

CHAPTER 2

PROMOTION IN PUBLIC PERSONNEL ADMINISTRATION IN INDIA: ITS RATIONAL, CONSTITUTIONALITY AND ROLE OF SENIORITY

2.1. Overview

As an aspect of government activity, administration has been co-existent with every political system as the action part of government for the fulfilment of the objectives set by the political decision-makers. Thus, Ernest Barker defines administration as ‘the sum of persons and bodies who are engaged, under the direction of a government in discharging the ordinary public services which must be rendered daily if the system of law and duties and rights is to be duly served.’⁹⁶ Administration has been defined as a cooperative human effort toward achieving some common goals. Thus articulated, public personnel administration can be found in various institutional settings like a business firm, a hospital, a university, a government department and so on.⁹⁷

2.2. The Structure of a Bureaucratic Organisation: A Weberian Concept

The ideal type of a bureaucratic organisation is a conceptual construction of certain empirical elements into a logically precise and consistent form, a form which, in its ideal purity, is never to be found in concrete reality.⁹⁸ However, the characteristics contained in the ideal type, although transformed and exaggerated in a certain way, correspond more or less to concrete features of existing organisations. Briefly, the main characteristics of the bureaucratic type of organisation are:

- i. High degree of specialisation
- ii. Hierarchical authority structure with limited areas of command and responsibility
- iii. Impersonality of relationships between organisational members
- iv. Recruitment of officials on the basis of ability and technical knowledge

⁹⁶ Ernest Barker, *The Development of Public Services in Western Europe, 1660-1930*, 3 (Oxford University Press, Oxford, 1945)

⁹⁷ Bidyut Chakrabarty and Mohit Bhattacharya (ed.), *Public Administration: A Reader*, 1 (Oxford University Press, New Delhi, 2003)

⁹⁸ Max Weber, *On the Methodology of the Social Sciences*, 90 (Free Press, Glencoe, Illinois, 1949)

v. Differentiation of private and official income and fortune and so on

Now, if one tries to see what lies beyond the above characteristics, how they are linked with one another, one finds a common, all pervasive element; the existence of a system of control based on rational rules, rules which try to regulate the whole organisational structure and process on the basis of technical knowledge and with the aim of maximum efficiency.⁹⁹ Therefore, in the words of Max Weber, bureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature of it which makes it specifically rational.¹⁰⁰

Weber was interested in a full-blown discussion on bureaucracy as a sociological phenomenon.¹⁰¹ His thought needs to be placed in the more general context of his theory of domination. Domination refers to a power relationship between the rulers and the ruled. In any kind of established authority, there exist a number of beliefs that legitimises the exercise of power in the eyes of the leaders and the led. The other important element in this approach is the notion of the administration apparatus. Domination when exercised over a large number of people necessitates an administrative staff which will execute demands and serve as a bridge between the ruler and the ruled. The beliefs about the legitimation and the administrative apparatus constitute the two important criteria for the Weberian construction of typology of domination.¹⁰²

In designing the legal rational authority system, Weber formulated the following the following structural propositions:¹⁰³

- a. Official tasks are organised on a continuous, regulated basis.
- b. These tasks are sub-divided into functionally distinct spheres, each furnished with the requisite authority and sanctions.
- c. Offices are arranged hierarchically, the rights of control and compliant between them being specified.

⁹⁹ Nicos P. Mouzelis, *The Ideal Type of Bureaucracy, Public Administration-A Reader*, Bidyut Chakarabarty and Mohit Bhattacharya (ed.), 89 (Oxford University Press, New Delhi, 2003)

¹⁰⁰ Max Weber, *The Theory of Social and Economic Organisation*, 311 (Martino Fine Books, Connecticut, 1947 Reprint 2012)

¹⁰¹ See Nicos P. Mouzelis, *Organisation and Bureaucracy*, Aldine Publishing Company, Chicago, 1975

¹⁰² Mohit Bhattacharya, *Public Administration*, 64-5 (World Press, Kolkata, 8th ed., 2012)

¹⁰³ Id at 66

- d. Official work is conducted according to the rules which are either technical or legal. In either case, trained men are necessary.
- e. The resources of the organisation are quite distinct from those of the members as private individuals.
- f. The holder of an office cannot appropriate the office.
- g. Administration is based on written documents or files. This tends to make the office the hub of the modern organisation
- h. Legal authority systems can take many forms, but are seen at their purest in a bureaucratic administrative staff.

These eight principles of authority informed the organisation of the bureaucratic administrative staff in Weber's view. Following this line of thought, the defining characteristics of the bureaucracy in the most rational form were identified as follows¹⁰⁴:

- a. The administrative staff members are engaged in the discharge of only the impersonal duties of their offices; they are personally free.
- b. There is a clear hierarchy of offices.
- c. Officials are appointed on the basis of a contract.
- d. They are selected on the basis of professional qualifications, ideally substantiated by a diploma gained through competitive examination.
- e. They have a money salary, and usually pension rights. The salary is graded according to position in hierarchy. The official can always leave the post, and under certain circumstances it may also be terminated.
- f. The official's post is his sole or major occupation.
- g. There is a career structure, and promotion is possible either by seniority or merit, and according to the judgment of superiors.
- h. The official may appropriate neither the post nor the resources that go with it.
- i. He is subject to a unified control and disciplinary system.

It needs to be pointed out here that in Weberian formulation, bureaucracy is not to be confused with the civil services. It refers to the sociological concept of rationalisation of collective activities. As a form or design of organisation it assures predictability of behaviour of the organisational members. The bureaucratic form, according to Weber, is the most efficient organisational form for large scale, complex administration that has

¹⁰⁴ Ibid

been developed in the modern world so far. It is superior to any form in decision precision, stability, maintenance of discipline and reliability.¹⁰⁵ As Weber wrote: “The development of the modern form of the organisation of corporate groups in all fields is nothing less than identical with the development and continual spread of bureaucratic administration. This is true of church and state, of armies, political parties, economic enterprises, organisations to promote all kinds of causes, private associations, clubs, and many others. Its development is to take the most striking case, the most crucial phenomenon of the modern Western State...The whole pattern of everyday life is cut to fit this framework. For bureaucratic administration is, other things being equal, always, from a formal, technical point of view, the most rational type. For the needs of the mass administration today, it is completely indispensable. The choice is only that between bureaucracy and dilettantism in the field of administration.”¹⁰⁶

2.2.1. The Nature of Bureaucratic Hierarchy

The principle of office hierarchy, levels of graded authority, a firmly ordered system of super-subordination provides orderliness fostering internal control that can produce outward predictability. Where jurisdiction produces clear division between tasks at any given level, hierarchy produces a vertical division of levels concerned with matters of different scope and importance. Hierarchy is also the control mechanism that holds the division of labour together resulting in a unified policy and program structure. In contrast, with the pre-modern organisations it is not reliably possible for clients to tell who is in charge of what, that is, whose commands are responsible or authoritative in relation to another's. Technically, hierarchical structure allows the creation of a massive administrative structure within which the higher ups can at least claim abstract knowledge of what is going on below, even if millions are involved.¹⁰⁷

Modern theories of bureaucracy, basing on their views on Weber, often use the hierarchy characteristics as one of the most decisive criteria for finding out to what extent an organisation is bureaucratized.¹⁰⁸

¹⁰⁵ Id at 68

¹⁰⁶ Max Weber, *The Theory of Social and Economic Organisation* (tr. A.M. Henderson), 337 (The Free Press, New York, 1964)

¹⁰⁷ Ralph P. Hummel, *Defining Public Administration*, Ed. By Jay M. Shafritz, 125 (Rawat Publications, 2000, reprint 2007)

¹⁰⁸ Supra n. 99 at 90

2.3. Promotion- Meaning, Rationality and Constitutionality

Since a government organisation is not a monolithic structure and is primarily hierarchical in nature¹⁰⁹, career development becomes one of the basic considerations in the personnel policy of the government. In the words of Glenn Stahl, the term ‘career’ denotes “...the progression of an individual in a field of work throughout the employable years of his life. A career in business or in a profession is a commonly understood concept. Sometimes it means devotion to a speciality, sometimes it means a series of employment which are only loosely related to each other. In either case, it usually means some degree of success.”¹¹⁰ The Commission of Inquiry on Public Service Personnel (USA) clearly described the concept of a government career services, as it stated:

“We recommend that the day-to-day administrative work of government be definitely made a career service. By this we mean that steps shall be taken to make public employment a worthwhile life work, with entrance to the service open and attractive to young men and women of capacity and character and with opportunity of advancement through service and growth to posts of distinction and honour.”¹¹¹

Thus, the Commission defined a career as an honourable occupation which one normally takes up in youth with the expectation of advancement and pursues until retirement.

In order to enhance the morale and efficiency of the public personnel in his/her career, it is highly necessary that the security of tenure and better conditions of service by way of suitable pay scales, promotional opportunities and retirement benefits and a just and fair treatment to public personnel under the State be given. This is of utmost importance to secure honesty, contentment and discipline among the civil servants which form the very foundation for their discharging their duties as expected of them.

A useful principle laid down in ‘Sukraniti’, the great ancient Indian compilation, of the principles to be adopted in the administration of the affairs of the state is as follows:

“Low wages, harsh treatment, insults, abuses and imposition of heavy fines or severe punishments are the causes of unrest among the employees.

¹⁰⁹ See 2.2. of this Chapter

¹¹⁰ Mohit Bhattacharya, *Public Administration*, 189 (World Press, Eighth Ed., 2012)

¹¹¹ Ibid

Satisfied by payment of adequate wages, promoted honourably, cheered up by gentle words and consoled in grief, the employees would never let down or desert master.”¹¹²

This passage emphasises the importance of fixation of proper wages and fair treatment of employees, with sympathy and respect.

2.3.1. Promotion- Its Meaning and Rationales

It is an oft-stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it for the welfare of its employees. The Supreme Court in *Balram Gupta vs. Union of India*¹¹³, observed that, as a model employer the Government must conduct itself with high probity and candour with its employees. In *State of Haryana vs. Piara Singh*¹¹⁴, the Court had clearly stated that the main concern of the Court in matter of employment is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. Similarly, in *Secretary, State of Karnataka vs. Umadevi and Others*¹¹⁵, the Constitution Bench, while discussing the role of the State in recruitment procedure, stated that the Government can make appointments only in accordance with the rules made under Article 309, where they have been made under Article 309, for the State is meant to be a model employer. In *Mehar Chand Polytechnic & Anr. vs. Anu Lamba & Ors.*¹¹⁶, the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all citizens of India entitled for being considered for recruitment in vacant posts.

Thus, recognised as a model employer, the State is under a duty to provide promotional opportunities, which is a facet of public employment, to its employees.

It has been judicially recognised that “so multifarious are the activities of the State that employment... for the purpose of these activities has by the very nature of things to be in different departments... and inside each department, in many different classes.”¹¹⁷

¹¹² Sukra II, 836-839. See M.Rama Jois, *Legal and Constitutional History of India*, Vol. 1, 188 (N.M. Tripathi Pvt. Ltd., 2nd Ed., 1990)

¹¹³ AIR 1987 SC 2354

¹¹⁴ AIR 1992 SC 2130

¹¹⁵ AIR 2006 SC 1806

¹¹⁶ AIR 2006 SC 3074

¹¹⁷ *All India Station Masters etc. vs. G.M. Central Railways*, AIR 1960 SC 384

Therefore, Promotion, as a condition of service, plays a major role in bringing out the efficiency in public personnel and the expected result that the state wants from them. An employee joins a service in the hope of a satisfactory career of progression. An important factor contributing to the attractiveness of service is the prospect of promotion.

Etymologically, the word 'promotion' is derived from the Latin term 'promotionem'. It is a noun of action from 'promovere', which means to move forward. The word 'pro' means 'forward' and 'movere' means 'to move'.¹¹⁸

Promotion has been explained to be "the action of raising someone to a higher position or rank."¹¹⁹ It also means "advancement of preferment in honour, dignity, rank or grade."¹²⁰ Again, Promotion, in the context of law relating to service, means advancing or raising an employee to a higher office or rank or post than the one the employee was holding or to a higher scale of pay than the one the employee was enjoying immediately before such promotion. The higher office or rank or post or scale is generally referred to as 'promotional post or scale' as the case may be. The office or rank or post from which the employee is promoted is referred to as the feeder post.¹²¹

The Supreme Court in *Tarsem Singh v. State of Punjab*¹²² has defined 'promotion under the service law jurisprudence' as "advancement in rank, grade or both. Promotion is always a step towards advancement to a higher position, grade or honour. Opting to come to a lower pay scale or to a lower post cannot be considered a promotion, it is rather a demotion."

Prof. Pigor and Mayres have defined promotion in the following manner¹²³:

"Promotion is the advancement of an employee to better job, better in terms of greater responsibilities, more prestige, or status, greater skill and specially increased rate of pay or salary."

Promotion is an integral part of the career service. The vacant posts in the public services can either be filled in by fresh recruitment or by promoting the existing lower

¹¹⁸ Rajesh K. Jha(ed.), *Public Personnel Administration*, 120-121 (Pearson, New Delhi, 1st ed.)

¹¹⁹ Concise Oxford English Dictionary, 11th ed., 2008, p.1149

¹²⁰ Webster's Comprehensive Dictionary, International Edition, p.1009

¹²¹ Samaraditya Pal, *Law Relating to Public Service*, 3rd ed., 2011, p.541

¹²² AIR 1995 SC 384

¹²³ Mohit Bhattacharya, *Public Administration*, 193 (World Press, 8th ed. 2012)

cadre employees to the higher positions. This method is called promotion system. In this liberalised era, the retention of many ambitious, capable and talented employees depends to a great extent on the effective promotion system. Promotions are in fact one of the most important aspects of personnel management, meant to keep the employees contented, disciplined, efficient and to help retain men of potential ability in service.¹²⁴

The capacity study appointed by the United Nations commented, “It must be realised that is senior posts are invariably or frequently filled from outside the service, it will prove impossible to retain first class people in the lower ranks, since they will inevitably seek to fulfil their ambitions in other careers which offer better prospects of advancement. Thus, the constraints on efficiency and capacity would be compounded.”

¹²⁵It is difficult to devise a good promotional system. If the promotion is not effected judiciously, there is a danger that it may breed discontent, diminution of incentive and general impairment of morale, which may ultimately affect the efficiency of the organisation.

Therefore, a well-developed promotion policy is very essential for the efficiency of the employees. Promotion is a continuous incentive to efficient working on the part of the employee. The hope of promotion is sufficient to keep the man interested in the job.

W.F. Willoughby in his book ‘Principles of Public Administration’, has pointed out the following as the essentials of a sound promotion system¹²⁶:

1. Adoption of standard specifications setting forth the duties and qualifications required for all promotions in the government service.
2. The classification of these promotions into distinct classes, salaries, grades and service.
3. The inclusion within this classification of all higher administrative promotions except those having a practical character,
4. The adoption, so far as possible, of the principle of recruitment from within for filling up of higher posts.
5. The adoption of principles of merit and seniority in determining the promotion of employees.

¹²⁴ Supra n. 118 at 121

¹²⁵ Ibid

¹²⁶ Id at 194. See also W.F. Willoughby, *Principles of Public Administration* (Publications of Institute for Government Research, Washington 1927)

6. The provision of adequate means for determining the relative merits and seniority of employees eligible for promotion.

In *Union of India v. S.S. Ranade*¹²⁷, the scope and meaning of the word ‘promotion’ was considered by the Supreme Court. The issue in this case was whether a Commandant (Selection Grade) held a higher rank than a Commandant and consequently entitled to be superannuated at a later age of 58 years instead of 55 years. It was held as follows:

“Undoubtedly, a Commandant who becomes a Commandant (Selection Grade) secures a promotion to a higher pay scale. But it is a higher pay scale in the same post. The use of the word ‘promotion’ in Rule 6 and the Constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that promotion which is contemplated there is necessarily a promotion to a higher post. Promotion can be either to a higher pay scale or to a higher post.”

Again, following the decision of S.S. Ranade, the Apex Court in *State of Rajasthan v. Fateh Chand Soni*¹²⁸, defined promotion thus:

“in the literal sense the word “Promote” means to advance to a higher position, grade or honour. Promotion not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression “Promotion” has been understood in the wider sense and it has been held that “Promotion can be either to a higher pay scale or to a higher post.”

It needs no reiteration that ‘promotion’ as a condition of service, increases efficiency of a Public Personnel. The Supreme Court in *Dr. Ms. O.Z. Hussain v. Union of India*¹²⁹ opined:

“...provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other Ministries would have the benefit of promotion, the non-medical ‘A’ Group scientists in the establishment of Director General of Health Services would be deprived

¹²⁷ (1995) 4 SCC 462

¹²⁸ (1996) 1 SCC 562

¹²⁹ AIR 1990 SC 311

of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representatives of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed within four months from now on for providing promotional avenue for “A” category of scientists in the non-medical wing of the Directorate.”

The question also came up for consideration in *Ujagar Prints Etc. v. Union of India*¹³⁰ and *Council of Scientific and Industrial Research and Anr. v. K.G.S. Bhatt and Anr.*¹³¹. In the latter decision, the Apex Court held:

“It is often said and indeed, adroitly, an organisation public or private does not ‘hire a hand’ but engages or employs a whole man. The person is recruited by an organization not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of a free enterprise system. The opportunity for advancement is a requirement for progress of any organization. It is an incentive for personnel development as well.¹³² Every management must provide realistic opportunities for promising employees to move upward. ‘The organization that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale and ineffectual performance, among both non-managerial employees and their supervisors’.¹³³

In *State of Tripura v. K.K. Roy*¹³⁴, the Supreme Court considered some of its earlier decisions in matters of promotion and held:

“It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations

¹³⁰ AIR 1989 SC 516

¹³¹ AIR 1989 SC 1972

¹³² Flipo Edwin B., Principles of Personnel Management, Fourth Ed., p.246. Extracted from *Food Corporation of India and Ors. v. Parshotam Das Bansal and Ors.*, (2008) 5 SCC 100

¹³³ Udai Pareek, Personnel Management, p.277, extracted from *Food Corporation of India and Ors. V. Parashotam Das Bansal and Ors.*, (2008) 5 SCC 100

¹³⁴ (2004) 9 SCC 65

adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue for promotion, he cannot resile therefrom. It is not a case where the principles of estoppels or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other states in India/Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the Scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the appellant like other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this court in the decisions referred to hereinbefore, it was expected that the appellant should have followed the said principle.”

In *Food Corporation of India v. Parashotam Das Bansal*¹³⁵, the Respondents were appointed in the engineering section of the Food Corporation and constituted about one per cent of the corporation’s work force. Since there were no promotional avenues open to them, they were stagnated. It was held by the Supreme Court that when employees are denied an opportunity of promotion for 30 long years on the ground that they fell within a category of employees excluded from promotional prospect, the Supreme Court will have the jurisdiction to issue necessary direction. It was further pointed out that if there is no channel of promotion in respect of officers resulting in stagnation over the years, the Court although may not issue any direction as to in which manner scheme should be formulated or by reason thereof interfere with the operation of existing channel of promotion to the officers working in different departments and officers of the Government but the jurisdiction to issue direction cannot be denied to the Supreme Court of the country.

¹³⁵ (2008) 5 SCC 100

2.3.2. Promotion and Upgradation Distinguished

In order to understand the true meaning and scope of the term ‘promotion’, it is of utmost importance to distinguish between ‘promotion’ and ‘upgradation’. Though ‘promotion’ and ‘upgradation’ might be deemed to be synonymous, there are few points of differences which need be aptly mentioned here. As have already been discussed, promotion is advancement to a higher rank or position or a higher grade; upgradation, on the other hand, is conferment of financial benefits upon a post. The posts are upgraded by raising the scale of pay of the posts. Of course, the nature of the upgraded post would finally depend upon the terms of the upgradation, and in a given case could amount to creation of a situation akin to a promotional post, i.e., where the rules provide for filling up the upgraded posts on criteria similar to those for promotion e.g., seniority or merit or the like. But generally they are distinct concepts.¹³⁶ The distinction has been explained by a Full Bench of the Kerala High Court in *N.G. Prabhu v. Chief Justice (Kerala)*¹³⁷ in the following words:

“Promotion is, ofcourse, appointment, to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in the same category the scale of pay of all the posts in the category is raised, the incumbents would naturally get the higher scale of pay. But in such a case it may not be proper to characterise the event as a promotion to higher posts though a benefit of a higher scale of pay is obtained by all concerned. In other words, if upgradation relates to all the posts in a category naturally, there is no sense in calling it a promotion of all persons in that category. That is because there is no question of appointment from one post to another. Parties continued to hold same posts but get a higher scale of pay. It may be that it is not all the posts in a particular category that are so upgraded, but only a part of it. Normally, the benefit of such upgradation would go to the seniors in the category. They would automatically get a higher scale of pay. That is because though their posts continue in the same category a higher pay scale is fixed for those posts. It is appropriate then to say that the seniors have been nominated to the Higher Grade which has been so created by upgradation. This phenomenon does not differ from case where all the posts are upgraded and, it appears to us that those who get the higher grade cannot be said to have been ‘promoted’ because here again there is no question of appointment from one post

¹³⁶ Ibid

¹³⁷ 1973 (2) SLR 251

to another. They continue to hold the same post, but because of seniority in the same post they are given a higher scale of pay. When a person is nominated to the higher scale of pay from time to time based on seniority it may perhaps loosely be termed as promotion.”

In *All India Employees Association (Railways) v. V.K. Agarwal*¹³⁸, it has been held by the Supreme Court that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs. 550-700 will go into higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case was restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation.

The Allahabad Bench of a Tribunal in the case of V.K. Agarwal held as follows:

“The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created. Some posts out of existing total were placed in higher grade to provide these avenues to the staff who were stagnating. The placement of these posts cannot be termed as creation of additional posts. There were definite number of posts and the total remained the same. The only difference was that some of these were in a higher grade. It was a deliberate exercise of redistribution with the primary object of betterment of chance of promotion and removal of stagnation.”

The Union of India challenged the said order of the Tribunal in *Union of India vs. V.K. Sarothia*¹³⁹ and the Supreme Court by a brief order dated 19.11.1998 dismissed the appeal. It held that:

“The finding of the tribunal that the ‘so-called promotion as a result of the redistribution of posts is not promotion attracting reservation’ on the facts of the case, appears to be

¹³⁸ (2001) 10 SCC 165

¹³⁹ (2008) 9 SCC 283

based on good reasoning. On facts, it is seen that it is a case of upgradation on account of restructuring of the cadres, therefore, the question of reservation will not arise.”¹⁴⁰

The concepts of ‘promotion’ and ‘upgradation’ was again considered while explaining the difference between a ‘promotion post’ and a ‘selection post’ in *Lalit Mohan Deb v. Union of India*¹⁴¹. In this case the pay scale of all the Assistants in Civil Secretariat in Tripura was Rs. 80-180 and on the basis of the recommendations of the Second Pay Commission appointed by the Government of India the scales were revised and 25% of the posts were placed in the Selection Grade in the scale of Rs. 150-300 and the rest continued in the old pay scale of Rs. 80-180. For the purpose of filling the Selection Grade posts, a test was held and those who qualified in the said test were appointed to the Selection Grade. The Assistants in the Selection Grade and the Assistants in the old pay scale were doing the same type of work. The Supreme Court observed that “provision of a Selection Grade in the same category of posts is not a new thing” and “a Selection Grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotion should at least be placed in the Selection Grade to prevent stagnation on the maximum of the scale”. One of the rationales behind creation of ‘Selection Grades’ is to bring out greater efficiency from the employees of the State. In *Union of India v. S.S. Ranade*¹⁴² again an element of selection was involved in granting selection grade as there was no automatic promotion to the selection grade pay scale. In this case, similar to *Lalit Mohan Deb*¹⁴³, Selection Grade posts were created entirely for the purpose of granting some relief to those who have very limited avenues of getting promotion to a higher post. Thus, by its very nature, a selection grade post cannot be considered as a higher post for the purposes of Rule. This is because the creation of a selection grade in the same post stands on a very different footing. By its very nature a selection grade provides a higher pay or a higher pay scale in the same post. The beneficiary of a selection grade does not thereby occupy a post which is higher in rank than the post earlier occupied by him. The Supreme Court, looking into the facts of this case, found that the Respondent therein required a promotion which resulted in occupation of a post which was higher in rank than the post earlier occupied, to get the relief of longer service. This Court therefore, held that

¹⁴⁰ Supra n. 129

¹⁴¹ (1973) 3 SCC 862

¹⁴² Supra n. 127

¹⁴³ Supra n. 132

though his promotion to a higher pay scale, which was not sufficient to grant relief to the Respondent therein as his promotion to selection grade did not involve advancement to a higher post.

In *Union of India v. Pushpa Rani*¹⁴⁴, the Supreme Court examining the case law at length, explained the difference between ‘upgradation’ and ‘promotion’ thus:

“In legal parlance, upgradation of a post involves transfer of a post from lower to higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment. The word ‘promotion’ means advancement or preferment in honour, dignity, rank, grade. Promotion thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law, the word ‘promotion’ has been understood in wider sense and it has been held that promotion can be either to a higher pay scale or to a higher post.

Once it is recognised that additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from among the employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude applicability of policy of reservation while effecting promotions, more so because it has not been shown that procedure for making appointment by promotion against such additional posts is different from the prescribed for normal promotion.

The policy contained in Letter dated 09.10.2003 has been framed with a view to strengthen and rationalise the staffing pattern. For this purpose, the Ministry of Railways undertook review of certain cadres. The basis of the review was functional, operation and administrative requirement of the Railways. This exercise was intended to improve efficiency of administration by providing incentives to existing employees in the form of better promotional avenues and at the same time requiring promotes to discharge more onerous duties. The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadre should be filled by

¹⁴⁴ (2008) 9 SCC 242

promotion by considering such of the employees who satisfy the conditions of promotions by considering such employees who satisfy the conditions of eligibility including minimum period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing existing incumbents in the higher grade without subjecting them to the rigour of selection. It has therefore, to be held that the Railway Board did not commit any illegality by directing that existing instructions with regard to the policy of reservation of posts for SC and ST will apply at the stage of effecting promotion against the additional posts. The Tribunal committed serious illegality by striking down para 14 of letter dated 09/10/2003. Matters relating to creation and abolition of posts, formulation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of employees fall within the exclusive domain of employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. Power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated by mala fides. The court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also open to the court to make comparative evaluation of merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.”

In *Bharat Sanchar Nigam Ltd. v. R. Santha kumara Velusamy and Others*¹⁴⁵, the question involved is whether rules of reservation will apply to upgradation of posts? In dealing with this question, the Supreme Court made a careful analysis of the principles relating to ‘promotion’ and ‘upgradation’ in the light of the aforesaid decisions and laid down the following principles:

- i. “Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher pay scale without moving to a different post. But the mere fact that both, i.e., advancement to a higher position and advancement to a higher pay scale, are described by the common term ‘promotion’ does

¹⁴⁵ *Bharat Sanchar Nigam Ltd. Vs. R. Santha kumara Velusamy and Ors.*, AIR 2011 SC 3793

not mean that they are same. The two types of promotion are distinct and have different connotations and consequences.

- ii. Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from the lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.
- iii. Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there still a difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.
- iv. Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.
- v. Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore, a promotion, rules of reservation will apply.
- vi. Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the

other hand, where restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.”

In the present case in our hand¹⁴⁶, the Biennial Cadre Review scheme did not involve creation of additional posts but merely restructured the existing posts as a result of which 10% of the promotion posts in Grade III were placed in a higher grade to give relief against stagnation. Therefore, the Biennial Cadre Review scheme was an upgradation scheme to give relief against stagnation. It did not involve creation of any new posts. It did not involve advancement to a higher post. It did not involve any process of selection for conferment of the benefit of higher pay-scale. The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority. BCR scheme as per circular dated 16.10.1990 was thus a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit.

2.3.3. Promotion of Personnel in Services under the State: It's Constitutionality

Since the 17 century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the state, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognise these rights and freedoms and allow them free play. The underlying idea in entrenching certain basic and fundamental rights is to take them out of the reach of transient political majorities. It, has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written Constitutions guarantee a few rights to the people and forbid governmental organs from interfering with the same.¹⁴⁷

In India, the pressing need to incorporate the fundamental rights in our Constitution was well accepted by the Constituent Assembly and they were embedded in our Constitution under Articles 12 to 35.

¹⁴⁶ AIR 2011 SC 3793

¹⁴⁷ M.P. Jain, *Indian Constitutional Law*, 827-828 (Wadhwa and Co., Nagpur, 5th ed., Reprint 2008)

The ‘Fundamental Right to Equality’ guaranteed under Articles 14 to 18 of the Constitution is “one of the magnificent corner-stones of the Indian judiciary”.¹⁴⁸ The golden thread of principles of ‘equality’ runs through the length and breadth of our Constitution. The Preamble to the Constitution emphasises upon the principle of equality as basic to the Constitution. Recognising this, the Supreme Court has declared equality as one of the basic features of the Indian Constitution.¹⁴⁹ Under the principles of “Right to Equality” enshrined in Articles 14-18, Article 14¹⁵⁰ is the genus, while Articles 15¹⁵¹ and 16¹⁵² are the species.

¹⁴⁸ Thommen, J., in *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹⁴⁹ *M.G. Badappanavar v. State of Karnataka*, AIR 2001 SC 260

¹⁵⁰ Article 14. Equality before law – The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India

¹⁵¹ Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth – (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

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

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

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

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

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

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

¹⁵² Article 16. Equality of opportunity in matter of public employment – (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

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

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

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

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

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

The Constitutional right to equality of opportunity and employment in public offices is provided under Article 16 of the Constitution of India. Article 16(1) guarantees equality of opportunity in matters of employment under the State, which includes appointment, promotion, post retirement benefits etc. The guarantee is to each individual citizen and therefore, each 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 filled¹⁵³. The three principles of Article 16(1) are:

1. Article 16 is merely an incident of Article 14 and both these articles form part of a common system seeking to achieve the same
2. Article 16 applies to all classes of appointments including promotion and selection posts and
3. Article 16 permits a valid classification.¹⁵⁴

The principle of equality of opportunity can be traced back to the Government of India Act, 1935 which provided that “No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India...”.¹⁵⁵ Considering this clause, perhaps, the right to equality of opportunity and prohibition of discrimination on grounds of religion, race, language, caste etc., in the matters of employment rights were included in the Draft Constitution by Dr. B.R. Ambedkar, Dr. K. M. Munshi, K.T. Shah, Harinam Singh and others.

Equality of opportunity is not simply a matter of legal equality, its existence depends not merely as absence of disabilities, but on presence of abilities and opportunity of excellence in each cadre or grade.¹⁵⁶ The concept of equality can have no existence except with reference to matters which are common as between individuals, between

are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

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

¹⁵³ Durga Das Basu, *Commentary on the Constitution of India*, Ed. Y.V. Chandrachud, S.S. Subramani, B.P. Banerjee, Eighth Ed. Reprint 2012, LexisNexis ButterworthsWadhwa, p. 1871

¹⁵⁴ *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490

¹⁵⁵ Section 298 (1), Government of India Act, 1935

¹⁵⁶ *Jagdishlal v. State of Haryana*, AIR 1997 SC 2366

whom equality is predicated. Equality in matters of employment can be predicated only as between persons, who are either seeking the same employment or have obtained the same employment. Thus, equality of opportunity in matters of promotion is nothing but equality between members of separate and independent classes.¹⁵⁷

Equality contemplated under Article 16(1) should not be confused with “absolute equality”. Article 16 only speaks of equality of opportunity and not opportunity to achieve equality and is different from equality of results.¹⁵⁸ Articles 16 and 14 also deal with equality and inhibition against discrimination. These articles strike at arbitrariness in State action must be based on valid relevant principles applicable alike to all similarly situate and it must be guided by an extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the anti-chamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and is hit by Articles 16 and 14.¹⁵⁹

a. Promotion in Services under the State: Article 16 and Its Relevance

A very many times it has come for determination before the Supreme Court that whether the scope of Article 16(1) and (2) extends to promotion or is confined to the initial appointment to any post in services under the State. In *General Manager, Southern Railway v. Rangachari*¹⁶⁰ an appeal came up before the Supreme Court where the appellants and respondent both conceded that cases of promotion fell within Article 16(1) and 16(2) though they differed as to whether they were included within Article 16(4). It was immediately noticed that the respondent’s petition postulates the inclusion of promotion in Article 16(1) and (2) for it is on that assumption that he challenges the validity of the impugned circulars. Similarly, the appellants’ defence postulated that Article 16 Clauses (1) and (2) as well as Article 16(4) refer to cases of promotion for it is on this basis that Article 16(4) includes promotion that they sought to support the validity of the impugned circulars. When this appeal was argued before the Constitution Bench on the first occasion it became clear to the Bench that neither party was interested in contending that the guarantee afforded by Article 16 Clauses (1) and (2) is confined

¹⁵⁷ Supra n. 148. Also see *All India Station Masters’ and Asst. Station Mastes’ Association v. General Manager, Central Railway*, AIR 1960 SC 384

¹⁵⁸ *IndraSawhney v. Union of India*, AIR 1993 SC 477

¹⁵⁹ Supra n. 148. Also see *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555

¹⁶⁰ AIR 1962 SC 36

only to initial appointment and does not extend to promotion, and so notice was ordered to be issued to the Attorney General. In response to the notice, the Attorney General had appeared before the Supreme Court and took the same stand as that of the appellants and nobody seemed interested in challenging the inclusion of promotion within Article 16 Clauses (1) and (2).

This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16(1) and (2) allows the State to prescribe reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity. Here it is important to note that though Article 16(1) includes the aspect of promotion to a selection post, all that the provision guarantees is equality of opportunity to all citizens who enter service.¹⁶¹

If the narrow construction of the expression “matters relating to employment” is accepted it would make the fundamental right guaranteed by Article 16(1), illusory. In that case it would be open to the State to comply with the formal requirements of Article 16 (1) by affording equality of opportunity to all citizens in the matter of initial employment and then defeated its very aim and object by introducing discriminatory provisions in respect of employees soon after their employment. Would it, for instance, be open to the State to prescribe different scales of salary for the same or similar posts, different terms of leave or superannuation for the same or similar post? On the narrow construction of Article 16(1) even if such a discriminatory course is adopted by the State in respect of its employees that would not be violative of the equality of opportunity guaranteed by Article 16(1). Such a result could not obviously have been intended by the Constitution. In this connection it may be relevant to remember that Article 16 Clauses (1) and (2) really give effect to equality before law guaranteed by Article 14 and to the prohibitions of discrimination guaranteed by Article 15(1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior and

¹⁶¹ Samaraditya Pal, *India's Constitution- Origins and Evolution*, 806 (LexisNexis, Mumbai, 1st ed. 2014 Reprint 2015)

subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.¹⁶²

Article 16(2) emphatically brings out in a negative form what is guaranteed affirmatively by Article 16(1). It prohibits discrimination of citizens on the grounds of “religion, race, caste, sex, descent, place of birth, residence or any of them”. Discrimination is a double-edged weapon; it would operate in favour of some person and against others; and Article 16(2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16(1). The words ‘in respect of any employment’ used in Article 16(2) must, therefore, include all matters relating to employment as specified in Article 16(1). Therefore, in the words of Gajendragadkar, J.¹⁶³:

“...we are satisfied that Mr. Sen is right when on behalf of the Attorney General he conceded that promotion to selection Posts ‘is included both under Article 16(1) and (2). Broadly stated the Bombay and the Patna High Courts support the concession made by Mr. Sen (vide *Pandurang Kashinath More v. Union of India*¹⁶⁴, *Sukhnandan v. State*¹⁶⁵).”

This position was again reiterated by Sarkaria, J. in *Govt. Branch Press v. D.B. Beliappa*¹⁶⁶ who said that:

It is now well settled that the expression ‘matters relating to employment’ used in Article 16(1) is not only restricted to initial matters in any employment under the State. It comprehends all matters in relation to employment both prior, and subsequent, to the employment, such as provisions as to salary, increments, leave, gratuity, pensionary benefits, age of superannuation, promotion and even termination of employment. It is further well established that Articles 14, 15(1) and 16(1) form part of the same constitutional code of guarantees and supplement each other. If my authority is needed for the above enunciation, reference may be made to the observations made by

¹⁶² Ibid

¹⁶³ Supra n. 154

¹⁶⁴ ILR [1958] Bom 1266

¹⁶⁵ (1956) ILR 35 Pat.

¹⁶⁶ AIR 1979 SC 429

Gajendragadkar, J., as he then was, in *General Manager, Southern Railway v. Rangachari*.”¹⁶⁷

b. Right to Promotion vs. Right to be Considered for Promotion

From the discussions made as above, it has become clear that the interpretation of the phrase ‘equality of opportunity in State services’ not only includes appointment in the initial stages but includes all other incidences of service including appointment by promotion. However, the question to be pondered over is whether there is at all a fundamental right to promotion under the Constitution of India.

While interpreting provisions of the Constitution and in particular fundamental rights of citizens, it is well to bear in mind certain fundamental concepts. In *McCulloch v. Maryland*¹⁶⁸, Chief Justice Marshall cautioned that we must keep in mind that it is the Constitution that we are expounding. He said that the Constitution was intended to endure for ages to come and had consequently to be adapted to the various crises of human affairs from time to time.

Brandeis, J., wrote “Our Constitution is not a straight jacket. It is living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions of material things.” (Brandeis Papers, Harvard Law School).

Similarly, in a beautiful metaphor Mr. J. M. Beck said as follows:

“The Constitution is neither, on the one hand, a Gibraltar Rock, which wholly resists the ceaseless washing of time and circumstances, nor is it, on the other hand, a sandy beach, which is slowly destroyed by erosion of the waves. It is rather to be likened to a floating dock which, while firmly attached to its moorings, and not therefore, at the caprice of the waves, yet rises and falls with the tide of time and circumstances.”¹⁶⁹

Article 14 and Article 16(1) of the Constitution of India are closely connected. They deal with individual rights of the person. Article 14 demands that the ‘State shall not

¹⁶⁷ Supra n. 153

¹⁶⁸ (1819) 4 Wheel (17 U.S. 316). Extracted from the order given by *M. Jagannadha Rao, J.*, in *Ajit Singh and Ors. v. The State of Punjab*, AIR 1999 SC 3471

¹⁶⁹ Ibid

deny to any person equality before law or equal protection of laws'. Article 16(1) issues a positive command that there shall be equality of opportunity in the matters of employment under the State. It has been held repeatedly by the Supreme Court that Sub-clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said Sub-clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word 'employment' being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, fundamental right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

Having said so, the question which arises now is whether the right to be considered for promotion is a mere statutory right or a fundamental right.

In *Ashok Kumar Gupta v. State of U.P.*¹⁷⁰ it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". Para 43 in *Ashok Kumar Gupta* reads as follows:

'It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do not have adequate representation consistently with the efficiency of administration...before expiry thereof (i.e., 5 years rule), Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right.'

In *All India Administrative Service Association v. Union of India*¹⁷¹, a three-Judge Bench held that an officer serving the state does not have a vested right to promotion. Again in *State of Maharashtra vs. Chandrakant Anath Kulkarni*¹⁷², it was clarified that mere chances of promotion are not conditions of service. If there is reduction in the chances of

¹⁷⁰ (1997) 5 SCC 201

¹⁷¹ 1993 Supp. (1)SCC 730

¹⁷² AIR 1981 SC 1990

promotion of an officer reduces, it does not tantamount to a change in the conditions of service. It was further held in *T.R. Kapoor v. State of Haryana*¹⁷³ by the Supreme Court that where employees are already promoted before the amendment of the Rules, they cannot be reverted back unless specifically provided in the rules. In *K. Jagdeesh v. Union of India*¹⁷⁴, it was held that mere chances of promotion or acquiring eligibility for promotion are not terms of service. However, “right to be considered for promotion” is a term of service. It was decided, thus, in *K. Jagdeesh* that passing of departmental examination is nothing but mere chances of promotion and hence, not a condition of service.

In *State of M.P. vs. Shardul Singh*¹⁷⁵, it was held that conditions of service means all those conditions which regulate the holding of a post by a person right from the time of his appointment to his retirement and even beyond, in matters like pensions, etc. This same view was reiterated in *I.N. Subba Reddy vs. Andhra University*. In any promotional policy, the rule which prescribes the conditions of service include a right of actual promotion or a right to be considered for promotion. This was held in *Md. Shujat Ali v. Union of India*¹⁷⁶, by a constitution Bench. Again, in *Mohd. Bhakar v. Y. Krishna Reddy*, a Constitution Bench comprising of three judges ruled that any provision in Rules regarding promotion which affects the promotion of a person, relates to his conditions of service. In *State of Mysore v. G.B. Purohit*¹⁷⁷, the Supreme Court again held that the rule which merely effects chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. This same view was also reflected in another judgment of a Constitution Bench in *Ramchandra Shankar Deodhar vs. State of Maharashtra*¹⁷⁸. Drawing from the judgment of another two Judge Bench in *State of Punjab vs. Kailash Nath*, it was held that there is no doubt that conditions of service may be classified as salary, confirmation, promotion, seniority, termination or tenure. In *Syed Khalid Rizvi v. Union of India*¹⁷⁹, it was held in that no employee has a right to promotion but he has the right to be considered for

¹⁷³ AIR 1987 SC 415

¹⁷⁴ AIR 1990 SC 1072

¹⁷⁵ (1970) 1 SCC 108

¹⁷⁶ AIR 1974 SC 1631

¹⁷⁷ 1967 SLR 753 (SC)

¹⁷⁸ AIR 1974 SC 259

¹⁷⁹ 1993 Supp (3) SCC 575

promotion according to rules. Hence, conditions of service do not include chances of promotion.

It is a settled law, as has been laid down in *S.S. Bola vs. B.D. Sardana*¹⁸⁰ that appointment to a post in accordance with the rules is a condition precedent and no one can claim appointment to a post or promotion, as of right, but has a right to be considered for promotion in accordance with the rules. Appointment by promotion or direct recruitment, therefore, must be in accordance with the rules so as to become a member of the service in a substantive capacity.

In *Jagdish Lal v. State of Haryana*¹⁸¹ it was decided that it is a settled principle of service jurisprudence that conditions of service are not inclusive of mere chances of promotion and a candidate appointed in accordance with the rules can steal a march over his erstwhile seniors in the feeder/lower cadre. On his having satisfactorily completed probation and declaration thereof, he is given seniority in the higher cadre. He becomes a member of the higher cadre from his date of starting discharging duty of the post to which he is promoted unless otherwise determined in accordance with the rules. From that day, he ceases to be a member of the feeder cadre/grade from which he is promoted. The hierarchical promotions to various cadres mentioned hereinabove operate in the same manner and thereby on successive promotions to various cadres/grades, though in the same service, one would steal a march over others, be they general or reserved.

In *Ajit Singh and Ors. v. State of Punjab*¹⁸², it has been held that Article 16(1) provides for a fundamental right to be considered for promotion to every employee otherwise eligible for promotion or who comes within the zone of consideration. If such a person is not considered for promotion there will be a clear infraction of his fundamental right under Article 16(1).

Again, in *Paluru Ramkrishnaiah v. Union of India*¹⁸³, the Apex Court referring to *Ramchandra Shankar Deodhar*¹⁸⁴ held thus:

“In the case of Ramchandra Shankar Deodhar, the petitioners and others allocated Tehsildars from Ex-Hyderabad State had under the notification of the Raj Pramukh

¹⁸⁰ AIR 1997 SC 3127

¹⁸¹ AIR 1997 SC 2366

¹⁸² AIR 1999 SC 3471

¹⁸³ AIR 1990 SC 166

¹⁸⁴ Supra n. 178

dated September 15, 1955 all the vacancies in the posts of Deputy Collector in the ex-Hyderabad State available to them for promotion but under subsequent rules of July 30, 1959, 50 per cent of the vacancies were to be filled by direct recruitment and only the remaining 50 per cent were available for promotion and that too on divisional basis. The effect of this change obviously was that now only 50 per cent vacancies in the post of Deputy Collector being available in place of all the vacancies it was to take almost double the time for many other allocated Tehsildars to get promoted as Deputy Collectors. In other words, it resulted in delayed chance of promotion. It was inter alia, urged on behalf of the petitioners that the situation brought about by the rules of July 30, 1959 constituted variation to their prejudice in the conditions of service applicable to them immediately prior to the reorganisation of the State and the rules were consequently invalid. While repelling this submission the Constitution Bench held that “all that happened as a result of making promotions to the posts of Deputy Collector’s division wise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners”. Thus, condition of service indicates only the right of consideration of promotion and not mere chances of promotion.

Again, in the case of *Delhi Jal Board v. Mahinder Singh*¹⁸⁵, it has been held that the right to be considered by the Departmental Promotion Committee is a fundamental right under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the Disciplinary Enquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any Disciplinary Enquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time DPC met.

¹⁸⁵ AIR 2000 SC 2767

In *Union of India vs. Hemraj Singh Chauhan*¹⁸⁶, it was recalled that both the State Government as well as the Central Government have the Constitutional obligation to act as model employers, which is consistent with their role in a welfare State. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 flows from guarantee of equality under Article 14 of the Constitution. Therefore, right to be considered for promotion is a legitimate expectation of any employee from the State, which when violated becomes duty of the Court to resolve it fairly.

c. Reservation in Promotion with Consequential Seniority vis-a-vis Article 16

Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. The concept of public employment, unlike right to property is socialistic and, therefore, falls within the Preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the Preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of equality of opportunity in public employment concerns an individual, whether that individual belongs to general category or backward class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a backward class has to be balanced. Both the claims have a particular object to be achieved.¹⁸⁷

The application of the above concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When Article 16(4) is construed, it is equality in fact which plays a dominant role. Backward classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. Therefore, it is for the Court to bring stability while providing justice to the backwards, equity for the forwards and efficiency for the entire system. Adding efficiency to equity and justice will pose problem in context of the reservation. This problem has to be examined, therefore, on

¹⁸⁶ (2010) 4 SCC 290

¹⁸⁷ *M. Nagaraj and Ors. v. Union of India and Ors.*, AIR 2007 SC 71

the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of Scheduled Caste and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by the Supreme Court, the limitations on the discretion of the government in the matter of reservation under Article 16(4) as well as Article 16(4A) come in the form of Article 335 of the Constitution.¹⁸⁸

Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and 16(4A) is enabling. The discretion of the State is, however, subject to the existence of 'backwardness' and 'inadequacy of representation' in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in.

A word of caution against excessive reservation was first pointed out in *The General Manager, Southern Railway and Anr. v. Rangachari*.¹⁸⁹ Gajendragadkar, J., giving the majority judgment said that reservation under Article 16(4) is intended merely to give adequate representation to backward communities. A reasonable balance must be struck between the claims of backward classes and claims of other employees as well as requirement of efficiency of administration. The question of the extent of reservation was directly involved in *M.R. Balaji v. The State of Mysore*.¹⁹⁰ It was observed that special provision should be less than 50%, how much less would depend on the relevant prevailing circumstances of each case. In *Indra Sawhney v. Union of India*¹⁹¹ the majority held that the rule of 50% as laid down in M.R. Balaji was a binding rule and not a mere rule of prudence. Giving the judgment of the Court in *Indra Sawhney, Reddy* ., stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of backward classes to the total population would certainly be relevant. He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of principle of equality under Article 14.

¹⁸⁸ Ibid

¹⁸⁹ AIR 1962 SC 36

¹⁹⁰ AIR 1963 SC 649

¹⁹¹ AIR 1993 SC 477

In Indra Sawhney again, the Supreme Court held that the 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in *R.K. Sabharwal v. State of Punjab*¹⁹² it was held that the entire cadre strength should be taken into consideration to determine whether the reservation up to the quota-limit has been reached. It was clarified that the judgment in Indra Sawhney was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensure that the reservation remains within the ceiling-limit of 50%. However, the Government felt that the judgment of the Supreme Court in Indra Sawhney adversely affected the interests of the SCs and STs in services, as they have not reached the required level. Therefore, the Government felt that it was necessary to continue with the existing policy of providing reservation in promotion confined to SCs and STs only and thereby introducing Clause 16(4A) in Article 16 of the Constitution.¹⁹³

Clause (4A) follows the pattern specified in Clauses (3) and (4) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, Clause (4A) will be governed by two compelling reasons – ‘backwardness’ and ‘inadequacy of representation’, as mentioned in Article 16(4A). If the said two reasons do not exist, then the enabling provision cannot come into force.

¹⁹² AIR 1995 SC 1371

¹⁹³ THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995
STATEMENT OF OBJECTS AND REASONS

The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of *IndraSawhney v. Union of India*, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extent to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new Clause (4A) in the said Article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.

The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II)*, this Court has held that apart from ‘backwardness’ and ‘inadequacy of representation’ the State shall also keep in mind ‘overall efficiency’.

After the Constitution (Seventy-Seventh Amendment) Act, 1995, the Supreme Court stepped in to balance the conflicting interests. Hence, as was held in *Union of India vs. Virpal Singh Chauhan*, a roster point promote would not get consequential seniority if he had already got the benefit of accelerated promotion. However, the decisions in the cases of *Virpal Singh* and *Ajit Singh (I)* did not appeal to the Government and was of the view that the concept of ‘catch-up’ rule would adversely affect the interests of the SCs and STs in the matters of promotion with seniority. According to the Government, the decisions in *Virpal Singh Chauhan* and *Ajit Singh (I)* bringing in the concept of ‘catch-up’ rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade. This led to the amending of Clause (4A) again and consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Thus, the Constitution (Eighty-Fifth Amendment) Act, 2001, was nothing but an extension of Clause (4A) of Article 16 and the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 have to be read together.

i. The Catch-up Rule and the Rule of Promotion with Consequential Seniority

One of the questions raised in *M. Nagaraj* on behalf of the petitioners was whether obliteration of the ‘catch-up rule’ or insertion of the concept of ‘consequential seniority code’, would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16.

The concept of the ‘catch-up’ rule appears for the first time in the case of *Virpal Singh Chauhan*. In the category of Guards in the Railways, there were four categories, namely, Grade ‘C’, Grade ‘B’, Grade ‘A’ and Grade ‘A Special’. The initial recruitment was made recruitment was made Gr. ‘C’. Promotion from one grade to another was by seniority-cum-suitability. The rule of reservation was applied not only at the initial stage of appointment to Grade ‘C’ but at every stage of promotion. The percentage reserved for SC was 15% and for ST, it was 7.5%. to give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for SCs and STs

respectively. Subsequently, a hundred-point roster was prepared reflecting the same percentage. In 1986, general candidates and members of SCs and STs came within Grade 'A' in Northern Railway. On 01.08.1986, the Chief Controller promoted certain general candidates on ad hoc basis to Grade 'A' Special. Within three months, they were reverted and SCs and STs were promoted. This action was challenged by general candidates as arbitrary and unconstitutional before the tribunal. The general candidates asked for three reliefs, namely, (a) to restrain the Railways from filling-up posts in higher grades in the category of Guards by applying the rule of reservation; (b) to restrain the Railway from acting upon the seniority list prepared by them; and (c) to declare that the general candidates were alone entitled to be promoted and confirmed in Grade 'A' Special on the strength of their seniority earlier to the reserved category employees. The contention of the general candidates was that once the quota prescribed for the reserved group is satisfied, the forty-point roster cannot be applied because that roster was prepared to give effect to the rule of reservation. It was contended by the general candidates that accelerated promotion may be given but the Railways cannot give consequential seniority to reserved candidates in the promoted category. It was also contended by general candidates that giving consequential seniority to accelerated promotion constituted conferment of double benefit upon the members of the reserved category and, therefore, violated the rule of equality in Article 16(1). It was further urged that accelerated promotion-cum-accelerated seniority is destructive of the efficiency of administration in as much as by this means the higher echelons of administration would be occupied for entirely by members of reserved categories. This was opposed by the reserved category candidates who submitted that for the purposes of promotion to Grade 'A' Special, the seniority list pertaining to Grade 'A' alone should be followed; that, the administration should not follow the seniority lists maintained by the administration pertaining to Grade 'C' as urged by the general candidates and since SCs and STs were senior to the general candidates in Grade 'A', the seniority in Grade 'A' alone should apply. In short, the general candidates relied upon the 'catch-up' which was opposed by the reserved category candidates.

The Supreme Court gave the following reasons for upholding the decision of the tribunal. Firstly, it was held that a rule of reservation as such is not violative of Article 16(4). Secondly, the Court opined that there is no fixed method of providing reservation. The extent and nature of reservation is a matter for the state to decide having regards to

facts and requirements of each case. It is open to the State to say that while the rule of reservation shall be applied, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over seniors in the feeder category and that it is open to the State to interpret the 'catch-up' rule in the service conditions governing the promotions. Thirdly, the Court did not agree with the view expressed by the Tribunal in (Virpal Singh Chauhan) that a harmonious reading of Clauses (1) to (4) of Article 16 should mean that a reserved category candidate belonged to general category. It was argued on behalf of the general candidates that all top grades stood occupied exclusively by the reserved category members, which violated the rule of equality underlying Articles 16(1), 16(4) and 14. The Supreme Court opined that the above situations arose on account of faulty implementation of the rule of reservation, as the Railways did not observe the principle that reservation must be in relation to 'posts' and not 'vacancies' and also for applying the roster even after the attainment of the requisite percentage reserved for SCs/STs.

The point which requires special mention here is that the Court has categorically ruled in Virpal Singh Chauhan that the 'catch-up' rule is not implicit in Clauses (1) to (4) of Article 16. Hence, the said rule is not beyond the amending power of the Parliament.

In Ajit Singh (I), the controversy which arose for determination was - whether after the members of SCs/STs for whom specific percentage of posts stood reserved having been promoted against those posts, was it open to the administration to grant consequential seniority against general category posts in higher grades. The affirmative ruling of the High Court was aside on the ground of application of the 'catch-up' rule. Accordingly, the Court took the view that the seniority between the reserved category candidates and general candidates in the promoted category shall be governed by their panel position.

Ajit Singh (II)¹⁹⁴ brought forth the conflict between Virpal Singh Chauhan and Ajit Singh (I) on the one hand and the judgment of Jagdish Lal on the other. While the former two judgments were pronounced following the 'catch-up rule' and favoured the general candidates, the latter judgment favouring the reserved candidates observed that under the general rule of service jurisprudence relating to seniority, the date of continuous officiation has to be taken into account and if so, the roster point promotees were entitled to the benefit of continuous officiation.

¹⁹⁴ AIR 1999 SC 3471

In *Ajit Singh (II)*, three points came up for consideration:

- i. Can the roster point promotees count their seniority in the promoted category from the date of their continuous officiation vis-a-vis general candidates, who were senior to them in the lower category and who were later promoted to the same level?
- ii. Have *Virpal* and *Ajit Singh (I)* been correctly decided and has *Jagadish Lal* been correctly decided?
- iii. Whether the catch-up principles are tenable?

As a result, *Jagadish Lal* was overruled by the judgment of *Ajit Singh (II)*. However, in the context of balancing fundamental rights under Article 16(1) and the rights of reserved candidates under Articles 16(4) and 16(4A), the Supreme Court opined that Article 16(1) deals with fundamental right whereas Articles 16(4) and 16(4A) are only enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. As a remedial measure, the Court held that in matters relating to affirmative action by the State does not lead to reverse discrimination.

Considering the above judgments, the Supreme Court Bench in *M. Nagaraja*¹⁹⁵ viewed that the concept of 'catch-up rule' and 'consequential seniority' are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. it cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that the equality code under Articles 14, 15 and 16 is violated by deletion of the catch-up rule. These concepts are based on practices. However, such concepts cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the parliament. Principles of service jurisprudence is different from constitutional limitations. Therefore, it was rightly pointed out by the Bench that 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*.

¹⁹⁵ *M. Nagaraj and Ors. v. Union of India and Ors.*, AIR 2007 SC 71

Efficiency in Administration

The question then is: what is the meaning of the phrase “efficiency of administration”? In D.T.C case, it was observed in para 275 that “the term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. If a superior officer develops liking towards sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums and corruption in such cases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing to be ‘not up to the mark’, ‘wanting public relations’ etc. At times, they may be termed to be “security risk” (to their activities). Thus, they spoil the career of the honest, sincere and devoted officers. Instances either way are galore in this regard. Therefore, one would be circumspect, pragmatic and realistic to these actualities of life while ambulating constitutional validity of wide, arbitrary, uncanalised and unbridled discriminatory power of dismissal.

ii. The Carry-Forward Rule

Justice O. Chinnappa Reddy, in *K.C. Vasanth Kumar and Anr. v. State of Karnataka*¹⁹⁶ had stated thus:

Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceeds 50 %; efficiency, it seems, will suffer if the ‘carry forward’ rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50 % or extending to promotional posts and against the carry forward rule, one would think that the civil service is a heavenly paradise into which only the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belong to the chosen classes area not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, ‘naturally’ perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the

¹⁹⁶ AIR 1985 SC 1495

infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes. There is neither statistical basis nor expert evidence to support these assumptions that efficiency will be necessarily impaired if reservation exceeds 50 %, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinions are expressed entirely on an ad hoc presumptive basis. The age long contempt with which the 'superior' or 'forward' castes have treated the 'inferior' castes and classes is now transforming and crystallizing itself into an unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means for the 'superior' castes, parting with a bit of it. Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the profession. It is difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the 'inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage. Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a mantra which is whispered by the Guru in the Shishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better, than the ones belonging to those very sections? Why not ask ourselves why 35 years after Independence, the position of scheduled castes, etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and

for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different minimum modes of selection may be prescribed for different posts and for admission to different to different courses of study and having regard to the requirements of the posts and the courses of study. No one will suggest that the degree of efficiency required of a general medical practitioner. Similarly, no one will suggest that he degree of efficiency is to be altogether discounted. Similarly, no one will suggest that the degree of industry and intelligence expected of a candidate seeking admission to an ordinary arts degree course. We do not, therefore, mean to say that efficiency is to be altogether discounted. All that we mean to say is that it cannot be permitted to be used as a camouflage to let the upper classes in its name and to monopolise the services, particularly the higher posts and the professional institutions. We are afraid we have to id our minds of many cobwebs before we arrive at the core of the problem. the quest for equality is self-elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue quest for equality. It will be advantageous to quote at this juncture R. H. Tawney in his classic work 'Equality' where he says:

The truth is that is absurd and degrading for men to make much of their intellectual and moral superiority to each other and still more of their superiority in the arts which bring wealth and power, because, judged by their place in any universal scheme, they are infinitely great or infinitely small. The equality which all these thinkers emphasize as desirable is not equality of capacity or attainment but of circumstances, and institutions, and manner of life. The equality which they deplore is not the inequality of the personal gifts, but of social and economic development... Their views, in short, is that, because men are men, social institutions-property rights, and the organization of industry, and the system of public health and education should be planned, as far as possible to emphasize and strengthen, not the class differences which divide but the common humanity which unite them...

Pandit Jawaharlal Nehru, the first Prime Minister of India in his "Independence and After That" (Collection of Speeches 1946-49, Publication division, Government of India, pg. 28), has stated that "social equality in the widest sense and equality of

opportunity for everyone, every man and woman must have the opportunity to develop to the best of his and her ability. However, merit must come from ability and hard work and not because of caste or birth or riches.” This was followed in Air India Statutory Corporation case (supra) in para 53 where it was held that “social equality would develop the sense of fraternity among the members of a social group where each would consider the other as his equal, not higher or lower. A society, which does not treat each of its members as equals, forfeits its right of being called a democracy. All are equal partners in the freedom. Every one of our ninety-four million must have equal right to opportunities and blessings that freedom of India has to offer. To bring freedom in a comprehensive sense to the common man, material resources and opportunity for appointment be made available to secure socio-economic empowerment which would ensure justice and fullness of life to workmen, i.e., every man and woman.” In para 43, it was held that “(I)n a developing society like ours, steeped with unbridgeable, and ever-widening gaps of inequality of status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and the opportunities to remove handicaps and disabilities due to which the poor, the workmen etc. are languishing ad to secure the dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality.

Efficiency in service attracts the well-known parable that insanity cannot be cured until married and marriage cannot be celebrated till insanity is cured. Unless one is given opportunity and facility by promotion to hold an office or a post with responsibilities, there would be no opportunity to prove efficiency in the performance or discharge of duties. Without efficiency one cannot be promoted. How to synthesis both and give an effect to the Constitutional animation to effectuate the principal of adequacy of representation in all posts or classes of posts in all cadres, service or grade is a nagging question. From that perspective, one is required to examine whether reservation in

promotion is constitutionally valid. The rules of promotion lay down that appointment to the post of Executive Engineer from Assistant Engineer shall be made on the principle of 'seniority subject to rejection of unfitness' and for appointment in higher posts like Superintendent Engineers, merit has to be considered. Even employees from Dalits or Tribes get promoted only on satisfying the above test. Appointment by promotion is a facet of recruitment to a service or cadre/grade/class or classes of posts. In fairness on the part of the appellants/petitioners and their learned counsel, none impugned nor alleged that the private respondents are not meritorious or inefficient. No such evidence is placed on record.

The fundamental requisites to all employees are honesty, integrity and character, apart from hard work, dedication and willingness to apply assiduously to the responsibilities attached to the office or post and also inclination to achieve improved excellence. What Dalits and Tribal employees need is an opportunity and fair chance of promotion to higher posts and offices earmarked for them in the roster where they are not adequately represented. In a clash of competing claims between general category employees on the one hand and Tribals and Dalits on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. When the authorities have a power coupled with the constitutional duty, the doctrine of full faith and credit under Article 261 gets due acceptance when done truly and sincerely with an honest, objective and dispassionate assessment by the appropriate authority. These claims need to be considered in that perspective; they should be given promotion, if found eligible, to the posts or classes of posts in the higher cadre, grade, class or category etc. The selecting officer/officers need to eschew narrow, sectarian, caste, religion or regional consideration or prejudices which are deleterious to fraternity, unity and integrity and integration of the nation as unified Bharat. What needs to be achieved by the Dalits and Tribal officers so promoted is that they should, on par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts with added willingness and dedication to improve excellence. Thereby the efficiency of administration would automatically get improved and the nation constantly rises to higher levels of achievement. Therefore, it cannot be held that reservation in promotion is bad in law or unconstitutional.

As stated earlier, Article 16 (4A) has come into force w.e.f. 17 June, 1995. The appellants/ petitioners have sought amendment of the pleadings challenging the vires of article 16 (4A) of the Constitution and in fairness on the part of the learned Counsel, they did not press for consideration thereof obviously for the reason that its objects are mentioned in the Statement of Objects and Reasons as under:

“The Scheduled Castes and Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. In *Indra Sawhney and Ors. v. Union of India and Ors.*, the Supreme Court however, observed that reservation of appointments or posts under Article 16 (4A) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Tribes and Scheduled castes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of Scheduled castes and Scheduled Tribes. To carry out the commitment of the government for protecting the interests of the Scheduled Castes and Scheduled Tribes, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.”

It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of the service. Article 16 (4A) read with Articles 16 (1) and 14 guarantees a right to promotion to Dalits and Tribals as fundamental right where they do not have adequate representation consistently with the efficiency in administration. The Mandal's case has prospectively overruled the ratio in Rangachari's case, i.e., directed the decision to be operative after 5 years from the date of judgment; however, before expiry thereof, Article 16 (4A) has come into force from June 17, 1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribals on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the Constitutional goals, policy and objectives referred to herein before.

In *R.K. Sabharwal and Ors. v. State of Punjab and Ors*¹⁹⁷, the Constitution Bench was called upon to consider whether the reservation in promotion as per the roster was correct in law, and, therefore, constitutional and whether the employees belonging to Scheduled Castes have right to be considered for promotion in their own merits, if so how they are required to be adjusted in the roster prescribed by the Government. The Constitution Bench has pointed out when percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserved points, it has to be taken that the posts shown at the reserved points are to be filled from amongst the members of the reserved categories. The candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand, the reserved category candidates can compete for non-reserved posts. In the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be strictly followed. The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed or promoted against general seats. The fact that considerable number of members of the backward classes have been appointed/promoted against the general seats in the State may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed. It was further held that the reserved vacancies were required to be filled according to the roster like a running account. When the reserved quota is full in the cadre then application of rule of reservation would be stopped until vacancies as per roster arise and operate. It was also held following Mandal's case that the judgment therein could be operative prospectively from that date, viz., February 10, 1995 and all the promotions which became settled rights due to reservation in promotion could not be unsettled. As seen earlier, 'right to equality', 'equality or status and opportunity', duty to 'improve excellence', 'opportunities and facilities to remove inequality in status' and 'social justice', all should be given their due and full play under rule of law to bring about equality in results to establish an egalitarian social order. It would, therefore, be clear that

¹⁹⁷ (1995) 2 SCR 35

reservation in promotion is constitutionally valid; the posts earmarked for Dalits and Tribes shall be filled up and adjusted with them. The Dalits and Tribes selected in open competition for posts in general quota should be considered appointees to the general posts in the roster as general candidates. The promotions given in excess of the quota prior to the judgment in Sabharwal's case should not be disturbed.

The further question is: whether the judgment in Mandal's case in paragraph 860 (8) by Jeevan Reddy, J. prospectively overruling the ratio in Rangachari's case is a majority judgment? In this connection, we may, at the outset, refer to Article 145 (5) of the Constitution. It postulates that "(No) judgment and no such opinion shall be delivered by the Supreme Court, save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion". It would, therefore, be manifest that unless majority Judges comprised in the bench concur on the opinion or the decision, it would not be a judgment and no such opinion shall be delivered by the Supreme Court. In Mandal's case, on the question of reservation in promotion, eight of the nine Judges participated in the opinion. Of them, Jeevan Reddy, J. spoke for himself, Kania, C.J.I. and Venkatachaliah, J. as he then was Pandian and Sawant, J.J. also agreed with them. There is a considerable debate on Micro Lexicon Surgery conducted by the learned Counsel for the appellants/petitioners drawing a distinction between conclusions and directions contained in paragraph 860 (8) and the language used in the concurrent opinions of Pandian and Sawant, J.J. In support thereof, they have placed strong reliance on the wording used by Sawant, J. in paragraphs 552 and 555 on the conclusions and the absence of concurrence with directions. Pandian, J. has expressly agreed in his conclusions and directions. Equally, there was absence of concurrence by other learned judges. They have also drawn our attention to the dictionary meanings of these words. Having given due consideration, we are of the view that the Micro Lexicon Surgery of the distinction between conclusions and directions leads us nowhere to reach satisfactory solution. One needs to adopt pragmatic approach to understand the conclusions reached and the directions given as part of the judgment in that behalf. Even if rule of strict interpretation is to be applied, as is sought by the learned Counsel, Sawant, J. in paragraph 555 has indicated his concurrence with the conclusions of Jeevan Reddy, J. in paragraph 860 (8) which includes directions concurred therein. We have, to our benefit, the contemporaneous understanding that directions in paragraph 860 (8) given by Jeevan

Reddy, J. is a majority judgment and it gets reinforced from the approval therefore, as followed by the Constitution bench, in R.K. Sabharwal's case. The presiding Judge therein, viz., Kuldeep Singh, J, who was one of the nine judges in Mandal's case, participated in the majority opinion on the issue of reservation in promotion. However, no opinion was expressed on the conclusions and directions of Jeevan Reddy, J. in paragraph 860, the Constitution bench having upheld the rule of reservation in promotion, proceeded to apply the law and worked out the rights of the Dalits in promotion in R. Sabharwal's case. The same do support out conclusion that the Constitution Bench equally understood that the directions contained in paragraph 860 (8) constituted majority judgment. Otherwise, the Constitution Bench in R.K. Sabharwal's case would not have proceeded to consider the rights to promotion of the Dalits and question of giving effect to the roster system and the question of percentage of reservation provided in promotions would not have been given effect. The Constitution Bench in that case would have declared in the light of the majority judgment the reservation in promotions were void ab initio under Article 13 (2), and that, therefore, the question of application of the roster would not have arisen. It is true that there is no positive indication or a finding to that effect in Sabharwal's case but the fact that the presiding Judge therein was one of the members of the 9-Judge Bench in Mandal's case, and that the Constitution bench considered and upheld the right to reservation in promotion to the Dalits and Backward Classes and applied the roster points to such promotions, itself goes to point out and reassure us that prospective overruling of Rangachari's case by Jeevan Reddy, J. is a majority opinion. In that view of the matter, the Micro Lexicon Surgery fails.

The next questions are: whether the prospective overruling of Rangachari's case, to be operative after 5 years from the date of Mandal's case, amounts to judicial legislation? Is it void ab initio under Article 13 (2) of the Constitution? Whether it is violative of the fundamental rights of the appellant-petitioners and whether the exercise of the power by this Court under Article 32 (4) and 142 of the Constitution is inconsistent with and derogatory to the fundamental rights of the appellants-petitioners and, if so, what would be the consequence? It is settled Constitutional Principle that to make the right to equality to the disadvantaged Dalits and Tribes meaningful, practical contents of results would be secured only when principles of distributive justice and protective discrimination are applied, as facet of right to equality enshrined under Article 14 of the

Constitution. Otherwise, the right to the equality will be a teasing illusion. Right to promotion is a method of recruitment from cadre to another higher cadre or class or category or grade of posts or classes of posts or offices, as the case may be. Reservation in promotion has been evolved as a facet of equality where the appropriate Government is of the opinion the Dalits and Tribes are not adequately represented in the class or classes of posts in diverse cadres, grade, category of posts or classes of posts. The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was evolved as a part of social and economic justice assured in the Preamble and articles 38, 46, 14, 16 (1), 16 (4), 16 (4a) of the Constitution. The right to equality, dignity of person and equality of status and of opportunity are fundamental rights to bring Dalits and the Tribes in the mainstream of the national life. It would, therefore, be an imperative to evolve such principle to adjust the competing rights, balancing the claims, rights and interest of the deprived and disadvantages Dalits and Tribes on one hand and the general section of the society on the other.

d. Right to be Considered for Promotion as guaranteed under Article 309 of the Constitution

“Services under the Union and the States” are provided under Part XVI of the Constitution of India. The scope of this Part of the Constitution is restricted to the framing rules and regulations for the controlling and monitoring the Civil Services who are responsible for carrying on the administration under the direction and control of the elected representatives of the people and in accordance with rules and principles. The power of the appropriate Legislature to frame rules regulating recruitment to public services has been provided in Article 309¹⁹⁸ of the Constitution. ‘Recruitment’ is a comprehensive term and includes any method provided for inducting a person in public service. Appointment, selection, promotion, deputation are all well-known methods of

¹⁹⁸ 309. Recruitment and Conditions of Service of persons serving the Union or the State – Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to the public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor [***] of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

recruitment.¹⁹⁹ Any rule so framed under Article 309 shall be subject to other provisions of the Constitution.

On the plain reading of the language of Article 309, the proposition that any rule framed under this article has to be confined to recruitment and conditions of service of persons mentioned therein admits of no doubt. In the normal course what falls within the purview of the term “conditions of service” may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay scale, leave, provident fund, gratuity, confirmation, promotion, seniority, tenure or termination of service, compulsory or premature retirement, superannuation, pension, changing the age of superannuation, deputation and disciplinary proceedings.²⁰⁰

Thus, the rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively subject to the condition that the existing rule cannot be taken away by an amendment with retrospective effect.

e. Right to Be Considered for Promotion: How Made?

It has become a settled principle of service jurisprudence that there is a right to be considered for promotion of every employee to a higher post subject to eligibility provided he is “within the zone of consideration”. But the question is as to the manner in which his case is to be considered. This is a matter of considerable importance in service jurisprudence as it deals with ‘fairness’ in the matter of consideration for promotion under Article 16.²⁰¹ Let us, therefore, look at the present legal position in this context.

In *Baikunth Nath Das v. Chief District Medical Officer*²⁰², the issue was whether uncommunicated adverse remarks would be violative of ‘fairness’ in considering the appellant for promotion. This case also considered the question of relative strength of old remarks and also relevance of remarks made before an earlier promotion. Jeevan Reddy, J., speaking for the Bench opined that more importance should be attached to record of later years. Adverse remarks made before granting the earlier promotion must be considered to have lost the ‘sting in them’.

¹⁹⁹ Subhash C. Kashyap, *Constitutional Law of India*, Vol. 2, 1795 [Universal Law Publishing, Second Ed. (In 3 Vols.), 2015]

²⁰⁰ M. Ramajois, *Services under the State*, 473 (Indian Law Institute, New Delhi, 2007)

²⁰¹ *Badrinath v. Government of Tamil Nadu and Ors.*, AIR 2000 SC 3243

²⁰² AIR 1992 SC 1020

In *State of Punjab v. Gurdas Singh*²⁰³, there were adverse remarks from 1978 prior to 1984 when the officer was promoted and there were also adverse remarks for the period 18.06.84 to 31.03.85. The compulsory retirement order was passed on 03.09.87. The said order was quashed by the Civil Court on the ground that his record prior to his promotion i.e., prior to 1984 could not have been considered and two adverse entries after 1984 were not communicated and could not be relied upon. Following *Baikunth Nath Das*, the Bench felt that uncommunicated adverse remarks could be relied upon and in that case these entries related to the period after an earlier promotion. That ground alone was sufficient for the case. There is a further observation that an adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during the whole tenure of service.

The proposition laid down in *Gurdas Singh* needs further explanation in the context of the ruling in *Baikunth Nath Das*. Similar to the position in the latter case, the general principle has been upheld that though adverse remarks prior to an earlier promotion can be taken into account, they would have lost their sting. However, there is a special fact attached to the former case which is the adverse remarks prior to the promotion in relation to his 'dishonesty'. Therefore, in a case relating to compulsory retirement, the 'sting' in adverse remarks relating to dishonesty prior to an earlier promotion cannot be said to be absolutely wiped out.

In *D. Ramaswami v. State of Tamil Nadu*²⁰⁴, the appellant started as a Lower Division Clerk and rose to the position of a Dy. Commissioner of Commercial Taxes. His entire service record contained only one single adverse entry in 1969 which referred to taking money from business people. The inquiry into that complaint ended in his favour, the government dropping the charges in November, 1974. In May, 1975 he was offered the selection post of Dy. Commissioner. In September 1975, he was compulsorily retired. It was held that while his previous record should not be completely ignored, there was nothing in the present conduct casting any doubt on the wisdom of the promotion and there was therefore no justification for needless digging into the past. It was held that the basis of the adverse entry of 1969 was knocked out by the order of the government in

²⁰³ AIR 1998 SC 1661

²⁰⁴ AIR 1982 SC 793

November 1974 and the effect of the entry (of 1969) was blotted out by his promotion as Dy. Commissioner.

In *Badrinath v. State of Tamil Nadu and Ors.*²⁰⁵, having referred to the above judgments, the Supreme Court laid the following principles in relation to ‘right to be considered for promotion’:

1. Under Article 16 of the Constitution, right to be ‘considered’ for promotion is a fundamental right. It is not the mere ‘consideration’ for promotion that is important but the consideration must be ‘fair’ according to established principles governing service jurisprudence.
2. Courts will not interfere with assessment made by Departmental Promotion Committees unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury Principles or was it mala fide.
3. Adverse remarks of an officer for the entire period of service can be taken into consideration while promoting an officer or while passing an order of compulsory retirement. But the weight which must be attached to the adverse remarks depends upon certain sound principles of fairness.
4. If the adverse remarks relate to a distant past and relate to remarks such as his not putting his maximum effort or so on, then those remarks cannot be given weight after a long distance of time, particularly if there are no such remarks during the period before his promotion. This is the position even in cases of compulsory retirement.
5. If the adverse remarks relate to a period prior to an earlier promotion they must be treated as having lost their sting and as weak material, subject however to the rider that if they related to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored altogether.
6. Uncommunicated adverse remarks could be relied upon even if no opportunity was given to represent against them before an order of compulsory retirement is passed.

²⁰⁵ AIR 2000 SC 3243

2.4. Promotion How Made vis-a-vis the Principle of Seniority

The principle of seniority in Public Personnel Administration is a widely prevalent method of promoting personnel in most countries. Under this principle, promotion is determined on the basis of the length of service of an employee. In general, an employee who has served longer is eligible for promotion. On the basis of this principle, an employee is promoted to a higher grade or class.²⁰⁶

2.4.1. Importance of Seniority in Determining Promotion in Public Personnel Administration

A system of promotion is the essence of modern management and, as already pointed out previously, when a person is recruited in an organisation he must be given an opportunity to advance. The object of assigning seniority is to facilitate the filling of promotional posts. It has been seen that, though seniority is not the only factor for granting promotion, as provided under various statutory rules and instructions, there is no denying the fact that seniority is that aspect of employment which cannot be ignored. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to everyone except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action can be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem therefore is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able men? The challenge which lies before the administration is to churn out methods that can pose a balance between seniority and merit while making promotional policies.

In his celebrated book 'An Introduction to Public Administration'²⁰⁷, Leonard D. White has very objectively stated the importance of merit and seniority in making promotions. According to him, in public administration, it is in the public interest that superior civil servants should be enabled to move up the promotion ladder as merit deserves and as vacancies occur. Shielding the principle of seniority, he said that seniority can be

²⁰⁶ Mohit Bhattacharya, *Public Administration*, 195 (Word Press Pvt. Ltd., Kolkata, 12th ed., 2012)

²⁰⁷ Leonard D. White, *Introduction to the Study of Public Administration*, (Macmillan Publishing, New York, 4th ed., 1955)

considered as a method of promotion provided it is kept within limits. Employees prefer this rule because an eligible employee who has served longest is automatically awarded the promotion. It is because of the objectivity that characterises seniority and is used to eliminate favouritism or the suspicion of favouritism. White also explained that experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true.

Seniority in service is one of the important factors in making promotion. The well-known methods which are adopted in the recruitment rules for making promotions are (1) seniority-cum-merit; (2) promotion by selection. While the method of seniority-cum-merit is generally prescribed for promotions in the lower cadres, the method of promotion by selection is adopted in making promotion to the higher echelons of the services. The question of adopting seniority-cum-merit method or selection method is a complicated administrative problem and had to be decided by the concerned authority. In the seniority-cum-merit method, seniority is of great importance.²⁰⁸

In the case of selection method also seniority has some importance. But it can be safely said that seniority by itself is no basis to make promotion in either of the methods. Dealing with the problem relating to promotion policy, the Supreme Court in *Sant Ram Sharma*²⁰⁹ said that there are various conflicting factors upon which a proper promotion policy is based. The reason behind guaranteeing a promotion by seniority is because of its absolute objectivity. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of the public business.

²⁰⁸ M. Ramajois, *Services under the State*, 473 (Indian Law Institute, New Delhi, 2007)

²⁰⁹ *Sant Ram Sharma v. State of Rajasthan*, AIR 1967 SC 1910: 1968 (1) SCR 111

Therefore, the challenge that lies with the administration is to strike a balance between seniority and merit; only then can a proper promotion policy can be ensued.

Generally speaking, a person gets seniority in the promotion, effective from his date of promotion, in the absence of rules to the contrary. Thus, a person promoted earlier would be senior to one promoted later. The Promotion of reserved candidates in excess of the quota as per roster point would be treated as *ad hoc* promotions. Their seniority would be counted only from such time as their promotion against a post created by a future vacancy of a post held by a reserved candidate.²¹⁰

The proviso to article 335 inserted by the Constitution (Eighty-second) Amendment Act, 2000 enables the state to make any provision in favour of the members of the scheduled castes or scheduled tribes for relaxation of qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion in services under the State.

In Capoor, the Supreme Court observed as follows:

We fail to see why administrative machinery which secures for the most meritorious, chances of superseding their seniors, in promotions to higher posts shall have an adverse and not beneficial effects upon the morale of members of State services or upon incentives for better work and efficiency. No doubt care has to be taken that it is so operated as to really secure the choice of the most meritorious by honest and rigorous application of correct and proper tests.

The general principles adopted for appointment by promotion are merit-cum-seniority and seniority-cum-merit.

i. Merit-cum-seniority

When promotion is made by merit-cum-seniority, the qualitative aspects of service, i.e., merit and ability, are more emphasised upon, rather than seniority. In other words, the role and significance of seniority is lesser in such criterion. It is only where merit and ability are approximately equal, that seniority is given some weight. In view of the principle of merit-cum-seniority, Mathew, J., opined that seniority should play a secondary role while considering any officer for promotion. Merit and suitability are the

²¹⁰ *Ashwani Kumar Singh v. UP Public Service Commission*, (2003) 11 SSC 584

guiding principles and it is only when they are ‘roughly equal’ that seniority can be a determining factor.

ii. *Seniority-cum-merit*

The law relating to promotions to be granted on the basis of seniority-cum-merit has been settled by the Supreme Court in various decisions. In *State of Mysore vs. Syed Mahmood*²¹¹, it was held that an officer cannot claim promotion as a matter of right by virtue of seniority alone in situations where promotion is based on seniority-cum-merit. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

In the case of *State of Kerala vs. N.M. Thomas*²¹², again, the Supreme Court gave us the meaning of seniority-cum-merit. It propounded the meaning of seniority-cum-merit as giving priority to the senior even though he is less meritorious given the minimum necessary merit requisite for efficiency of administration.

In *B.V. Sivaiah vs. K. Addanki Babu*²¹³, a three-Judge Bench of the Supreme Court considered the question “what is meant by seniority-cum-merit”. It was held that the criterion of ‘seniority-cum-merit’ in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

In *Union of India vs. Lt. Gen. Rajendra Singh Kalyan*²¹⁴, the Apex court again held that what is required in seniority-cum-merit is a fulfilment of certain minimum merit or satisfying a benchmark previously fixed, and subject to the fulfilling the said requirement, the promotion is based on seniority.

²¹¹ AIR 1968 SC 1113

²¹² AIR 1976 SC SC 490

²¹³ (1998) 6 SCC 720

²¹⁴ (2000) 6 SCC 698

The question whether minimum qualifying marks could be prescribed for assessment of past performance and interview, where the promotions are to be made on the principle of seniority-cum-merit came up for consideration in *Rajendra Kumar Srivastav vs. Samyut Kshetriya Gramin Bank*²¹⁵. It was observed by the Supreme Court that the principle of seniority-cum-merit, for promotion, is different from the principle of ‘seniority’ and the principle of ‘merit-cum-seniority’. Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum necessary merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard and fast rule as to how the minimum necessary merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit as a basic requirement, will not militate against the principle of seniority-cum-merit. Thus, it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of seniority-cum-merit. What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made according to merit instead of seniority from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit are bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit.

The position was again settled in the recent judgment of *Haryana State Warehousing Corp. vs. Jagat Ram*²¹⁶. The Court reiterated the settled position that the criterion of

²¹⁵ (2010) 1 SCC 335

²¹⁶ (2011) 3 SCC 422 at 433-434

seniority-cum-merit is different from the criterion of merit and also the criterion of merit-cum-seniority. Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. Seniority-cum-merit means that, given the minimum necessary merit required for efficiency of administration, the senior, though less meritorious, shall have priority in the matter of promotion and there is no question of further comparative assessment of the merit of those who were found to have the minimum necessary merit required for efficiency of administration. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employees. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be considered for promotion on the basis of seniority-cum-merit.

2.4.2. Advantages of the Principle of Seniority

The principle of seniority surely has its own set of advantages which can be summarised as under²¹⁷:

- i. Seniority is objective in its assessment of the employees. There is a general perception that the principle of seniority is relatively free from favouritism, nepotism, communalism and political affiliations. It is considered to be fair and free from biases.
- ii. In this policy, an employee is rewarded for gaining rich experience over the years. It is based on the belief that an experienced person discharges his functions in a more effective manner than his junior without experience.
- iii. It is impartial and universal in its application. It gives a chance to everybody for moving up the official ladder and this motivates the person to work harder.
- iv. It is based on the principle of equity and justice.
- v. Personnel can be promoted automatically. There is no scope for human manipulation.

Therefore, it is for the state to formulate a proper promotion policy and to reserve certain specified quota for promotion. After laying down a proper promotion policy the most

²¹⁷ Rajesh K. Jha (ed.), *Public Personnel Administration*, 13 (Pearson, 1st ed., 2012)

important aspect of the matter is, as observed by the Supreme Court, an honest and sincere evaluation of merit and suitability of civil servants with reference to relevant criteria. Fair evaluation is of crucial importance to administrative efficiency and the morale of public service.

2.4.3. Performance Appraisal Report

The 'fair evaluation' system that has been referred to in the previous paragraph indicates the importance of a Performance Appraisal System. Every organisation has a system of assessment of performance of its employees periodically for determining their output as well as for deciding on their promotion. A Performance Appraisal Report, in a government service, is a key performance indicator in which quantitative gradation of performance is assessed by awarding scores. It, thus, serves a short term purpose of assessing the usefulness of an employee to the organisation, and in the long run determines his potential for elevation to higher levels.

Following are the main features of the PAR system:

1. It is written for each financial year.
2. If PAR for a financial year is not recorded by 31st of December, no remarks may be recorded thereafter and the officer may be assessed on the basis of the overall record and self-assessment for the year if he/she has submitted his/her self-assessment on time.
3. A PAR is also written when either the reporting officer or the officer reported upon relinquishes charge of the post. When more than one report is written during a financial year, each report shall indicate the period to which it pertains.
4. Only one report for a particular period is written during the financial year and there shall be a single reporting, reviewing and accepting authority at each level of assessment which shall be specified in the channel for writing PARs.
5. If more than one person of the same superior level supervises the performance of the officer, the government shall identify the person to report or review well in advance of the relevant assessment year.
6. If the reporting authority has not seen the performance, then, the next immediate authority that has seen it for three months shall write the report. Similarly, the reviewing

authority has also not seen, but the accepting authority has seen it for three months, then he/she shall write the report.

7. If neither the reporting nor the reviewing nor the accepting authority has seen the performance for at least three months, then none of them shall write the PAR and entry, accordingly, shall be made in the self-assessment report.

8. No authority shall write a PAR after he/she demits office.

i. Administrative Reforms Commission of India on Performance Appraisal

a. At the end of each year, the official reported upon should submit a brief resume, not exceeding three hundred words, of the work done by him, bringing out his special achievements. The resume should be submitted to the reporting officer and should form a part of the confidential report. This should be taken into account by the reporting officer while making his report or comments.

b. Only three gradations are to be made, viz., 'fit for promotion', 'not yet fit for promotion', when writing the confidential reports of secretariat officers of the level of under-secretary and above. Further, it has to be indicated whether the officer reported upon has to be indicated whether the officer reported upon has any outstanding qualities which entitle him for promotion out of turn.

c. Good work done during the year should receive prompt appreciation either on a file or in a tour or inspection note. The official concerned should be allowed to quote these in his resume.

ii. Review of the Performance Appraisal Report

A PAR is reviewed in the following manner:

(a) The reviewing authority shall record his/her remarks on the PAR, within the specified time frame.

(b) Where the reviewing authority has not seen, and the accepting authority has seen the performance of an officer for at least three months during the period for which the performance appraisal report is written, the accepting authority shall review the performance appraisal report.

(c) It shall not be competent for the reviewing authority, or the accepting authority, to review or accept any such PAR unless it has seen the performance of an officer for at least three months during the period for which the report has been written, and in every such case an entry to that effect shall be made in the PAR.

(d) It shall not be competent for the reviewing authority or the accepting authority to review any such performance appraisal report, where the authority reviewing the PAR is a government servant after one month of his retirement from service, and in other cases, after one month of the date on which he/she demits office.

2.5. A Sum-up

The constitutional code of equality and equal opportunity is a charter for equals, and hence equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially within the same class.²¹⁸ In terms of article 16 of the Constitution, the employees similarly situated cannot be discriminated. Employees having the same qualifications, thus, must be considered equally for promotion.²¹⁹ However, as a matter of fact, a right to promotion cannot be vested upon an official under Article 16. At the least, he can get be considered for promotion which is guaranteed under the said Article.

It is already seen that the right to a public employment is a constitutional right under Article 16 (1). Promotion, being an aspect of public employment, is also protected by Article 309 and any statutes, rules and regulations or instructions made under it. But the relevant provisions must be conformable to the rights guaranteed in Part III and IV of the Constitution. Article 21 guarantees the right to life which guarantees the right to livelihood, to a many the assured tenure of service is the source, the deprivation thereof must be in accordance with the procedure prescribed by law conformable to the mandates of Articles 14 and 21 as be fair, just and reasonable but not fanciful, oppressive or at vagary. The need for the fairness, justness or reasonableness of the procedure was elaborately considered in Maneka Gandhi case and it hardly needs reiteration.²²⁰

²¹⁸ *Vijay Lakshmi v. Punjab University*, AIR 2003 SC 3331

²¹⁹ *Union of India through Govt. of Pondicherry v. V. Ramakrishnan*, AIR 2005 SC 4295

²²⁰ *Ashok Kr. Gupta vs. State of Uttar Pradesh*; (1997) 5SCC 201

Reservation in appointments or posts in favour of any ‘backward classes of citizens’ is guaranteed under Article 16(4) of the Constitution of India. This is done for those who have not been adequately represented in the Services under the State. However, the clause is only an enabling provision and no right or duty can be read into it. But as held in *State of Kerala v. N. M. Thomas*, it is not an exception to the general principle in Article 16(1) but an emphatic statement of equality of opportunity guaranteed under clause (1) which means equality between employees belonging to the same class and not equality between separate and independent classes of employees. Thus, in the case of the Scheduled Caste and Scheduled Tribes who suffer from socio-economic backwardness, the fundamental right to equality of opportunity justifies separate categorisation for the purpose of “adequate representation in State services.” The Courts have however, held that Article 16(4) has got to be read with Article 335 inasmuch as the latter states that while considering SC and ST claims maintenance of efficiency of administration must be kept in view.

In *T. Devadasan v. Union of India*²²¹, the Supreme Court when called upon to pronounce on the constitutionality of the ‘carry-forward’ rule, held the rule ultra vires by a majority of four to one on the ground that the power vested in the State Government under Article 16(4) could not be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of classes other than backward.

The Mandal Commission had in its report recommended 27 per cent reservation for backward classes in view of the limit of 50 per cent imposed by the Supreme Court. In its judgment in *Indra Sawhney v. Union of India*, the Supreme Court decided that there was no reservation in promotion and that the total reserved quota did not exceed 50 per cent except in extraordinary circumstances. To meet this situation, Article 16 (4A) was inserted vide the Seventy-seventh Amendment providing reservation in matters of promotion in services under the State for the Scheduled Castes and the Scheduled Tribes. By adding Clause (4B) to Article 16 it as however clarified that the unfilled reserved vacancies are to be treated as a separate class and are not to be included under the prescribed ceiling of fifty per cent reservation of vacancies of the year. In 2002, Clause (4B) was further amended vide the Eighty-fifth Constitution Amendment Act,

²²¹ AIR 1964 SC 179

2002 to include the principle of ‘consequential seniority’ for the promotees. The Eighty Fifth Amendment came into operation with effect from 17 June, 1995.

Therefore, it can be precisely summed up that promotion based on an equality of opportunity and seniority attached to such promotion are the facets of the fundamental rights guaranteed under Article 16(1) and in matters relating to civil services, under Article 309 of the Constitution.

The seniority rule of continuous officiation is interlinked with the promotional rule based on equal opportunity and the same cannot be delinked.²²² It has been held that when promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying the principles of equal opportunity stated in Article 16(1). For example, if the promotion is by the rule of “seniority-cum-suitability” the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first for promotion and be promoted if found suitable.²²³

The PARs, on the basis of which seniority and promotion is made, have had great confidentiality about them. Unless there was something adverse in it the contents of the comments of the reporting officer, reviewing authority and the accepting authority would not be informed to the officer reported upon. However, an opportunity was given to make representation against the adverse remarks if any, but if the officer was graded as satisfactory, average, etc., it was not deemed to be an adverse entry. There has been great confusion about the confidential reports. The officer reported upon was supposed to write his/her own self-assessment report, which was to become the basis for the reporting officer. Sometimes, if the officers wanted to harass they would not write the report itself or grade the officer as satisfactory. Justification was required to be given only of an adverse entry but not for any remarks categorizing the officer as average or satisfactory.

²²² *Jatinder Pal Singh v. State of Punjab*, AIR 2000 SC 609

²²³ Durga Das Basu, *Commentary on the Constitution of India*, Vol. 2, 1929 (LexisNexis ButterworthsWadhwa, Nagpur, 8th ed., Reprint 2012)