subsequent “Communal Award” by Ramsay MacDonald, the British Prime Minister, granted this right to the Dalits. In protest, Gandhi went on a fast unto death. Ambedkar succumbed to enormous pressure on the twenty-first day of his fast and signed the Poona Pact, giving up the demand for separate electorates in return for a system of reserved seats.

24 Tellingly, he added “I won’t use the word commissions.”

25 The post independence affirmative action regime, propelled by the thrust of government measures and Supreme Court decisions, also owes much to Ambedkar. His speeches and position are increasingly cited by both sides of this struggle.

26 Despite reservation of seats in both the parliament and the State legislatures, Dalits have not enjoyed significant political power till very recently.

27 She headed a minority government supported by the BJP.

28 Her mentor, Kanshi Ram, though popular, did not enjoy mass appeal. The only other nationally known Dalit politician was Jagjiwan Ram, who became Deputy Prime Minister in the Janata Party Government after the emergency. However, he was a Congressman and aspired to represent national interests.

29 Though the two terms seem distinct enough, in the context of reservations they frequently create confusion, even in the mind of judges of the Supreme Court. An example of this confusion is discussed in the section titled “The Nagaraj Case Analysed”. It suffices to state here that while reservations (percentage reserved) are invariably made with reference to posts, all policies of reservation must necessarily be implemented thorough the aperture provided by the vacancies that arise in these posts.
30 Article 16(4) speaks of reservation in favour of any backward class of citizens but reservations in Central Government jobs were implemented only for these two categories. However, many provincial governments had implemented reservations for Other Backward Classes.

31 The percentage of upper castes in the total population is an approximation, based on widely held public perception in this regard.

32 This is discussed in the section titled The Nagaraj Case Analysed.

33 It is pertinent to note here that reservations are linked to both, posts and vacancies.

34 Article 335 of the Constitution declared that the claims of the Scheduled Castes and Tribes to appointment in Public jobs shall be considered consistently with the maintenance of efficiency of administration. This was interpreted to mean that appointees from these communities should fulfill the minimum eligibility requirement. Very few Dalits and Adivasis could meet these requirements in the initial years.


36 After one year the unfilled vacancies were de-reserved and filled from among the general candidates.

37 Though it seems anomalous that promotion (or its consequences) should be an issue when filling the reserved quotas for initial appointments was so difficult, this issue gave rise to a lot of litigation.

38 It is pertinent to note that such promotion benefited reservationists only till the levels where the criterion for promotion was seniority, or seniority cum-fitness. The situation of most Dalit employees was so bad that even the requirement of passing a simple departmental exam was a major hurdle that many could not cross.

39 Though the reasons for providing for reservations for Adivasis were similar to those for Dalits, fundamental differences between the situations of two communities resulted in the issues becoming different. For example, most Adivasi communities were concentrated in a few geographic locations, where they were in a majority. Thus, most government jobs in these regions were in any case filled by members of these communities. Outside these specific geographies, reservations for Adivasis were not much of an issue. On the other hand, though always a minority, Dalits are spread throughout India. Reservation with respect to them, therefore, tends to excite considerable passion.

40 Typically, thousands of applications are received for every government job, with graduates, post-graduates and, even, PhDs applying for the post of a Peon or a Lower Division Clerk. Even today, the competition continues to be as severe as before but the mix of applicants has changed considerably, with many more middle and lower caste applicants. Most of the upper caste applications for government jobs today are from first generation applicants. However, the best jobs continue to be dominated by the upper castes.

41 This is also attested to by the insertion of Article 16(4B) into the Constitution in 2000, specifically aimed at ensuring that the State could continue to fill carry forward vacancies, even after the decision of the Supreme Court in the Indra Sawhney case (Infra), de facto, barred the filling of such vacancies. The statement of Objects and Reasons accompanying the insertion of Article 16(4B) explicitly states that the filling of carry forward vacancies was essential to prevent the failure of reservations based affirmative action programs.

42 Since the paucity of eligible reserved category candidates is endemic, the second method results in a significant number of posts always remaining vacant. Since this militates against the requirement of efficiency in administration, most departments follow the first method.

43 Ultimately 45 persons were appointed, of which 29 were reserved quota candidates.

44 In other words, assuming that the concept of reservations was a legitimate mandate, the carry forward rule was a perversion of that mandate.
45 This position was reversed in the Indra Sawhney case (infra).

46 The bogey of the efficiency criterion is invariably raised to challenge all affirmative action programs. It is pertinent to mark the derogatoriness implicit in this argument. Given the fact that the Indian bureaucracy, which is even today dominated by the elite castes and classes, is widely known for its inefficiency and corruption, the inference of inefficiency against the backward classes is misconceived.


48 A revealing statement: the operative concern is not inefficiency but resentment.

49 The majority decision dismissed the (minority) view of Justice Wanchoo in the Rangachari case (supra), which said that to hasten attainment of the objective of adequate representation of a backward class Article 16(4) permits the State to reserve all the appointments (vacancies) in a cadre or service till the target strength is attained, holding that his view stands by itself and does not seem to have been accepted by the majority of the Court. Further, they declared, (i)the validity of the carry forward rule was not challenged in that case.... Lastly, they pointed out that unlike Justice Wanchoo, who took this position while interpreting the expression posts in Article 16(4), the Government resolution does not contemplate reservation of any posts in the service cadre but merely provides for reservation of vacancies. (This, last, statement was factually incorrect. While a particular document may or may not have referred to posts, there could not have been any doubt in the minds of the judges that reservation under Article 16 is with reference of posts, and not just reservation in vacancies.

50 The concept of reasonableness is now held to be intrinsic to Article 14 and, part of the basic structure of the Constitution, though what is reasonable in a particular set of circumstances is always moot. Since, a completely subjective determination of reasonableness would be self-defeating, reasonableness has to be determined with reference to the object (or objects) that the classification seeks to promote. In the context of reservations reasonableness is often found to have been used to defeat (or restrict) the object/s of reservation.

51 In this context it is noteworthy that the majority decision in the Devadasan case appeared inclined to question the legitimacy of the very concept of reservations in public employment, citing with approval a scheme of financial and other assistance adopted by the Maharashtra government for the advancement of the Backward Classes. Quoting from the judgment in the Balaji case (Supra) they seemed to suggest that reservations could be used to supplement such schemes, if found necessary.

52 The statement is tantamount to saying that— we wish we did not have to uphold reservations but we are constrained to do so.

53 A lucid, and complete, exposition of reservations under the Constitution. Nevertheless, as we will see, judges of the Supreme Court shy away from this position, preferring to mire the concept in confusion.

54 There are hundreds of examples, from Supreme Court decisions, on the manner in which a non-obstante clause must be interpreted, to prove that Justice Subba Rao was right and his brother judges, wrong.

55 This interpretation of Article 16(4) has prevailed and the majority position – that 16(4) is an exception to 16(1) – stands overruled. This is discussed below.

56 He held that while “Backward class” is not defined, whether a particular class is backward or not is a question of fact in each case and must be determined on the basis of certain objective tests. Further, he said, the determination of whether the backward class in question is adequately represented or not has been left to the subjective satisfaction of the State.

57 Though verging on the conservative, Justice Subba Rao’s position was more consistent with the then established norms (and limits) of judicial review. He declared that the Court was only concerned with the interpretation of the constitutional provisions and not with the policy underlying it. Thus, he said, given the constitutional sanction for the reservation of appointments and posts in favour of Dalits and Adivasis, the only question that remained to be answered was whether in applying the instant rule the State did not provide for the reservation of appointments or posts.
58 Justice Subba Rao also noted the argument that reservation implies the carving out of a part of the entire field. Thus, if the reservation covers the entire field or a major part of it, it ceases to be a reservation and is, therefore, not protected by Article 16(4). He noted that it was argued that the principle of “carry forward”, if logically extended, would result after some time in the destruction of the equality guaranteed by Article 16(1). Finally, he noted that it was argued that Articles 16 and 335 must be read together and, if so read, they imply that reservation cannot be made at the expense of efficiency.

59 The numerical example used by the majority judges was demonstrated as being imperfect and false by Justice Jeevan Reddy in his judgment in the Indra Sawhney case (Infra).

60 The Subba Rao judgment cited the minority judgement of Justice Wanchoo in the Rangachari case (Supra) to support his views in this regard.

61 He correctly noted out that the observations from the Balaji decision, relied upon in the Devadasan case, were general and, couched in expressions such as generally and broadly, indicating that the observations were intended only to be a workable guide but not an inflexible rule of law even in the case of admissions to colleges.

62 Both the issues are again discussed in the section titled “The Nagaraj Case Analysed”.

63 This is not to deny that over time the number of Dalits in government jobs has increased continuously. Their levels of education and qualifications have also shown steady improvement, resulting in a rise in the percentage of Dalits seeking promotion to higher posts. Added to this were better levels of awareness and confidence and, their growing political clout in an increasingly divided polity. Thus, the Dalits also struggled to undo biases in the administrative regime that implemented compensatory discrimination programs.

64 General Manager, Southern Railway v Rangachari (Supra). However, thirty years later, the Indra Sawhney case (Infra) returned the nation to the original position, namely that reservations are not permissible in promotions.

65 The fact that the average age of reservationists is generally higher by about two years, compared to the generalists, ensures that the top echelons were always occupied by generalists.

66 Article 16 does not limit reservations (or any other program of compensatory discrimination) to Dalits and Adivasis. It permits the State to provide for reservation for any “backward class of citizens… (who) is not adequately represented in the services under the State.” Article 340 empowers the President to appoint a Commission to “investigate the conditions of socially and educationally backward classes… and to make recommendations as to the steps that should be taken…to improve their condition…” Reservations for OBCs were implemented on the basis of the report of such a Commission, called the Mandal Commission.

67 The total population of the upper castes and other non-backward Indians would not exceed 30 per cent by any calculation.

68 Had the reservationists enjoyed social and political power commensurate with their numerical strength, it was theoretically possible that the tables would have actually been turned, making reservations a thing for the benefit of minority, upper castes.

69 It was decided by a 9-judge bench of the Court. By the principle of stare decisis this decision is therefore binding on all benches of the Court of smaller size, which includes the Nagaraj case, which was decided by a bench of 5 judges.

70 The summary is restricted to relevant issues only.

71 Indra Sawhney is a member of the said Association.

72 In other words, whether it is necessary to exclude the creamy layer from the benefits of reservation?

73 M.R. Balaji v State of Mysore, supra, page 27.
T. Devadasan v Union of India, supra, page 20.

A total of 14 questions, with several of them having sub-questions, were framed by Jeevan Reddy J, who delivered the main (and most quoted) judgment in this case.

Note the similarity of language between this and the language of the petitioner in the Devadasan case.

The Supreme Court has held that the basic structure of the Constitution is beyond the competence of simple (or, even, special) parliamentary majorities. For example, India cannot be changed from a republic to a monarchy; nor could the secular nature of its polity or the guarantees enjoyed by the minorities be tinkered with. Similarly, since “a free democracy” was impossible without equality and the freedoms (of speech, etc.) guaranteed by Article 19, these rights had to be preserved at all costs. The notion of a basic structure of the Constitution was built up in a series of decisions, emerging in full blown form in the Keshavananda Bharati case (His Holiness Keshavananda Bharati Sripradgalvaru and Others v State of Kerala and Others, AIR 1973 SC 1461), in which the Supreme Court held that the basic structure (or features) of the Constitution cannot be amended under Article 368, which empowers the Parliament to amend the Constitution. The doctrine was further developed over the succeeding years, culminating in the current position, which holds that the fundamental rights, including the power of judicial review by the Supreme Court and the High Courts, are part of the basic structure, which cannot be abridged or abrogated in any manner.

However, if the answer was no then the other questions also needed to be answered.

It declared that fundamental rights are not conferred upon citizens but individuals possess them independent of the Constitution because they are members of the human race.

The judgement said that the Supreme Court has repeatedly deduced fundamental features, which are not specifically mentioned as fundamental rights on the principle that certain unarticulated rights are implicit in the enumerated guarantees.

To illustrate, the Court cited the S.R. Bommai case in which the Court held secularism to be an essential feature of the Constitution and part of its basic structure, even though it is not listed as a fundamental right in explicit terms and, is to be found by a linked reading of several provisions.

An instance is the principle of reasonableness, which connects Articles 14, 19 and 21.

By this reasoning, the Court identified federalism, secularism, reasonableness and socialism, etc., as systematic and structural principles underlying and connecting various provisions of the Constitution, giving it coherence.

The basic structure doctrine was the Supreme Court’s answer to the conundrum posed by the Parliament’s attempts to limit the justiciability of certain laws on the ground that these laws were needed to protect the social justice laws from the depredations of the general guarantees of fundamental rights. Unchallenged, the polarity introduced by this bar to judicial review would have forced the Court to either adopt the stance of the legislature-executive, losing its own identity as a champion of justice (and social justice) or, if it opposed their proposals, run the risk of being pilloried for being pro rich and anti poor. The doctrine enabled the Court to take control of the very language of the debate that it entertains in this regard, propound its own views on what connotes a free, just, liberal and democratic polity. Further, it enabled the Court to disagree with the legislature-executive with respect to a social justice legislation or action, by declaring the proposed legislation (or action) to be in violation of the very same preamblic goals that the said legislation (or action) essayed to promote.

This was the position enunciated by the majority decision in the Devadasan case, which had been overruled by the Indra Sawhney case. Why the petitioners felt they could re-argue a point settled by the Indra Sawhney decision is discussed below.

The expression in italics was adopted by the petitioners in the Nagaraj case exactly as it was used by Justice Reddy in the Indra Sawhney case but was meant to connote the opposite of what he had said in that case. The why of this is discussed below. Thus, in order to understand it as it was meant, it must be read along with the rest of their submission on this point.
Note the link between this argument and the discussion on how the Court used the basic structure doctrine to subject laws protected by Articles 31A, 31B and 31C to judicial review.

In an argument that was peculiarly legal it was contended that the basic structure is not to be found in a particular Article of the Constitution (except the right to life in Article 21 read with Article 14) and hence, no particular Article of the fundamental rights chapter can be said to represent a basic feature of the Constitution. Thus, it was argued, the equality mentioned in Articles 14 and 16 is not to be equated to the equality, which is a basic feature of the Constitution. On the other hand, it was claimed, concepts flowing from the preamble to the Constitution definitely constitute the basic structure.

Note that this is essentially the position that justice Subba Rao took in his dissenting judgement in the Devadasan case. However, bereft of all other justifications for interfering, this is precisely what the Supreme Court has (impliedly) held in the Nagaraj case.

This is consistent with the position taken by the Court in the Indra Sawhney case.

As already seen, it was the majority decision in the Devadasan case that held that Article 16(4) was an exception to the rule of equality contained in Article 16(1).

The Court held that all legitimate methods are available for equality of opportunity in services under Article 16(1). Article 16(1) is affirmative whereas Article 14 is negative in language. Article 16(4) indicates one of the methods of achieving equality embodied in Article 16(1).

Two of the seven judges in the N.M. Thomas case persisted in adhering to the majority view in the Devadasan case.

Since the Court took the view that Article 16(1) itself permitted classification (being a facet of Article 14) the State would have been entitled to have evolved such a classification and made a provision for reservation, even without Article 16(4), which, it said, merely puts the matter beyond doubt in specific terms.

This does not imply that the Court is wrong in its articulation of the relationship between Articles 14 and 16. However, this articulation lacks the economy and precision of the Subba Rao position, besides failing to address the individual rights versus community expectation conundrum.

I have left out another crucial factor, namely the efficiency versus social justice binary, which too was addressed by Justice Subba Rao in his judgement in the Devadasan case, to avoid complicating the issue. This aspect shall be dealt with separately, below.

It said that Article 16(1) is a formal equality statement while 16(4) enunciates the goal of egalitarian equality. Or, in other words, egalitarian equality is, more or less, similar in content to equality of opportunity.

In legal parlance this is known as a non-obstante clause, which permits the part of the provision attached to it to override the remainder of the provision.

The Court added that these factors are not obliterated by the impugned amendments.

It argued that there can be no justice without equality, which is guaranteed by Article 14. Further, the “great social injustice” caused by Untouchability is abolished by Article 17 and, Article 25 empowers the State to make laws to throw open all “public Hindu religious temples to untouchables”. Therefore, provisions of Part-III also provide for political and social justice.

This has reference to the carry forward rule (Article 16(4B) and, reservations in promotions with consequential seniority, Article 16(4A).

To put it another way, this is an implicit acknowledgement of two vital facts – one, the greatly increased clout of Dalits and Adivasis; and, two, the fact that reservationists now comprise an overwhelming numerical majority in the population of the country—simultaneously, of course, with an assertion of the (political) discomfort that these facts cause to the ruling classes and castes.
To round off the discussion, I have also adverted to decisions that have not been discussed in the paper. These decisions were ignored because they do not affect the positions being discussed and, also to avoid unnecessarily complicating the discussion.

Several factors were responsible for this twisted position. First, the Court could not have directly gone against the binding decision in the Indra Sawhney case, being by a larger bench. Second, it is standard policy for the Court to adopt the most expedient method of arriving at the desired result; in this case it was simpler (and much more convenient) to merely uphold the primacy of the service rules, since their constitutionality had not been challenged. Third, depending on a complicated concatenation of facts and circumstances the Supreme Court uses either one of two well known methods to achieve the desired result: one, by a sweeping fiat that is applicable to all similar cases and, two, by a process of case by case attrition. The Devadasan case, the Indra Sawhney case, and the Nagaraj case can be seen as examples of the first method while the Virpal Singh Chauhan case can be taken as an example of the second method.

The absurdity of the decision in the Virpal Singh Chauhan case will be discussed below, while dealing with the manner in which the efficiency criterion has been used to defeat affirmative action.

There were three cases in all. They are labeled Ajit Singh I, II and III for distinguishing them from each other. In this paper I have only dealt with Ajit Singh II, which decided three applications for clarification of the main judgement in this case.

The Court found support for its view not only from the Indra Sawhney decision but also from speeches by Dr. Ambedkar in the Constituent Assembly. The Court also cited extensively from American decisions to bolster its views.

Patently absurd. The Badappanavar Court was so biased against reservations that it lost all sense of perspective and proportion. Else, it would not have sought to equate the inequality between the elite classes and castes and the backward classes, with that between the haves and the have-nots among the backward classes.

While referring to the decision in the Badappanavar case, the Nagaraj decision stated, “This is the only judgment of this Court delivered by three-Judge bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is part of the basic structure of the Constitution.”

The failure of the reservations regime to give adequate representation to Dalits and Adivasis in public employment, even after several decades is a theme that is repeatedly played out in the Nagaraj judgement. However, though forced to mention this fact, the judgement studedly refuses to be drawn into discussing the broader implications of this failure upon the so called, balance that it claims to strike with each decision on the subject of reservations.

Note later to say that this was not what the Chauhan case said (and not all what it said) and, that the Ajit Singh and Badappanavar cases were even more damaging. Also note the language of the Nagaraj Court here, “Court stepped in to balance the conflicting claims.” (What is the meaning such language?)

Nothing more was said about this amendment, at this point.

The discussion in the Indra Sawhney judgement in this regard, was in answer to question no. 5 (of the questions framed by Justice Jeevan Reddy), namely: whether Backward Classes can be further divided into backward and more backward categories? The discussion is contained in paragraph numbers 801 to 803.

The Court added that it was not calling for such a differentiation, merely that if such a categorization is made, it would not be invalid.

To buttress its reasoning the Court pointed out that even the Mandal Commission had differentiated between more and less backward OBCs, by grading them on a scale from 11 to 22. (Paragraph 802 of the Indra Sawhney decision.)
The respective reservation quotas for Dalits (15 per cent), Adivasis (7.5 per cent) and OBCs (27 per cent) added up to 49.5 per cent, leaving no scope for backlog vacancies within the overall limit of 50 per cent reservations.

This is an illogical statement. Unfilled vacancies arise because reserved posts that fall vacant cannot be filled for want of suitably qualified candidates from the reserved category to which the post in question has been assigned under the roster. By the operation of the carry forward rule, these vacancies are re-advertised in the next year, along with the current vacancies of that year. The Court called this the clumping of unfilled and current vacancies. It is obvious that the clumping will happen whenever unfilled vacancies are carried over, irrespective of whether the roster is operated properly or not.

Another illogical statement, which is discussed below.

Interestingly, the Court did not give Justice Subba Rao credit for this.

This refers to the placing of a limit on the carrying forward of unfilled vacancies. In other words, the Court assumes that despite being carried forward these vacancies are likely to not get filled. Hence, the State must, simultaneously with adopting the carry forward rule vide Article 16(4B), fix a limit for the number of years that the vacancies will be carried forward. There can be no more telling a statement about the essential indifference of the Court to affirmative action.

As has been pointed out above, in the section on The Period Till 1990, a very large number of carry forward vacancies have always lapsed because there are not enough suitably qualified candidates from among the Dalits and Adivasis to fill them.

This is also proof of the fact, if any were needed, that mere policies of reservation are never enough to attain equality of opportunity.

Article 141 makes the law declared by the Supreme Court...binding on all courts within...India. Article 142 makes all orders and decrees of the Court enforceable throughout India and, Article 144 enjoins all authorities, civil and judicial, (to) act in aid of the Supreme Court.

Ajit Singh v State of Punjab II, supra.

Article 368 is titled ‘Power of Parliament to Amend the Constitution and Procedure Therefor’. The topic is vast and requires separate treatment.

It was contended that to hold otherwise would stultify the Constitution, rendering it unable to meet the challenges posed by the changing needs of time and society.

There is a legal distinction between a law and the exercise of power under it. A law may be declared valid but the exercise of power under it may be struck down as violating the Constitution. Articles 16(4A) and 16(4B) did not bring about any reservation but merely enabled the State to make laws (or rules) for such reservation. Since the exact manner in which it would choose to exercise its powers under these provisions was not known, the State argued that the conferment of such enabling powers [by virtue of Articles 16(4A) and 16(4B)] could not be said to be bad by examining the (hypothetical) consequences resulting from a possible manner in which the power might be exercised.

The catch up rule, which is the obverse of the consequential seniority rule, was also discussed.

One possible way of overcoming the bar on reservation in promotion was suggested by the Court itself, namely that the respective recruitment authorities may provide for direct recruitment, in whichever grade of service, class or category in which they consider it necessary to appoint persons from the “backward class of citizens,” with a view to “ensuring adequate representation.” The Court also declared that “[i]t 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.”

The Court observed in this case that the ‘catch up’ rule was essential if merit was not to be ignored.
132 Supra.

133 Supra.

134 He cited from a speech of Dr. B.R. Ambedkar before the Constituent Assembly and from another speech by him while moving the Constitution (First) Amendment Bill before the Parliament in 1951, in support of this position.

135 The only exception being the Subba Rao judgement in the Devadasan case.

136 By its very nature, the carry forward rule tends to breach numerical limits upon reservation. Since the 50 per cent cap on reservations in annual vacancies imposed by the Indra Sawhney case included carry forward vacancies, the petitioners argued that the clear and direct effect of the 81st Amendment introducing Article 16(4B) was to nullify this decision.

137 This is illustrative of the Court’s attitude in general, which permits it to use and discard practices without regard to mundane considerations, such as consistency.

138 The numbers/ percentages are consistent with the actuals approved by the Court, i.e. 27 per cent reservation for OBCs, added to the existing reservation of 22.5 per cent for Dalits and Adivasis, making a total of 49.5 per cent reservations in all.

139 Something that the Supreme Court claims to have always striven for, in matters of reservation.

140 This is an honest statement. But, having made it, the Court went on to indulge in all sorts of semantic jugglery, in order to forge an, essentially, untenable position.

141 The entire sequence is contained on one paragraph but is reproduced, with minimal editing, as a bulleted sequence for convenience.

142 This is a generously pro-reservationist position. The Court held that a reserved category employee who had gained accelerated promotion by virtue of the operation of a promotion roster (and, who had also been given the benefit of consequential seniority, could, on the basis of that seniority, be eligible for promotion to the next higher post. Further, since this, second, promotion was given de hors the promotion roster (i.e. to a non-reserved post), that employee would thereafter not count towards the total strength of reserved category employees in that service or cadre.

143 For example, if 15 per cent of a cadre is reserved for Dalits, once this percentage of reservation is achieved the roster should be discontinued. If, however, even after that 15 per cent of the posts falling vacant each year are reserved for Dalits, irrespective of whether the posts represented by those vacancies were filled by Dalits or not, then the total strength of Dalits in the service would go beyond the requisite reservation.

144 It can only be assumed (speculated) that the Jeevan Reddy quotation was extracted in the Sabharwal judgement to refute a contention by one of the parties to the Sabharwal case to the effect that the Indra Sawhney decision authorized the continuance of the roster even after all the posts of a cadre had been filled in accordance with it.

145 The comment was that. The observation in the Indra Sawhney case that reservation in a year should not go beyond 50 per cent was only in relation to posts which are filled initially in a cadre (and do not pertain to promotions).

146 The Indra Sawhney decision placed a cap on the percentage of annual vacancies that can be reserved. The R.K. Sabharwal decision declared that posts could only be filled by appointing a person from the category to which it has been assigned in the roster. Read together, the Nagaraj Court said, the State had no choice but to create a classification between current and backlog (or carry forward) vacancies. Once again, the superfluity of the Sabharwal decision in the equation is patent.

147 That is, percentage reservations for each category must necessarily be based upon the total strength of a cadre or a service.
The Sabharwal decision itself explains the roster in sufficient detail to make this fact clear. For example, of 15 per cent of the posts in a service or a cadre are reserved for Dalits, a hypothetical roster might reserve every 7th post for Dalits. In other words, post numbers, 1, 8, 15, 22, 29, 36, 43, 50, 57, 64, 71, 78, 85, 92 and 99 of that service or cadre would have to be filled by appointing a Dalit.

It would also ensure that there is no confusion about the category to which a post that falls vacant belongs.

Some part of the discussion on how the Nagaraj Court used the classification rule to validate both, Articles 16(4A) and 16(4B), has already taken place above.

The Court held that Article 16(4A) was a derivative of Article 16(4) since it carves out the Scheduled Castes and the Scheduled Tribes as being eligible for special dispensation on the basis of substantial reasons as given in the Statement of Objects and Reasons of the 77th Amendment Act.

In other words, the Court accepted the innovative argument put forward by the State that the impugned constitutional amendments were merely enabling in nature and, their constitutionality need not be judged on the anvil of (hypothetical) examples of actual exercise of power under them.

The law must operate equally on all persons under like circumstances.

The factual incorrectness of this statement has been pointed out above.

Nor are they being attributed.

Though the Court tried to maintain this balance in the Indra Sawhney case, there is no doubt that this decision ignored the ground realities about the situation of the Dalits and Adivasis in the field of public employment. The subsequent decisions accentuated this imbalance.

Articles 309, 311, 315, 316, 317, and 318 to 323 were cited to illustrate the constitutional importance of the rights of, and protections to, office holders in the services of the Union and the States.

His remarks are reproduced above.

The Court said that justice, equity and merit are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case...In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system.

The statements are verbatim (except where carried in parenthesis) but are edited for compactness; albeit, without tinkering with the meaning.

The Court said that inadequacy in representation and backwardness of Dalits and Adivasis enable the governments to act under Article 16(4) of the Constitution but their discretion is limited by the need to comply with the mandate of Article 335.

This refers to a paper by Amartya Sen, in Meritocracy and Economic Inequality, Kenneth Arrow (ed.).

The statement is factually correct. However, it is not known if this lack was despite the Court’s calls for data or, because of the nature of the issues before the Court in this case, data was never called for. On the face of it, that latter circumstance seems more likely. In which case, the repeated emphasis on the lack of data would seem to be a tactic to reserve the right of the Court to reopen the issues of the Nagaraj case at some future date.

Thus, the Court reserved its right to strike down individual schemes of reservation, wherever they were found to violate the parameters set by it. This stand is unexceptionable on the face of it but
given the vagueness of proposition stated, this stand virtually negates the entire exercise of the Nagaraj decision.

165 Thus, the Court took the view that the proviso to Article 335 was part of the scheme of the four impugned amendments. Since the Court found the main components of the scheme [Articles 16(4A) and 16(4B)] to be valid, it cleared the proviso to Article 335 also.

166 The threat of judicial intervention, repeated.

167 This sentence exemplifies the Nagaraj judgement. Disjointed statements and staccato expressions, clumsily cobbled together, which continually leave the reader wondering about the meaning of what has been said.

168 Another, typical example!

169 Statements such as this make it clear that all the ratiocination is mere window dressing, verbiage. In the ultimate analysis all that is relevant is that the extent of reservations should be controlled.

170 The ulteriorness of the merit-efficiency argument is patent.

171 While the deconstruction may be correct in academic terms, it is of no use unless it serves the purpose.

172 It is interesting to note that Justice Khanna used the same quotation in the N.M. Thomas case (supra) in the course of delivering an opinion that denied the right of the State to grant relaxation to Dalit employees for fulfilling the qualifying criteria for a promotion.

173 The expression proportional equality can also be used, in an appropriate context.

174 The terminology ‘balance’ is inadequate for the purpose because it suggests a two way movement. However, in actuality the balance that is desired has multi directional movement.

175 A deliberate understatement. It is perversity to label what Dalits suffer at the hands of caste Hindus, invidious discrimination.

176 Minority judgement of Justice K. Subba Rao in the Devadasan case (supra).

177 It is unlikely that Justice Subba Rao came to his position by a process of analysis of equality, similar to what I have attempted in this paper. His position was probably much more instinctual, based on common sense rather than theory. However, there can be no doubt about what his position connotes.

178 Without going into the reasons (or consequences) of why the modern nation-state prefers to emphasise individual citizenship to the exclusion of all other types, it is sufficient to state that in certain situations this may necessitate interpreting the constitutional equality affirmation as being an affirmation of formal equality also.

179 Even as it stated its opinion on the correct manner of interpreting the constitutional scheme of reservations the Court declared that in each case that comes before it, the State will have to satisfy the Court that it has exercised its opinion on the basis of the requisite quantifiable data, that such reservations were necessary on account of inadequacy of representation of the backward class in question in a particular class or classes of posts and, that the reservations made will not affect the general efficiency of the service.

180 Needless to add, the executive, which has been saddled with the task of actually devising proper mechanisms for excluding the creamy layer among the OBCs from the benefits of reservation has neither any clarity on how the task is to be accomplished, nor the necessary political will to devise such an exclusionary process.
181 Since the Nagaraj decision only addressed itself to reservation for Dalits and Adivasis, this omission is of some significance.

182 For all its inadequacies, the Mandal Commission report is a comprehensive survey of facts relating to the social, educational and economic position of the backward classes, including Dalits. Further, the intense passions generated by the implementation of the report's recommendations has resulted in considerable documentation, with all sides marshalling facts in support of their positions. All this data was readily available to the Court.

183 There is no rule or convention that requires that issues of constitutionality be determined as pure questions of law, without reference to facts. In fact, to quote Justice Holmes once again, the life of law is not logic but experience. Or, facts are essential even when debating abstruse legalities.

184 The Court stated that numerous petitions were pending before it, in which the reservations made by provincial governments on the basis of the powers vested in them by Articles 16(4A) and 16(4B) had been challenged as excessive.

185 The idiom is western. Eastern thought would place justice more centrally, attributing it to all things on earth and in space; in other words, as Dharma, the law that governs the universe.