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2024 INSC 562

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE / ORIGINAL JURISDICTION

Civil Appeal No. 2317 of 2011

The State of Punjab & Ors. **…Appellants**

Versus

Davinder Singh & Ors. **…Respondents**

With
C.A. No.6936 of 2015

With
C.A. No.5597 of 2010

With
W.P.(C) No. 21 of 2023

With
C.A. No.5593 of 2010

With
S.L.P.(C) No.30766 of 2010

With
S.L.P.(C) No. 8701 of 2011

With
S.L.P.(C) Nos.36500-36501 of 2011

With
T.C.(C) No.38 of 2011

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With
T.P.(C) No.464 of 2015

With
W.P.(C) No.1477 of 2019

With
C.A. No.5586 of 2010

With
C.A. No.5598 of 2010

With
C.A. Nos. 5595-5596 of 2010

With
C.A. No.2324 of 2011

With
T.C.(C) No.37 of 2011

With
C.A. No.5589 of 2010

With
C.A. No.5600 of 2010

With
C.A. No.5587 of 2010

With
S.L.P.(C) Nos.5454-5459 of 2011

With
C.A. No.2318 of 2011

With
C.A. No.289 of 2014

And With
W.P.(C) No.562 of 2022

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Dr Dhananjaya Y Chandrachud, CJI

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PART A

1. The reference to this Constitution Bench raises significant questions relating to the right to equal opportunity guaranteed by the Constitution. The principal issue is whether sub-classification of the Scheduled Castes for reservation is constitutionally permissible.

A. Background

i. Relevant constitutional provisions

2. Article 14 of the Constitution stipulates that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Article 15(1) states that the State should not discriminate against any citizen on grounds only of religion, race, **caste**, sex, place of birth or any of them. Article 15(4) stipulates that nothing in Article 15 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.[1]

3. Article 16 deals with equality of opportunity in matters of public employment. Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (2) stipulates that no citizen shall be discriminated in or be ineligible for any employment or office under the State on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Clause (4)

[1] Article 15 (4) "Nothing in this article or in clause (2) of Article 29 shall prevent the State form 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."

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of the provision states that nothing in Article 16 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[2].

4. Article 366(24) of the Constitution defines the term 'Scheduled Castes' to mean such castes, tribes or parts of or groups within such castes, races or tribes as are **deemed** under Article 341 to be Scheduled Castes for the purposes of the Constitution. Article 341(1) grants the President the power to notify the castes, races or tribes (or parts of or groups within castes, races or tribes) which shall be **deemed** to be Scheduled Castes for a State or a Union Territory for the purposes of the Constitution. The President has been empowered to issue the notification with respect to a State in consultation with the Governor of the State. Article 341(2) stipulates that Parliament may by law **include or exclude** any caste, race, or tribe (or part of or group within any caste, race, or tribe) from the list of Scheduled Castes specified in the notification and that a notification issued under clause (1) shall not be varied by any subsequent notification. Article 341 is extracted below for reference:

> "Article 341. Scheduled Castes.- (1) The President may with respect to any State or Union Territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes, or parts of or groups within castes, races, tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.

[2] Article 16 (4) "Nothing in this article shall prevent the State from making any provision for 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."

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> (2) Parliament may by law include or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

5. Articles 342[3] and 342-A[4] relate to notification of Scheduled Tribes and socially and educationally backward classes respectively and contain provisions *pari materia* to Article 341.

ii. The genesis of the reference to the Constitution Bench

6. The State Legislature of Punjab enacted the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act 2006[5]. The long title stipulates that it is a statute to provide for reservation in services for the members of the Scheduled Castes and Backward Classes and for matters incidental thereto. Section 2(f) defines "Scheduled Castes" as Scheduled Castes notified by the President under Article 341 of the Constitution by the Constitution (Scheduled Castes) Order 1950, as amended from time to time.

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[3] Article 342. Scheduled Tribes.-(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.
(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[4] Article 342A. Socially and educationally backward classes.—(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify 6 [the socially and educationally backward classes in the Central List which shall for the purposes of the Central Government] be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.
(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[5] "Punjab Act"

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Section 4(2) provides that reservation of twenty-five percent shall be made for the members of the Scheduled Castes and twelve percent for Backward Classes while filing up vacancies by direct recruitment in services. Section 4(5) stipulates that fifty percent of the vacancies of the quota reserved for the Scheduled Castes in direct recruitment shall be offered to Balmikis and Mazhabi Sikhs, if available, as a first preference from amongst the Scheduled Castes.

7. Proceedings were instituted under Article 226 of the Constitution for challenging the validity of Section 4(5) of the Punjab Act. By a judgment dated 29 March 2010, the High Court of Punjab and Haryana declared Section 4(5) unconstitutional, relying on the judgment of the Constitution Bench of this Court in **EV Chinniah** v. **State of Andhra Pradesh**[6].

8. Opposing the State's appeal against the order of the High Court, the respondents relied upon the judgment of the Constitution Bench in **Chinnaiah** (supra). The State submitted that **Chinnaiah** (supra) does not apply to the controversy in hand and that the decision is in any event, not consistent with the judgment of the nine-Judge Bench in **Indra Sawhney** v. **Union of India.**[7] On 20 August 2014, a three-Judge Bench referred the correctness of **Chinnaiah** (supra) for consideration by a larger Bench. The three-Judge Bench observed that the judgment needs to be revisited, considering Article 338, the judgment of this Court in **Indra Sawhney** (supra) and the interplay between Article 16 and Articles 338 and 341 of the Constitution.

[6] (2005) 1 SCC 394
[7] (1992) Supp (3) SCC 217

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9. On 9 November 1994, the Government of Haryana issued a notification[8] by which the Scheduled Castes in the State were classified into two categories - Blocks A and B - for the purposes of reservation. Block B consisted of Chamars, Jatia Chamars, Rahgars, Raigars, Ramdasias or Ravidasias. Block A consisted of the remaining thirty-six castes in the list of Scheduled Castes for the State. Within the quota reserved for Scheduled Castes in direct recruitment for Government jobs, fifty percent of the vacancies were to be offered to candidates from Block A and the other fifty percent were to be offered to candidates from Block B. The notification further stipulated that in case suitable candidates from Block A were unavailable, candidates from Block B should be recruited against those vacancies. Similarly, in the event that suitable candidates from Block B were unavailable, candidates from Block A should be recruited against those vacancies. Thus, preference would be given to castes belonging to Block A and Block B in the fifty per cent earmarked for them. Proceedings were initiated under Article 226 for challenging the constitutional validity of the notification. By a judgment dated 6 July 2006, the High Court of Punjab and Haryana quashed the notification on the ground that the sub-classification of castes placed in the list of Scheduled Castes is unconstitutional in view of the judgment of this Court in **Chinnaiah** (supra). The Special Leave Petitions challenging the judgment of the High Court of Punjab and Haryana were tagged with the appeals involving the challenge to the Punjab Act.

[8] Notification No.22/5590-3-GS/111

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10. The State Legislature of Tamil Nadu enacted the Tamil Nadu Arunthathiyars (Special Reservation of seats in educational institutions including private educational Institutions and of appointments or posts in services under State within the Reservation for the Scheduled Castes) Act 2009[9]. The long title to the legislation states that it is an Act to provide for reservation of seats to Arunthathiyars in educational institutions, including private educational institutions in the State and for appointment in services under the State. The Tamil Nadu Act defines Arunthathiyars to mean the castes of Arunthathiyar, Chakkiliyan, Madari, Madiga, Pagadi, Thoti and Adi Andhra from the list of seventy-six Scheduled Castes notified by the President under Article 341, as amended from time to time.[10] Section 3 stipulates that sixteen per cent of the seats reserved for the Scheduled Castes in educational institutions shall be offered to the Arunthathiyars, if available, having regard to the social and educational backwardness of the community. Section 4 makes a similar provision for the Arunthathiyars in recruitment to Government posts.[11] Proceedings under Article 32 of the Constitution were instituted before this Court for challenging the constitutional validity of the Tamil Nadu Act on the ground that it contravenes the judgment of this Court in **Chinnaiah** (supra).

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[9] "Tamil Nadu Act"

[10] Tamil Nadu Act; Section 2(a)

[11] 4. Notwithstanding anything contained in the 1994 Act or the 2006 Act or in any other law for the time being in force or in any judgment, decree or order of any Court or other authority, having regard to the social and educational backwardness of Arunthathiyars included in the Scheduled Castes, sixteen per cent of the appointments or posts reserved for the Scheduled Castes shall be offered to Arunthathiyars, if available, in appointments or posts in the services under the State, on preferential basis amongst the Scheduled Castes, in such manner as may be prescribed.

Explanation.- For the purposes of this Act, "services under the State" includes the services under-

(i) The Government
(ii) He legislature of the State
(iii) Any local authority
(iv) Any Corporation or Company owned or controlled by the Government; or
(v) Any other authority in respect of which the State Legislature has power to make laws

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The batch of matters challenging the Tamil Nadu Act was tagged with the batch of matters challenging the Punjab Act.

iii. The judgment in Chinnaiah

11. A three - judge Bench of this Court was called upon to adjudicate on the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act 2000. The Act was enacted following the recommendations of the Ramachandran Raju Commission constituted by the State Government. The Commission was tasked with ascertaining the groups among the Scheduled Castes in the State who had failed to avail of the benefits of reservations in college admissions and state public services. The Commission found inter-se backwardness among the Scheduled Castes in the state in matters of reservation in education and appointment. Accepting its findings - that there were inequalities among the Scheduled Castes as far as the distribution of the benefits of reservation was concerned - the State Government promulgated the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Ordinance 1999. While proceedings challenging the Ordinance were pending, the State enacted a law to replace Ordinance. Section 3, which provided for 'Rationalisation of Reservations,' apportioned the benefits of reservation among Scheduled Castes into four groups – Groups A, B, C and D - in varying percentages : 1% for Group A, 7% for Group B, 6% for Group C and 1% for Group D respectively, subject to the availability of eligible candidates. The Andhra Pradesh High Court rejected challenges to the Act, leading to appeals which came to be decided by this Court in **Chinnaiah** (supra).

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12. The appellants argued that the State legislature lacked legislative competence to enact the law. They argued that once enumerated in the Presidential List under Article 341 of the Constitution, the Scheduled Castes constitute a homogenous class, which is incapable of further subdivision/sub-classification. Such a classification, they argued, amounted to tinkering with the Presidential List, in violation of Article 341(2) and Article 14 of the Constitution.

13. The respondent-State on the other hand, argued that Article 341 allows the President to identify certain castes as Scheduled Castes and only Parliament can include or exclude entries from the List so created. The State argued that it could, in exercise of powers under Articles 15(4) and 16(4) decide the scope and extent of reservations. This power, they argued, was not limited by Article 341 which operates in an entirely different field. The State urged that the Act of 2000 was a form of affirmative action and it did not exclude or include anyone from the Presidential List under Article 341. Such a sub-classification of the Scheduled Castes was claimed to be permissible under Article 16(4) for the same reason that this Court had held in **Indra Sawhney** (supra) that the backward classes could be divided into the 'more backward' and 'backward', depending on inter-se backwardness.

14. A Constitution Bench of this Court, speaking through Justice Santosh Hegde (for himself, Justice SN Variava and Justice BP Singh), Justice HK Sema and Justice SB Sinha unanimously held that the Andhra Pradesh Act was unconstitutional.

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15. Justice Hegde examined whether the Andhra Pradesh Act tinkered with the Presidential List notified under Article 341 and held that the States have no power to deal with the Scheduled Castes except the maintenance of efficiency of administration. Justice Hegde observed that certain members of the Constituent Assembly sought to give power to the States to interfere with the list but the amendments to that effect were unsuccessful. Analysing the opinion of Justice Hegde, the following formulations emerge:[12]

    a. The Scheduled Castes form a class by themselves[13] as elucidated in the opinions of Justice Krishna Iyer and Justice Fazl Ali in State of Kerala v. NM Thomas;[14]

    b. The purpose of the Act was to divide the castes in the Presidential List and then to distribute the 15% reservations for the Scheduled Castes in the state among four groups. The Act did not provide reservations for the first time but redistributed them by sub-classifying the Scheduled Castes. Reservations are not a constitutional mandate and once the state has fulfilled the obligation to reserve certain seats under Articles 15(4) and 16(4), it cannot apportion reservations among sub-classes. Notwithstanding the purpose of such sub-classification, the State cannot claim legislative competence under Entry 41, List II and Entry 25, List III of the Seventh Schedule in order to divide the Scheduled Castes' List. The pith and substance of the law in question was not traceable to these entries;[15]

[12] Chinnaiah (supra) [Justice Hegde, 13-19].
[13] Chinnaiah (supra) [Justice Hegde, 20-26].
[14] Chinnaiah (supra) [Justice Hegde, 82, 135 and 169].
[15] Chinnaiah (supra) [Justice Hegde, 30-31].

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c. The Scheduled Castes constitute a class, and a classification already exists. The issue was whether a further classification is permissible within this class with the objective of providing reservations.[16] The rationale of **Indra Sawhney** (supra), to the extent that it permitted sub-classification of the Other Backward Classes[17], did not apply to the Scheduled Castes.[18] Sub-classification was akin to giving preference to a 'miniscule proportion' of the Scheduled Castes, over other groups and would be impermissible in view of Article 14;[19] and

d. The Constitution creates a legal fiction in terms of which the Scheduled Castes constitute a "class as a whole". The States cannot sub-divide them. Such a sub-classification would tinker with the Presidential list and violate Article 14. If the benefits of reservation are not being distributed equitably, they can be supplemented by additional measures such as training, which would not be contrary to Articles 14 and 15.[20] A further sub-classification amongst the Scheduled Castes would not be reasonable and a uniform yardstick must be adopted to give benefits to the Scheduled Castes.[21]

16. In his concurring opinion, **Justice HK Sema** held that the purpose of reservations is to afford special protection to the members of the Scheduled Castes and Scheduled Tribes as a homogenous class of persons. Further classification of this class of people would amount to tinkering with the

[16] Chinnaiah (supra) [Justice Hegde, 38].
[17] "OBCs"
[18] Chinnaiah (supra) [Justice Hegde, 38].
[19] Chinnaiah (supra) [Justice Hegde, 39,40]
[20] Chinnaiah (supra) [Justice Hegde, 43]
[21] ibid.

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Presidential List. This regrouping of a homogenous group would, also amount to reverse discrimination and be violative of Article 14.[22]

17. In his concurring opinion, Justice SB Sinha held that **Indra Sawhney** (supra), while determining whether backward classes could be divided into more backward and backward classes, was not dealing with Scheduled Castes.[23] In that context, Justice Sinha observed:

a. Unlike the Other Backward Classes, Scheduled Castes and Scheduled Tribes are treated as a separate class by the Scheduled Castes and Tribes Orders;[24]

b. The State had failed to establish the reasonableness of its classification among the Scheduled Castes;[25]

c. The Relli Community was the most backward community and hardly received any benefits of reservations. On the other hand, the Adi Andhra community was numerically larger and educationally better off compared to the Rellis. Both these groups were placed in Group A and Group D respectively and each was given the same 1% share in total reservations. The Act thus wrongly treated them alike despite apparent differences, without any basis;[26]

d. Micro-classification was impermissible under Article 14;[27]

[22] Chinnaiah (supra) [Justice Sema, 49, 50]
[23] Chinnaiah (supra) [Justice Sinha, 75]
[24] Chinnaiah (supra) [Justice Sinha, 77]
[25] Chinnaiah (supra) [Justice Sinha, 81]
[26] Chinnaiah (supra) [Justice Sinha, 97].
[27] Chinnaiah (supra) [Justice Sinha, 98]. Relied on Triloki Nath v. State of J&K 1969 1 SCR 103; State of UP v. Pradip Tandon 1975 1 SCC 267; Akhil Bhartiya Soshit Karamchari Sangh (Rly) v. Union of India (1981) 1 SCC 246.

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e. Backwardness of the class was the link holding this class together and a classification that is justifiable based on backwardness of the class cannot be based on backwardness of the caste;[28]

f. Article 16(4) must be read with Article 335 and efficiency of administration cannot be sacrificed to benefit some castes out of the homogenous Scheduled Castes;[29] and

g. The validity of the sub-classification and not the extent of the reservation was in question. Therefore, the argument that the States have the prerogative to decide the extent of reservations was inapplicable.[30] The State could certainly stipulate the legislative policy about the extent of reservations but it could not take away the benefit of reservations on the ground that certain groups among the Scheduled Castes have advanced in the hierarchy.[31]

iv. The reference

18. On 27 August 2020, in **State of Punjab** v. **Davinder Singh**[32], a Constitution Bench held that the judgment in **Chinnaiah** (supra) requires to be revisited by a larger Bench of seven Judges because it failed to consider significant aspects bearing on the issue. These aspects have been formulated thus:

a. In **Indra Sawhney** (supra),[33] this Court held that it is constitutional to classify the backward class into the 'backward' and the 'more backward'

[28] Chinnaiah (supra) [Justice Sinha, 104].
[29] Chinnaiah (supra) [Justice Sinha, 105].
[30] Chinnaiah (supra) [Justice Sinha, 112,113].
[31] Chinnaiah (supra) [Justice Sinha, 114].
[32] (2020) 8 SCC 1
[33] (1992) Supp (3) SCC 217 [Justice Reddy,803];[Justice Sawant, 524 and 525]

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class of citizens. The provisions of Articles 341, 342, and 342A are *pari materia*. That being the case, this Court has to analyse how a contrary conclusion to the effect that sub-classification is permissible within the Backward Class but not within the Scheduled Castes, could be reached. In **Indra Sawhney** (supra) the phrase "Backward Classes" in Article 16(4) was interpreted to include both socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes;[34]

b. The Scheduled Castes are not a homogenous class[35]. Preferential treatment can be given to the most downtrodden of the class who are not adequately represented. Such a sub-classification is made to provide equality of opportunity, so as to achieve the purpose of reservation;[36]

c. It would be open to the State, under Article 16(4), to grant the benefits of reservation on a rational basis to certain castes within the Scheduled Castes by fixing a reasonable quota of the reserved seats for them if they are inadequately represented;[37] and

[34] (2020) 8 SCC 1 [42]
[35] Relied on the observation of Justice Reddy in Indra Sawhney (supra)
[36] (2020) 8 SCC 1 [50]
[37] (2020) 8 SCC 1 [52, 56]

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d. Preferential treatment to certain castes would not lead to the exclusion of other castes from the list prepared under Article 341[38]. In **Jarnail Singh** v. **Lachhmi Narain Gupta**[39], this Court observed that the exclusion of the "creamy layer" from the Scheduled Castes for securing the benefit of reservation does not tinker with the Presidential List under Article 341. All the castes included in the list of Scheduled Castes are given the benefit of reservation even if they are sub-classified.

B. Submissions

19. The submissions of the counsel were restricted to the issue of whether the judgment of this Court in **Chinnaiah** (supra) requires to be reconsidered since the High Court had held that the Punjab Act and the Haryana Notification were unconstitutional solely for the reason that they are contrary to the above judgment.

i. Submissions of Petitioners

20. Mr Gurminder Singh, Advocate General for the State of Punjab and Mr Shadan Farasat, Additional Advocate General made the following submissions:

a. The judgment in **Chinnaiah** (supra) erroneously treats the Scheduled Castes as an indivisible monolith/block;

[38] (2020) 8 SCC 1 [35]
[39] (2018) 10 SCC 396

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b. Preferential treatment promotes substantive equality. **Chinnaiah**(supra) is against the very idea of reservations which mandates protective discrimination based on relative backwardness;

c. Justice SB Sinha's judgment in **Chinnaiah** (supra) is self-contradictory. While it recognizes inter-se disparity among the Scheduled Castes, it holds the remedy to address this disparity to be unconstitutional. Once inter-se disparity is acknowledged, sub-classification of the class would be in pursuance of substantive equality;

d. The State has the power to sub-classify because the enabling power to reserve seats includes ancillary and supplemental provisions such as preferences, concessions and exemptions;

e. In **Indra Sawhney** (supra) this court has recognised internal differences between castes.[40] Sub-classification within a class aligns with the opinion of Justice Mathew in **NM Thomas** (supra) holding that further classification within the class was possible;[41]

f. The Scheduled Castes are not a homogenous group but face varying degrees of discrimination. The first part of the obligation under Article 16(4) to ascertain backwardness has been accomplished by the President and subsequently, by the Parliament under Article 341. The second part of the enquiry about 'inadequate representation' is a

[40] Relied on Indra Sawhney (supra) [Justice Reddy, 802].
[41] Relied on NM Thomas (supra) [Justice Mathew, 43]

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mandate for the States. If the Scheduled Castes list were to be treated as a monolith, it would render the second part of Article 16(4) otiose and make the role of the States redundant;

g. Sub-classification varies from the creamy layer principle since (i) economic advancement does not offset social discrimination faced by the Scheduled Castes; (ii) while the creamy layer excludes the socially advanced, sub-classification aims to identify within the Scheduled Castes, those who face the maximum social discrimination; (iii) sub-classification mainstreams certain castes and creates a preference based on qualitative inclusion, contradistinguished from exclusion of the creamy layer; and (iv) preferential treatment identifies certain castes within the Scheduled Castes' list, while the creamy layer exclusion applies to individuals;

h. Scheduled Castes do not lose their identity once enumerated because caste is a sociological reality while the enumeration in the list is through the operation of a legal fiction. The limited preference to some groups by sub-classification because of their relative disadvantage will not exclude the other Scheduled Castes in the List notified under Article 341;

i. The State Legislatures have the legislative competence to make preferences for the purposes of laws in relation to Entry 41 of List II and Entry 25 of List III of the Seventh Schedule; and

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j. Article16(4) is not subject to Article 335. 'Efficiency' under Article 335 must be defined in an inclusive sense.

21. Mr Kapil Sibal, senior counsel made the following submissions:

a. The Constitution permits sub-classification. Article 366(34) which defines the Scheduled Castes envisages that even a part of a caste or a group may be included;

b. While Justice Mathew in **NM Thomas** (supra) noted that "they are no castes in the Hindu fold but an amalgam of castes …", in **Chinnaiah** (supra), Justice Hegde replaced "they" with "there" in the above paragraph and noted instead, "there are no castes…". This replacement completely alters the meaning of the quotation in **NM Thomas** (supra) which was that the Scheduled Castes and Scheduled Tribes are a conglomeration of groups placed outside of the caste hierarchy, and not that Scheduled Castes/Scheduled Tribes are homogenous[42];

c. When Dr. B R Ambedkar stated in the Constituent Assembly that Article 341 is meant to "eliminate any kind of political factors" in "disturbing" the List, he was referring to inclusion and exclusion from the List. Sub-classification has no bearing on the power of inclusion and exclusion. Potential political tinkering cannot obviate the present constitutional need for acknowledging and remedying inter-se inequality among the Scheduled Castes;

[42] Chinnaiah (supra) [Justice Hegde, 22] relying on NM Thomas (supra) [Justice Iyer, 135]

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d. Article 342A of the Constitution inserted by the Constitution (One Hundred and Second Amendment) Act 2018 empowers the President to notify socially and educationally backward classes. This Article is *pari materia* to Article 341 and Article 342. Sub-classification is permissible for Schedule Castes because **Indra Sawhney** (supra) permits sub-classification for the Socially and Educationally Backward Classes and

after the inclusion of Article 342A, they are at par with the Scheduled Castes; and

e. **Chinnaiah** (supra) is not in line with empirical data collected by the State. According to the view of Justice Reddy in **Indra Sawhney** (supra)[43], several castes or tribes within the Scheduled Castes and Scheduled Tribes are not similarly situated.

22. Mr Shekhar Naphade, senior counsel appearing on behalf of the State of Tamil Nadu submitted that:

a. **Chinnaiah** (supra) does not provide connecting links between Article 341 and subclassification. The plain meaning of Article 341 does not limit the power of the State legislature to classify the listed Scheduled Castes; and

[43] Relied on Indra Sawhney (supra) [Justice Reddy, 795].

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b. Classification based on inter-se backwardness is in pursuance of Article 14. This inter-se backwardness is not among individuals but among groups in the Scheduled Castes. **Indra Sawhney** (supra) is applicable to sub-classification of the Scheduled Castes.

23. Mr Gopal Sankaranarayanan, senior counsel submitted on behalf of Intervenor Madiga Jana Seva Samiti that Scheduled Castes or Tribes are not castes because Article 366(24) uses “deemed”. Article 16(2) uses “only”; thus, a Scheduled Caste, identified due to historic untouchability, is not “caste” under Articles 15(1) and16(2).

24. Mr KK Venugopal, learned senior counsel for the Petitioner Madiga Reservation Porata Samithi submitted that Article 14 does not only mandate equal treatment to all but also bars discrimination by equal treatment of unequals. He submitted that Article 38(2) entitles those who are unequal in status to special treatment to bring them on the same plane. Article 341 has to be read along with Article 38(2).

25. Mr R Venkataramani, Attorney General of India submitted that Articles 14 to 16 and Articles 341 and 342 operate in different fields. Mere designation under Article 341 does not entail homogeneity.

26. Mr Tushar Mehta, Solicitor General of India submitted that equality is not a static concept. It has evolved from the judgment of this Court in **Champakam Dorairajan** (supra), to **Indra Sawhney** (supra). Sub-classification is an issue of rationalising the affirmative action regime.

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27. Mr Nidhesh Gupta, Senior Counsel submitted that adequate representation is a matter within the subjective satisfaction of the state, subject to backwardness and inadequacy of representation. Courts cannot scrutinize underlying data to reach that satisfaction of the state. Since Article 16(4) refers to "backward classes of citizens" collectively, Scheduled Castes are at par with the Backward Classes. Article 16(4) is a broader provision that Articles 15 (4) and 15(5). While Articles 15(4), 15(5) refer to "any special provisions for **the** Scheduled Castes..", Article 16(4) uses "..**any** backward class of citizens". The use of "any" in Article 16(4), as opposed to the use of the word "the" to qualify the beneficiary classes in Articles 15(4) and 15(5), indicates that there is a greater discretionary power under Article 16(4).

28. Mr Vijay Hansaria, Senior Counsel submitted that the List under Article 341 is not a constitutional provision in itself, but an executive order passed by the President that can be modified by Parliament.

29. Dr S Muralidhar, Senior Counsel appearing on behalf of the State of Andhra Pradesh submitted that the State has not enacted a new law consequent to the decision in **Chinnaiah** (supra).

30. Mr Arun Bhardwaj, Senior Counsel appearing on behalf of the State of Haryana submitted that there are disadvantaged groups within the Scheduled Castes and the State should be allowed to alleviate their concerns.

31. Mr Kanu Agarwal, standing counsel for Chandigarh submitted that affirmative action can be summarized as a two- step process including identification

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(Articles 341 and 342) and extension (i.e. how affirmative action can be undertaken).

32. Ms Shraddha Deshmukh, counsel submitted that rights cannot be bundled up for the unequal members of the Scheduled Castes, without ensuring that the rights accrue to them in proportion to their lack of representation. Sub-classification is therefore, essential for better representation of the weaker among the Scheduled Castes.

33. Mr Dama Sheshadri Naidu, Mr Rajesh Kumar Khanna, Mr Sidharth Luthra, senior counsel, and Dr Vivek Sharma, Mr Shivam Singh and Mr Sanjay Jain, counsel appearing on behalf of other Petitioners and Intervenors have adopted the above submissions.

ii. Submissions of Respondents

34. Mr Manoj Swarup, senior counsel made the following submissions:

a. The Scheduled Castes constituted by a notification issued by the President under Article 341(1) are a class in themselves. The latter part of Article 341(2) stipulates that no variation to the List is permitted except by a law enacted by Parliament. The class constituted by the Presidential notification can be **interfered** with only by Parliament under Article 341(2). As is evident from the Constituent Assembly debates on Article 341, Parliament is solely vested with the power to alter the Presidential list otherwise, the executive would tinker with the list to achieve political ends;

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b. Upon the issuance of a notification by the President under Article 341, the castes notified are **deemed** to be Scheduled Castes for the purposes of the Constitution. The castes which are included in the Presidential list under Article 341 are heterogenous. However, once notified, the castes are put in an artificial mould of homogeneity by the deeming fiction;

c. The necessary effect of the preferential treatment to Balmiki Sikhs and Mazhabis in the fifty percent seats reserved for Scheduled Castes in Punjab is that the persons belonging to other Scheduled Castes are **excluded** from those seats;

d. None of the entries in the Seventh Schedule deal with Scheduled Castes. The only entry under which a law on reservation for the Scheduled Castes can be enacted is Entry 97 of List I. Thus, even if sub-classification of the Scheduled Castes is permissible, only Parliament and not the Legislature of the State has the power to enact such a law;

e. The National Commission for Scheduled Castes constituted under Article 338 can consider any new data sets or experiences of the Scheduled Castes and make recommendations. However, the power to alter the list solely vests with Parliament;

f. Courts through a judicial exercise cannot include or exclude any caste from the list of Scheduled Castes or Scheduled Tribes notified by the President[44];

[44] Bhaiyalal v. Harikishan Singh, (1965) 2 SCR 877; State of Maharashtra v, Milind, (2001) 1 SCC 4; Bir Singh v. Dekhi Jal Board, (2018) 10 SCC 312

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g. Classification within the Scheduled Castes is based on **caste** which is impermissible by virtue of Article 16(2); and

h. Contrary to the submissions of the petitioners, **Chinnaiah** (supra) discusses the interplay between Articles 16(4) and 341 of the Constitution.

35. Mr Salil Sagar, senior counsel made the following submissions:

a. The direct impact and effects standard[45] must be used to decide the issue of whether granting preference to certain castes amounts to tinkering the Presidential List. Sub-classification, in **effect**, restricts the scope and operation of the Presidential list in the following manner:

i. It has an exclusionary effect, disturbing the scheme of reservation sought to be implemented;

ii. It disproportionately increases the share of reservation available to certain communities and decreases the share available to the rest of the communities; and

iii. The sub-grouping of castes violates the legal fiction in Article 341 by which a homogenous group is created for the purposes of the Constitution.

b. In **Indra Sawhney** (supra), this Court held that sub-classification of other backward classes is constitutionally valid. This Court cautioned against

[45] Relied on IR Coelho v. State of Tamil Nadu, (2007) 2 SCC 1

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the application of the same principles to Scheduled Castes and Scheduled Tribes; and

c. Sub-classification of the Scheduled Castes cannot be held constitutional merely because Articles 341, 342 and 342-A are *pari materia.* The classes represented by the Scheduled Castes and the Other Backward Classes are distinct. Castes which are notified as Scheduled Castes have a feature of commonality; they all suffer from the historical injustice of untouchability.

36. Dr KS Chauhan, senior counsel made the following submissions:

a. In **Indra Sawhney** (supra), this Court held that a caste can be a class for the purposes of reservation under Article 16 if the caste is socially and educationally backward[46]; and

b. In **Indra Sawhney** (supra), Justice Jeevan Reddy observed that Article 16(4) of the Constitution **mainly** contemplates that reservation must be on the grounds of social backwardness. There cannot be any further classification of the Scheduled Castes since all the castes which are notified as Scheduled Castes by the President share the commonality of social backwardness in the form of untouchability.

[46] (1992) Supp (3) SCC 217 [Justice Pandian, 57,60,67,82,95]; [Justice Jeevan Reddy, 782,784]

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37. Mr Sanjay Hegde, senior counsel made the following submissions:

a. This Court in the judgments delivered after **Indra Sawhney** (supra) has observed that it was limited in its application to Other Backward Classes[47];

b. In **State of Kerala** v. **NM Thomas**[48], this Court held that the Scheduled Castes constitute a class in themselves. Similar observations were made in **Akhil Bharatiya Soshit Karamchari Sangh (Railway)** v. **Union of India**[49];

c. The notification issued by the President under Article 341 can be **altered** only by law made by Parliament[50];

d. States must confer the benefits to members of all the castes notified by the President under Article 341. If the State Government is of the opinion that benefits are not required to be conferred to the caste, then it can make a recommendation for its exclusion from the list of Scheduled Castes; and

e. The purpose of conferring Parliament with the power to alter the list issued by the President under Article 321 is to prevent the tinkering of the list for political purposes.

[47] Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 [293, 393, 633]; Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396 [16, 24, 34]
[48] (1976) 2 SCC 310
[49] (1981) 1 SCC 246
[50] Relied on B. Basavalingappa v. D. Munichinnapa, (1965) 1 SCR 316; Bhaiya Lal v. Harikrishnan Singh, (1965) 2 SCR 877; Srish Kumar Chodhury v. State of Tripura, 1990 Supp SCC 220; Palghat Jilla Than dan Samudhya Samrakshna Samiti v. State of Kerala, (1994) 1 SCC 359; State of Maharashtra v. Milind, (2001) 1 SCC 4 [15]; Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312

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38. Mr Mallela Venkata Rao, counsel submitted that the opinion of Justice SB Sinha in **Chinnaiah** (supra) that other forms of affirmative action must be employed to remedy inter-se backwardness within the Scheduled Castes is the appropriate and constitutional approach.

39. Mahendra Kumar Mitra, Petitioner-in-person appearing on behalf of Dr. Ambedkar Scheduled Castes Federation, Karnataka submitted that the recommendation of the Justice Usha Mehra Committee to include Clause (3) to Article 341 providing Parliament the power to sub-categorize castes upon

a resolution received from the State was not accepted by the National Commission for Scheduled Castes[51].

40. Anusuchit Jaati-Janjati Adhikari Evam Karamchari Sangh, a social welfare association submitted that sub-classification of the Scheduled Castes defeats the purpose of providing special reservation to Scheduled Castes.

41. Mr Saket Singh, appearing for the Haryana Pradesh Chamar Mahasabha, submitted that the deeming fiction in Article 341 creates a common identity of Scheduled Castes even though each caste within the list possesses a unique identity. Counsel further submitted that the Constitution would expressly provide a provision for the special treatment of certain castes where necessary.

[51] 3rd meeting of the National Commission for Scheduled Castes held on 13.12.2010 under the Chairmanship of Dr PL Punia.

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42. Mr Vembadi Subramanian and Mr VK Biju, counsel, made submissions on the same lines.

C. Issues

43. The Constitution Bench has to adjudicate upon whether the sub-classification of Scheduled Castes for the purpose of providing affirmative action, including reservation is valid. In this context, the following issues arise for consideration:

a. Whether sub-classification of a reserved class is permissible under Articles 14, 15 and 16;

b. Whether the Scheduled Castes constitute a homogenous or a heterogenous grouping;

c. Whether Article 341 creates a homogenous class through the operation of the deeming fiction; and

d. Whether there any limits on the scope of sub-classification.

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D. Analysis

i. The jurisprudence on reservation

44. The jurisprudence surrounding reservations has undergone turbulations, both inside and outside the courts. Two crucial issues have dominated the jurisprudential debate – identifying the model of equality espoused by the Constitution and the interplay of equality with 'efficiency' or 'merit'. It is important that we trace the core principles governing reservations in India before we proceed to answer the issue of whether sub-classification of the Scheduled Castes is violative of Articles 14,15 and 16. This would enable us to analyze whether sub-classification furthers the constitutional promise of equality.

a. Reservation as an exposition of substantive equality

45. The purpose of the equal opportunity principle in Article 16(1) and the reservation provision in Article 16(4) has emerged as a focal point of the jurisprudence on reservations in this Court. A discussion of the journey of the competing models of equality that the Court has espoused and their evolution over the course of the years is necessary to understand the constitutional vision on equality.

I. The competing visions of equality

46. Articles 14, 15 and 16 of the Constitution encompass an equality code in pursuance of the preambular values of equality of status and opportunity and

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social justice. Article 14 lays down general principles governing equality by postulating that there must be "equality before the law" and "equal protection of law". In its formative years, this Court interpreted Article 14 through the lens of the classification doctrine[52] which is premised on the recognition that formal equality in law, by which every person irrespective of their circumstances is treated alike, does not translate to factual equality. The underlying foundation of this doctrine is that two persons who are not similarly situated cannot be treated alike.[53]

47. Articles 15(1) and 16(1) were viewed as an elucidation of the equality principle housed in Article 14.[54] However, the Courts were reticent in applying the doctrine of reasonable classification and its underlying assumption that 'not all persons (and not all situations) are alike' to the realm of reservation. The reason for the hesitation was that the means adopted (that is, reservation) were understood to not have relevance to securing equality of opportunity which was defined in terms of formal equality and efficiency[55]. In the State of Madras (now Tamil Nadu), seats in Medical and Engineering colleges were apportioned among different groups in the proportion set forth in a Government Order called the "Communal GO". Seats were apportioned in specific proportions for Non-Brahmins (Hindus), Backward Hindus, Brahmins, Harijans, Anglo-Indians, Christians and Muslims.[56] In **State of Madras** v.

[52] See State of West Bengal v. Anwar Ali Sarkar, 1952 AIR 75
[53] Chiranjit Lal Chowdhury v. Union of India, 1950 SCC 833 [38,39]
[54] Chiranjit Lal Chowdhury v. Union of India, 1950 SCC 833 [38,39]
[55] General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36; CA Rajendra v. Union of India, AIR 1968 SC 507
[56] Non-Brahmin (Hindus): 6; Backward Hindus: 2; Brahmins: 2; Harijan: 2, Anglo-Indians and Indian Christians (1); Muslims: 1.

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Champakam Dorairajan[57], a Constitution Bench of this Court held the reservation of seats in educational institutions on that basis to be unconstitutional and violative Article 29(2) which stipulates that no citizen shall be denied admission in any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. The Court observed that Article 29 does not contain an exception clause such as Article 16(4) which would permit reservation of seats in educational institutions.

48. The State of Madras also notified that vacancies to the post of District Munsif would be filed on the basis of the Communal GO. In **B Venkataramana** v. **The State of Madras**[58], reservation of seats in services based on the Communal GO was challenged. The Constitution Bench observed that Article 16(4) permits the State to make provisions for 'backward classes' in the services if they are not adequately represented in the opinion of the State and that only Harijans and the backward Hindus can be considered as 'backward classes'. The denial of admission to seats other than those reserved for Harijans and Backward Hindus, it was observed, would be a discrimination based on "caste," violating Articles 16(1) and 16(2).

49. The above judgments adopted a formalistic and reservation-limiting approach in the reading of the constitutional provisions. In this approach, reservation was viewed as an exception to the principle of equal opportunity in Articles 15(1) and 16(1). This Court had recognized the principle of reasonable

[57] 1951 SCR 525
[58] AIR 1951 SC 229

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classification in Article 14 before the decision in **Champakam Dorairajan** (supra). However, it did not transpose the principle to the realm of reservation.[59] Even in **Venkataramana** (supra), this Court held that reservation in services is permissible only because the Constitution expressly provides for it. Reservation or any other form of affirmative action was regarded as antithetical to the equality principle and not a re-statement of it.

50. The Constitution was amended by the Constitution (First Amendment) Act 1951 to include Clause (4) in Article 15 to overcome the judgment in **Champakam Dorairajan** (supra). Despite the inclusion of Article 15(4), a formalistic reading of the equality code continued. In **Balaji** v. **State of Mysore**[60], this Court observed that Articles 15(4) and 16(4) are special provisions (or in other words, an exception to the principle of equality) while prescribing a cap of fifty per cent on the total seats to be reserved. It was in **NM Thomas** v. **State of Kerala**,[61] that this Court undertook an expansive and substantive reading of the equality code. In that case, proceedings were instituted for challenging the constitutional validity of Rule 13AA of the Kerala State and Subordinate Services Rules 1958 by which the qualifying criteria was relaxed for candidates belonging to the Scheduled Castes and Scheduled Tribes. The majority constituting the seven-Judge Bench interposed the principle of reasonable classification in Article 14 to Article 16(1)[62] and observed that Article 16(4) is not an exception to the principle of

[59] Article 15(4) was included in the Constitution by the Constitution (First Amendment) Act 1951 to overcome the judgment in Champakam Dorairajan.
[60] AIR 1963 SC 649
[61] (1976) 2 SCC 310; the seeds of the expansive approach were sowed by Justice Subba Rao in T Devadasan.
[62] (1976) 2 SCC 310 [Ray CJI, 21]

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equality of opportunity. Article 16(4), in the opinion of the Court, clarifies and explains the principle in Article 16(1).[63] Chief Justice Ray observed that Article 16(1) will not be violated when the rule ensures "equality of representation in the services for unrepresented classes after satisfying the basic needs of efficiency of administration".[64] Chief Justice Ray's opinion rests on two conceptual foundations. First, the goal of Article 16(1) is to ensure equality of representation while maintaining efficiency of service; and second, the beneficiaries must be the unrepresented class. Equality of opportunity was framed in the language of equal representation subject to these two caveats. Justice K K Mathew adopted a different approach. The learned Judge broke down the conceptual foundation of the equality provision in the following manner:

a. A criterion which is relevant to the apportionment of the good (that is, services) must be adopted[65];

b. It must be determined if the relevant criterion leads to an *a priori* exclusion of a certain class. The State is required to identify if persons of all classes have an **equal** chance of satisfying the chosen criteria[66]; and

[63] (1976) 2 SCC 310 [Ray CJI, 37]
[64] (1976) 2 SCC 310 [Ray CJI, 45]
[65] (1976) 2 SCC 310 [Justice Mathew, 55]
[66] (1976) 2 SCC 310 [Justice Mathew, 58-59]

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c. There is a violation of the right to equal opportunity if the relevant criterion leads to *a priori* exclusion. In that case, a compensatory provision must be made to offset the disadvantage.[67]

51. In his concurring opinion, Justice Krishna Iyer observed that when two interpretations of Article 16(1) are available, that which ensures equal participation and fair representation in administration must be chosen.[68]

52. Thus, at the end of the first phase, it was clarified that the Constitution espouses a substantive vision of equality where reservation is not an exception but, as Justice Krishna Iyer observed in **NM Thomas** (supra), an "illustration of constitutionally sanctified" classification[69]. However, the Judges varied on the purpose of Article 16(1). While Chief Justice Ray defined equality in opportunity in terms of equality in representation and efficiency of service, Justice Mathew defined it in terms of equality in representation of the backward class. Additionally, Chief Justice Ray identified the beneficiary class as the 'unrepresented' class without laying down the basis of the under-representation. Justice Mathew on the other hand, identified the beneficiary class not merely on the basis of under-representation but on the cause for under-representation. It was this difference in the opinions that brooded over the post-NM Thomas era. In the subsequent section, we will discuss the impact of Chief Justice Ray's reading of the principle of efficiency into Article 16 on the scope of reservation policies.

[67] (1976) 2 SCC 310 [Justice Mathew, 74]
[68] (1976) 2 SCC 310 [Justice Krishna Iyer, 120]
[69] (1976) 2 SCC 310 [Justice Krishna Iyer, 136]

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II. The “efficiency” of reservation

53. The expansive reading of the constitutional ideal of equality, noticed above, was not sufficient to realize the full potential of affirmative action. A barrier was raised through Article 335. Article 335 emphasizes that the State shall maintain efficiency of administration while deciding the claims of the Scheduled Castes and the Scheduled Tribes in appointments to services.[70] This Court, while deciding the following four important questions relating to reservations, placed considerable emphasis on the efficiency of service to limit the scope of reservation:

a. Whether reservation is limited to initial appointment;
b. If reservation is extendable to promotions, the method to be employed to ascertain seniority;
c. Whether lowering the standard of evaluation for backward classes violates the equal opportunity principle in Article 16; and
d. The permissible method for calculating vacancies to be filled through reservation.

The central theme that governed these four issues was whether the expansion of the scope of reservations would dilute the overall efficiency of the service.

[70] 335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of service, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

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54. In **General Manager, Southern Railway** v. **Rangachari**[71], the issue was whether Article 16(4) permits reservations in promotions. Writing for the majority of the Constitution Bench, Justice Gajendragadkar observed that though reservations in promotions are detrimental to "efficiency", a reading of Article 16(4) to include reservations in promotions would further substantive equality[72]:

> "27. It is true that in providing for the reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. **Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency;** but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts."
>
> (emphasis supplied)

55. Both the majority and the minority (consisting of Justice Wanchoo and Justice Ayyangar) agreed that reservations impair the efficiency of administration. The learned Judges belonging to the minority only disagreed on the balance which must be drawn between reservation and efficiency of service. Justice

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[71] (1962) 2 SCR 586

[72] (1962) 2 SCR 586 [27]; See Article 335 which provides that that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. The majority in **Rangachari** (supra), interpreted the phrase "matters relating to employment" as it occurs in Article 16(1) to also include promotion. The next issue which fell for the consideration of the Court was whether Article 16(4) covers promotion because the provision only uses the phrases "appointments or posts". This Court held that the phrase "posts" would - as held by the High Court - not mean ex-cadre posts but posts in the services under the State because any other interpretation would be contradictory to the purpose of Article 16(4) which is to ensure adequate representation.

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Gajendragadkar observed that though reservations in promotion will impair efficiency of administration, the social benefit of reservation will trump the cost of the impairment. Justice Wanchoo and Justice Ayyangar disagreed. According to the minority, an interpretation of Article 16(4) to include reservation in promotion would be contrary to the principles set out in Article 335.[73] Similarly, in **CA Rajendran** v. **Union of India,**[74] this Court observed that restricting reservations only to Class III and Class IV posts was justified because Class I and Class II posts require candidates with higher efficiency which would not be achieved if promotional posts are reserved.[75]

56. The judgment in **Rangachari** (supra) was overruled in **Indra Sawhney** (supra). In **Indra Sawhney** (supra), this Court adopted the approach of the minority in **Rangachari** (supra), holding that reservations in promotions would dilute efficiency in administration.[76] By the Constitution (Seventy-seventh Amendment) Act 1995, Parliament amended the Constitution to include Clause (4-A) into Article 16 permitting reservation for the Scheduled Castes and the Scheduled Tribes in promotion.

57. The issue whether members of the Scheduled Castes and Scheduled Tribes should be considered senior to candidates of the general category (who were senior to the candidates of the reserved category in the feeder category)[77] when they are being considered for subsequent promotion arose before this

[73] (1962) 2 SCR 586 [Justice Wanchoo, 35]; [Justice Ayyangar, 41]
[74] AIR 1968 SC 507
[75] AIR 1968 SC 507 [9]
[76] 1992 Supp (3) SCC 217 [Justice Reddy, 827, 828]; [Justice Thommen,302]; [Justice Sawant,552]
[77] The service rule by which the general category retains their seniority is called the catch-up rule. The service rule by the seniority is measured based on the feeder pool is called consequential seniority.

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Court. In **Union of India** v. **Virpal Singh Chauhan**[78], this Court held that though the catch-up rule is not implicit in Article 16, it is a constitutionally valid practice to maintain "efficiency".[79] This was reiterated in **Ajit Singh (I)** v. **State of Punjab**[80]. Justice NP Singh, writing for the three-Judge Bench observed that the process of appointments must balance both Article 16(4) and Article 335 and that the "principal object of a promotion system is to secure the best possible incumbents for the higher position".[81] Subsequently, Parliament amended Article 16(4-A) by the Constitution (Eighty-fifth Amendment) Act 2001 to overcome a series of judgments of this Court where the rule of consequential seniority in reservation was held to result in reverse-discrimination. Article 16(4-A), as amended by the Constitution (Eighty-fifth Amendment) Act 2001, enables the State to provide reservation in promotion with consequential seniority.

58. In **Indra Sawhney** (supra), Justice Jeevan Reddy writing for four Judges observed that relaxation of qualifying marks in promotion would result in inefficiency of administration. This position was reiterated by a two-Judge Bench in **S Vinod Kumar** v. **Union of India**[82]. A proviso was included in Article 335 by the Constitution (Eighty-second) Amendment Act 2000 to overcome this aspect of the ruling in **Indra Sawhney** (supra) and **Vinod Kumar** (supra). The proviso provides that Article 335 does not prevent the

[78] (1995) 6 SCC 684
[79] Also see Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209
[80] (1996) 2 SCC 715; "it cannot be overlooked that at the first promotion from the basic grade, there was no occasion to examine their merit and suitability for the purpose of promotion."
[81] (1996) 2 SCC 715 [15]
[82] (1996) 6 SCC 580

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State from relaxing the qualifying marks in any examination for reservation in promotion.

59. The method for calculating the permissible total percentage of reservation was another issue in which the "efficiency of administration" was used to limit the scope of reservation. This Court had held in **Balaji** (supra) and **Indra Sawhney** (supra) that reservation must not exceed 50 per cent. The State was faced with a peculiar situation where a sufficient number of persons from the reserved category was not available to fill the seats reserved for them. The issue was whether the unfilled seats of the reserved category could be carried over to the next year, and whether the carried forward vacancies could be counted while calculating the total percentage of reserved seats in that year.

60. In **T Devadasan** v. **Union of India**[83], the majority held that a carry forward of the unfilled vacancies of the reserved category to the next year will abrogate the equal opportunity principle and impair efficiency. Justice Subba Rao while dissenting, advocated for a harmonious reading of Articles 16, 46 and 335. Laying the groundwork for the jurisprudential development in **NM Thomas** (supra), the learned Judge observed that the phrase "any provision" in Article 16(4) is wide enough to include the carry forward rule. The observation of the majority that carrying forward the vacancies to the subsequent year is contrary to the equal opportunity principle was line with the judgment in **Balaji** (supra) because the judgment was delivered in the pre-**NM Thomas** (supra)

[83] (1964) 4 SCR 680

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era. However, besides the narrow interpretation of the equal opportunity principle, the concept of "efficiency" also weighed with the Court.

61. By the Constitution (Eighty-first) Amendment Act 2000, the Constitution was amended to include Article 16(5) by which the States are permitted to carry forward the unfilled seats of the reserved category to be filled up in the succeeding years. The challenge to the constitutional validity of Article 16(4-A) and 16(4-B) was rejected by the Constitution Bench in **M Nagaraj** v. **Union of India**[84] where it was held that the efficiency of administration is only relaxed and not "obliterated" by the inclusion of Articles 16(4-A) and 16(4-B).[85]

62. As is evident from the discussion above, the jurisprudence in the second phase on questions involving the scope of reservation, evolved around the idea that reservation dilutes the efficiency in administration or to put it otherwise, reservation is anti-merit. The Constitution was amended to overcome this Court's holding on each of the above issues, thereby overhauling the premise that reservation does not ensure efficiency in service. The Constitution, after the numerous turbulations within each of the issues traced, today advances a more substantive reading of the equality provision, expanding the sphere and the scope of reservation to ensure that the benefits trickle down to those who need it the most. However, traces of the friction between merit and reservation continue to persist even after the amendments to Articles 16 and 335.[86] This Court has, with a few divergences[87], continued

[84] (2006) 8 SCC 212
[85] (2006) 8 SCC 212 [108]
[86] Nagaraj v. Union of India, (2006) 8 SCC 212
[87] Neil Aurelio Nunes v. Union of India, (2022) 4 SCC 1; BK Pavitra (II) v. State of Karnataka, (2019) 16 SCC 129

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to uphold the binary of merit and reservations. The understanding of the Courts at the end of this phase was that the scope of reservation must be expanded to ensure substantive equality **in spite** of its dilution of efficiency[88], thereby continuing to read the requirement of efficiency into Article 16(4).

III. The interplay of Article 16 and Article 335

63. In this section, we will discuss whether the principle in Article 335 must be read as a limitation on the power of the State to provide reservations under Article 16. Article 335 provides that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services. The proviso to the Article states that the provision shall not prevent the "relaxation of qualifying marks in any examination or lowering the standards of evaluation", for reservation of the Scheduled Castes and the Scheduled Tribes in matters of promotion.

64. Reservations under Article 16(4) are not restricted to the Scheduled Castes and Scheduled Tribes. The provision provides the State with the enabling power to provide reservations for the "backward classes" which are not adequately represented in the services of the State. The "backward class" encompasses more than the Scheduled Castes and the Scheduled Tribes. It encompasses all classes whose backwardness is attributable to social

[88] See General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36; T Devadasan v. Union of India, (1964) 4 SCR 680 [Justice Subba Rao, 32]

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reasons.[89] This includes other socially and educationally backward classes such as the Other Backward Class category, women and the disabled.

65. Applying the additional requirement of "efficiency of administration" only with respect to the exercise of power under Article 16(4) vis-à-vis the Scheduled Castes and the Scheduled Tribes would be discriminatory. Reading this requirement into Article 16(4) assumes that a dilution of the principle of efficiency in administration is the necessary effect of reservation for the Scheduled Castes and Scheduled Tribes while the same standard is not applied to reservations for Other Backward Classes. Though this Court has not expressly stated so in as many words, efficiency of administration was added as a requirement for the exercise of power under Article 16(4) to prevent discrimination between the Scheduled Castes/Scheduled Tribes and other Socially and Educationally Backward Classes. If the requirement of efficiency of administration in Article 335 was not read into Article 16, then the requirement would only apply to reservations for the Scheduled Castes and the Scheduled Tribes but not for the reservation of other socially backward beneficiary classes.[90]

66. However, such an interpretative exercise (that is, applying the principle of efficiency of service to restrict the power of the State to provide affirmative action policies) is contrary to the express language of Article 335 which is confined to the Scheduled Castes and the Scheduled Tribes. The preliminary

[89] See Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [116,117,492,788, 859(3)(e)]
[90] The opinion of Justice Sawant in **Indra Sawhney** (supra), highlights this aspect:" 434: […] It cannot, however, be doubted that the same considerations will have to prevail while making provisions for reservation in favour of all backward classes under Article 16(4). To hold otherwise would not only be irrational but discriminatory between two classes of backward classes."

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error is that the requirement of efficiency of administration was viewed as an additional requirement and a roadblock to reservation provisions. Efficiency was not understood as a facet of the principle of equal opportunity.

67. The meaning of the phrase "efficiency" as it occurs in Article 335 must be determined to take this argument to its logical conclusion. Though the Constitution does not define the phrase, the proviso to the Article offers interpretative guidance. The proviso states that "relaxation in qualifying marks in any examination or lowering the standards of evaluation" does not amount to a reduction in the efficiency of administration. There can be two possible deductions about the scope of the provision, based on a reading of the proviso. One possible meaning that can be deduced is that marks in the qualifying examination are not a marker of efficiency of administration because if they were, then a reduction of the qualifying standards/marks would also lead to a reduction in efficiency. Another possible interpretation could be that the premise of the proviso is that while **reduction** or **dilution** of the evaluating standards or the qualifying marks is not inconsistent with maintenance of efficiency, a complete removal of the qualifying marks would be.[91] Even if the latter interpretation is accepted, it only goes to establish that securing higher marks in an examination does not contribute to higher efficiency and that securing a **minimum** mark (and not the highest) in the examination is sufficient to maintain efficiency of administration. Thus, a

[91] See Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [835]; M Nagaraj v. Union of India, (2006) 8 SCC 212 [108]

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policy which allows for lower qualifying marks or standards of evaluation is by the proviso to Article 335 not contrary to efficiency.

68. The only constitutional provision which refers to an examination for appointments to posts in services is Article 320 which stipulates that the Union and State Public Service Commissions must conduct examinations for appointments to the services of the Union and the State. An examination is an assessment to determine the proficiency of candidates and their suitability for the post. The Constitution does not prescribe the exact method of assessment which must be adopted for the examination. The Constitution also does not prescribe that the examination must be framed in a manner which would only assess skill sets accessible to certain classes of people. The principle of equality in opportunity in Article 16(1) is therefore the guide for the State while it is determining the method of examination. The examination or any method of distribution of posts must ensure factual equality. An examination leads to *a priori* exclusion if it only assesses the skill set that is accessible to specific classes. It is to offset this disadvantage that affirmative action policies are introduced for the distribution of posts.

69. The underlying premise of the decision in **NM Thomas** (supra) is that the distribution of public resources including seats in educational institutions and public services must be based on considerations of equality and justice. Thus, Article 335 is not a limitation on the exercise of power under Articles 16(1) and 16(4). Rather, it is a restatement of the necessity of considering the claims of the Scheduled Castes and the Scheduled Tribes in public services.

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Efficiency of administration must not be viewed in terms of the narrow lense of scores in an examination which *a priori* excludes certain classes but in terms of inclusivity and equality as required by Article 16(1).

70. This Court has previously challenged the binary of reservation and merit. In **Devadasan** (supra), Justice Subba Rao observed that there is no conflict between the provisions of Articles 16(4) and 335 and that the latter has no bearing on the interpretation of the former. Justice Rao observed that the former provision, is directory while the latter is a mandatory provision by which the State is required to consider the "claims"[92] of the Scheduled Castes and Scheduled Tribes.[93] Subsequently, in **Vasanth Kumar** (supra) Justice Chinnappa Reddy echoed this view. The learned Judge observed that reservation cannot be viewed as a conflict between the principles of merit and distributive justice. It is rather, the conflict between the haves and the have-nots.[94]

71. This line of reasoning was furthered in **BK Pavitra (II)** v. **State of Karnataka**[95]**,** where this Court observed that the assumption of the critiques of reservation is that awarding opportunities in government services based on "merit" results in an increase in administrative efficiency.[96] In **BK Pavitra (II)** (supra) and **Neil Aurelio Nunes** v. **Union of India**[97], this Court highlighted the folly of measuring "merit" based on the performance of candidates in a

[92] Justice Krishna Iyer in **NM Thomas** (supra) observed that the usage of the phrase 'claims' in Article 335 indicates that reservation is a right and not the provision of charity or benevolence. [paragraph 128]
[93] (1964) 4 SCR 680 [25]
[94] 1985 (Supp) SCC 714 [35, 36]
[95] (2019) 16 SCC 129
[96] (2019) 16 SCC 129 [129]
[97] (2022) 4 SCC 1

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seemingly "neutral" selection process which is factually not neutral since the process does not provide equal opportunity to candidates belonging to classes which face widespread inequalities in accessing facilities required to ace the examinations.[98] In **Neil Aurelio Nunes** (supra), a two-Judge Bench of this Court discussed the privileges that accrue to the advanced classes in the form of cultural capital which ensures that a child is unconsciously trained by the familial environment and the economic capital:

> "24. […] the privileges that accrue to forward classes are not limited to having access to quality schooling and access to tutorials and coaching centres to prepare for a competitive examination but also includes their social networks and cultural capital) communication skills, accent, books or academic accomplishments) that they inherit from their family. […] Social networks based on community linkages) become useful when individuals seek guidance and advice on how to prepare for examination and advance in their career."

72. One of us (DY Chandrachud J) writing for the Bench, observed that while examinations are a convenient method to allocate educational resources, they are not effective markers of merit, and that merit should be understood in terms of the social good of equality and inclusivity.[99]

73. Before concluding the discussion in this section, we deem it necessary to discuss the opinion of the nine-Judge Bench in **Indra Sawhney** (supra) on the binary of merit and reservation because this Bench sitting in a composition of seven is bound by the opinion of the larger Bench. The petitioners in that case argued that the necessary effect of reservation is the appointment of

[98] Neil Aurelio Nunes v. Union of India, (2022) 4 SCC 1
[99] Neil Aurelio Nunes v. Union of India (2022) 4 SCC 1 [28]; BK Pavitra (II) v. State of Karnataka (2019) 16 SCC 129 [131]

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less meritorious persons while the respondents argued that marks obtained in an examination do not represent the inherent merit of the candidate. Justice B P Jeevan Reddy, authoring the plurality opinion, observed that it is not necessary to express their view on the competing visions of reservation and merit. However, the learned Judge observed that reservation is not anti-merit. The learned Judge made two conceptual observations: first, even if merit is not synonymous with efficiency in administration, its relevance and significance cannot be ignored. Reservations imply the selection of a less meritorious person[100]; and second, members of disadvantaged sections, given the opportunity, would overcome the barriers and **prove** their merit.

74. Applying these two principles, Justice Jeevan Reddy held that: (a) the removal of minimum marks in qualifying examinations for the backward class is invalid; (b) there cannot be reservations in promotions[101]; and (c) there cannot be any reservation in certain positions of services "where either on account of the nature of duties attached to them or the level (in the hierarchy)", merit alone counts. The learned Judge also proceeded to give a non-exhaustive list of such positions. The list included technical posts in research and development organizations/departments/institutions; specialties and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics; defense services; posts of professors; airline pilots; and scientists and technicians in nuclear and space application.

[100] Also see, Janki Prasad Parimoo v. State of J&K, (1973) 1 SCC 420, Justice Khanna in NM Thomas v. State of Kerala, (1976) 2 SCC 310; Justice Subba Rao in Devadasan v. Union of India, 1964 4 SCR 680
[101] The holding that there shall not be reservations in promotions was based on the link between Article 16(4) and Article 335. See, Justice Reddy [827] and Justice Sawant [552-224]

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Justice Pandian also agreed with this view[102], making it the view of the majority.

75. Justice Jeevan Reddy recognized that reservation is not anti-merit. Two constitutional amendments overruled the above aspects of the holding in **Indra Sawhney** (supra). These amendments altered the intersection between the exercise of power under Article 16(4) and Article 335. The Constitution (Seventy-seventh Amendment) Act 1995 included Article 16(4-A) enabling the State to provide reservations for the Scheduled Castes and the Scheduled Tribes in promotions. The Constitution (Eighty-second) Amendment Act 2000 added the proviso to Article 335 stipulating that lowering the standards of evaluation will not be inconsistent with the maintenance of efficiency. The amendments recognize the difficulties and struggles faced by members of the Scheduled Castes and the Scheduled Tribes during promotions. In a formal sense, the criteria of selection for promotions *a priori* excludes the members of the Scheduled Castes and Scheduled Tribes because the criteria which are considered to be appropriate are not accessible to them. In a more informal but substantive manner, the members of the Scheduled Castes and the Scheduled Tribes are often unable to climb up the ladder because of the stigma of incompetence held against candidates who are selected through reservation. The stereotype operates against them because they are externalized as "affirmative action beneficiaries" or "quota candidates".[103] The amendments recognize the discrimination through the operation of both

[102] Justice Pandian in Indra Sawhney, (1992) Supp (3) SCC 217 [243(11)]
[103] See Ashwini Deshpande, Double Jeopardy? Stigma of Identity and Affirmative Action, The Review of Black Political Economy 2019, Vol. 46(I) 38-64

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human conduct and recruitment processes. They are an emphatic repudiation of the binary of reservation and merit.

ii. Permissibility of sub-classification under Article 14

76. In **Chinnaiah** (supra), one of the issues was "whether the impugned enactment creates sub-classification or **micro-classification** of Scheduled Castes".[104] Justice Santosh Hegde, writing for himself and two other Judges noted that according to the decision in **NM Thomas** (supra), all the castes in the list acquired a special status as a 'class' and that a classification for the purpose of reservation already existed. The learned Judge observed that the Scheduled Castes form a class by themselves and any further classification would violate the doctrine of reasonableness.[105] Justice Hegde observed that a class cannot be sub-divided to give more preference to a "miniscule proportion of the Scheduled Castes in preference to the other members of the same class".[106] In his concurring opinion, Justice Sema observed that further classification of the Scheduled Castes, who constitute a homogenous group would amount to "discrimination in reverse" and would run contrary to Article 14[107]. Justice Sinha observed that the Constitution permitted additional measures in respect of disadvantaged groups to bring them at par with the advantaged groups, but the class which requires the benefits of additional protection, cannot be discriminated inter se when both satisfy the test of

[104] Chinnaiah (supra) [Justice Hegde J,32]
[105] Chinnaiah (supra) [Justice Hegde,37,43].
[106] Chinnaiah (supra) [Justice Hegde,36]
[107] Chinnaiah (supra) [Justice Sema, 46-50].

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abysmal backwardness and inadequate representation in public service.[108] Justice Sinha further noted that the state had not discharged the burden of proving reasonable classification and the nexus of the classification with the purpose of the enactment.[109]

77. In **Chinnaiah** (supra), this Court held that the Scheduled Castes cannot be further classified for the purpose of reservation because they constitute an internally homogenous class by virtue of their inclusion in the Presidential list and thus, as a class, groups within the Scheduled Castes cannot be treated differently. In view of the already existing classification of the Scheduled Castes under the Constitution, further classification and consequent preferential treatment were held to violate Article 14, as it would amount to a constitutionally proscribed 'micro-classification'. To appreciate the correctness of this view of Article 14 and micro-classification, we must analyze the contours of the equality guarantee and permissibility of sub-classification under Article 14.

a. The contours of Article 14

78. Article 14 employs two expressions – equality before the law and equal protection of the laws. Both different in content and sweep[110]. "Equality before the law"-, an expression derived from the English Common law, entails absence of special privileges for any individual within the territory. It does not mean that the *same* law should apply to everyone, but that the same law

[108] Chinnaiah (supra) [Justice Sinha, 81]
[109] ibid.
[110] Indra Sawhney (supra) [Justice Reddy,643].

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should apply to those who are similarly situated.[111] The expression "equal protection of the laws" means that among equals, laws must be equally administered. It enjoins the State with the power to reasonably classify those who are differently placed. The mandate of "equal protection of laws" casts a positive obligation on the state to ensure that everyone may enjoy equal protection of the laws, and no one is unfairly denied this protection. In essence, the guarantee of equality entails that all persons in like circumstances must be treated alike. That there must be a parity of treatment under parity of conditions.[112] Equality does not entail sameness. The State is allowed to classify in a manner that is not discriminatory. The doctrine of classification gives content to the guarantee of equal protection of the laws.[113] Under this approach, the focus is on the equality of results or opportunities over equality of treatment.[114]

79. The Constitution permits valid classification if two conditions are fulfilled. *First,* there must be an intelligible differentia which distinguishes persons grouped together from others left out of the group. The phrase "intelligible differentia" means difference capable of being understood.[115] The difference is capable of being understood when there is a yardstick to differentiate the class included and others excluded from the group.[116] In the absence of the yardstick, the differentiation would be without a basis and hence,

[111] Gauri Shankar v. Union of India, AIR 1995 SC 55.
[112] Indra Sawhney (supra), [Thommen J, 260].
[113] HM Seervai, Constitutional Law of India, 4th Edition, Volume I, page 439.
[114] Sandra Fredman, Substantive Equality Revisited, International Journal of Constitutional Law, Volume 14, Issue 3, 2016, 712-738.
[115] State of West Bengal v. Anwar Ali Sarkar (1952) 1 SCC 1.
[116] Anwar Ali Sarkar (supra) (1952) 1 SCC 1, [Das J, 66].

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unreasonable. The basis of classification must be deducible from the provisions of the statute; surrounding circumstances or matters of common knowledge.[117] In making the classification, the State is free to recognize degrees of harm.[118] Though the classification need not be mathematical in precision, there must be some difference between the persons grouped and the persons left out, and the difference must be real and pertinent.[119] The classification is unreasonable if there is "little or no difference".[120] *Second,* the differentia must have a rational relation to the object sought to be achieved by the law, that is, the basis of classification must have a nexus with the object of the classification.[121]

b. Sub-classification as a facet of equality

80. The first issue that arises for the consideration of this Court is whether the principle of sub-classification *per se* violates Article 14. It is established precept that Article 14 guarantees factual and not formal equality. Thus, if persons are not similarly situated in reference to the purpose of the law, classification is permissible. The same logic of classification equally applies to sub-classification. The law can further classify a class that is already created by law for a limited purpose if it is heterogeneous for another purpose.

[117] Shri Ram Krishna Dalmia v. Shri SR Tandolkar 1958 SCC OnLine SC 6, [12].
[118] Ibid; Special Courts Bill, 1978, In re, (1979) 1 SCC 380.
[119] Moorthy Match Works v. CCE, (1974) 4 SCC 428.
[120] Deepak Sibal v. Punjab University, (1989) 2 SCC 145.
[121] Indra Sawhney (supra) [Reddy J, 643]; State of Kerala v. N.M. Thomas (1976) 2 SCC 310; Ram Krishna Dalmia v. Justice S.R. Tendolkar, 1959 SCR 279; Budhan Choudhry v. State of Bihar (1955) 1 SCR 1045

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This Court has in multiple judgments held that such classification within a class is valid under Article 14.[122]

81. To lay down the contours of the scope of sub-classification, it needs to be determined if the class is an integrated homogenous class. In **All India Station Masters & Assistant Station Master's Association** v. **General Manager, Central Railways**[123], the issue before a Constitution Bench of this Court was whether 'road-side Station Masters' could be differentiated from Guards for the purpose of promotion to the higher post of Station Masters. Answering the issue in the affirmative, this Court held that the Station Masters and Guards did not form an integrated class since they were recruited and trained separately. Thus, a distinction between the two classes was held not to be violative of the equality code which only requires the State to treat equals equally. Similarly, in **Mohd. Shujat Ali** v. **Union of India**[124], another Constitution bench of this Court held that the distinction between graduate and non-graduate Supervisors for the purpose of promotion to the post of Assistant Engineer was valid because there was no integration between the two categories. The pay scale and even the nomenclature for the two classes were different.

82. In **All India Station Masters** (supra) and **Mohd. Shujat Ali** (supra), this Court did not specifically answer the question of whether there could be sub-classification within an integrated class. That issue arose for adjudication

[122] State of Kerala v. NM Thomas [Justice Mathew J, 83]; DS Nakara v, Union of India 1983 1 SCC 305 [Justice Desai, 48].
[123] AIR 1960 SC 384.
[124] 1975 3 SCC 76.

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before this Court in **State of Jammu and Kashmir** v. **Triloki Nath Khosa**[125]**.** The rules provided that only Assistant Engineers who possessed a degree or certain other qualifications were entitled to promotion to the post of Divisional Engineer. However, the pool of Assistant Engineers consisted of both degree and diploma holding graduates. The diploma holders among them challenged the constitutionality of the rule on the ground that it classified within the class of "Assistant Engineers" based on their educational qualification, and such a classification within a class was violative of Article 14. It was argued that if persons recruited from different sources are integrated into one class, they cannot thereafter be classified to permit preferential treatment in favour of some of them. This Court upheld the validity of the rule holding that the classification based on educational qualifications, for the purpose of promotions is not unreasonable. Justice YV Chandrachud (as he then was), writing for the bench held that the classification had a reasonable nexus with the objective of promotions, which was to achieve administrative efficiency in engineering services.

83. It was also submitted that if persons recruited from different sources are integrated into one class, no further classification can be made within that class. In this case, the direct recruits to the post of Assistant Engineer were required to hold a degree in civil engineering. However, the promotees were drawn from the service which was open to both degree and diploma holders (the latter did not require a civil engineering degree). Thus, it was argued that

[125] 1974 1 SCC 19.

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a classification based on educational qualifications is a classification which is based on the source of service. This Court held that though persons were appointed from various sources such as promotion and direct recruitment, they came to be integrated into a common class of Assistant Engineers[126]. However, despite this integration into a class, they could be validly classified based on educational qualifications because it was not a classification based on the source of service.

84. In this context, this Court cautioned that the judgment ought not to be interpreted as a justification for minute and microcosmic classifications and that the theory of classification could not be evolved through "imperceptible extensions", diluting the very substance of the equality guarantee.[127] Distinguishing the judgment in **Roshan Lal Tandon** v. **Union of India**[128]**,** this Court observed in **Triloki Nath** (supra) that the issue in the former was whether the yardstick for integration (that is, the source of recruitment) could be used as a yardstick for further integration, which was not the issue in **Triloki Nath** (supra). Thus, **Triloki Nath** (supra) is the leading judgment for the proposition that an integrated class can be further classified if there is

[126] ibid, [YV Chandrachud J, 50]. "*50.* We are therefore of the opinion that though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The Rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Articles 14 and 16 of the Constitution and must be upheld."

[127] ibid, [YV Chandrachud J, 51]. "51. But we hope that this judgment will not be construed as a charter for making minute and microcosmic classifications. Excellence is, or ought to be, the goal of all good governments and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants. But let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: What after all is the operational residue of equality and equal opportunity?"

[128] (1968) 1 SCR 185

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intelligible differentia and if the yardstick used has a nexus to the object of the provision.[129]

85. It is not a given that appointees of different sources form an integrated class merely upon their appointment to one post. Even upon integration, the groups retain their separate identity for other purposes. In **Katyani Sayal** v. **Union of India**[130], this Court held that the Assistant Officers of the Railways recruited through a competitive examination and those recruited on the recommendation of the Union Public Service Commission do not form an integrated homogenous class because the objects of recruitment, the tenure and even the appointing authority are different. In **Col AS Iyer** v. **V Balasubramanyam**[131], a Constitution Bench of this Court upheld Survey of India promotion rules that reserved 50% more posts for engineers drawn from the military than for civilian engineers. Justice Krishna Iyer, writing for the Bench, observed that the army engineers never merged into the Survey of India service, along with their civilian counterparts.

86. The judgment of this Court in **DS Nakara** v. **Union of India**[132] has dwelt on the issue of sub-classification. In **Nakara**[133], a scheme which divided pensioners into two groups based on the date of retirement, to provide pension was challenged. A Constitution Bench held that pensioners formed a class. Notably, this Court, similar to **Triloki Nath** (supra), did not hold that sub-classification is impermissible merely because the pensioners constitute

[129] See NM Thomas [Justice Mathew, 83]
[130] (1980) 3 SCC 245.
[131] 1980 1 SCC 634.
[132] 1983 1 SCC 305
[133] ibid [48]

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a class in themselves. As opposed to the inherent impermissibility of sub-classification, the particular basis of classification in that case namely, the date of retirement, was found to be arbitrary considering the objective of granting pensions. It was held that if this basis of classification was accepted as valid, it would create an artificial distinction between two persons who retired within forty-eight hours of each other. Writing for the Bench, Justice D A Desai held that this Court while deciding if sub-classification is permissible must determine if the class is homogenous for the purpose of the law.[134]

87. **Nakara** (supra) goes a step further than **Triloki Nath** (supra) to state that the scope of sub-classification does not hinge on the yardstick which is used to integrate groups into a class but on the issue of whether the class is homogenous or integrated for the specific objective of the law. When a law integrates a class, such as diploma and degree holders, it integrates the class for the purpose of that specific law and not for all purposes. Thus, a class which is not similarly situated for the purpose of the law can be further classified. The test that the Court must follow to determine the validity of the sub-classification of a class is as follows:

    a. Whether the class is “homogenous” or “similarly situated” for the purpose of the specific law;
    b. If the answer to ‘a’ above is in the affirmative, the class cannot be sub-classified;

[134] DS Nakara (supra) [Desai J,42] : “If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogenous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision and would such classification be founded on some rational principle?”

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c. If the answer to 'a' above is in the negative, the class can be sub-classified upon the fulfilment of the following standard:

i. There must be a yardstick (or intelligible differentia) further classifying the class; and

ii. The yardstick must have a rational nexus with the object of the statute.

c. Micro-classification: the limits of sub-classification

88. The next issue which arises is whether there are any limits to sub-classification. In numerous judgments, this Court has held that the State must not micro-classify since such classifications would denude (rather than promote) the guarantee of equality, replacing the doctrine of equality with the doctrine of classification.[135] When does sub-classification take the properties of micro-classification?

89. In **Nakara** (supra), this Court incidentally illustrated what could be termed as a microscopic classification. This Court observed that if each pensioner were to be classified based on their individual dates of retirement or the month of their retirement, it would be too microscopic a classification. Notably, it was not the State's argument that every individual pensioner retiring on a particular date was a class unto themselves or that the date of retirement was the basis of classification. Rather, the argument was that those retiring before the *designated date* were a class, distinct from those retiring after that date:

[135] Mohammad Shujat Ali and Others v. Union of India 1975 3 SCC 76 [Justice Bhagwati, 24-26].

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> "9. Is this class of pensioners further divisible for the purpose of "entitlement" and "payment" of pension into those who retired by certain date and those who retired after that date? If date of retirement can be accepted as a valid criterion for classification, on retirement each individual government servant would form a class by himself because the date of retirement of each is correlated to his birth date and on attaining a certain age he had to retire. It is only after the recommendations of the Third Central Pay Commission were accepted by the Government of India that the retirement dates have been specified to be 12 in number being last day of each month in which the birth date of the individual government servant happens to fall. In other words, all government servants who retire correlated to birth date on attaining the age of superannuation in a given month shall not retire on that date but shall retire on the last day of the month. **Now, if date of retirement is a valid criterion for classification, those who retire at the end of every month shall form a class by themselves.** This is too microscopic a classification to be upheld for any valid purpose. Is it permissible or is it violative of Article 14?"
>
> (emphasis supplied)

90. All persons are unequal in one or the other aspect. In a given situation, even a single individual may be treated as a class by themselves.[136] In that case, it is particularly important that laws do not micro-classify. The question of whether the classification amounts to a micro-classification which is impermissible under Article 14 would depend on the facts of each case. However, the two crucial components of the standard of intelligible differentia prescribe the limits of sub-classification. The two components are (a) the purpose; and (b) the rational basis (or principle) for the differentiation. This Court has previously held that the purpose must be independent of the differentiation.[137] The Court grants the State sufficient latitude in identifying

[136] Charanjit Chowdhury (supra) 833 [58]; Ram Krishna Dalmia (supra) [11].
[137] Deepak Sibal v. Punjab University (1989) 2 SCC 145

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the purpose, including the degrees of harm.[138] The same degree of latitude is not accorded to the principle underlying the differentiation. It is not sufficient if the principle underlying the classification is relevant or shares a nexus to the purpose. The principle underlying the classification must be reasonable and rational.[139] In **Nakara** (supra), this Court questioned the **rationale** of classifying the beneficiary class based on the date of retirement. In a concurring opinion in **Navtej Singh Johar** v. **Union of India**[140], Justice Indu Malhotra held that a principle of differentiation based on "core and immutable" characteristics is not rational. For example, if the law stipulates that the loan of farmers from one specific village in a State will be fully waived, it must prove through the submission of cogent material that there is a rational principle distinguishing one village from other villages in the State. In this context, the State will for example have to prove that location of the land is a rational principle of categorization and then subsequently prove that the village is not similarly situated for the purpose of the law. With this background, we proceed to analyze the specific issue of whether the sub-classification within the Scheduled Castes is constitutionally permissible.

iii. Sub-classification in reservations: tracing the journey through Balaji, Vasanth Kumar and Indra Sawhney

91. The issue of whether the State can further sub-classify within a class for the purpose of reservation first arose in **MR Balaji** (supra). The State of Mysore

[138] See Anwar Ali Sarkar (Supra) [7]; Ram Krishna Dalmia (supra) [11]; State of Gujarat v. Shri Ambica Mills (1974) 4 SCC 656 [61].
[139] See DS Nakara (supra) [43]
[140] (2019) 3 SCC 345.

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appointed the Mysore Backward Class Committee to advise it on the adoption of criteria for the determination of the socially and educationally backward class. Based on the report of the Committee, the State recommended the sub-classification of the Backward Class into the Backward Class and More Backward Class based on educational backwardness[141]. In **MR Balaji** (supra) the Constitution Bench held the sub-classification of the backward class to be unconstitutional because it: (a) was solely based on caste[142]; and (b) devised measures for the benefit of "all" classes of citizens who are less advanced when compared to the most advanced class in the State which is not the scope of Article 15(4)[143]:

> " 29. In this connection, it is necessary to add that the sub-classification made by the order between Backward Classes and More Backward Classes does not appear to the justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of Backward Classes what the impugned order, in substance purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced, compared to the most advanced classes in the State, and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of Backward and More Backward. The classification of the two categories, therefore, is not warranted by Article 15(4)."

[141] The criterion for the sub-classification was whether the standard of education in the community is less than 50% of the State Average. If it is, the community must be regarded as a more backward community. If it is not, then the community must be regarded as the backward community.
[142] AIR 1963 SC 649 [25]
[143] AIR 1963 SC 649 [29] This observation must be read along with the observation in Paragraph 21 where this Court held that the test of relativity must not be used to determine the backward class: "21. In considering the scope and extent of the expression "Backward Classes" under Article 15(4), it is necessary to remember that the concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Article 15(4)."

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92. This view was critiqued by Justice O Chinnappa Reddy in **Vasanth Kumar** (supra). In **Vasanth Kumar** (supra), this Court was invited to deliver its opinion on reservations which may serve as a guideline to the Commission that the Government of Karnataka proposed to appoint for examining the question of reservation in education and employment sectors. In his concurring opinion, Justice Chinnappa Reddy observed that as a matter of principle, sub-classification within a reserved class is valid provided that both the classes are **far** behind the advanced class and that one of the classes is ahead of the most backward class.[144] The learned Judge observed that the validity of the classification of the Backward Class into Backward and More Backward Classes may be open to adjudication on the facts of each case.

93. In **Indra Sawhney** (supra), an Office Memorandum which introduced a criterion giving preference for the **poorer** of the Socially and Educationally Backward Class was under challenge. The learned Judges diverged on the interpretation of the phrase “poorer”. Justice Pandian construed the phrase “poorer” in the Memorandum to mean economically weaker sections. Justice B P Jeevan Reddy, authoring the plurality opinion, construed the phrase “poorer” not in the economic sense but in the socio-economic sense. The learned Judges adopted a different approach while dealing with the issue of sub-classification owing to this divergence. Justice Pandian observed that preference for a section of the socially and educationally backward section would eliminate or exclude the other section of the class.[145] This observation

[144] Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [55]
[145] Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [207(5)]

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of the learned Judge must be read along with a previous observation that the socially and educationally backward class shares a common characteristic of social backwardness which cannot then be further divided solely based on economic criteria. Thus, the learned Judge did not find the sub-classification of the socially and educationally backward classes unconstitutional *per se* but the sub-classification of the class based on economic criteria which is alien to the determination of the beneficiary class. Another reason for the decision of the learned Judge was the model of sub-classification which was prescribed by the Office Memorandum. The Office Memorandum provided that the poorer section would have preference over all the seats reserved for a class, leaving the possibility of excluding the rest open.

94. Justice Jeevan Reddy observed that there is no constitutional or legal bar in classifying the backward class into backward and most backward class.[146] The learned Judge held that sub-classification is valid for two reasons. First, there may be inter-se backwardness within same class and in such a situation, sub-classification ensures that the more backward of the class can secure the benefit.[147] Second, the constitutional scheme expressly provides for sub-classification. Article 16(4) only identifies the beneficiary class as the "backward class" unlike Article 15(4) which expressly identifies the socially

[146] Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [802]
[147] "802. We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes."

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and educationally backward class, the Scheduled Castes and the Scheduled Tribes. The relevant observation is extracted below:

> "803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say — we may reiterate — that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

95. The learned Judge also construed the phrase "preference" in the Office Memorandum to mean "equitable apportionment" such that preference does not exclude the benefit to the less backward of the socially and educationally backward class.

96. With respect to the sub-classification of the backward classes, Justice Sawant observed that both the sub-categories must be **substantially** (and not comparatively) backward when compared to the forward class and there must be a substantial difference in backwardness between the sub-categories themselves. The learned Judge notes that if these two criteria are fulfilled, then it is not only advisable but imperative to sub-classify. Echoing the opinion of Justice Jeevan Reddy, Justice Sawant observed that sub-classification

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would lead to the exclusion of classes if the preference model is followed instead of the model whereby a percentage of seats are allotted to the most backward.[148]

97. The observations in **Indra Sawhney** (supra), elucidate the following three principles with respect to sub-classification:

a. Sub-categorization within a class is a constitutional requirement to secure substantive equality in the event that there is a distinction between two sections of a class;

b. Sub-classification must not lead to the exclusion of one of the categories in the class. A model that provides sufficient opportunities to all categories of the class must be adopted; and

c. Sub-classification among a class must be on a reasonable basis. Justice Sawant held that the distinction between the categories must be **substantial**. Justice Jeevan Reddy held that the sub-categorization must be **reasonable**.

[148] "524.[…] To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated October 13, 1986 on reservations issued after the decision in *Vasanth Kumar* [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] where the backward classes are grouped into five categories, viz., A, B, C, D and E. In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential."

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a. Indra Sawhney did not exclude sub-classification within the Scheduled Castes

98. In **Chinnaiah** (supra), this Court observed that the principles in **Indra Sawhney** (supra) on sub-classification of the Other Backward Class will not apply to the Scheduled Castes because the judgment specifically observed that it is only ruling on the sub-classification of the Other Backward Class and not the Scheduled Castes and the Scheduled Tribes.[149] At two places in **Indra Sawhney** (supra), Justice Jeevan Reddy limited the observations to the Other Backward Classes and did not extend them to the Scheduled Castes and Scheduled Tribes. While dealing with the identification of the backward class of citizens under Article 16(4), the learned judge made the following observations:[150]

> "781. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes – for it cannot be denied that Scheduled Castes include quite a few castes."

99. These observations were made in the specific context of the recognition of the Scheduled Castes and the Scheduled Tribes as a separate class of beneficiaries under Article 15(5) and their absence in Article 16(4). Justice Jeevan Reddy noted that it is admitted that the Backward Class in Article

[149] Chinnaiah v. State of AP, (2005) 1 SCC 394 [Justice Santhosh Hegde, 38]; [Justice Sinha, 76]
[150] (1992) Supp (3) SCC 217 [781]

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16(4) includes the Scheduled Castes and Scheduled Tribes even though the provision does not expressly state so.

100. While discussing the issue of the exclusion of the creamy layer in the identification of the beneficiary class under Article 16(4), Justice Jeevan Reddy noted that the discussion is confined to the Other Backward Class and does not have any relevance to the Scheduled Castes and the Scheduled Tribes.[151] This observation must also be understood in the context in which it was made. While discussing the necessity of the exclusion of the creamy layer of the Other Backward Class for the purposes of reservation, Justice Reddy observed that social backwardness is the connecting link in a class identified under Article 16(4). The learned Judge remarked that the class does not remain a homogenous class if some of the members of the class are socially forward. This Court noted that economic advancement can be a relevant criterion to exclude the creamy layer provided that the economic advancement is so high as to cause social advancement. The observation that this does not apply to the Scheduled Castes and Scheduled Tribes was made because they suffer from a more egregious form of social backwardness when compared to the Other Backward Class. The Court did not deem it necessary to decide the issue of whether the financial advancement of the members of the Scheduled Castes and Scheduled Tribes would cause social advancement since the issue in **Indra Sawhney** (supra) was only with respect to reservation for the Other Backward Class.

[151] (1992) Supp (3) SCC 217 [792]

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PART D

101. The question then is whether there is any reason to not extend the principle of sub-classification to the Scheduled Castes when a nine-Judge Bench of this Court has already extended the principle to the beneficiary classes under Articles 15 and 16. It is true that the social backwardness of the Other Backward Class is not comparable to that of the Scheduled Castes since they are more socially advanced than the Scheduled Castes. That is precisely why the Constitution groups them into two separate classes in Article 15(4). It is also true that the castes included within the class of Other Backward Class do not suffer from a single form of social backwardness. The castes which are included within the Other Backward Class suffer from a certain degree of comparable backwardness but the form of social backwardness amongst them may vary. As opposed to this position, the Scheduled Castes suffer from a common form of social backwardness through untouchability.

102. It is one thing to argue that the Scheduled Castes cannot be sub-categorized on account of their limited heterogeneity and common identity as opposed to the Other Backward Class. But it is another issue to completely disregard the application of the principle of sub-classification to the Scheduled Castes on the ground that **Indra Sawhney** (supra) limited its application to the Other Backward Class. We do not find that the purport of the observations in **Indra Sawhney** (supra) on sub-classification was to limit it to the Other Backward Classes, to the exclusion of the Scheduled Castes. The principle of sub-classification was given judicial assent in **Indra Sawhney** (supra) to ensure that the principle of substantive equality is fulfilled. The principle of sub-classification will be applicable to the Scheduled Castes if the social positions

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of the constituents among the castes/groups is not comparable. In the subsequent section, we will analyze if Article 341 through the operation of the deeming fiction creates an integrated homogenous class that cannot be further classified.

iv. The import of the deeming fiction in Article 341

103. Article 366(24) defines the Scheduled Castes as the castes, groups, races or tribes which are **deemed** to be Scheduled Castes under Article 341(1). The provision does not offer any assistance on the criteria which must be satisfied by the castes, groups, races or tribes for them to be notified as a Scheduled Caste under Article 341. The definition clause only refers to the deeming fiction created by Article 341. Article 341(1) also does not lay down the criteria for inclusion of a caste as a Scheduled Caste. Sub-clause (1) of Article 341 refers to the power of the President to **specify** the castes, races, tribes or parts of or groups within these three groups. Specified as such, they shall be **deemed** to be Scheduled Castes for the purpose of the Constitution in relation to the state. The respondents submitted that the "deeming fiction" creates a homogenous integrated class that cannot be further classified. The tenability of the submission needs to be analyzed.

a. Chinnaiah on the deeming fiction in Article 341

104. In his opinion in **Chinnaiah** (supra), Justice Santosh Hegde relied on **NM Thomas** (supra) to hold that the Scheduled Castes, though drawn from various castes, races and tribes, attain a new status by the Presidential notification. Justice Sema noted that once notified through a Presidential

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Notification under Article 341 (1), Scheduled Castes attain a homogenous status. The learned Judge then held that the objective of the notification was to afford special protection to the Scheduled Castes as a homogenous group, which cannot be regrouped in the manner in which it was done by the Andhra Pradesh Act. Justice Sinha noted that Scheduled Castes constitute a class of persons entitled to special protection and could not be discriminated inter se, as all of them satisfied the test of abysmal backwardness and inadequate representation. He specifically observed that the Scheduled Castes are a "single integrated class of most backward citizens".

105. One of the issues in **Jarnail Singh** (supra) was whether the judgment in **Nagaraj** (supra) was correct to apply the principle of the exclusion of the creamy layer to the Scheduled Castes and Scheduled Tribes. It was argued before the Court in **Jarnail Singh** (supra) that the application of the creamy layer principle to the Scheduled Castes and Scheduled Tribes would have the effect of amending the List, which is not permissible under Articles 341(2) and 342(2). The Constitution Bench held that the exclusion of the creamy layer from the Scheduled Castes and the Scheduled Tribes is justified under the equality code because the members of the creamy layer no longer require reservation since they have moved "forward so that they may march hand in hand with other citizens of India on an equal basis."[152] Writing for the Bench, Justice Nariman observed that the application of the principle of creamy layer to reservations for the Scheduled Castes and the Scheduled Tribes *per se* will not have the effect of tinkering with the Lists notified under Articles 341

[152] (2018) 10 SCC 396 [26, 34].

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and 342 because a caste as a whole is not excluded from the List but only persons who have overcome backwardness are excluded.[153]

106. Thus, it needs to be determined if the interpretation of the scope of Article 341 in **Chinnaiah** (supra) is correct. We must decide, first, whether Article 341 creates a deeming fiction. Second, if it does, the purpose and effect of the legal fiction created under Article 341 must be analyzed. That is, we must decide whether the legal fiction creates a homogenous class which cannot be further classified. Third, the scope of the prohibition under Article 341 (2) must be determined in relation to the effect of the legal fiction created by Article 341(1).

b. Scope of deeming fiction

107. The use of the phrase "deemed to be" is not conclusive of a legal fiction.[154] The word deemed is used for many purposes, such as for the artificial construction of a word and to clarify uncertain constructions, or plainly just to mean "regarded as being".[155] A legal fiction is essentially a presumption that certain facts which do not exist in fact, will be treated as real and existing for the purpose of law. Courts have evolved two principles on the operation of legal fictions. The first principle is that a legal fiction must be confined to its 'legitimate field', for the specific purpose for which it was created.[156] In **Bengal**

[153] ibid [26].
[154] *See* Consolidated Coffee Ltd v. Coffee Board, Bangalore, 1980 3 SCC 358 [11,12]; Bhuwalka Steel Industries Limited v. Union of India, (2017) 5 SCC 598 [36,37,43,44]
[155] St. Aubyn v. Attorney General, 1952 AC 15, 53 [Lord Radcliffe]
[156] Industrial Supplies Private Limited v. Union of India, (1980) 4 SCC 341 [25]; K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754 [39]; See Bengal Immunity Company Ltd v. State of Bihar, (1955) SCC OnLine SC 2.

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Immunity Company Ltd v. **State of Bihar**[157], a seven-Judge Bench of this Court held that legal fictions are created only for a certain purpose and they must be confined only to that *"legitimate field".* In its decision in that case, this Court held that the deeming fiction in the Explanation to Article 286(1)(a), before the Constitution (Sixth Amendment) Act 1956, (by which a sale was deemed to have taken place in the State where the goods were delivered because of the direct sale) only applied to Article 286(1)(a) and not to Article 286(2). This Court held that the scope of Article 286(1)(a) which barred a State from imposing tax on sales outside the State, was different from the scope of Article 286 (2) which stated that unless otherwise provided by law, State laws could not tax a sale or purchase which took place in the course of *inter-state* trade or commerce.[158]

108. The second principle is that the scope of the legal fiction must be extended to the consequences which "logically" flow from its creation. The opinion of Lord Asquith in **East End Dwelling Co. Ltd.** v. **Finsbury Borough Council**[159] is the leading case for this proposition. The Law Lord observed that the effect of a legal fiction must not be limited to treating facts that do not exist as real

[157] Bengal Immunity Company Ltd v. State of Bihar, (1955) SCC OnLine SC 2 [Justice Das, 32].

[158] 52. A legal fiction pre-supposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts have got to be worked out to their logical extent. But due regard must be had in this behalf to the **purpose for which the legal fiction has been created**. If the purpose of this legal fiction contained in the Explanation to Article 286(1)(a) is solely for the purpose of sub-clause (a) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be. **The legal fiction which was created here was only for the purpose of determining whether a particular sale was an outside sale or one which could be deemed to have taken place inside the State and that was the only scope of the provision. It would be an illegitimate extension of the purpose of the legal fiction to say that it was also created for the purpose of converting the inter-State character of the transaction into an intra-State one**. This type of conversion could not have been in the contemplation of the Constitution-makers and is contrary to the express purpose for which the legal fiction was created as set out in the Explanation to Article 286(1)(a). [emphasis supplied]

[159] LR 1952 AC 109.

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but must be expanded to understand the effects and consequences that flow from the legal fiction.[160] However, a law creating a deeming fiction cannot create presumptions in favor of a legal consequence but only presumptions about facts from which certain legal consequences may follow. In **Delhi Cloth & General Mills Co. Ltd** v. **State of Rajasthan**[161], the constitutional validity of the Kota Municipal Limits (Continued Existence) Validating Act of 1975 was challenged. The Municipalities Act prescribed a mandatory procedure for delimitation of municipalities including a public notice inviting objections. This mandatory procedure was flouted in the inclusion and exclusion of certain villages to and from the Kota municipality in the State. The Validating Act provided that notwithstanding the mandatory provisions of the Municipalities Act, those villages would be deemed to have always continued to exist as they do within the limits of Kota municipality. The Court held that the Validating Act required the deeming of a legal position rather than the deeming of a fact from which such legal consequence would follow. The Bench found that this was not a permissible creation of a fiction. Article 341 must be interpreted based on the above principles.

c. Article 341 does not create a deeming fiction

109. In **Punit Rai** v. **Dinesh Chaudhary**[162], the issue before a three-Judge Bench of this Court was whether the Respondent, who contested an election for a

[160] ibid at page 132. "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."
[161] 1976 3 SCC 443.
[162] 2003 8 SCC 204.

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seat reserved for the Scheduled Castes in the Legislative Assembly, belonged to the Scheduled Caste community. Justice Sinha, writing the concurring opinion made a passing observation that Article 341(1) creates a deeming fiction.[163] However, this observation does not form the *ratio decidendi* of the judgment. Thus, it needs to be analyzed if Article 341(1) creates a deeming fiction.

110. Article 341(1) consists of three parts. The first part lays down the procedure for notifying a caste as a Scheduled Caste. The President, in consultation with the Governor (if the notification is with respect to a State) is empowered to specify castes which shall be Scheduled Castes. In the second part, a provision similar to Article 366(26), provides some clarity on who could be notified as a Scheduled Caste: a caste, race, or tribe or parts of or groups within the caste, race or tribe. The third part, with the use of the words "for the purposes of this Constitution be **deemed** to be Scheduled Castes" includes a substantive provision. In the absence of the word "deemed", the provision would have solely been a procedural clause, empowering the President to notify the Scheduled Castes. The use of the word "deemed" ensures that the castes or groups of castes shall **be regarded** as Scheduled Castes by the very act of notifying them. Thus, the inclusion of the word 'deemed' in Articles 341(2) and 342(2) does not create a legal fiction since it does not provide any artificial construction. To that extent, the observations of the three-Judge Bench of this Court in **Punit Rai** (supra) that Article 341(2) creates a deeming fiction are erroneous.

[163] ibid [Justice Sinha, 25].

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111. In **Milind** (supra), a Constitution Bench of this Court observed that the purpose of Article 341(1) is to recognize and identify the Scheduled Castes for the purpose of the Constitution and to prevent disputes as to who would constitute a Scheduled Caste for the purpose of the benefits under the Constitution.[164] The Indian social order consists of castes or groups which suffer from varying degrees of social backwardness, ranging from untouchability to occupational segregation. These castes are grouped into different classes by the Constitution, such as the Scheduled Castes or the Scheduled Tribes, based on the degree of marginalization for the purpose of conferring benefits through affirmative action. A caste only becomes a Scheduled Caste or a Scheduled Tribe or a socially and educationally backward caste when the President issues a notification to that effect in the exercise of the power under Articles 341, 342 and 342A respectively. Thus, it could be argued that the word “deemed” in the provision creates a legal fiction for creating a constitutional identity for the castes which are included in the lists.

112. Even if it is accepted that the deeming fiction is used for the creation of a constitutional identity, the fiction can neither be extended to other purposes nor can it create legal consequences that do not logically flow from the fiction. Accepting the respondents’ argument that once included in the List, communities specified in the List of Scheduled Castes assume homogeneity would be akin to extending the legal fiction to a purpose that was not envisaged. The purpose of the deeming fiction is ‘identification’ of castes

[164] ibid, [35]

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which are the Scheduled Castes. The logical corollary of the identification of castes or groups as Scheduled Castes is not that this creates a homogenous unit. The inclusion of certain castes within the Scheduled Caste category is only to demarcate them from other castes which are not included in the category. The inclusion does not automatically lead to the formation of a uniform and internally homogenous class which cannot be further classified. Article 341 creates a legal fiction for the limited purpose of identification of Scheduled Castes by distinguishing them from other groups**.** It offers no guidance on how the Scheduled Castes fare among themselves or on heterogeneity among the Scheduled Castes for the purpose of the Constitution. The legal fiction which assigns an identity to the Scheduled Castes, separate from other categories cannot be stretched to draw inferences about the existence or non-existence of internal differences among the Scheduled Castes. The only logical consequence is that each of the groups that is included in the list will receive the benefits that the Constitution provides to the Scheduled Castes as a class.

113. In **Chinnaiah** (supra), Justice Santosh Hegde observed that the Castes notified by the President in the exercise of power under Article 341 form a class in themselves. For this purpose, the learned Judge relied on the following observations of the Constitution Bench in **NM Thomas** (supra):

    a. Justice Mathew observed that the members of the Scheduled Castes attain a new status by the Presidential Notification;[165]

[165] NM Thomas (supra) [Justice Mathew, 82].

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b. Justice Krishna Iyer observed that the Scheduled Castes are not castes within the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President;[166] and

c. Justice Fazal Ali observed that the Scheduled Castes and the Scheduled Tribes have been given a special status in the Constitution and they constitute a class by themselves.[167]

114. It is necessary to understand the context of the case to understand the import of the above observations. In **NM Thomas** (supra), rules providing concessions to the members of the Scheduled Castes for qualifying at the entrance examination were challenged. One of the issues before the Court was whether the concession to the members of the Scheduled Castes violated Article 16(2) since it discriminates solely on the ground of "caste". To overcome the embargo placed by Article 16(2), the learned Judges observed that provision for affirmative action is made in favour of the Scheduled Castes, which once notified by the President in exercise of the power under Article 341 are not a "caste" but a class. The class that is constituted by the Presidential notification as the Scheduled Castes consists of numerous castes, thereby forming a class. The observations in **NM Thomas** (supra) do not go further to state that it is a homogenous class that cannot be classified

[166] NM Thomas (supra) [Justice Iyer, 135].
[167] NM Thomas (supra) [Justice Fazal Ali, 169] : "If, therefore, the members of the scheduled castes and the scheduled tribes are not castes, then it is open to the State to make reasonable classification in order to advance or lift these classes so that they may be properly represented in the services under the State."

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further. In fact, Justice Mathew observed in the very next paragraph that there can be further classification within a class if there is an intelligible differentia separating a group within a class from another group.[168] Additionally, the approach adopted in **NM Thomas** (supra) by this Court that the Scheduled Castes are a class because they comprise of a collection of castes must be read in the context of the nine-Judge Bench decision in **Indra Sawhney** (supra), where this Court held that caste is itself a class. Therefore, we are of the view that the inference drawn by Justice Hegde in **Chinnaiah** (supra) that the Scheduled Castes are a homogenous class based on the above observations in **NM Thomas** (supra) is erroneous.

d. Article 341(1) read with Article 341(2) only proscribes exclusion from and inclusion in the Scheduled Castes List.

115. In **Chinnaiah** (supra), this Court held that sub-classification amounted to tinkering with the Presidential list by the State legislature, and was therefore, violative of Article 341(2) which exclusively vests power in Parliament. Article 341(2) prescribes the only manner in which the Presidential Notification under Article 341(1) may be altered. The provision stipulates that castes, races or tribes, or parts of or groups within them once notified by the President under Article 341(1) may be included in or excluded from the List only by Parliament. The latter half of the clause states by way of abundant caution that 'save as aforesaid', the notification shall not be varied. The provision reads as follows:

> "(2) Parliament may by law **include in or exclude** from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part

[168] NM Thomas (supra) [Justice Mathew, 83].

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> of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be **varied** by any subsequent notification."
>
> (emphasis supplied)

116. Dr B R Ambedkar, while proposing the inclusion of Articles 300A and 300B of the Draft Constitution (which correspond to Articles 341 and 342 of the Constitution), indicated that once notified, any elimination from the list or an addition to the list was to be made by Parliament and not by the President. This limitation, he noted was to eliminate "political factors" from disturbing the list:

> "..The only limitation that has been imposed is this: that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the government of each State, thereafter, if any elimination was to be made from the list so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."[169]

117. Unless amended in the manner prescribed under Article 341(2), the Presidential List notified under Article 341(1) is conclusive of which community is a Scheduled Caste and must be taken as it is. Article 341(2) prescribes the scope of permissible changes to the List published under Article 341(1) and exclusively vests the power to vary these lists in Parliament.

[169] Constituent Assembly Debates, Volume 9, page 1636 (17 September 1949)

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118. The prohibitions in Articles 341 (1) and 342 (2) are two-fold : first, specification as a Scheduled Caste is circumscribed by the territorial limits of the State or the region, specific to which a particular group has been notified[170]. For instance, Entry 23 of Part I of the Scheduled Castes Order for the State of Andhra Pradesh enumerates: "Godagalli, Godagula (in the districts of Srikakulam, Vizianagaram and Vishakhapatanam)". Hence, the enlisted communities (Godagalli and Godagula) are treated as a Scheduled Caste for the districts named in the entry and not for the entire State. In **Marri Chandra Shekar Rao** v. **Dean, Seth GS Medical College**[171], a Constitution Bench of this Court considered whether a member of the Gouda community, recognized as a Scheduled Tribe in Andhra Pradesh, could seek admission to a seat reserved for the Scheduled Tribes in Maharashtra. Answering it in the negative, this Court observed that since the social conditions of caste groups vary across the country, a caste or tribe could not be generalized as a Scheduled Caste or Scheduled Tribe for the whole country. It held that the expression "in relation to that State" in Articles 341 (1) and 342(1) could not be rendered redundant by treating a caste specified as a Scheduled Caste in one State to be entitled to the benefits for Scheduled Castes in another State, where it was not so specified.[172] In **Bir Singh** v. **Delhi Jal Board**[173], one of the issues before this Court was whether the power of the State to make provisions for affirmative action for the Scheduled Castes and Scheduled Tribes under Article 16(4) is impacted by the power of the President under

[170] See Constitutional (Scheduled Castes) Order, 1950 [2,4].
[171] (1990) 3 SCC 130
[172] Marri (supra) [9]
[173] 2018 10 SCC 312.

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Articles 341(1) and 342(1) of the Constitution. The Constitution Bench held that a State in exercise of its power under Article 16(4), cannot extend the benefits accorded to the Scheduled Castes to a caste which is not enumerated in the Presidential list notified under Article 341(1). The Court held that the enabling provision under Article 16(4) must be harmoniously read with Articles 341 and 342. Therefore, if a statute extends the policy of affirmative action to groups not enumerated specifically with respect to that State/Union Territory, it would circumvent the mandate of Article 341(2) and would be an impermissible expansion of the List, contrary to the mandate of Article 341(1).[174] Thus, this Court held that the benefit of reservation cannot be extended to a caste which is not enumerated as a Scheduled Caste in that State, though it finds a place in the Presidential List with respect to another State.

119. Second**,** Article 341(2) provides that only Parliament can **include in or exclude** from the List any caste, tribe, race or their parts or groups. The Presidential notification cannot be **varied** by any subsequent notification, other than by an inclusion or exclusion by Parliament. By completely vesting in Parliament the power to include or exclude from the Presidential List, Article 341(2) correspondingly limits the power of the President (acting on the aid and advice of the Council of Ministers at the Centre) and the Governor (acting on the aid and advice of the State Government when consulted) to include or exclude castes or sub-castes from the List.

[174] ibid, [Justice Gogoi, 34]; [Justice Banumathi, 79, 81]

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120. In **Chinnaiah** (supra), this Court interpreted Article 341(2) as a limit on the power of the President to "tinker" with the list.[175] Article 341(2) consists of two parts. First, it grants only Parliament the power to "include or exclude" any caste or group, or a part of the caste or group, and second, "save as aforesaid", a notification issued by the President under Article 341(1) shall not be varied by any other subsequent notification. It is important to understand the purport of the second part of the provision to understand the scope of Article 342(2).

121. The second part of Article 341(2) must be read in the context of Article 367. Article 367 provides that unless the context otherwise requires, the General Clauses Act 1897 shall apply for the interpretation of the Constitution as it applies to the interpretation of an Act of the Legislature of the Dominion of India. Section 21 of the General Clauses Act 1897 states that the power to issue notifications includes the power to add to, amend, vary or rescind the notification.[176] By Article 341(1) read with Article 367 and Section 21 of the General Clauses Act 1897, the President would have the power to add to, amend, vary or rescind the notification. The first part of Article 341(2) removes the power of the President to include in and exclude from the List and places it in the domain of Parliament. This power is traceable to the words "add to" or "amend" in Section 21 of the General Clauses Act. The second part of Article 341(2) ensures that the President does not have any residual power

[175]Chinnaiah (supra), [Justice Hegde, 43]

[176] 21. Power to issue, to include power to add to, amend, vary or rescind notifications orders, rules, or bye-laws- Where, by any [Central Act] or Regulations a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to , amend, vary or rescind any notifications, orders, rules, or bye-laws so issued.

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to "vary" the List. The phrase "vary" in common parlance has a wider meaning than exclusion or inclusion. It includes altering the list, even by partial change.[177] However, the phrase "vary" in Article 341(2) takes the meaning of inclusion in and exclusion from the List, and not the other way around. This is clear with the use of the phrase "save as aforesaid" in the second part of the provision. Thus, by Article 341(2), the President does not have the power to vary the List notified under Article 341(1) by inclusion in and exclusion from it.

122. The power of Parliament to vary the list includes not merely the power to exclude or include "any caste, race or tribe" but also the power to exclude or include "parts of or groups within any caste, race or tribe". In **Milind** (supra), the issue before this Court was whether an entry titled 'Halba/Halbi' in the Scheduled Tribe Order relating to the State of Maharashtra could be read to include the 'Halba-Koshti' tribe. This Court held that the Presidential list is to be read as it is and no evidence could be allowed to establish that an entry in the Scheduled Caste or Scheduled Tribe list included a particular group that was not included specifically in the List. The Court held that any other interpretation would infringe upon the power accorded solely to Parliament by Article 341(2). Justice Shivraj V Patil, writing for the Bench, held that unless a tribe is specified expressly in the List under Article 342, which is *pari materia* to Article 341, no inquiry could be held or evidence led to establish that such

[177] "Vary" - to make changes to something to make it slightly different. Oxford Learner's Dictionary, <https://www.oxfordlearnersdictionaries.com/definition/american_english/vary>; "vary" Merriam-Webster Dictionary <https://www.merriam-webster.com/thesaurus/vary#thesaurus-entry-1-2>

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tribe, or any part thereof, is included within the meaning of an entry included in the Presidential Order.[178] This Court underscored that the power of the States is limited to making recommendations at the initial stage of consultation, prior to the notification of the Presidential List under Article 341(1). This Court observed that the Constitution vests the power to make any further changes to the List in Parliament to prevent alterations to the List due to political pressure. [179]

123. The prohibition under Article 341(2) entails that once a particular caste, race, tribe or a part or group of it is specified in the Presidential List under Article 341(1), the list shall be read as it is with no additions or deletions. The benefit of the special provisions shall not be given to any caste or sub-caste not included in the List with respect to that State. Article 341(2) uses the words "include in" or "exclude from" and "shall not be varied". These terms contained in the provision are unambiguous. An inclusion would occur if the State were to enact a law that extends the benefits meant for Scheduled Castes in that State to a community that is not enumerated as a Scheduled Caste for that State. The only mechanism open to the State, in case it regards a community fit for inclusion in the List notified for that State, is to make a proposal to that effect to the central authorities. After due inquiry, the community may be added to the List by Parliament, subject to its satisfaction that such a modification is required. Until then, the State has to apply the Scheduled Castes List as it is.[180] Thus, to summarize, Article 341(2) bars the State

[178] Milind (supra) [12].
[179] Milind (supra) [15].
[180] Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala, 1994 1 SCC 359 [17, 18].

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Legislature from removing or adding castes from and to the List respectively. Sub-classification within the Scheduled Castes for the purposes of affirmative action, including reservation does not include or exclude any caste or group from the List. Section D(iii) of this judgment deals with the different models of sub-classification to determine if the operation of reservation upon sub-classification in-effect leads to exclusion.

v. Historical and empirical evidence of inter-se backwardness within the Scheduled Castes

124. Having held that Article 341 does not create an integrated homogenous class, we will next decide whether there is an intelligible differentia to group the castes within the Scheduled Castes. For this, it needs to be analyzed if the Scheduled Castes are a heterogenous class. The respondents submitted that there cannot be any sub-categorization of the Scheduled Castes because all the castes face the same form of social backwardness based on untouchability. The petitioners, on the other hand, submitted that there exists inter-se backwardness within the Scheduled Castes.

125. The Constitution of India does not provide a definition of the Scheduled Castes. Article 366(24) states that castes/groups notified under Article 341 shall be Scheduled Castes. However, neither Article 341 nor Article 366(24) prescribes the criteria for their identification. The President issued the Constitution (Scheduled Castes) Order 1950 which nearly corresponds to the Government of India (Scheduled Castes) Order 1936 notified under the

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Government of India Act 1935.[181] It is important to identify the criteria for inclusion of groups or castes in the Scheduled Castes Order 1936.

126. The Government of India Act 1935 did not define the criteria for the identification of Scheduled Castes. Clause 26(1) of the First Schedule to it defined the Scheduled Castes as castes that corresponded to the classes of persons known as the "depressed classes":

> "the scheduled castes" means such castes, races or tribes, or parts of or groups within castes, races or tribes being castes, races, tribes, parts or groups which appear to his Majesty in Council **to correspond to the classes of persons formerly known as the depressed classes**, as His Majesty in Council may specify."
>
> (emphasis supplied)

127. It is necessary that we briefly refer to the historical material on how the depressed classes were identified to analyze if the Scheduled Castes are a heterogenous class and whether there is an intelligible differentia distinguishing the sub-categories within the Scheduled Castes.

a. Identification of the depressed classes

128. In 1916, the definition of the depressed classes was raised in the Indian Legislative Council. It was suggested during the discussion that the expression should include criminal and wandering tribes, aboriginal tribes and untouchables.[182] In 1917, Sir Henry Sharp, the Education Commissioner, prepared a list of depressed classes which included the aboriginal or hill

[181] Marc Galanter, Competing Equalities: Law and the Backward Classes in India, [Oxford University Press (1984)] 130
[182] Report of the Indian Franchise Committee (1932) Vol I, 112

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tribes, depressed classes and criminal tribes. While preparing the list, Sir Henry stated that depressed classes "[…] includes communities which though not absolutely outside the pale of caste, are backward and educationally poor and despised and also certain classes of Muslims. Some have interpreted it as simply educationally backward".[183]

129. In 1919, the Southborough Franchise Committee adopted the test of untouchability to define the depressed class. The Indian Franchise Committee 1932, *inter alia,* was appointed to ascertain if a separate electorate must be provided to the depressed classes. The Committee also had to arrive at a definition of "depressed classes". The Committee interpreted the phrase "depressed classes" as the 'untouchability class', that is, the class whose touch or approach is deemed to cause pollution as it exists in the United Provinces.[184] The report stated that the depressed classes "should not include primitive or aboriginal tribes nor should it include those Hindus who are only economically poor and in other ways backward but are not regarded as untouchables."[185] The Committee accepted the tests of untouchability formulated by Hutton[186]. Hutton had submitted a Census Report in 1931 by which depressed castes were defined as castes, contact with whom requires purification. The instruction which was given to determine if the caste is an untouchable caste was as follows:

> "I have explained depressed castes as castes, contact with whom entails purification on the part of high caste Hindus. It is not intended that the term should have any

[183] Ibid, 113
[184] id
[185] id
[186] Ibid,Pg. 112

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> reference to occupation as such but to those castes which by reason of their traditional position in Hindu society are denied access to temples, for instance, or have to use separate wells or are not allowed to sit inside a school but have to remain outside or which suffer similar social disabilities. These disabilities vary in different parts of India being much more severe in the south of India than elsewhere."[187]

130. The following tests were directed to be considered to determine if the caste faces untouchability:

a. Whether the caste or class in question can be served by clean Brahmans;

b. Whether the caste or class in question can be served by the barbers, water-carriers, tailors, etc., who serve the caste Hindus;

c. Whether the caste in question pollutes a high caste Hindu by contact or by proximity;

d. Whether the caste or class in question is one from whose hands a caste Hindu can take water;

e. Whether the caste or class in question is debarred from using public conveniences such as, roads, ferries, wells, or schools;

f. Whether the caste or class in question is debarred from the use of Hindu temples;

[187] Hutton Censes Report (1931) 471

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g. Whether in ordinary social intercourse, a well-educated member of a caste or class in question will be treated as an equal by high caste men of the same educational qualifications;

h. Whether the caste or class in question is merely depressed on account of its own ignorance, illiteracy or poverty and but for that would be subject to no social disability; and

i. Whether it is depressed on account of the occupation followed and whether but for that occupation it would be subject to no social disability.

131. Though the test that was proposed to be used was that of untouchability, the criteria above and in particular, criteria (f), (g) and (h) indicate that other forms of social disability which cannot be strictly confined to untouchability were also considered. The report recognized that there may be a variance in the degree of restrictions based on the degree of untouchability. For example, a few castes may have been denied entry to a temple as compared to castes which were denied entry to the inner sanctuary of the temple.[188]

132. The Note submitted by Assam casts light upon the heterogeneity amongst the castes which face untouchability. The Note states that untouchability as it existed in Madras, where an untouchable's touch necessitated immediate purification, did not exist in Assam. Mr Maullan, the Census Superintendent in Assam defined the depressed class (which he termed as "exterior castes") as castes whose water is not acceptable and **in addition** are so deficient in

[188] Ibid, 472

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education, wealth, influence, or for some reason connected with their traditional occupations which prevents them from acquiring any further social privileges. The Superintendent further noted that there are influential and wealthy castes even among the jal-achals (that is, those whose water was not acceptable). The note also distinguished the untouchability which certain castes faced from other untouchable castes:[189]

> "The exterior castes themselves are, however, guilty of similar treatment to each other and an exterior caste which considers itself to be on a higher social level than another exterior caste adopts exactly the same attitude as the higher castes do towards the exterior castes. A case which recently happened in Sunamganj illustrates this point. The local ferryman there (a patni by caste) was prosecuted for refusing to row a Muchi and that it has always been the practice, if a Muchi wanted to cross the river, for the paddle to be given to him so that he could row himself across."

133. The Note of the Superintendent of Assam on Mahars further elucidated the point that there was no "uniformity" in the untouchability faced by members of various castes. The Note explained that Mahars were included in the list of depressed class though they were jal-chal in the limited sense in as much as a man of the forward caste "can smoke huka filled with water by a Mahar". They were included because they were untouchables with respect to everything but for smoking requirements and they were a socially and educationally backward community:[190]

> "I have made close and careful enquiries and there is a general consensus of opinion that the Mahars are not jal-chal and are a depressed class. The story of Raja Subid Narayan made them jal-chal for smoking requirements only, seems to be true. If the Mahars are

[189] Ibid, 495
[190] Ibid, 498

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> at all jal-chal, they are jalchal only in the sense that a man of the higher caste can smoke a huka filled with water by a Mahara. There is not a single graduate among the Maharas in this subdivision and not even a single matriculate can be found. The deputy Inspector of Schools reports that the only educated Maharas he has met in the whole subdivision are three persons working as Vernacular teachers in Primary and Middle English Schools. So the Maharas are depressed both socially and educationally."

134. The list prepared by Madras noted that castes to whom the "technical stigma of untouchability" does not apply, had been excluded from the list. This approach when juxtaposed with the approach adopted by Assam, varies with respect to the stringency of the untouchability standard employed.[191] It is evident that there is no one "form" of untouchability. Untouchability, like other forms of social disability differs in degree and severity.

135. Based on the tests for identifying untouchability laid down by Hutton, the Provincial Committee prepared the provincial estimates of depressed classes. In Madras, Bombay and the Central Province, there was a general agreement between the Provincial Committees and the Local Governments on the estimate of the depressed classes because the distinction between the depressed and other classes of the Hindu Communities was clearly defined. On the other hand, the States of Bihar, Orissa and Assam while stipulating the castes which faced untouchability observed that untouchability in the States did not exist in the same form as it existed in South India.

[191] Ibid, 499

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136. Mr SB Rambe, Mr CY Chintamani and Mr RR Bakhale submitted a note of dissent, *inter alia*, on the depressed classes in which they claim that the tests for untouchability were not applied with uniformity.[192] They observed that untouchability only existed in Madras, Bombay and the Central Province. They claimed that in other states, untouchability was not an adjunct of a person but the occupation that they pursued and thus, those castes should not have been included in the list of the depressed classes.[193] It is here that the Note submitted by Dr B R Ambedkar on depressed classes is of particular importance for it encapsulates the heterogeneity within the castes which suffer untouchability.

137. Dr B R Ambedkar highlighted that applying a uniform criterion to identify the depressed class would be inappropriate. Dr Ambedkar observed that the differences in the tests of untouchability do not indicate differences in the conditions of the untouchables because the **notion** underlying both the standards would be the same, that it is below the dignity to interact or touch persons of certain castes. He observed that the difference in the **rigidity** with which untouchability is practiced does not eliminate the **notion** of such a practice. [194] This indicates that the depressed classes were identified based on the **notion** of untouchability and not in the literal sense of the term. The effect of adopting the notional and not the literal test is that the social condition of all the castes included within the depressed classes is not uniform. Though

[192] Minute of dissent by Mr SB Rambe, Mr CY Chintamani, Mr RR Bakhale, Report of the Franchise Committee, 231
[193] id
[194] Dr Ambedkar, Note on the Depressed Classes, Report of the Franchise Committee, 211

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the Government of India (Scheduled Castes) Order 1936 did not exactly correspond to the List published by Hutton or the Provincial Franchise Committees, the inclusions and exclusions to the list broadly matched.[195]

138. The heterogeneity within the class is also evident from the Constitution (Scheduled Castes) Order 1950 where certain castes are notified as the Scheduled Castes in specific localities. For example, in the State of Madhya Pradesh, of the twenty-five castes, only nine are Scheduled Castes throughout the State. The criteria used to identify the Scheduled Castes itself indicates that the endeavor was not to include all castes that suffered from **identical** forms of untouchability. Thus, the Scheduled Castes are not a homogenous class.

b. Empirical evidence of heterogeneity

139. Field researchers have also accounted that the Scheduled Castes are not one homogenous class. Studies indicate that certain castes of the Scheduled Castes are not only sociologically backward vis-à-vis the forward castes but also amongst the Scheduled Castes themselves. AM Shah recounts that there was much less interaction between two Dalit castes in Gujarat than there was between a Dalit caste and a forward class. The author observes that the priests for the Dalits are placed high amongst the Dalit castes and the

[195] Galanter, *supra*, 130

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scavengers are placed the lowest, with the leather-workers and the rope makers occupying the intermediary positions:[196]

> "Briefly, the Dalits have reproduced among themselves a hierarchy on the model of caste hierarchy in general. There is at the top a small caste of garodas (derived from the Sanskrit word 'guru'), who are priests for other dalit castes, […] Similarly, just as there are castes of bards for the upper castes, there is a bardic caste of dalit mendicants called dhed bava or sadhu. The garudas, turi barots, and dhed sadhus are accorded certain sacredness.
>
> The bhangis (scavengers) are the bottom of the hierarchy and the most under-privileged. Between the garodas and bhangis there is a large caste, the higher stratum of which is traditionally vankar (weavers) and the lower stratum dhed (menial servants). […] The chamars (leatherworkers) and senwas (rope-makers) occupy positions intermediately between the vankar-cum-dheds and bhangis. The bhangis are the most oppressed."

140. The Robert F Kennedy Centre for Justice and Human Rights in collaboration with Navsarjan (an organization that promotes the rights of Dalits) undertook an extensive study on caste discrimination in 1589 villages in Gujarat. The census conducted by them produced results of horizontal discrimination, the practice by which certain Dalit castes practiced untouchability against other Dalit castes. The study identified that the practice of food, water and religion related untouchability is emulated within the Dalits as well. For example, Dalits of the lower sub-caste were prevented from sitting with the rest of the Dalit community during meals. They were not given tea when they visited the house of a higher sub-caste. It was also found that only in twelve percent of

[196] AM Shah, The 'Dalit" category and its Differentiation; Also see AM Shah, Untouchability, the Untouchables and Social Change in Gujarat in Dimensions of Social Life, Essays in Honor of David G Mandelbaum (edited by Paul Hockings)

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the villages could a Dalit belonging to a lower sub-caste receive water in the house of a Dalit of a higher sub-caste. The study also found that in 92.4 percent of the villages studied, all the Dalits did not have access to all-Dalit burial grounds and that the lower sub-castes were denied entry into to Dalit Temples in 79 percent of the villages.[197]

141. Similarly, in Tamil Nadu, when an Arunthathiyar man and a Paraiyar woman (both the castes find a place in the Scheduled Castes list) eloped, the woman's family allegedly raped the women of the man's family in retaliation.[198] The inequality within the Scheduled Castes in Andhra Pradesh has also been studied. Uma Ramaswamy draws on the inequality within the Scheduled Castes by comparing the social positions of members of the Mala and Madiga Castes.[199] The Madigas traditionally pursue the occupation of leather work which is assigned a lower status when compared to the weaving occupation of Malas. The author states that neither do members of both the castes live in the same hamlet nor do they draw water from the same well. The study found that the hierarchy between the castes translated to their relative progress in education, employment and political activity. In 1961, 10 percent of Malas were literate as against 5.1 percent of Madigas. In 1971, the proportion of literates among Malas had gone up to 12.9 per cent in comparison to 6.2 percent among the Madigas. The author stated that hierarchy exists even *within* the Mala caste. Mala Jangam and Mala Desari

[197] Robert F Kennedy, Center for Justice and Human Rights, Understanding Untouchability: A comprehensive Study of Practices and Conditions in 1589 Villages, 22-33
[198] Ravinchandran Bathran, The many omissions of a concept: Discrimination amongst Scheduled Castes, *Economic & Political Weekly*, (Vol L1 No. 47, November 19, 2016) 1342-1346
[199] Uma Ramaswamy, Protection and Inequality among Backward Groups, *Economic & Political Weekly* (Vol. 21 No. 9, 9 March 1986)

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are priestly castes and are spiritual advisors to Mala satellite castes. Within the Mala satellite castes, Mala Jangam is at the top, followed by Mala Pambala, Masti and Gurra Malas. The sub-castes also follow rules of untouchability amongst themselves:[200]

> "There are certain rules that restrict the taking of food, water and access to the temples among the Dalits. The Malas, higher caste Dalit do not take food or water from the Madigas, the lower caste Dalit in village India. Mala Jangam, Mala Dasari and Mithal Ayyalwar do not eat or drink from Malas, Madigas and Dakkal. Similarly other castes do not take cooked food or water from these castes. Malas and Madigas have separate wells and temples. Malas do not take food and water from Mastu, Gurram Malas and Madigas. But all these castes take food and water from priestly class of Malas. The singari, the gurus to Madigas, strictly refrain from eating food touched or cooked by Madigas or other satellite caste. Bindla though enjoys higher social status in Madigas satellite caste. The higher castes do not take either cooked food or water from Bindlas. Being worshippers of Shakti (the power) they do not take food or water from the hands of their satellite castes, since they consider themselves as sacred. Sindhu, the entertaining caste of Madigas" do not take food or water from Dakkals but their food or water is acceptable for Madigas. Dakkals who occupied a lowest social status in social hierarchy accept food and water from all castes, except Vishwa Brahamaa. The food or water of Dakkals is not acceptable to any other caste. Dakkals have to take food or water standing outside Madiga houses. Thus the higher caste Dalits do not drink or dine in common. These commenalities indicate the foundation of Panchama hierarchy and heterogeneous caste cleavages within Scheduled Castes in Andhra Pradesh."

142. Empirical evidence indicates that there is inequality even within the Scheduled Castes. The Scheduled Castes are not a homogenous integrated class.

[200] Justice Usha Mishra Report on National Commission to Examine Issue of Sub-Categorisation [327]

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vi. The power of the State to sub-classify under Articles 15 and 16

143. Article 16(4) provides the State with the enabling power to make provisions for reservations in appointments or posts in favour of "any backward class of citizens". The provision, unlike Article 15(4), does not distinguish amongst the Scheduled Castes, Scheduled Tribes, and other Socially and Educationally Backward Classes. In **Indra Sawhney** (supra), this Court defined the backward class in terms of social backwardness. Social backwardness is attributable to several identities such as caste, gender and disability. Though, the backwardness caused due to these multiple identities are all collectively within the ambit of the backward class for the purposes of Article 16(4), the State is free to recognize the heterogeneity amongst the class and provide separate reservation to women and the Scheduled Castes to deal with the purpose.

144. Article 15(4) recognizes the power of the State to make "any" special provisions for the advancement of "any" socially and educationally backward classes of citizens or for "the" Scheduled Castes and "the" Scheduled Tribes. Article 15(5) is similarly worded. It was submitted before this Court that the use of the preposition "any" before the socially and educationally backward class as opposed to the phrase "the" before Scheduled Castes and Scheduled Tribes indicates the Scheduled Castes and Scheduled Tribes are a homogenous integrated class. We do not agree with the submission. The provision provides the State with the power to make "**any**" special provisions for the Scheduled Castes and the Scheduled Tribes. Thereby, it recognizes

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the wide power of the State to employ a range of means to secure substantive equality. This would include sub-classification within the Scheduled Castes.

145. The first prong of the test for sub-classification is whether the Scheduled Castes form a homogenous integrated class for all purposes. We have held above that even if Article 341 creates a deeming fiction, the provision does not create an integrated class that cannot be further sub-classified. The provision only puts certain castes or groups or parts of them into a group called the Scheduled Castes. The castes or groups within the Scheduled Castes form an integrated class for the limited purpose of constitutional identification. They do not form an integrated class for any other purpose. We have also established through historical and empirical evidence that the Scheduled Castes notified by the President under Article 341 are a heterogenous class where groups within the class suffer from varying degrees of social backwardness. Thus, the first test is satisfied.

146. The State in exercise of its power under Articles 15 and 16 is free to identify the different degrees of social backwardness and provide special provisions (such as reservation) to achieve the specific degree of harm identified. If the Scheduled Castes are not similarly situated for the purposes of the law (or the specific harm identified), there is nothing in Articles 15, 16 and 341 which prevents the State from applying the principle of sub-classification to the class. Thus, the Scheduled Castes can be further classified if: (a) there is a rational principle for differentiation; and (b) if the rational principle has a nexus with the purpose of sub-classification.

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147. One of the issues before this Court in **Chinnaiah** (supra) was whether the State has the legislative competence to sub-classify. Justice Santosh Hegde observed that having once fulfilled the mandate of providing reservations under Articles 15(4) and 16(4), the enactments were beyond the legislative competence of the State because - first, the primary object of the law was grouping of sub-castes and apportionment of reservations was merely consequential and second, the State could not under Entry 41 of List II and Entry 25 of List III (of the Seventh Schedule) dealing with State services and education respectively, divide the Scheduled Castes List.[201] Justice Sinha noted that the legislative competence of the State legislatures under Article 246 is subject to the other provisions of the Constitution, namely Article 341 of the Constitution.[202]

148. The opinions in **Chinnaiah** (supra), conflate the issue of legislative competence, which is referrable to Articles 245 and 246, with the power to ensure substantive equality under Articles 15 and 16. Article 245 read with the Seventh Schedule lays down the legislative competence of the State Legislatures and Parliament. Articles 15(4) and 16(5) recognize the power of the State to make special provisions for the advancement of the backward class, including the Scheduled Castes. These provisions permit the State to confer the benefit of affirmative action on classes where it is most necessary. Thus, the power of the State to sub-classify the Scheduled Castes for the purpose of affirmative action, including reservations, is traceable to Articles

[201] Chinnaiah (supra) [Justice Hegde, 31]
[202] Chinnaiah (supra) [Justice Sinha, 90]

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15(4) and 16(5) in the case of educational institutions and appointments, respectively.

vii. Criteria for sub-classification

149. The object of the special provisions in Articles 15(4) and 16(4) is to provide substantive equality to the beneficiary class.[203] Inter-se backwardness within the class is a roadblock to achieving substantive equality. Sub-classification is one of the means to achieve substantive equality. But the crucial question is, what should be the rational principle to distinguish categories within the Scheduled Caste? Should it be based on the form of untouchability or any form of inter-se social backwardness? We will discuss the rational principle which must be used for sub-categorization in this segment of the judgment.

150. It is important to understand the provision from the perspective of the beneficiary class for whose advancement it has been adopted, to elucidate the rational principle for differentiation. Though both Articles 15(4) and 16(4) share a similarity to the extent that they enable the State to provide affirmative action policies, there exist some dissimilarities in the language of the provisions. Firstly, Articles 15(4) and 16(4) deal with different spheres. Article 15(4) is a general provision which gives effect to the principle of substantive equality by recognizing that the non-discrimination provisions shall not prevent the State from making "any special provision" for the **advancement** of the beneficiary class. On the other hand, Article 16(4) deals specifically

[203] See NM Thomas (supra)

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with matters of public employment. Secondly, Article 16(4) only deals with reservation while Article 15(4) recognizes other forms of affirmative action. Article 15(4) is broader and all-encompassing as compared to Article 16(4). Thirdly, the beneficiary class under Article 15(4) must be "socially and educationally backward" while the class under Article 16(4) is a backward class which is not adequately represented. The Scheduled Castes and the Scheduled Tribes are expressly carved out in Article 15(4), unlike Article 16(4), where they are encompassed within the "backward class".

151. One of the issues that must be adjudicated while discussing the scope of the provisions is whether the beneficiary classes in Articles 15(4) and 16(4) are different. This issue must be decided with reference to:

    a. The use of the qualifiers "socially and educationally" backward in Article 15(4); and

    b. The use of the qualifier "adequate representation" in Article 16(4).

a. The meaning of "Backward Class"

152. Article 15(4), unlike Article 16(4), provides that the beneficiary class for the purposes of the provision must be socially and educationally backward. In **Balaji** (supra), this Court held that the beneficiary class under Article 15(4) must be both socially **and** educationally backward. Justice Gajendragadkar observed that caste, occupation and poverty are important factors for determining the socially backward class.[204] This was reiterated in **Janki**

[204] MR Balaji v. State of Mysore, AIR 1963 SC 649 [24,25]

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Prasad Parimoo v. **State of Jammu and Kashmir**[205]. Justice D G Palekar writing for this Court made a crucial observation on the relationship between social and educational backwardness. The learned Judge observed that though the phrases 'socially' and 'educationally' are used cumulatively for the purposes of identifying the backward class under Article 15(4), "if a class as a whole is educationally advanced it is generally also socially advanced because of the reformative effect of education on that class".[206] The relationship between social and educational backwardness where social backwardness contributes to educational backwardness was reiterated in **Indra Sawhney** (supra). Thus, though the criteria of socially and educationally backward class must be cumulatively read for the purposes of identifying the beneficiary class, they are not mutually exclusive concepts. They have a causal relationship, where the educational backwardness of a class is an impact of its social backwardness.

153. The next issue is whether the beneficiary classes in Article 15(4) and Article 16(4) are the same even though, unlike Article 15(4), Article 16(4) does not include the qualifiers of "social" and "educational". In **Janki Prasad Parimoo** (supra), this Court read the requirement of social and educational backwardness into Article 16(4).[207] This was reiterated in **Vasant Kumar** v. **State of Karnataka**[208] by a Constitution Bench of this Court. However, in

[205] (1973) 1 SCC 420
[206] (1973) 1 SCC 420 [24]
[207] (1968) 2 SCR 786
[208] 1985 Supp SCC 714; Justice Chinnappa Reddy observed that "backward classes of citizens referred to in Article 16(4), despite the short description, are the same as the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, so fully described in Article 15(4)." Justice Sen and Justice Venkataramiah (as the learned Chief Justice then was) observed that Articles 15(4)

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Indra Sawhney (supra), Justice B P Jeevan Reddy speaking for four Judges (Chief Justice Kania, Justice Venkatachaliah, Justice AM Ahmadi and himself) observed that there is no basis for this assumption. The learned Judge observed that Article 16(4) applies to a much larger class. The socially and educationally backward class is **one** of the categories, to which Article 16(4) applies. The socially and educationally backward classes are included within the broader class to which Article 16(4) applies. Justice Jeevan Reddy also held that reading educational backwardness in Article 16(4), which deals with reservation in appointments at any level, would not appropriate:

> "787. […] "Backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). […] Thus, SEBCs referred to in Article 340 is only [one] of the categories for whom Article 16(4) was enacted: Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that 'backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services- which may mean, at any level whatsoever- insisting upon educational backwardness may not be quite appropriate."

154. The observation above must not be read in a vacuum. The purport of the observation by Justice Jeevan Reddy is clarified in the subsequent paragraph

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and 16(4) are intended for the benefit of those who belong to casts, communities which are traditionally disfavored and which have suffered societal discrimination in the past.

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where the learned Judge observed that though educational backwardness is not to be excluded as a criterion, social backwardness must have caused educational backwardness:

> "788. […] It goes without saying that in the Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty- which in turn breeds and perpetuates the social and educational backwardness. They feel upon each other constituting a vicious cycle. It is a well-known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes.[…] We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social and educational."

155. In **Indra Sawhney** (supra), Justice Pandian defined the backward class of citizens as "a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense that not having so much of intellect and ability will fall within the ambit of 'any backward class of citizens' under Article 16(4)".[209] The learned Judge further elucidated that the "primary consideration" in identifying the backward class is social backwardness.[210] Justice Sawant also observed that in identifying the beneficiary class under Article 16(4), social backwardness must be given importance. Justice Sawant held that the

[209] (1992) Supp (3) SCC 217 [58]
[210] (1992) Supp (3) SCC 217 [117]

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criterion for the identification of the beneficiary class is whether it is socially backward and whether the class which is educationally and economically backward, is so **because** of its social backwardness.[211]

156. Justice Kuldip Singh adopted a different approach. The learned Judge held that the beneficiary classes in Articles 15(4) and 16(4) are different. Justice Kuldeep Singh observed that unlike the determination of the beneficiary class in Article 15(4) which must be socially and educationally backward, the class identified for the purposes of Article 16(4) need not be backward because:

a. The Constituent Assembly Debates indicate that reservation under Article 16(4) is to provide access to communities that have not had a 'look in' at the administration of the State. The object of including the phrase "backward" in Article 16(4) - which did not find a place in the initial draft - was only for the purpose of reducing the number of claimants for the reserved posts;[212]

b. Inadequate representation in the services of the State is the only test for the identification of the beneficiary class under Article 16(4). Inadequate representation can be identified based on occupation, economic criterion, family income, political sufferers, border areas, backward areas, communities kept out of State services or any other means.[213] The 'backward class' must be culled out from the classes which are inadequately represented[214];

[211] (1992) Supp (3) SCC 217, [Justice Thommen, 273]; [Justice Sawant 441,552]
[212] (1992) Supp (3) SCC 217 [363]
[213] (1992) Supp (3) SCC 217 [368]
[214] (1992) Supp (3) SCC 217 [364]

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c. The backward class cannot be classified into adequately represented and inadequately represented. A class that is adequately represented cannot be considered backward. Reading the qualifier of inadequate representation with respect to the backward class would render the former expression redundant; and[215]

d. The Constitution has expressly mentioned the Scheduled Castes and the Scheduled Tribes whenever the Constitution grants protection to the "weaker classes".[216]

157. Contrary to the opinion of Justice Kuldeep Singh, which held that the determining character of the class in Article 16(4) is not backwardness but inadequacy of representation[217], the majority in **Indra Sawhney** (Justice Reddy writing for four Judges, Justice Pandian and Justice Sawant) held that the predominant factor which must be employed to identify the "backward class" must be social backwardness. The majority also held that the backward class in Article 16(4) subsumes the socially and educationally backward class identified under Article 15(4).[218] Thus, the objective of both Articles 15(4) and 16(4) is to ensure substantive equality by uplifting the socially backward class.

[215] (1992) Supp (3) SCC 217 [366]
[216] (1992) Supp (3) SCC 217 [367]
[217] See opinion of CJ Ray in MN Thomas (supra)
[218] (1992) Supp (3) SCC 217 [Justice Reddy,787]; [Justice Sahai, 583]

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b. Inadequacy of representation in services of the State

158. The issue on the identification of beneficiaries which will impact the scope of reservation is whether the class is both backward **and** inadequately represented. That is, whether they are mutually exclusive qualifiers. In **Indra Sawhney** (supra), Justice Sawant writing the concurring opinion observed that only classes which are inadequately represented must be provided reservation under Article 16(4). In the opinion of the learned Judge, a class that is backward will cease to be a beneficiary when the class becomes adequately represented. This observation aligns with the argument that reservation must not be provided once the goal of the provision, which is securing adequate representation is achieved.

159. To navigate this issue, it is necessary that we refer to the debates of the Sub-Committee of Minorities and Sub-Committee of Fundamental Rights to ascertain the reason for the inclusion of the phrase “inadequate representation” in Article 16(4). The Objectives Resolution which was introduced by Mr Jawaharlal Nehru on 13 December 1946 resolved to provide adequate safeguards for minorities, backward and tribal areas, and the depressed and other backward classes. The equality provision in the first draft report submitted by the Sub-Committee on Fundamental Rights did not provide for reservation of seats for the backward community or the minorities. Though the report included provisions emphasizing anti-discrimination and equal opportunity, it did not recommend an enabling provision for affirmative

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action.[219] The Sub-Committee on Minorities along with the Fundamental Rights Sub-Committee decided to examine the clauses recommended to determine if any of them required to be amended to protect minority rights. During the discussion, Mr KM Munshi stated that reservation may have to be made for the minorities in public employment.[220] An Advisory Committee was formed to make recommendations on how best to reconcile the anti-discrimination provision with the provision for reservation. The Sub-Committee on Minorities recommended that a proviso may have to be added to meet the claims of representation of the marginalized communities.[221]

160. After the discussion, Dr Ambedkar representing the Advisory Committee, suggested the inclusion of the following provision:

> "Nothing herein contained shall prevent the State from making provisions for reservation in public services **in favour of classes** as **may be prescribed by the State**."
>
> (emphasis supplied)

161. The Sub-Committee on Fundamental Rights debated two issues related to the above clause. First, whether the word "minority" or "class" must be used

[219] There shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, ranks, roads, schools and places of public resort maintained wholly or party out of public funds or dedicated to the use of the general public
(b) There shall be equality of opportunity for all citizens-
(i) in matters of public employment
(ii) in the sercise or carrying on of any occupation, trade, business or profession;
and no citizen shall on any of the grounds aforesaid be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occuptation, trade, business or profession within the Union
(2) Any enactment, regulation, judgment, order, custom or interpretation of law, in force immediately before the commencement of this Constitution by which any penalty, disadvantage, or disability is imposed upon or any discrimination is made against any citizen on any of the grounds aforesaid shall cease to have effect.
[220] B Shiva Rao, The Framing of India's Constitution: Select Documents [Vol II, The Indian Institute of Public Administration] 221
[221] Ibid, 258-259; KM Panikkar: "I was responsible for the change from the word 'minorities'. The reason which I gave was that minorities in India have come to have a specific meaning, that is to say, religious or political minorities, Muslims, Sikhs etc.

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to signify the beneficiaries. The debates indicate that the phrase "class" was preferred over "minority" because the latter has a specific connotation, that is, religious or political minorities and this would exclude classes who constitute the majority but are yet not adequately represented. The reason is best explained by Dr Ambedkar in the Annexure to the Memorandum and Draft Articles on the Rights of States and Minorities, where he noted that "to make religious affiliation the determining factor for constitutional safeguards is to overlook the fact that religious affiliation may be accompanied by an intense degree of social separation and discrimination".[222]

162. The second issue was whether the provision must be qualified with the phrase "adequately represented". A few members expressed the fear that the use of the phrase "adequate representation" would become litigious.[223] In spite of this apprehension, the phrase was retained to restrict the discretion of the State since the phrase "class" and not "minority" was adopted. Without the phase "adequate representation", the clause would have also included reservations for adequately represented majorities for whom the benefit was not intended. However, with the inclusion of the phrase "adequately represented" qualifying the phrase "classes", the benefit of the provision extends to classes which may be considered 'majorities' but are yet inadequately represented.[224]

[222] Shiva Rao, *supra,* 109
[223] BR Ambedkar: "I am omitting the words "not adequately represented". If we have the words "not adequately represented", any reservation made by the State may be open to be challenged in a court. The court may say that reservation is made for a class although it is adequately represented."
[224] KM Panikkar: "I was responsible for the change from the word 'minorities'. The reason which I gave was that minorities in India have come to have a specific meaning, that is to say, religious or political minorities, Muslims, Sikhs etc. Sikh, Muslim, Depressed Classes, either a political or religious minority. The meaning

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163. The debates in the Sub-Committee on Fundamental Rights and Sub-Committee on Minorities indicate that the beneficiaries of reservation are classes that are not "adequately represented" and this could include classes which are numerical majorities. Provisions for reservation are now available not only to the members of the Scheduled Castes and Scheduled Tribes but also of the socially and educationally backward classes which are numerical religious majorities. The phrase "backward" preceding "class" was absent in the draft circulated by the Sub-Committee. The phrase was included in Article 10 of the Draft Constitution. The inclusion of the phrase backward along with the qualifier of adequate representation clarifies the scope of the beneficiary class.

164. Dr B R Ambedkar stated in the Constituent Assembly that reservations under Article 10 of the Draft Constitution [Article 16 of the Constitution of India] are given to those who have not had a "proper look-in" to the administration because it has historically been controlled by a few communities.[225] Referring to the above observations of Dr Ambedkar, Justice Jeevan Reddy held in **Indra Sawhney** (supra) that the objective of Article 16(4) is to ensure that the backward classes get the opportunity to share state power.[226]

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has come to that. There may be among the majority, among the Hindus for example, many classes who have not adequate representation in the services."

[225] CAD Vol 7. P. 701

[226] Reddy J [694] "[…] In short, the objective behind Article 16(4) is empowerment of the deprived backward communities- to give them a share in the administrative apparatus and in the governance of the community." Also see Paragraph 161 where Justice Pandian states that "inadequate representation is not confined to any specific section of the people, but all those who fall under the group of backwardness whether they are Shudras of Hindu community or similarly situated other backward classes of people in other communities, namely, Muslims, Sikhs, Christians etc.

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165. It is clear from the debates extracted above that the purpose of the reservation clause is to remedy the inadequate representation in public services of certain "classes". The cause for inadequate represented could be two-fold. First, it may be a result of laws that **expressly** excluded certain classes from accessing the good, that is posts in public service. Second, it may be the result of a class being excluded not expressly by law but through social exclusion. A class may be socially excluded from accessing skills which are relevant for acquiring the good. These restrictions could either be in the form of social and informal or legal and formal restrictions.

166. In **Indra Sawhney** (supra), Justice Jeevan Reddy observed that a class for the purpose of securing reservations under Article 16(4) should not only be a backward class but must also be inadequately represented in the services of the State.[227] Thus, the beneficiary class is not to be determined solely on the basis of whether the class is a numerical minority or a majority in the services of the State. The focus instead is on identifying classes that have been excluded from public services not as a matter of chance or choice but because of the operation of the system of hierarchy. Thus, both the phrases, "backward" and "not adequately represented," in Article 16(4) cannot be interpreted in a mutually exclusive manner in determining the beneficiary class under Article 16(4). The intent of Article 16(4) is to cover those classes which have been inadequately represented **because** of their backwardness.

[227] Also see Nagaraj (supra) where this Court observed that the discretion of the State under Article 16(4) is subject to the existence of "backwardness" which must be based on objective factors and "inadequacy of representation" which must factually exist.

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Thus, the requirement of inadequate representation cannot be detached from the requirement of backwardness.

c. The requirement of "effective" representation

167. Conventionally, the State has assessed if the class is adequately represented by comparing the representation of the class in the services to the total population of the State.[228] However, adequacy of representation when determined purely from a numerical perspective without accounting for factors such as representation vis-à-vis posts would dilute the purpose of the provision. The objective of Article 16(4) is to ensure effective representation of the class in the services of the State across posts and grades. Classes which are socially backward occupy the lowest of the social strata primarily because of the traditional occupation accorded to the class by social rules. For example, certain Dalit castes are regarded as scavenger castes. Even with the provision of reservation, it is very difficult for the backward classes to shed the traditional occupation that is ascribed to them by society and optimize the opportunities even at the lowest levels. The struggles that the class faces do not disappear with their representation in the lower grades. The endeavor is to ensure true and effective representation of the socially backward classes across posts.

168. Opportunities for real and effective representation must be created in all posts and grades. The objective of the provision is not to emulate the existing social

[228] See RK Sabharwal v. State of Punjab, (1995) 2 SCC 745 [4]; BK Pavitra (II) v. State of Kerala, (2019) 16 SCC 129 [107]; Indra Sawhney, (1992) Supp (3) SCC 217 [807 and 808]

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hierarchy where the low-grade posts are occupied by the socially backward while supervisory and managerial posts continue to be occupied by the advanced classes. If the objective of Article 16(4) is to be achieved in the truest sense, the inadequacy of representation must not be determined only on the basis of the total number of members of the backward class in the services of the State but by assessing the representation of the class across various posts.

169. The meaning of the phrase "adequate representation" fell for the consideration of this Court in **Rangachari** (supra). Writing for the majority, Justice Gajendragadkar observed that adequate representation means not only numerical representation but **qualitative representation** as well:

> "25. […] This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. **The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well.** In the context the expression "adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service can be judged."
>
> (emphasis supplied)

170. On the other hand, Justice Wanchoo and Justice Rajgopala Ayyangar observed that the phrase 'adequate representation' only conveys the

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meaning of inadequacy of representation in the quantitative sense and does not convey any idea of equality.[229] In **Triloki Nath** v. **State of Jammu and Kashmir (I)**[230], a reservation policy providing 50 percent of the seats to Muslims from Jammu and Kashmir, 60 percent of the remaining fifty percent seats to Hindus from Jammu and the remaining 40 percent of the 50 percent to Kashmiri Pandits was challenged. The State contended that the sole test of backwardness for the beneficiary class under Article 16(4) is inadequacy of representation in the services of the State. The Constitution Bench rejected the argument, observing that if it is accepted, the benefit would be conferred only on the 'rich and cultured' who are socially and educationally advanced.

171. Justice Jeevan Reddy also adopted a value-ridden interpretation of the phrase "adequately represented" in **Indra Sawhney** (supra). The learned Judge held that the principal test to determine the adequacy of representation is "effective representation or effective voice in the administration" and not mere numerical presence. Effective representation can only be achieved, in this view, when there is adequate representation at all levels or posts in the administration. Justice Sawant also adopted a similar approach.[231]

[229] Justice Wanchoo's opinion "32. Therefore, when Article 16(4) says that reservation may be made in order that any backward class of citizens may be adequately represented in the services it means that reservation may be made in order to make the number of any backward class sufficient in the services under the State. These words do not in my opinion convey any idea of equality […]; Justice Ayyangar [Paragraph 43]: "[…] I have drawn attention to this because it pointedly demonstrates that the correct view is that when "inadequacy of representation" is referred to in Article 16(4) as justifying a reservation, the only rational and reasonable construction of the words are that it refers to a quantitative deficiency in the representation of the backward classes in the service taken as a whole and not to an inadequate representation at each grade of service or in respect of each post in the service."
[230] (1967) 2 SCR 265
[231] (1992) Supp (3) SCC 217 [517]

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172. We are in complete agreement with the opinions of Justice Jeevan Reddy in **Indra Sawhney** (supra) and Justice Gajendragadkar in **Rangachari** (supra) on this aspect which is being discussed in the present segment. Adequate representation means meaningful and effective representation. The sphere of public services is a constitutionally recognized realm for reservation because being a part of the administrative mechanism of the State is itself an indicator of social power. It is for the same reason that the Constitution, when it was adopted, guaranteed reservation in the legislature. However, there exists a hierarchy in social power within the sphere of public service. Positions that are higher up in the pyramid are positions that command greater authority. For example, let us assume a situation where the Class III and Class IV posts in the State are filled by members of a certain class while the higher positions of authority and power are filled by members of a certain class. This demographic of representation, if the service is taken as a whole unit, does not paint a realistic picture of the inequality that persists within the sphere. If numerical representation is used as an indicator, provision for representation will have to be made in favour of classes which are unrepresented in Class III and Class IV which does not align with the purpose of the provision. In fact, that would be nothing but another indicator of the existence of unequal social structures where members of the backward classes are subject to the authority and power of the more advanced. Thus, a numeric-representation focused interpretation of the phrase ‘inadequate representation’ does not fulfill the purpose of the provision.

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173. In view of the discussion above, the following principles are summarized with respect to the objective and yardstick for identifying the beneficiary class under Articles 15(4) and 16(4):

a. The beneficiary class in Article 15(4) must be a socially and educationally backward class. “Socially and educationally backward” are not mutually exclusive concepts. The phrase constitutes a constitutional recognition of the sociological reality that educational backwardness is caused by the social backwardness of the class;

b. The beneficiary class in Article 16(4), similar to the class under Article 15(4), must predominantly be socially backward. The purpose of both the provisions is to ensure substantive equality of opportunity to the socially backward communities. The beneficiary class in Article 16(4) subsumes the socially and educationally backward classes under Article 15(4);

c. The qualifier of inadequate representation in Article 16(4) is not mutually exclusive of the requirement of backwardness. The inadequate representation of the class in the services of the State must be because of social backwardness; and

d. The adequacy of representation must be determined based on the standard of effective representation and not numerical representation.

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d. Yardstick for sub-classification

174. This takes us to the next question. What must be the rational basis for sub-classification within the beneficiary classes? Since the purpose of Articles 15(4) and 16(4) is to ensure equality of opportunity of the socially backward classes, the criterion for sub-classification within a class (be it the Other Backward Classes or the Scheduled Castes or Tribes) must be an indicator of social backwardness. The yardstick for classification must differentiate the class based on inter-se social backwardness. The inter-se backwardness could be identified based on the same or different identity. The State has identified the Other Backward Classes, the Scheduled Castes and the Scheduled Tribes.[232] Here, the State sub-classifies based on the same identity, that is, social backwardness because of caste identity. Horizontal reservation is provided to classes which face backwardness due to identities other than caste such as gender[233] and disability[234]. Here, the State sub-classified based on a different identity.

175. Though Article 16(4) only refers to the "backward class" collectively, the Scheduled Castes are differentiated because they suffer from social backwardness in the form of untouchability which leads to educational and economic backwardness. The Scheduled tribes are classified as a separate class because they suffer from social backwardness because of their spatial and cultural isolation from the rest of the population.[235] Since the State can

[232] See the Central Educational Institutions (Reservation in Admission) Act 2006
[233] Seats have been reserved for women through executive notifications issued by various states.
[234] See The Rights of Persons with Disabilities Act 2016, Sections 32, 34
[235] Galanter,*supra,* 147

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use any yardstick to determine inter-se backwardness, it is not necessary that the criteria for sub-classification and the criteria used to distinguish the class from the other classes must be the same. That is, if the criteria for recognizing the Scheduled Castes as a backward class is untouchability, it is not necessary that the group can be sub-classified only if there is inter-se backwardness due to the same identity (that is, untouchability).

176. The Scheduled Castes are a collection of castes, races or tribes or parts of groups, races or tribes.[236] Caste is both a unit in the sense that it consists of a homogenous group of people and is also an indicator of backwardness because it is an occupational grouping.[237] The nexus between caste and occupation continues to persist, more predominantly in the rural areas. This position has been expounded by numerous cases right from **Balaji** (supra) to **Indra Sawhney** (supra). A caste whose traditional occupation is that of scavenging and another caste whose traditional occupation is that of weaving may both face the stigma of untouchability. However, the caste whose traditional occupation is that of scavenging will be more socially backward when compared to the weaver caste because of the caste-occupation-poverty nexus.

177. How does the State identify inter-se social backwardness within the Scheduled Castes? As discussed above, the inter-se backwardness can, *inter alia*, be identified based on inadequacy of effective representation. However, it must be proved that inadequacy of effective representation of a

[236] Constitution of India 1950; Article 366(24)
[237] (1992) Supp (3) SCC 217 [Justice Jeevan Reddy, 779]

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caste is **because** of its social backwardness. I have had the benefit of reading the erudite opinion of my learned Brother, Justice Gavai. My learned Brother and I agree that the State must prove that the group/caste carved out from the larger group of Scheduled Castes is more disadvantaged and inadequately represented.

viii. The limits of sub-classification

178. Having held that sub-classification of the Scheduled Castes for the purposes of reservation is valid and having laid down the yardstick which must be used for further categorization, the next issue that falls for our consideration is its scope. In this section, we will answer the following issues:

a. Whether the State should earmark seats for the each of the sub-categorized classes or follow a preference model; and

b. Whether the State can allocate seats or preference for **each** of the castes in the Scheduled Castes List.

This section is not intended to prescribe an inflexible criterion for the State. Our analysis will lay down broad constitutional parameters without trenching on matters of policy.

a. Model of special provisions

179. A crucial issue which arises for consideration is with respect to the model of reservations for the sub-classified classes. There are two models that the

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State may employ while reserving seats for the sub-classified castes. It needs to be analyzed if both the methods are constitutional.

180. In the first model, the class(es) that are more socially backward are given a preference to all the seats that are reserved for the Scheduled Castes. There are two variations of this model. In the first variation, certain castes are given a preference over all the seats reserved for the category of Scheduled Castes. In other words, the sub-categorized class will get the first bite at the apple. In the second variation, the sub-categorized class will have a preference over a certain percentage of seats. Any unfilled seats will be available to the other categories.

181. In the second model, seats shall be exclusively available to certain castes. The exclusive model differs from the preference model to the limited extent that in the former, the seats that are not filled will be carried over to be filled by the same castes in the subsequent year while in the latter, the seats that are not filled will be available to the other castes within the same class. There are two variations to this model as well. In the first variation, a certain percentage of seats will be reserved for the sub-categorized class and the State shall carry forward the unfilled seats, if any, to be filled by the same class in the subsequent year. In the second variation, all the seats are exclusively available to a certain caste from the category and the State shall carry forward the unfilled seats.

182. Whether the preference or the exclusive model is unconstitutional would depend on whether the variation in-effect excludes any caste notified as a

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Scheduled Caste with respect to that State by the President under Article 341(1). With respect to the preference model, the first variation by which preference is given to certain castes to all the seats would be an unconstitutional approach because there is a possibility that other categories within the class of the Scheduled Castes are **excluded**. For example, if the State grants preference to three of the thirty castes classified as the Scheduled Castes over all the seats reserved for the Scheduled Castes, it is possible that the three castes exercise their preference and fill up all the seats. This would lead to a situation where the other twenty-seven castes classified as the Scheduled Castes would be **excluded** from the benefit of reservation. This model will be arbitrary and unreasonable also because the Other Backward Classes which are socially advanced compared to the castes classified as the Scheduled Castes would receive the benefit of reservation but the castes or groups within the Scheduled Castes would not. The castes classified as the Scheduled Castes must be given the opportunity to secure the benefit. If not, the provision would become otiose for their purposes.

183. However, the second variation of the first model is differently placed vis-à-vis the scope of Article 341(2). In the second variation, preference to certain castes is given only over a certain percentage of the seats. Thus, castes for whom preference is not given but which are included in the List of Scheduled Castes will be able to compete for a certain percentage of seats. In addition to those seats, they may get the opportunity to compete for the percentage of seats reserved for the sub-classified caste, if they are left unfilled. Thus, this

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model does not have the effect of excluding any of the castes in the Scheduled Castes List.

184. The difference between the first and the second model is the method in which unfilled vacancies of the more-backward sub-category are to be filled. In the former, the more backward sub-category only has a **preference** to a certain percentage of seats while in the latter, a percentage of the seats is exclusively available to them and the unfilled seats, if any, will not be available to be filled by the more advanced category of the class. The State may carry forward the unfilled vacancies to the subsequent year which will be available to the same category for which the seats were reserved.

185. Article 16(4-B) provides that the State can consider carrying forward the unfilled vacancies of the year, which were reserved to be filled by classes under Article 16(4) and 16(4-A), to the subsequent year or years. The provision further provides that the unfilled vacancies shall not be considered together with the vacancies of the subsequent year for determining the ceiling of fifty percent reservation on total vacancies for that year.

186. Article 16(4-B) does not make any distinction between a class and sub-classified classes. The provision stipulates that the State can carry forward vacancies of unfilled seats which were reserved to be filled under Articles 16(4) and 16(4-A) of the Constitution. As held in the preceding section, the power of the State to sub-classify within the Scheduled Castes is traceable to Article 16(4). Further, the seats that remain unfilled will not in any manner reduce the seats which are available to the other sub-categories of the

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Scheduled Castes. The Constitutional validity of Article 16(4-B) was upheld in **Nagaraj** (supra). Thus, there is no reason to prevent the State from exercising its power under Article 16(4-B) of carrying forward the vacancies which are reserved for a specific sub-category. Such an exercise will be legal and valid.

187. Like the first model, the constitutionality of the exclusive model depends on the percentage of reservation for the sub-categorized castes. The model of sub-classification will be unconstitutional if it excludes some Scheduled Castes from the benefit. This, similar to the first variant of the preference model, would violate of Article 341(2), and would thus be unconstitutional. However, the second version of the exclusive model in which only a certain percentage of seats is exclusively allotted to the sub-classified castes would be constitutional. For example, if ten percent of the seats reserved for the Scheduled Castes are reserved for the more backward among Scheduled Castes, the other castes will have the chance to compete for the other ninety percent of the seats, thus, not excluding any of the castes. The sole test is whether the operation of the policy has the effect of eliminating the possibility of castes or groups competing for the seats reserved for the Scheduled Castes.

188. Article 341(2), as we have noted above, unambiguously prevents inclusion in and exclusion from the Scheduled Castes List by anyone except Parliament. Inclusion could be by way of extending the benefits meant for Scheduled Castes in the State, to a community that is not specifically mentioned in the

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State Scheduled Castes List (as was the case in **Milind** (supra)), by reading as a part of an enumerated entry or by reading it as a synonym of an enumerated entry. Such an exercise is not open to the States or for that matter to the Courts. Only Parliament is entrusted with the power to make inclusions to or exclusions from the Lists of Scheduled Castes and Tribes. The thrust of the prohibition, as Dr Ambedkar also indicated, is a proscription on the elimination of an entry or addition of an entry to the List. Such elimination or addition, it was apprehended could arise out of political calculations in the hope of short-term electoral gains. Therefore, only Parliament is invested with the exclusive power to make such variations to the List. Any legislative effort by the State that does not either include unspecified communities or exclude specified communities from the Scheduled Castes List applicable to that State does not fall foul of Article 341(2) of the Constitution.

189. The state has the power to follow either of the two permissible models discussed above while reserving seats through sub-classification. The decision of the State to choose from either of the two models will depend on multiple considerations such as the degree of backwardness of certain castes vis-à-vis the other castes and the total number of qualifying candidates belonging to the Scheduled Castes (both the more backward castes of the Scheduled Castes and the others).

190. The course of action adopted by the State is subject to judicial review, when faced with a constitutional challenge. Where the action is challenged, the State will have to justify the basis of its action. The basis of the sub-

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classification and the model which has been followed will have to be justified on the basis of empirical data gathered by the State. In other words, while the State may embark on an exercise of sub-classification, it must do so on the basis of quantifiable and demonstrable data bearing on levels of backwardness and representation in the services of the State. It cannot in other words merely act on its whims or as a matter of political expediency. The decision of the State is amenable to judicial review. When its action is challenged under Article 226 or before this Court under Article 32, the State must provide justification and the rationale for its determination. No State action can be manifestly arbitrary. It must be based on intelligible differentia which underlie the sub-classification. The basis of the sub-classification must bear a reasonable nexus to the object sought to be achieved.

b. The caste-class conundrum

191. One of the issues that arises is whether the State may provide special provisions for each caste within the class. In **Indra Sawhney** (supra), the State classified the Other backward Castes into two categories – the backward class and the more backward class. Thus, the class was only sub-divided into two categories. Is it permissible to classify the Scheduled Castes by providing preference or reservation in a percentage of seats to **every** caste?

192. Both Articles 15(4) and 16(4) do not enable reservation based on castes but only on classes. The absence of the use of “caste” in Articles 15(4) and 16(4) when coupled with its use in Articles 15(2) and 16(2) led the courts to hold

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that caste cannot be the sole basis of reservation.[238] However, as Marc Galanter notes, the court had erroneously fused the two distinct usages of caste, as a unit or class, and as a criterion of backwardness.[239]

193. In **Balaji** (supra), the criterion for the determination of social and educational backwardness was in question. This Court held that caste is a relevant consideration for determining social backwardness. However, the Court observed that caste cannot be the **sole** basis for determining the beneficiary class because it would perpetuate the vice of castes. Disagreeing with the Nagan Gowda report, Justice Gajendragadkar writing for the Bench, held that economic backwardness and not caste is the ultimate cause of social backwardness. This interpretation of the permissibility of caste as a criterion to determine the backward class was approved in **Chitralekha** v. **State of Mysore**.[240] In **P Rajendran** v. **State of Madras**,[241] this Court deviated from the approach adopted in **Chitralekha** (supra) and **MR Balaji** (supra) observing that caste is a class because it is a homogenous "unit".[242] The approach in **P Rajendran** (supra) was later approved by a nine-Judge Bench in **Indra Sawhney** (supra), where this Court observed that to determine a socially backward class, a caste can be identified as a unit since it is homogenous and then the criteria for backwardness can be applied to it.[243]

[238] Venkataramana v. State of Madras, AIR 1951 SC 226; Balaji v. State of Mysore, AIR 1963 SC 649
[239] Galanter, *supra,* Pg. 189
[240] AIR 1964 SC 1823
[241] (1968) 2 SCR 786
[242] "It must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward classes within the meaning of Article 15(4)."
[243] (1992) Supp (3) SCC 217 [859]

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194. The Constitution does not bar the allocation of a percentage of seats to a caste since every caste is a class. However, the State must have sufficient material to prove inter-se backwardness between each of the castes. The State must with the submission of cogent material prove that there is a rationale principle which distinguishes the groups included and those excluded from the class. However, the rational principle will have nexus with the object only when the principle can identify the inter-se social backwardness of the class. For example, if the State allocates a separate percentage of seats for the *dhobi* caste and the *barber* caste, it must prove that these two castes suffer from differing levels of social backwardness. It is not merely sufficient for the State to base the classification on the difference in the traditional occupation of the two castes. Rather, the State must on the basis of quantifiable data prove that the castes suffer from different levels of social backwardness. The State must also back this with the submission of data on effective representation of the caste in the services of the State.

195. Though sub-categorization based on each caste is permissible, we are of the opinion that there can never be a situation where seats are allocated for every caste separately. Though each caste is a separate unit, the social backwardness suffered by each of them is not substantially distinguishable to warrant the State to reserve seats for each caste. If the social backwardness of two or more classes is comparable, they must be grouped together for the purposes of reservation.

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ix. Scope for judicial review

196. The scope of judicial review of reservation policies was laid down in **Indra Sawhney** (supra). Justice Jeevan Reddy observed that a class for meriting reservations must be both backward and inadequately represented in the "services under the State". In **Nagaraj** (supra), this Court held that backwardness must be based on objective standards whereas inadequacy of representation must factually exist. The Court held that the State must submit quantifiable data to prove backwardness and inadequacy of representation. This standard applies for classifying groups for the purpose of reservations and would, equally apply for sub-classification within a group because it is premised on the same principle of difference and inequality.

197. Two prominent considerations arise while discussing the scope of judicial review of sub-classification of the Scheduled Castes and the Scheduled Tribes. First, whether the State must prove inter-se backwardness given the position of law laid down in **Indra Sawhney** (supra) that the backwardness of the Scheduled Castes and the Scheduled Tribes is not required to be proved. Second, whether the inadequacy of representation of the more backward of the Scheduled Castes must be proved.

a. Inter-se backwardness

198. In **Indra Sawhney** (supra), this Court held that the requirement of social and educational backwardness cannot be applied to the Scheduled Castes and the Scheduled Tribes because they admittedly fall within the backward class

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of citizens.[244] One of the issues before the Constitution Bench of this Court in **Jarnail Singh** v. **Lachhmi Narain Gupta**[245], was whether **Nagaraj** (supra) in requiring the State to collect quantifiable data showing backwardness is contrary to the decision in **Indra Sawhney** (supra), where this Court held that backwardness of the Scheduled Castes and the Scheduled Tribes need not be proved. In **Jarnail Singh** (supra), this Court held that observations in **Nagaraj** (supra) that the State is required to collect quantifiable data to prove the backwardness of the Scheduled Castes and the Scheduled Tribes is bad in law because it is contrary to **Indra Sawhney** (supra).

199. The decision in **Indra Sawhney** (supra) exempts the State from having to prove that the Scheduled Castes and the Scheduled Tribes are backward for the purposes of securing benefits under Articles 15 and 16. The observations do not exempt the State from having to justify the decision of sub-classifying within the Scheduled Castes and Scheduled Tribes for the purposes of reservation. The basis of sub-classification is that few of the castes or groups within the class are more backward. Thus, though the State is not required to collect quantifiable data to prove backwardness of the entire class of the Scheduled Castes/Tribes, it is required to collect data to prove inter-se backwardness within the class, where it seeks to make a sub-classification within the class.

[244] (1992) Supp (3) SCC 217 [Justice Reddy 781; 796-797]
[245] (2018) 10 SCC 396

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b. Adequacy of representation

200. Justice Jeevan Reddy noted in **Indra Sawhney** (supra) that the issue of whether a class is inadequately represented is a matter within the subjective satisfaction of the State which is evident from the use of the phrase "in the opinion of the State", and that the subjective satisfaction of the executive action must be judicially reviewed based on the standard laid down in **Barium Chemicals** v. **Company Law Board**[246]. In **Barium Chemicals** (supra)**,** a Constitution Bench of this Court while determining the validity of administrative actions held that though the formation of opinion by the State may be based on its subjective satisfaction, the State could not act based on circumstances it 'thinks' existed. There must be apparent circumstances that merit a certain inference by the State, and such circumstances, must be shown to exist at least prima facie.[247] In the preceding section, we have held that inadequacy of effective representation is a criterion for determining inter-se backwardness. Hence, quantifiable data for that purpose must be submitted.

201. In **Nagaraj** (supra), this Court held that the State must submit quantifiable data to satisfy the court that reservations are necessary "on account of inadequacy of representation of the Scheduled Castes and Scheduled Tribes in a particular class or classes of posts".[248] However, in the subsequent paragraphs, this Court held that the cadre strength must be taken as a unit to

[246] AIR 1967 SC 295; (1992) Supp (3) SCC 217 [Justice Reddy, 798]
[247] AIR 1967 SC 295 [28]
[248] Nagaraj v. Union of India, (2006) 8 SCC 212 [117]

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ascertain whether a given class or group is adequately represented. These observations were made in the backdrop of **RK Sabharwal** (supra) where this Court held that the entire cadre strength should be taken into account to determine if the quota limit has been breached. The relevant observations are delineated as under:

> "82. Before dealing with the scope of the constitutional amendments we need to recap the judgments in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] and *R.K. Sabharwal* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . In the former case the majority held that 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* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached. It was clarified that the judgment in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%.
>
> 83. In our view, the appropriate Government has to apply the cadre strength as a unit in the **operation of the roster in order to ascertain whether a given class/group is adequately represented in the service.** The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based."
>
> (emphasis supplied)

202. At this juncture, it is important that we clarify the observations in **Nagaraj** (supra) extracted above. In **Nagaraj** (supra), this Court referred to the judgment in **RK Sabharwal** while observing that the cadre must be taken as

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a unit to determine the inadequacy of representation. However, the context in which **RK Sabharwal** (supra) held cadre must be considered as a unit was different. In that case, two issues were considered. First, whether appointments of the backward classes in the general category must be counted while working out the percentage of reservation for the backward classes. Second, whether the reservation is complete when the posts earmarked for the Scheduled Castes or Scheduled Tribes are filled. It is while answering the second of the issues that this Court held that reservations must operate in accordance with the roster maintained in the Department which will be a running account every year to ensure that there is no excessive reservation. This Court explained the working of the calculation of cadre-based vacancy as follows: posts falling in specific serial numbers would be reserved seats allotted to each class and when a reserved seat falls vacant, it must be filled by the person of the same category:

> "5. […]concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts …" are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled

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> Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. […] As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation."

203. The inference in **Nagaraj** (supra) that cadre must be taken as a unit to determine inadequacy of reservation based on the above observations in **RK Sabharwal** (supra), in our respectful opinion, is misplaced. The cadre as a unit was considered only for the purpose of preparation of roster to draw a balance between the reserved and open seats. This Court did not hold that cadre must be used as a unit for the purpose of determining the adequacy of representation. In fact, **RK Sabharwal** (supra) says to the contrary. **RK Sabharwal** (supra) observed that the State Government may take the total population of a particular Backward Class and its representation in the State Services while determining adequacy of representation:

> "4. […] It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services."

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As observed above, the inadequacy of representation in the services of the State is an indicator to determine the backwardness of the class in the services of the State. When the cadre-strength is used, the inadequacy of representation of the **class** is not determined. Rather, it determines the inadequacy of representation in a cadre, thereby, merging the distinction between quantitative and qualitative representation. Further, the observations in **Nagaraj** (supra) that adequate reservation of the class or group must be measured against the cadre is contrary to the plain language of Articles 16(4) and 16(4-A). Both the provisions use the phrase “not adequately represented in the **services under the State**”.

204. Thus, in view of the above discussion, the State for a valid exercise of power to sub-classify under Article 16(4) is required to collect quantifiable data with respect to the inadequacy of representation of the sub-categories in the services of the State. As held in the preceding section, the inadequacy of representation is an indicator of backwardness and thus, to use the cadre as a unit to determine representation alters the purpose of the indicator itself. The State while deciding if the class is adequately represented must calculate adequacy based on effective and not quantitative representation.

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E. Conclusion

205. In view of the discussion above, the following are our conclusions:

a. Article 14 of the Constitution permits sub-classification of a class which is not similarly situated for the purpose of the law. The Court while testing the validity of sub-classification must determine if the class is a homogenous integrated class for fulfilling the objective of the sub-classification. If the class is not integrated for the purpose, the class can be further classified upon the fulfillment of the two-prong intelligible differentia standard;

b. In **Indra Sawhney** (supra), this Court did not limit the application of sub-classification only to the Other Backward Class. This Court upheld the application of the principle to beneficiary classes under Articles 15(4) and 16(4);

c. Article 341(1) does not create a deeming fiction. The phrase “deemed” is used in the provision to mean that the castes or groups notified by the President shall be “regarded as” the Scheduled Castes. Even if it is accepted that the deeming fiction is used for the creation of a constitutional identity, the only logical consequence that flows from it is that castes included in the list will receive the benefits that the Constitution provides to the Scheduled Castes. The operation of the provision does not create an integrated homogenous class;

d. Sub-classification within the Scheduled Castes does not violate Article 341(2) because the castes are not per se included in or excluded from the List. Sub-

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classification would violate the provision only when either preference or exclusive benefit is provided to certain castes or groups of the Scheduled Castes over all the seats reserved for the class;

e. Historical and empirical evidence demonstrates that the Scheduled Castes are a socially heterogenous class. Thus, the State in exercise of the power under Articles 15(4) and 16(4) can further classify the Scheduled Castes if (a) there is a rational principle for differentiation; and (b) the rational principle has a nexus with the purpose of sub-classification; and

f. The holding in **Chinnaiah** (supra) that sub-classification of the Scheduled Castes is impermissible is overruled. The scope of sub-classification of the Scheduled Castes is summarized below:

   i. The objective of any form of affirmative action including sub-classification is to provide substantive equality of opportunity for the backward classes. The State can sub-classify, *inter alia,* based on inadequate representation of certain castes. However, the State must establish that the inadequacy of representation of a caste/group is because of its backwardness;

   ii. The State must collect data on the inadequacy of representation in the "**services of the State**" because it is used as an indicator of backwardness; and

   iii. Article 335 of the Constitution is not a limitation on the exercise of power under Articles 16(1) and 16(4). Rather, it is a restatement of the

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necessity of considering the claims of the Scheduled Castes and the Scheduled Tribes in public services. Efficiency of administration must be viewed in a manner which promotes inclusion and equality as required by Article 16(1).

206. The Registry is directed to obtain administrative instructions from Chief Justice for placing the matters before an appropriate Bench.

.....CJI
[Dr Dhananjaya Y Chandrachud]

.....J
[Manoj Misra]

New Delhi;
August 01, 2024

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION
CIVIL APPEAL NO.2317 OF 2011

THE STATE OF PUNJAB & ORS. ...APPELLANT(S)

VERSUS

DAVINDER SINGH & ORS. ...RESPONDENT(S)

WITH
C.A. NO.5593 OF 2010
S.L.P.(C) NO.8701 OF 2011
W.P.(C) NO.1477 OF 2019
W.P.(C) NO.21 OF 2023
W.P. (C) NO.562 OF 2022
C.A. NO.5586 OF 2010
C.A.NO.5597 OF 2010
C.A. NO. 5598 OF 2010
C.A.NO.5600 OF 2010
C.A. NO.5589 OF 2010
C.A. NO.5587 OF 2010
C.A. NO.5595-5596 OF 2010
C.A.NO.2324 OF 2011
C.A.NO. 6936 OF 2015
S.L.P.(C) NO.30766 OF 2010
S.L.P.(C) NO. 5454-5459 OF 2011
C.A. NO.2318 OF 2011
S.L.P.(C) NO. 36500-36501 OF 2011
C.A. NO.289 OF 2014
T.C.(C) NO.37 OF 2011
T.C.(C) NO.38 OF 2011
T.P.(C) NO.464 OF 2015

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J U D G M E N T

B.R. GAVAI, J.

I have gone through the erudite and scholarly judgment authored by Hon'ble the Chief Justice of India. I am in agreement with the views expressed by the Hon'ble the Chief Justice of India. Taking into consideration the importance of the matter, I find it apposite to express my opinion through this separate judgment.

Since the facts and submissions of the learned counsel appearing on behalf of the parties have been elaborately considered in the judgment of the Hon'ble the Chief Justice of India, in order to avoid repetition, I have not referred to them.

I. BACKGROUND

> "The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to

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divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must

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> remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

1. These are the words of warning, which Dr. B.R. Ambedkar, the Chief Architect of the Indian Constitution, gave in his speech on 25th November 1949, while replying to the debate on the final draft of the Constitution. This was the day prior to 26th November 1949, on which day, the Constituent Assembly adopted, enacted, and gave to our country the most cherished document for every Indian, "the Constitution of India".

2. He warned that we should not be content with mere political democracy but make our political democracy a social democracy as well. He emphasized that a social democracy would mean a way of life which recognizes liberty, equality, and fraternity as the principles of life. According to him, liberty, equality, and fraternity, not individually but a trinity of the three was necessary for converting our political democracy into social

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democracy. He pointed out the contradictions in the country about the social and economic structure. He warned that if we continue to deny equality in social and economic life for long, we will do so only by putting our political democracy in peril. He therefore appealed to the nation to remove this contradiction at the earliest possible moment. He warned that if we do not do so, those who suffer from inequality will blow up the structure of political democracy which the Constituent Assembly had so laboriously built up.

3. Two months thereafter, the Constitution of India came into force on 26th January 1950. On 26th November 2023, we have completed 74 years from the date on which the Constitution of India was enacted, adopted, and given to ourselves. On 26th January 2024, we have completed 74 years from the date on which the Constitution of India came into effect. We are now in the 75th year of our Republic.

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4. For the last 75 years, there has been a march towards achieving social and economic equality. There have been efforts to give social and economic justice to the millions of citizens who on account of centuries and centuries of discrimination and inhuman treatment were denied the legitimate right to come into the mainstream of life. The trinity of Articles 14, 15, and 16 along with Articles 46, 335, 338, 341 and 342 have provided a tool to march towards social and economic equality; emphasis on affirmative action so as to give a special treatment to the underprivileged so that they can march forward; providing reservations in the matters of education and in the matter of public employment have been used so as to provide a special treatment to these backward classes.

5. The present case raises a dispute amongst various classes in the group of Scheduled Castes who claim to be more underprivileged and therefore claim for a more differential treatment qua the more advantageous in that group. Per contra,

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the rival classes inside them claim that once the classes are brought into the Presidential List of Scheduled Castes or Scheduled Tribes, they become a part of homogeneous group, and a further classification is not permissible under the Constitution.

6. This quest of the underprivileged for more preferential treatment as compared to the more advantageous in the larger group falls for consideration in the present reference.

7. The 5-Judge Bench of this Court in the case of ***E.V. Chinnaiah vs. State of A.P. and others***[1] has held that such a further classification on the ground of more backwardness among the backwards listed in the Presidential List is not permissible. However, another 5-Judge Bench of this Court in the case of ***The State of Punjab & Ors. vs. Davinder Singh & Ors.***[2] has doubted the view in ***E.V. Chinnaiah*** (supra) and

[1] (2005) 1 SCC 394.
[2] (2020) 8 SCC 1.

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referred the matter to a larger Bench. That is how these matters came up for consideration before us.

ARTICLE 341, ARTICLE 342 AND THE PRESIDENTIAL ORDER FOR SCHEDULED CASTES AND SCHEDULED TRIBES

8. For appreciating the rival submissions before us, it is to be noted that while on one hand the struggle for gaining freedom for India was going on; on the other hand, on account of social discrimination prevailing since centuries, a quest for social reforms was also going on.

9. In the beginning, a nomenclature often used by Christian Missionaries was 'depressed classes' to describe the poor and downtrodden section of the society. A wide array of untouchable castes, aboriginal tribes, and other backward communities were all lumped together under that label. In 1909, leaders like Gopal Krishna Gokhale and Annie Besant also referred to low caste or marginalized communities in India as the 'depressed classes'. Besant compared the 'depressed classes' in India to the

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'submerged tenth' in England, i.e., unskilled labourers, scavengers, sweepers, casual dock labourers, etc., constituting 10% of the population of that country. However, by 1918, the term 'depressed classes' began to be used for only low-caste Hindus who suffered from the stigma of untouchability. The word 'class' in 'depressed class' was really a synonym for caste[3].

10. It would be apposite to start with the Census Report of 1891. It refers to the manner of enumeration of castes including castes, tribes and sub-divisions. It also refers to the scheme of classification based on occupation divided into 60 categories. Then the said report regroups these 60 categories into 21 groups. The said report refers to Rajputs and Jats as tribes, larger than castes. Class VII deals with "Leather Workers and Lower Village Menials" and it includes the following groups:

> "40. Leather workers
> 41. Watchmen and Village Menials
> 42. Scavengers"

[3] Abhinav Chandrachud, *These Seats are Reserved: Caste, Quotas and the Constitution of India* (Viking by Penguin Random House India 2023).

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11. Thereafter comes the Indian Statutory Commission Report, 1930. The heading of Chapter 4 of Part I is "Caste and the Depressed Classes". The report specifically states that a Caste has been described as "the foundation of the Indian social fabric". It further states that every Hindu necessarily belongs to the caste of his parents, and in that caste he inevitably remains. It states that no accumulation of wealth and no exercise of talents can alter his caste status; and marriage outside his caste is prohibited or severely discouraged. It further states that in some cases, the application of the rule of caste seems almost to prescribe the means of livelihood of its members; indeed, many castes partake of the nature of occupational guilds. It states that the caste system, which may have originated in the preservation of ceremonial purity in social relations and in rules designed to limit admixture of blood, has during ages developed into an institution which assigns to each individual his duty and his position in orthodox Hinduism. However, the boundary which

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brings members of the same caste together also serves to separate them from innumerable compartments embracing other castes. It further states that this has resulted in a rigid and detailed subdivision of Hindu society which strongly contrasts with the theory of equalitarian ideas among Moslems and Christians.

12. Paragraph 53 of the Report deals with "the depressed classes". It states that the depressed classes comprise about 20% of the total population of the British India or about 30% of the Hindu population. They constitute the lowest castes recognized as being within the Hindu religious and social system. It further states that in origin these castes seem to be partly "functional," comprising those who followed occupations held to be unclean or degrading, such as scavenging or leather working, and partly "tribal," i.e., aboriginal tribes absorbed into the Hindu fold and transformed into an impure caste. It further states that their essential characteristic is that, according to the tenets of

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orthodox Hinduism, they are, though within the Hindu system, "untouchable," – that is to say, that for all other Hindus they cause pollution by touch and defile food or water. They are denied access to the interior of an ordinary Hindu temple. It states that they are not only the lowest in the Hindu social and religious system, but with few individual exceptions are also at the bottom of the economic scale and are generally quite uneducated. The Report shows that in the villages they are normally segregated in a separate quarter and very frequently eat food which would not be even touched by any other section of the community.

13. A large proportion of them are landless agricultural labourers employed by cultivators for small remuneration. It states that it was not uncommon for a particular shed in a factory to be reserved for depressed class workers.

14. Paragraph 54 of the Report deals with "Disabilities of the Untouchables". It states that the actual disabilities, other than

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religious, suffered by the untouchables owing to their untouchability vary very greatly in different parts of India, not only from province to province, but also in different parts of the same province and even sometimes in different parts of the same district. It states that the two most widespread difficulties are about water and schools. It states that in many places it was customary for the untouchables to be denied access to the wells or tanks used by the other castes and great difficulty has often been found, when a new source of water supply has been provided from public funds by local authorities, in arranging for the untouchables to have use of it. The Report highlights that if any village draws its water from a river, the untouchables will be required to take their supply from a different point, lower down. In many places the children of untouchables are either excluded altogether from ordinary schools, although provided in whole or in part from public funds, otherwise they would be required to sit apart. In some cases, the untouchable children are required to

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attend the classes standing outside the classroom. The Report highlights that the difficulty of the administrator or political reformer was much increased by the fact that the great body of the untouchables yet accept their destiny as natural and inevitable. The Report states that their state is indeed pitiable inside the Hindu fold and yet not of it living on the edge of starvation, and unaware of any hope of improving their lot.

15. Paragraph 55 of the Report highlights that the depressed classes were most severely felt in Madras, and especially in Malabar. In Malabar, is still found the phenomenon of "unapproachability," that is, the untouchable must not approach within a certain distance of a high caste Hindu and would have to leave the road to allow his passage, and even to shout to give warning of the risk of pollution. The Report states that the local authority in another part of Madras had preferred to leave the roads un-mended rather than employ untouchable labourers to repair them.

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16. The Report further points out that in Bombay and the Central Provinces, the position was more or less comparable with that in Madras. The Report also refers to the telegrams from Nasik and Poona, in the Bombay Presidency, wherein organized action on the part of some untouchables was taken to assert a claim to enter Hindu temples.

17. It may not be out of place to mention that during the relevant period Dr. B.R. Ambedkar had also started a movement for opening waterbodies to the untouchables and even untouchables being permitted to enter the temples. One of such agitations was about a public tank called 'Chavder tank' in Mahad, held on 20th March 1927 and another was an attempt to enter Kalaram temple at Nashik on 2nd March 1930.

18. The Report further states that in Bengal, Bihar and Orissa and the United Provinces, although there were large numbers belonging to untouchable castes, in general they do not seem to suffer so universally or so severely as in the South. The Report,

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however, states that the problem did exist in these areas also. The Report also gives approximate percentage of population of the number of untouchables. The Report excludes aboriginals who are outside the Hindu fold.

19. The next document that requires a mention is 'the Census of India 1931'. The said Report coins the phrase 'primitive tribes', who reside in hills, forests, and other nomadic groups. These primitive tribes provide a foundation for Scheduled Tribes. It also notes that the formerly depressed classes are now referred to as the Scheduled Castes.

20. It could thus be seen that while the primitive tribes who reside in hills, forests and remote areas provide a foundation for Scheduled Tribes, the so-called depressed classes which are so recognized on account of untouchability provide a foundation for Scheduled Castes. The Report also states that the 1931 Census Report remains the source material for present day Scheduled Castes and Scheduled Tribes.

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21. Then comes the Government of India Act, 1935 (hereinafter referred to as "the 1935 Act"). Part II of the 1935 Act deals with "The Federation of India". Chapter I thereof deals with "Establishment of Federation and Accession of Indian States". Section 5 of the 1935 Act deals with "Proclamation of Federation of India" and Section 6 of the 1935 Act deals with "Accession of Indian States". Clause (a) of sub-section (2) of Section 5 of the 1935 Act provided that the States, the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled to choose not less than fifty-two members of the Council of States. Clause (b) of sub-section (2) of Section 5 of the 1935 Act provided that the States, the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained, have acceded to the Federation.

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22. Section 18 of the 1935 Act deals with "Constitution of the Federal Legislature". Sub-section (3) of Section 18 provided that representatives to be provided to the Council of States and the Federal Assembly shall be chosen in accordance with the provisions in that behalf contained in the First Schedule of the 1935 Act.

23. Similarly, Section 60 of the 1935 Act deals with "Constitution of Provincial Legislatures". Section 61 of the 1935 Act provides for "Composition of Chambers of Provincial Legislatures". Sub-section (1) of Section 61 provided that the composition of the Chamber or Chambers of the Legislature of a Province shall be such as is specified in relation to that Province in the Fifth Schedule to the 1935 Act.

24. The First Schedule to the 1935 Act provided for "Composition of the Federal Legislature". Clause 4 thereof *inter alia* provides for seats for representatives of the Scheduled Castes.

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25. It will be relevant to reproduce Clause 8 of the First Schedule to the 1935 Act, which reads thus:

> "8. In any Province to which a seat to be filled by a representative of the scheduled castes is allotted, a person to fill that seat shall be chosen by the members of those castes who hold seats in the Chamber or, as the case may be, either Chamber of the Legislature of that Province."

26. It could thus be seen that the 1935 Act provided that in any Province where seat(s) is/are to be filled by the representatives of the Scheduled Castes where they are so allotted, shall be chosen by the members of those castes who hold seats in the Chamber or either Chamber of the Legislature of that Province.

27. Clause 18 of the First Schedule deals with "The Federal Assembly".

28. It could thus be seen that Clause 18 of First Schedule to the 1935 Act *inter alia* deals with seats reserved for members of the Scheduled Castes.

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29. Clause 26 of the First Schedule to the 1935 Act is the interpretation clause. It defines "the Scheduled Castes" as under:

> ""the scheduled castes" means such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes, parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as "the depressed classes", as His Majesty in Council may specify;"

30. It is thus clear that the 1935 Act defines 'the Scheduled Castes" to mean such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes, parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as "the depressed classes", as His Majesty in Council may specify.

31. It could thus be seen that the definition of "the Scheduled Castes" can be traced to "the depressed classes", which were used in a generic sense earlier and again traced to the most backward people suffering untouchability.

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32. Then comes the Government of India (Scheduled Castes) Order, 1936 (hereinafter referred to as "the 1936 Order"), notified on 30th April 1936. It will be relevant to refer to the said order, which is as under:

"**THE GOVERNMENT OF INDIA (SCHEDULED CASTES) ORDER, 1936**

AT THE COURT AT BUCKINGHAM PALACE

The 30th day of April, 1936

Present,

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL

Whereas by certain provisions in the First, Fifth and Sixth Schedules to the Government of India Act, 1935, His Majesty in Council is empowered to specify the castes, races or tribe or parts of or groups within castes, races or tribes which are to be treated as the scheduled castes for the purposes of those Schedules:

AND WHEREAS a draft of this Order was laid before Parliament in accordance with the provisions of subsection (1) of section three hundred and nine of the said Act and an Address has been presented by both

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Houses of Parliament praying that an Order may be made in the terms of this Order :

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling Him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows :-

1. This Order may be cited as "The Government of India (Scheduled Castes) Order, 1936."

2. Subject to the provisions of this Order, for the purposes of the First, Fifth and Sixth Schedules to the Government of India Act, 1935, the castes, races or tribes, or parts of or groups within castes, races or tribes specified in Parts I to IX of the Schedule to this Order shall, in the Provinces to which those Parts respectively relate, be deemed to be scheduled castes so far as regards members thereof resident in the localities specified in relation to them respectively in those Parts of that Schedule.

3. Notwithstanding anything in the last preceding paragraph-

(a) no Indian Christian shall be deemed to be a member of a scheduled caste;

(b) in Bengal no person who professes Buddhism or a tribal religion shall be deemed to be a member of any scheduled caste;

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and if any question should arise as to whether any particular person does or does not profess Buddhism or a tribal religion, that question shall be determined according to the answers which he may make, in the prescribed manner, to such questions as may be prescribed.

4. In this Order the expression "Indian Christian" has the same meaning as it has for the purposes of Part I of the First Schedule to the Government of India Act, 1935, and the expression "prescribed" means prescribed by rules made by the Governor of Bengal, exercising his individual judgment.

5. Any reference in the Schedule to this Order to any division, district, subdivision, tahsil or municipality shall be construed as a reference to that division, district, subdivision, tahsil or municipality as existing on the first day of July, nineteen hundred and thirty-six.

SCHEDULE

PART I – MADRAS

(1) Scheduled castes throughout the Province :-

Adi-Andhra	Gosangi	Paidi
Adi-Dravida	Haddi	Painda
Adi-Karnataka	Hasla	Paky
Ajila	Holeya	Pallan
Arunthuthiyar	Jaggali	Pambada

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Baira	Jambuvulu	Pamidi
Bakuda	Kalladi	Panchama
Bandi	Kanakkan	Paniyan
Bariki	Kodalo	Panniandi
Battada	Koosa	Paraiyan
Bavuri	Koraga	Paravan
Bellara	Kudumban	Pulayan
Byagari	Kuravan	Puthirai Vannan
Chachati	Madari	Raneyar
Chakkiliyan	Madiga	Relli
Chalavadi	Maila	Samagara
Chamar	Mala	Samban
Chandala	Mala Dasu	Sapari
Cheruman	Matangi	Semman
Dandasi	Moger	Thoti
Devandrakulathan	Muchi	Tiruvalluvar
Ghasi	Mundala	Valluvan
Godagali	Nalakeyava	Valmiki
Godari	Nayadi	Vettuvan
Godda	Paga dai	

(2) Scheduled castes throughout the Province except in any special constituency constituted under the Government of India Act, 1935, for the election of a representative of backward areas and backward tribes to the Legislative Assembly of the Province :-

Aranadan	Kattunayakan	Kuruman
Dombo	Kudiya	Malasar
Kadan	Kudubi	Mavilan
Karimpalan	Kurichchan	Pano

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PART II – BOMBAY

Scheduled Castes : -

(1)Throughout the Province : -

Asodi	Dhor	Mang Garudi
Bakad	Garode	Meghval, or Menghwar
Bhambi	Halleer	Mini Madig
Bhangi	Halsar, or Haslar, or Hulsavar	Mukri
Chakrawadya – Dasar	Holaya	Nadia
Chalvadi	Khalpa	Shenva, or Shindhava
Chambhar, or Mochigar, or Samagar	Kolcha, or Kolgha	Shingdav, or Shingadya
Chena – Dasaru	Koli Dhor	Sochi
Chuhar, or Chuhra	Lingader	Timali
Dakaleru	Madig, or Mang	Turi
Dhed	Mahar	Vankar
Dhegu-Mega		Vitholia

(2) Throughout the Province except in the Ahmedabad, Kaira, Broaoh and Panch Mahals and Surat districts – Mochi.

(3) In the Kanara district – Kotegar.

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PART III – Bengal

Scheduled castes throughout the Province : -

Agariya	Hari	Mal
Bagdi	Ho	Mallah
Bahelia	Jalia Kaibartta	Malpahariya
Baiti	Jhalo Malo, or Malo	Mech
Bauri	Kadar	Mehtor
Bediya	Kan	Muchi
Beldar	Kandh	Munda
Berua	Kandra	Musahar
Bhatiya	Kaora	Nagesia
Bhuimali	Kapuria	Namasudra
Bhuiya	Karenga	Nat
Bhumij	Kastha	Nuniya
Bind	Kaur	Oraon
Binjhia	Khaira	Paliya
Chamar	Khatik	Pan
Dhenuar	Koch	Pasi
Dhoba	Konai	Patni
Doai	Konwar	Pod
Dom	Kora	Rabha
Dosadh	Kotal	Rajbanshi
Garo	Lalbegi	Rajwar
Ghasi	Lodha	Santal
Gonrhi	Lohar	Sunri
Hadi	Mahar	Tiyar
Hajang	Mahli	Turi
Halalkhor		

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PART IV – UNITED PROVINCES

Scheduled castes :-

(1)Throughout the Province :-

Agariya	Chamar	Kharot
Aheriya	Chero	Karwar (except Benbansi)
Badi	Dabgar	Khatik
Badhik	Dhangar	Kol
Baheliya	Dhanuk (Bhangi)	Korwa
Bajaniya	Dharkar	Lalbegi
Bajgi	Dhobi	Majhwar
Balahar	Dom	Nat
Balmiki	Domar	Pankha
Banmanus	Gharami	Parahiya
Bansphor	Ghasiya	Pasi
Barwar	Gual	Patari
Basor	Habura	Rawat
Bawariya	Hari	Saharya
Beldar	Hela	Sanaurhiya
Bengali	Kalabaz	Sansiya
Beriya	Kanjar	Shilpkar
Bhantu	Kapariya	Tharu
Bhuiya	Karwal	Turaiha
Bhuyiar	Khairaha	
Boriya		

(2)Throughout the Province except in the Agra, Meerut and Rohilkhand divisions – Kori

PART V – PUNJAB

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Scheduled Castes throughout the Province : -

Ad Dharmis	Marija or Marecha	Khatik
Bawaria	Bangali	Kori
Chamar	Barar	Nat
Chuhra, or Balmiki	Bazigar	Pasi
Dagi and Koli	Bhanjra	Perna
Dumna	Chanal	Sapela
Od	Dhanak	Sirkiband
Sansi	Gagra	Meghs
Sarera	Gandhila	Ramdasis

PART VI – BIHAR

Scheduled Castes : -

(1)Throughout the Province :-

Chamar	Halalkhor	Mochi
Chaupal	Hari	Musahar
Dhobi	Kanjar	Nat
Dusadh	Kurariar	Pasi
Dom	Lalbegi	

(2)In the Patna and Tirhut divisions and the Bhagalpur, Mong Palamau and Purnea district:-

Bauri	Bhumij	Rajwar
Bhogta	Ghasi	Turi
Bhuiya	Pan	

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(3)In the Dhanbad subdivision of the Manbhum district and the Central Manbhum general rural constituency, and the Purulia and Raghunathpur municipalities : -

Bauri	Ghasi	Rajwar
Bhogta	Pan	Turi
Bhuiya		

PART VII – CENTRAL PROVINCES AND BERAR

Scheduled Castes		*Localities*
Basor, or Burud Chamar Dom Ganda Mang Mehtar or Bhangi Mochi Satnami		Throughout the Province
Audhelia	:	In the Bilaspur district
Bahna	:	In the Amraoti district
Balahi, or Balai	:	In the Berar division and the Balaghat, Bhandara, Betul, Chanda, Chhindwara, Hoshangabad, Jubbulpore, Mandla, Nagpur, Nimar Saugor and Wardha districts
Bedar	:	In the Akola, Amraoti and Buldana districts.

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Chadar	:	In the Bhandara and Saugor districts
Chauhan	:	In the Drug district
Dahayat	:	In the Damoh subdivision of Saugor district.
Dewar	:	In the Bilaspur, Drug and Raipur districts.
Dhanuk	:	In the Saugor district, except in the Damoh subdivision thereof.
Dhimar	:	In the Bhandara district
Dhobi	:	In the Bhandara, Bilaspur, Raipur and Saugor districts, and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Dohor	:	In the Berar division, and the Balaghat, Bhandara, Chanda, Nagpur and Wardha districts.
Ghasia	:	In the Berar division and in the Balaghat, Bhandara, Bilaspur, Chanda, Drug, Nagpur, Raipur and Wardha districts.
Holiya	:	In the Balaghat and Bhandara districts.

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Jangam	:	In the Bhandara district.
Kaikari	:	In the Berar division, and in Bhandara, Chanda, Nagpur and Wardha districts.
Katia	:	In the Berar division, in the Balaghat, Betul Bhandara, Bilaspur, Chanda, Drug, Nagpur, Nimar, Raipur and Wardha districts, in the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district, in the Chhindwara district, except in the Seoni subdivision thereof, and in the Saugor district, except in the Damoh subdivision thereof.
Khangar	:	In the Bhandara, Buldhana and Saugor districts and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Khatik	:	In the Berar division, in the Balaghat, Bhandara, Chanda, Nagpur and Wardha

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		districts, in the Hoshangabad tahsil of the Hoshangabad district, in the Chhindwara district, except in the Seoni subdivision thereof, and in the Saugor district, except in the Damoh subdivision thereof.
Koli	:	In the Bhandara and Chanda district
Kori	:	In the Amraoti, Balaghat, Betul, Bhandara, Buldana, Chhindwara, Jubbulpore, Mandla, Nimar, Raipur and Saugor districts, and in the Hoshangabad district, except in the Harda and Sohagpur tahsils thereof.
Kumhar	:	In the Bhandara and Saugor districts and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Madgi	:	In the Berar division, and in the Balaghat Bhandara, Chanda,

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		Nagpur and Wardha districts.
Mala	:	In the Balaghat, Betul, Chhindwara, Hoshangabad, Jubbulpore, Mandla, Nimar and Saugor districts.
Mehra, or Mahar	:	Throughout the Province, except in the Harda and Sohagpur tahsils of the Hoshangabad district.
Nagarchi	:	In the Balaghat, Bhandara, Chhindwara, Mandla, Nagpur and Raipur districts.
Ojha	:	In the Balaghat, Bhandara and Mandla districts and the Hoshangabad tahsil of the Hoshangabad district.
Panka	:	In the Berar division, in the Balaghat, Bhandara, Bilaspur, Chanda, Drug, Nagpur, Raipur, Saugor and Wardha districts and in the Chhindwara district except in the Seoni subdivision thereof.

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Pardhi	:	In the Narsinghpur subdivision of the Hoshangabad district.
Pradhan	:	In the Berar division, in the Bhandara Chanda, Nagpur, Nimar, Raipur and Wardha districts and in the Chhindwara district, except in the Seoni subdivision thereof.
Rujjhar	:	In the Sohagpur tahsil of the Hoshangabad district.

PART VIII – ASSAM

Scheduled Castes : -

(1)In the Assam Valley : -

Namasudra	Hira	Mehtar, or Bhangi
Kaibartta	Lalbegi	Bansphor
Bania, or Brittial-Bania		

(2)In the Surma Valley :-

Mali, or Bhuimali	Sutradhar	Kaibartta, or Jaliya
Dhupi, or Dhobi	Muchi	Lalbegi
Dugla, or Dholi	Patni	Mehtar, or Bhangi
Jhalo and Malo	Namasudra	Bansphor

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Mahara

PART IX – ORISSA

Scheduled castes : -

(1)Throughout the Province :-

Adi-Andhra	Godra	Mangan
Audhelia	Gokha	Mehra, or Mahar
Bariki	Haddi, or Hari	Mehtar, or Bhangi
Basor,or Burud	Irika	Mochi, or Muchi
Bavuri	Jaggali	Paidi
Chachati	Kandra	Painda
Chamar	Kantia	Pamidi
Chandala	Kela	Panchama
Dandasi	Kodalo	Panka
Dewar	Madari	Relli
Dhoba, or Dhobi	Madiga	Sapari
Ganda	Mahuria	Satnami
Ghusuria	Mala	Siyal
Godagali	Mang	Valamiki
Godari		

(2)Throughout the Province except in the Khondmals district, the district of Sambalpur, and the areas transferred to Orissa under the provisions of the Government of India (Constitution of Orissa)

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Order, 1936, from the Vizagapatam and Ganjam Agencies in the Presidency of Madras:-

Pan, or Pano

(3)Throughout the Province except in the Khondmals district and the areas so transferred to Orissa from the said Agencies : -

Dom, or Dombo

(4)Throughout the Province except in the district of Sambalpur :

Bauri	Bhumij	Turi
Bhuiya	Ghasi, or Ghasia	

(5)In the Nawapara subdivision of the district of Sambalpur: -

Kori	Nagarchi	Pradhau

C. K. Rhodes,
Joint Secy. to the Govt. of India"

33. It could thus be seen that for the purposes of the First, Fifth and Sixth Schedules to the 1935 Act , the castes, races or tribes, or parts of or groups within castes, races or tribes specified in Parts I to IX of the Schedule to the 1936 Order were deemed to

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be scheduled castes in the Provinces to which those Parts respectively relate.

34. A perusal of the 1936 Order would reveal that for different provinces different castes were notified as Scheduled Castes. In some of the provinces, a particular caste was to be considered as Scheduled Caste, except in the districts mentioned therein where it was not to be considered as Scheduled Caste. Similarly, in some of the cases, in particular areas or districts, the said castes were deemed to be Scheduled Castes in the same province.

35. It can thus be seen that a same caste in the same province could be a Scheduled Caste only in one or more districts and not in the other districts.

36. It could be seen that insofar as the Bombay Province is concerned, the caste 'Mochi' would be a Scheduled Caste throughout the Province except in Ahmedabad, Kaira, Broaoh and Panch Mahals and Surat districts. Similarly, a caste

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'Kotegar' would be a Scheduled Caste only in the Kanara district and not in the rest of the Province.

37. It could thus be seen that the 1936 Order formed the basis of the Constitution (Scheduled Castes) Order, 1950 (hereinafter referred to as "the 1950 Order") issued under Article 341(1) after the commencement of the Constitution.

38. Then comes the most important event i.e. the debate in the Constituent Assembly on 17th September 1949, when Dr. B.R. Ambedkar moved two new draft Articles being Articles 300A and 300B, which read thus:

> "300A-Scheduled Castes
>
> (1) The President may, after consultation with the Governor or Ruler of a State, by public notification specify the castes, races or tribes or Scheduled Castes parts of or groups within castes, races or tribes, which shall for purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.

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(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued by the President under clause (1) of this article any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

300B-Scheduled Tribes

(1) The President may after consultation with the Governor or Ruler of a State, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for purposes of this Constitution be deemed to be scheduled tribes in relation to that State.

(2) Parliament may by law include in or exclude from the list of scheduled tribes specified in a notification issued by the President under clause (1) of this article any Tribe or Tribal community or part of or group within any Tribe or Tribal community but save as aforesaid a notification issued under the said

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> clause shall not be varied by any subsequent notification."

39. While moving the said new draft Articles, Dr. B.R. Ambedkar stated thus:

> "The object of these two articles, as I stated, was to eliminate the, necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have, the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this : that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."

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40. It could thus be seen that the idea behind draft Articles 300A and 300B, which are now Articles 341 and 342, was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It was proposed that the President, in consultation with the Governor or Ruler of a State shall have the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution.

41. It is thus clear that the purpose of draft Article 300A (now Article 341) and draft Article 300B (now Article 342) was for identifying the castes, races, or tribes, or parts of or groups within castes, races or tribes, which were entitled to the privileges which had been defined for them in the Constitution.

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42. It is thus clear that the purpose of draft Articles 300A and 300B (now Articles 341 and 342) was not providing the privileges but only identifying the castes, races, or tribes, or parts of or groups within castes, races or tribes, which would be entitled for the privileges which were elsewhere provided under the Constitution.

43. Dr. B.R. Ambedkar further observed that the only limitation that has been imposed was that once a notification has been issued by the President, which he would be issuing in consultation with and on the advice of the Government of the State, thereafter, if any elimination or addition was to be made in the List so notified, the same can be done only by Parliament and not by the President. The purpose was to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President.

44. It is amply clear that the purpose behind the said provisions was that once an identification has been done in the List so

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notified, the Executive should not tinker with it and any addition or deletion had to be made only by Parliament.

45. It will also be relevant to refer to the speech of Shri V.I.Muniswami Pillai, given on the same day i.e. 17th September 1949 in support of the amendment, which reads as under:

> **"Shri V. I. Muniswami Pillai :** Mr. President, I come to support the amendments that have been moved by the Honourable Dr. Ambedkar. These amendments deal with the definition of Scheduled Castes. As far as I can see he has made it clear that, according to the second part of it, the President on the 26th January 1950 will publish a list of such communities that come under the category of Scheduled Castes. But I would like to inform this House of the background which brought out the special name of Scheduled Castes. It was the intouchability, the, social evil that has been practised by the Hindu Community for ages, that was responsible for the Government and the people to know the section of people coming under the category of Hindus and who were kept at the outskirts of the Hindu society. Going backwards to 1916 it was in that year when Government found that something had to be done for the untouchable

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classes, (when they said untouchable classes, they were always understood to be Hindus,) and they had to be recognised. In Madras there were six communities that came under this classification. During the Montago Chelmsford reforms they were made ten. In 1930 when the great epoch-making fast of Mahatma Gandhi came about, then only the country saw who were the real untouchable classes. And in the 1935 Act, the Government thoroughly examined the whole thing and as far as the Province of Madras is concerned they brought 86 communities into this list or category, though there were some touchable classes also. Now, after further examination the Provincial Governments have drawn up a list and I think according to the amendment mover's suggestions, all those communities that come-under the category of untouchables and those who profess Hinduism will be the Scheduled Castes, because I want to emphasise about the religion. I emphasise this because of late there have been some movements here and there; there are people who have left Scheduled Castes and Hinduism and joined other religions and they also are claiming to be scheduled Castes. Such convert cannot come under the scope of this definition. While I have no objection to Government granting any concessions to these converts, I feel

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strongly that they should not be clubbed along with Scheduled Castes.

Sir, I am grateful to the Drafting Committee and also to the Chairman of that Committee for making the second portion of it very clear, that in future, after the declaration by the President as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude, anybody or any community from the list of Scheduled Castes that must be by the word of Parliament. I feel grateful to him for bringing in this clause, because I know, as a matter of fact, when Harijans behave independently or asserting their right on some matters, the Ministers in some Provinces not only take note and action against those members, but they bring the community to which that particular individual belongs; and thereby not only the individual, but also the community that comes under that category of Scheduled Castes are harassed. By this provision, I think the danger is removed.

I strongly oppose the amendment moved by Pandit Bhargava. The reason is that he wants to have the ten years period for observing these amendments. But he has entirely forgotten that under another article that we have already passed, or will pass the Constitution provides for the

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> appointment of a Special officer at the Centre and also various officers in all the Provinces to go into the various disabilities of these communities and to submit a report to the President who will then be able to know whether the Scheduled Castes have reached a stage when the facilities now given to them could be withdrawn. I do not think that the reasons that he has advanced are fair and square for the uplift of the Harijans.
>
> With these few words, I support the amendment."

46. It can thus be seen that the Learned Member of the Constituent Assembly refers to the background which brought out the special name of Scheduled Castes. He refers to untouchability, the social evil that has been practiced by the Hindu Community for ages. He states that a section of people, though Hindus, were kept at the outskirts of the Hindu society and it was in the year 1916 when the Government found that something had to be done for the untouchable classes. He refers to the efforts made by Mahatma Gandhi. He identified as to who

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were the actual untouchable classes. He refers to the 1935 Act and the efforts of the Government in thoroughly examining the whole thing and states that as far as the Province of Madras is concerned they brought 86 communities into the list or category. He states that according to the amendment mover's suggestions, all those communities that come-under the category of untouchables and those who profess Hinduism will be the Scheduled Castes. However, he opined that those people who have left Hinduism and joined other religions should not be entitled to claim the benefits of Scheduled Castes. He states that if the Government wants to grant any concessions to these converts, they should not be clubbed among the Scheduled Castes.

47. He acknowledges the vision of the Drafting Committee and its Chairman as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude anybody or any community from the list of Scheduled Castes that must

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be by the word of Parliament. He states that he is grateful to the Chairman for bringing in this clause and that when Harijans behave independently or assert their right on some matters, not only the members of that community but their entire community is harassed.

48. Having referred to the history of as to how the concept of Scheduled Castes and Scheduled Tribes has emerged, I, now, for the sake of convenience, refer to the provisions in the Constitution of India dealing with the special treatment provided to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. Since we are not concerned with political reservations, I do not find it necessary to refer to the provisions dealing therewith. Since Articles 341 and 342 are draft Articles 300A and 300B, which were approved by the Constituent Assembly on 17th September 1949, I do not repeat the same here.

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Article 15, 16, 46, 335, 338, Clauses 24 and 25 of Article 366

"**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 the general public.

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

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

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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 insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

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

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

(*b*) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) insofar as such special provisions relate to their admission to educational institutions

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including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.

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

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

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

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes

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of employment or appointment to an office [14][under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

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

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

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such

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class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

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

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category."

"**46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections**.—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the

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Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

"**335. Claims of Scheduled Castes and Scheduled Tribes to services and posts**.—The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

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

"**338. National Commission for Scheduled Castes**.—(1) There shall be a Commission for the Scheduled Castes to be known as the National Commission for the Scheduled Castes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the

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Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.]

(3) The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.

(4) The Commission shall have the power to regulate its own procedure.

(5) It shall be duty of the Commission—

(*a*) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(*b*) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes ;

(*c*) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and to evaluate the progress

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of their development under the Union and any State;

(*d*) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(*e*) to make in such report recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes; and

(*f*) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

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(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(8) The Commission shall, while investigating any matter referred to in sub-clause (*a*) or inquiring into any complaint referred to in sub-clause (*b*) of clause (5), have all the powers of a civil court trying a suit and in particular in respect of the following matters, namely:—

(*a*) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(*b*) requiring the discovery and production of any document;

(*c*) receiving evidence on affidavits;

(*d*) requisitioning any public record or copy thereof from any court or office;

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(*e*) issuing commissions for the examination of witnesses and documents;

(*f*) any other matter which the President may, by rule, determine.

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Castes.

(10) In this article references to the Scheduled Castes shall be construed as including references to the Anglo-Indian community."

"**366. Definitions**.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

****

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;"

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49. It will be relevant to note that in the draft definition of 'the Scheduled Castes', the word used earlier was "specify". However, in the final clause (24) of Article 366, the word "specify" has been changed to "deemed".

III. JUDICIAL PRECEDENTS

50. In the last 74 years, the aforesaid constitutional provisions have been considered by this Court on a number of occasions. It will be relevant to refer to some of these judgments.

51. It will also be relevant to note that by the First Amendment to the Constitution in the year 1951 by which clause (4) was added to Article 15 was necessitated on account of the judgment of this Court in the case of ***State of Madras vs. Smt. Champakam Dorairajan***[4] wherein Government Order specifying reservation for Harijans was set aside.

[4] (1951) SCR 525.

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A. M.R. Balaji vs. State of Mysore

52. In the case of ***M.R. Balaji and others vs. State of Mysore***[5], the subject matter of challenge before the Constitution Bench of this Court was an order issued by the State of Mysore under Article 15(4) of the Constitution of India. Vide the said order, the State reserved 68% of the seats in the engineering and medical colleges and other technical institutions for the educationally and socially backward classes and Scheduled Castes and Scheduled Tribes and only 32% seats were available for the merit pool.

53. The Constitution Bench of this Court held that the provisions contained in Articles 15(4) and 16(4) are similar provisions. It further held that Article 15(4) is an enabling provision and that it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary.

[5] 1963 Supp. (1) SCR 439:1962 SCC OnLine 147: AIR 1963 SC 649.

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54. It will be relevant to refer to the following observations of this Court:

> "**20.** Article 15(4) authorises the State to make a special provision for the advancement of any socially and educationally backward classes of citizens, as distinguished from the Scheduled Castes and Scheduled Tribes. No doubt, special provision can be made for both categories of citizens, but in specifying the categories, the first category is distinguished from the second. Sub-clauses (24) and (25) of Article 366 define Scheduled Castes and Scheduled Tribes respectively, but there is no clause defining socially and educationally backward classes of citizens, and so, in determining the question as to whether a particular provision has been validly made under Article 15(4) or not, the first question which falls to be determined is whether the State has validly determined who should be included in these Backward Classes. It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and

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Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them. Article 34(1) provides for the issue of public notification specifying the castes, races or tribes which shall, for the purposes of this Constitution, be deemed to be Scheduled Castes either in the State or the Union territory as the case may be. Similarly Article 342 makes a provision for the issue of public notification in respect of Scheduled Tribes. Under Article 338(3), it is provided that references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other Backward Classes as the President may, on receipt of the report of a commission appointed under Article 340(1) by order, specify and also to the Anglo-Indian community. It would thus be seen that this provision contemplates that some Backward Classes may by the Presidential order be included in

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> Scheduled Castes and Tribes. That helps to bring out the point that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes."

55. This Court observed that the backward classes of citizens for whom special provision is authorized to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. It has been observed that the Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. However, it was realized that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less backward than the Scheduled Castes and Scheduled Tribes, and it was thought that some special provision ought to be made even for them. The Court observed that the Backward Classes for whose improvement special provision is

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contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes.

56. It will also be apposite to refer to the following observations of this Court:

> "**21.** ……The backwardness under Article 15(4) must be social and educational. It is not either social or educational, but it is both social and educational; and that takes us to the question as to how social and educational backwardness has to determined."

57. It is thus clear that the Constitution Bench of this Court observed that the backwardness under Article 15(4) must be social and educational. It is neither social nor educational, but it has to be both social and educational.

58. The Court then considered the question as to whether caste can be made the sole basis for determining the social backwardness was permissible or not. The Court observed that

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the group of citizens to whom Article 15(4) applies are described as "classes of citizens", not as castes of citizens. The Court observed that therefore in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. It has been observed that though the caste of the group of citizens may be relevant, its importance should not be exaggerated. The Court further observed that social backwardness is, on the ultimate analysis, the result of poverty to a very large extent. It observed that the classes of citizens who are deplorably poor automatically become socially backward. It observed that they do not enjoy a status in society and have, therefore, to be content to take a backward seat. The Court therefore held that both caste and poverty are relevant in determining the backwardness of citizens.

59. The Court further observed that the occupations of citizens may also contribute to making classes of citizens socially

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backward. It has been observed that there are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. It has been observed that the place of habitation also plays a role in determining the backwardness of a community of persons. It therefore held that the problem of determining who are socially backward classes is very complex. It has been held that sociological, social, and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward. However, it observed, that is the function of the State which purports to act under Article 15(4) of the Constitution of India.

60. In the facts of the said case, the Court found that the State had applied the sole criteria of caste without regard to the other factors. It was therefore held that the criteria of social backwardness of the communities to whom the order impugned

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therein was applied was not permissible under Article 15(4) of the Constitution of India.

61. Insofar as the educational backwardness of the classes of citizens is concerned, the State had applied the formula that all castes whose average student population in the last three High School classes of all High Schools in the State was less than the State average of 6.9 per thousand should be regarded as backward communities. Insofar as more backward communities are concerned, the criteria applied was that if the average of any community was less than 50% of the State average, it should be regarded as constituting the more backward classes.

62. The Court held that the State was not justified in including in the list of Backward Classes, castes, or communities whose average of student population per thousand was slightly above, or very near, or just below the State average.

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B. *State of Kerala vs. N.M. Thomas*

63. Coming next to one of the most important judgments dealing with the affirmative action which is the 7-Judge Bench judgment of this Court in the case of ***State of Kerala and another vs. N.M. Thomas and others***[6]. In the said case, out of the 7 Learned Judges, 5 Learned Judges upheld the provisions made by the Kerala Government for providing affirmative action to ameliorate the situation of Scheduled Castes and Scheduled Tribes.

64. It will be apposite to refer to the following observation made by A.N. Ray, C.J.:

> "**21.** Articles 14, 15 and 16 form part of a string of constitutional guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable

[6] (1976) 2 SCC 310.

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classification having a nexus to the objects to be achieved. Under Article 16 there can be a reasonable classification of the employees in matters relating to employment or appointment.

22. This Court in *State of Gujarat* v. *Shri Ambica Mills Ltd., Ahmedabad* [(1974) 4 SCC 656 : 1974 SCC (L&S) 381] said: [SCC p. 675: SCC (L&S) p. 400, para 53]

> "The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. (*See* Joseph Tussman and Jacobusten Brook, *The Equal Protection of the Laws*, 37 California Rev. 341.)"

23. In *Ambica Mills case* [(1974) 4 SCC 656 : 1974 SCC (L&S) 381] this Court explained reasonable classification to be one which includes all who are similarly

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situated and none who are not. The question as to who are similarly situated has been answered by stating that one must look beyond the classification to the purpose of law.

> "The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good." [SCC p. 675: SCC (L&S) p. 400, para 54]

24. Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

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27. There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection (*State of Mysore* v. *V.P. Narasing Rao* [AIR 1968 SC 349 : (1968) 1 SCR 407 : (1968) 2 LLJ 120]).

28. This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).

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29. The power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the Backward Classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. (*General Manager, S. Rly.* v. *Rangachari* [AIR 1962 SC 36 : (1962) 2 SCR 586] .) The present case is not one of reservation of posts by promotion.

30. Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class. The Roadside Station Masters and Guards are recruited

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> separately, trained separately and have separate avenues of promotion. The Station Masters claimed equality of opportunity for promotion vis-à-vis the guards on the ground that they were entitled to equality of opportunity. It was said the concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated. The Roadside Station Masters and Guards were recruited separately. Therefore, the two form distinct and separate classes and there is no scope for predicating equality or inequality of opportunity in matters of promotion. (See *All India Station Masters and Assistant Station Masters' Association* v. *General Manager, Central Railway* [AIR 1960 SC 384 : (1960) 2 SCR 311].) The present case is not to create separate avenues of promotion for these persons."

65. It could thus be seen that in the opinion of Ray, C.J., Articles 14, 15 and 16 form part of a string of constitutional rights guaranteed by it, which supplement each other. His Lordship observed that Article 16, which ensures to all citizens

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equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. In turn, Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus with the objects to be achieved.

66. Referring to the judgment of this Court in the case of ***State of Gujarat v. Shri Ambica Mills Ltd., Ahmedabad***[7], His Lordship explained the reasonable classification to be one which includes all who are similarly situated and none who are not. He further observed that discrimination is the essence of classification, and that equality is violated if it rests on an unreasonable basis. He observed that those who are similarly circumstanced are entitled to an equal treatment and that equality is amongst equals. He observed that the classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the

[7] (1974) 4 SCC 656.

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groups. He further observed that such differential attributes must bear a just and rational relation to the object sought to be achieved. He further observed that there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. He observed that Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. He observed that this equality of opportunity need not be confused with absolute equality. It is observed that power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. His Lordship observed that in providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the Backward Classes

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consistently with the maintenance of the efficiency of administration.

67. His Lordship further observed thus:

> "**38.** The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and 16(2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Article 16(1) and (2). The relevant touchstone of validity is to find out whether the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it."

68. It is observed that the rule which provides that given the necessary requisite merit, a member of the backward class shall

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get priority so as to ensure adequate representation and the said rule will not violate Article 14 or Article 16(1) and (2). The relevant consideration would be to find out whether the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it.

69. His Lordship further observed thus:

> "**43.** Scheduled Castes and scheduled tribes are not a caste within the ordinary meaning of caste. In *Bhaiyalal* v. *Harikishan Singh* [AIR 1965 SC 1557 : (1965) 2 SCR 877] this Court held that an enquiry whether the appellant there belonged to the Dohar caste which was not recognised as a scheduled caste and his declaration that he belonged to the Chamar caste which was a scheduled caste could not be premitted because of the provisions contained in Article 341. No court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. Scheduled caste is a caste as notified under Article 366(25). A notification is issued by the President under Article 341 as a result of an elaborate enquiry. The object of Article 341 is to provide

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protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of Backward Classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Article 15(4) and 16(4) bring out the position of Backward Classes to merit equality. Special provisions are made for the advancement of Backward Classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept equality is equality of opportunity for appointment. Preferential treatment for members of Backward Classes with due

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> regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality."

70. His Lordship clearly observed that Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste. He observed that no court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. It is observed that the object of Article 341 is to provide protection to

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the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

71. His Lordship (Ray, C.J.) further observed that our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. It has been held that if members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. It has been observed that special provisions have been made for the advancement of Backward Classes and reservations of appointments and posts for them to secure adequate representation. It has been emphasized that only such special provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). His Lordship goes on to say that preferential treatment for members of Backward

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Classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. It has been observed that equality of opportunity for unequals can only mean aggravation of inequality and that equality of opportunity admits discrimination with reason and prohibits discrimination without reason. His Lordship held that discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. It has been held that Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognized by the Constitution. It has been held that the differential treatment in standards of selection is within the concept of equality.

72. I now refer to the following observations of K.K. Mathew, J.:

> "**53.** Formal equality is achieved by treating all persons equally: "Each man to count for one and no one to count for more

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than one." But men are not equal in all respects. The claim for equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallised privileges. Although the decision to grant equality is motivated prima facie by the alleged reason that all men are equal yet, as soon as we clear up the confusion between equality in the moral sense and equality in the physical sense, we realise that the opposite is the truth; for, we think that it is just to promote certain equalities precisely to compensate for the fact that men are actually born different. We, therefore, have to resort to some sort of proportionate equality in many spheres to achieve justice.

54. The principle of proportional equality is attained only when equals are treated equally and unequals unequally. This would raise the baffling question: Equals and unequals in what? The principle of proportional equality therefore involves an appeal to some criterion in terms of which differential treatment is justified. If there is no significant respect in which persons concerned are distinguishable, differential treatment would be unjustified. But what

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is to be allowed as a significant difference such as would justify differential treatment?

55. In distributing the office of a State, not any sort of personal equality is relevant; for, unless we employ criteria appropriate to the sphere in question, it would turn out that a man's height or complexion could determine his eligibility or suitability for a post. As Aristotle said, claims to political office cannot be based on prowess in athletic contests. Candidates for office should possess those qualities that go to make up an effective use of the office. But this principle also does not give any satisfactory answer to the question when differential treatment can be meted out. As I said, the principle that if two persons are being treated or are to be treated differently there should be some relevant difference between them is, no doubt, unexceptionable. Otherwise, in the absence of some differentiating feature what is sauce for the goose is sauce for the gander. The real difficulty arises in finding out what constitutes a relevant difference.

56. If we are all to be treated in the same manner, this must carry with it the

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important requirement that none of us should be better or worse in upbriging, education, than anyone else which is an unattainable ideal for human beings of anything like the sort we now see. Some people maintain that the concept of equality of opportunity is an unsatisfactory concept. For, a complete formulation of it renders it incompatible with any form of human society. Take for instance, the case of equality of opportunity for education. This equality cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. To remedy this, all children might be brought up in State nurseries, but, to achieve the purpose, the nurseries would have to be run on vigorously uniform lines. Could we guarantee equality of opportunity to the young even in those circumstances? The idea is well expressed by Laski:

> "Equality means, in the second place, that adequate opportunities are laid open to all. By adequate opportunities we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal. Children who are brought up in an atmosphere where things of the mind are accounted highly

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> are bound to start the race of life with advantages no legislation can secure. Parental character will inevitably affect profoundly the equality of the children whom it touches. So long, therefore, as the family endures — and there seems little reason to anticipate or to desire its disappearance — the varying environments it will create make the notion of equal opportunities a fantastic one. ["Liberty and Equality" in Special Problems and Public Policy : Inequality and Justice, Ed. Lee Rainwater, pp. 26 to 31]
>
> **57.** Though complete identity of equality of opportunity is impossible in the world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1)."

73. Mathew, J. observed that formal equality is achieved by treating all persons equally. Formally, it requires that all men have to be treated as the same. He observed that men are not equal in all respects. The claim for equality is in fact a protest

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against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges. He observed that as soon as we clear up the confusion between equality in the moral sense and equality in the physical sense, it is just to promote certain equalities precisely to compensate for the fact that men are actually born different. He explains the theory of proportional equality and observed that the principle of proportional equality can be attained only when equals are treated equally and unequals unequally. He observed that if there is no significant respect in which persons concerned are distinguishable, differential treatment would be unjustified. But if there is significant respect in which persons concerned are distinguishable, the same would justify differential treatment. His Lordship observed that if two people are being treated or are to be treated differently there should be some relevant difference between them. Otherwise, in the absence of some differentiating

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feature what is sauce for the goose is sauce for the gander. He observed that the real difficulty arises in finding out what constitutes a relevant difference.

74. His Lordship observed that if we all were to be treated in the same manner, the same would carry with it the requirement that none of us should be better or worse in upbringing and education than anyone else. He observed that the equality of opportunity for education cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. His Lordship referred to Laski, who opined that parental character will inevitably affect the equality of the children whom it touches. His Lordship then observed that though complete identity of equality of opportunity is impossible in the world, compensatory measures in character calculated to mitigate surmountable obstacles to ensure equality of opportunity would not violate Article 16(1).

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75. It will also be apposite to refer to the following observations of Mathew, J. in ***N.M. Thomas*** (supra):

> "**64.** It would follow that if we want to give equality of opportunity for employment to the members of the Scheduled Castes and scheduled tribes, we will have to take note of their social, educational and economic environment. Not only is the directive principle embodied in Article 46 binding on the law-maker as ordinarily understood but it should equally inform and illuminate the approach of the court when it makes a decision as the court also is 'state' within the meaning of Article 12 and makes law even though "interstitially from the molar to the molecular". I have explained at some length the reason why court is "State" under Article 12 in my judgment in *His Holiness Kesavananda Bharati Sripadagalavaru* v. *State of Kerala* [(1973) 4 SCC 225 : 1973 Supp SCR 1] .
>
> **65.** Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains insofar as, and only insofar as, each member of a community,

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whatever his birth or occupation or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence. [See R.H. Tawney, "Equality", (1965) pp. 103-04]

66. The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. They mark off a world in which the Government should have no jurisdiction. In this realm, it was assumed that a citizen has no claim upon Government except to be left alone. But the language of Article 16(1) is in marked contrast with that of Article 14. Whereas the accent in Article 14 is on the injunction that the State shall not deny to any person equality before the law or the equal protection of the laws that is, on the

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negative character of the duty of the State, the emphasis in Article 16(1) is on the mandatory aspect, namely, that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State implying thereby that affirmative action by the Government would be consistent with the article if it is calculated to achieve it. If we are to achieve equality, we can never afford to relax:

> "While inequality is easy since it demands no more than to float with the current, equality is difficult for it involves swimming against it. [R.H. Tawney, "Equality", (1952), p. 47] "

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

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and also in the decisions requiring the State to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc. Today, the sense that Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in constitutional law. While special concessions for the underprivileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances. [See "Developments — Equal Protection", 82 Harv LR 1165]

68. The idea of compensatory State action to make people who are really unequal in their wealth, education or social environment, equal, in specified areas,

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> was developed by the Supreme Court of the United States. Rousseau has said:
>
> > "It is precisely because the force of circumstances tends to destroy equality that force of legislation must always tend to maintain it. [Contract Social ii, 11] ""

76. His Lordship observed that if we want to give equality of opportunity for employment to the members of the Scheduled Castes and Scheduled Tribes, we will have to take note of their social, educational, and economic environment. His Lordship observed that the directive principle embodied in Article 46 is not only binding on the lawmaker, but it should equally inform and illuminate the approach of the court when it makes a decision. Referring to the exposition in the case of ***His Holiness Kesavananda Bharati Sripadagalavaru vs. State of Kerala***[8], His Lordship states that the Court is also a 'state' when it makes a decision within the meaning of Article 12.

[8] (1973) 4 SCC 225 : 1973 Supp. SCR 1.

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77. His Lordship observed that 'equality of opportunity' is not simply a matter of legal equality and that its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It has been observed that the guarantee of equality is something more than what is required by 'formal equality'. It implies differential treatment of persons who are unequal. It has been observed that egalitarian principle requires that the Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claim Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. His Lordship observed that the emphasis in Article 16(1) is on the mandatory aspect that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. It therefore implies that affirmative action by the Government would be consistent with the article if it is calculated to achieve it.

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78. Referring to Article 14 of the Constitution, His Lordship observed that the State is under obligation to help the members of the weaker sections. His Lordship observed that under the constitutional law, the Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise. Referring to the concept of proportional equality, His Lordship states that the State is required to frame legislation, to consider the private inequalities of wealth, of education and other circumstances.

79. Referring to the judgments of the Supreme Court of the United States, His Lordship opined that the idea of compensatory State action was to bring about the equality for the people who are really unequal in their wealth, education or social environment.

80. After referring to certain judgments of the United States Supreme Court, Mathew, J. observed thus:

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"**73.** There is no reason why this Court should not also require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.

74. The concept of equality of opportunity in matters of employment is wide enough to include within it compensatory measures to put the members of the Scheduled Castes and scheduled tribes on par with the members of other communities which would enable them to get their share of representation in public service. How can any member of the so-called forward communities complain of a compensatory measure made by the Government to ensure the members of Scheduled Castes and scheduled tribes their due share of representation in public services?

75. It is said that Article 16(4) specifically provides for reservation of posts in favour of Backward Classes which according to the decision of this Court would include

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the power of the State to make reservation at the stage of promotion also and therefore Article 16(1) cannot include within its compass the power to give any adventitious aids by legislation or otherwise to the Backward Classes which would derogate from strict numerical equality. If reservation is necessary either at the initial stage or at the stage of promotion or at both to ensure for the members of the Scheduled Castes and scheduled tribes equality of opportunity in the matter of employment, I see no reason why that is not permissible under Article 16(1) as that alone might put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. Whether there is equality of opportunity can be gauged only by the equality attained in the result. Formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. Equality of result is the test of equality of opportunity.

76. Daniel P. Moynihan, one of America's leading urban scholars, spelled out the problem in a widely publicized study that

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he prepared while he was Assistant Secretary of Labour. The Moynihan Report, as it came to be known, made the point in a passage that deserves full quotation:

> "It is increasingly demanded that the distribution of success and failure within one group be roughly comparable to that within other groups. It is not enough that all individuals start out on even terms, if the members of one group almost invariably end up well to the fore and those of another far to the rear. This is what ethnic politics are all about in America, and in the main the Negro American demands are being put forth in this new traditional and established framework.
>
> Here a point of semantics must be grasped. The demand for equality of opportunity has been generally perceived by White Americans as a demand for liberty, a demand not to be excluded from the competitions of life — at the polling place, in the scholarship examinations, at the personnel office, on the housing market. Liberty does, of course, demand that everyone be free to try his luck, or test his skill in such matters. But these opportunities do not necessarily produce equality: on the

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contrary, to the extent that winners imply losers, equality of opportunity almost insures inequality of results.

The point of semantics is that equality of opportunity now has a different meaning for Negroes than it has for Whites. It is not (or at least no longer) a demand for liberty alone, but also for equality — in terms of group results. In Bayard Rustin's terms, 'It is now concerned not merely with removing the barriers to full opportunity but with achieving the fact of equality'. By equality Rustin means a distribution of achievements among Negroes roughly comparable to that among Whites. [The Moynihan Report and the Politics of Controversy, Eds. Lee Rainwater and William L. Yancey, p. 49]"

77. Beginning most notably with the Supreme Court's condemnation of school segregation in 1954, the United States has finally begun to correct the discrepancy between its ideals and its treatment of the black man. The first steps, as reflected in the decisions of the courts and the civil rights laws of Congress, merely removed the legal and quasi-legal forms of racial

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discrimination. These actions while not producing true equality, or even equality of opportunity, logically dictated the next step: positive use of government power to create the possibility of a real equality. In the words of Professor Lipset:

> "Perhaps the most important fact to recognise about the current situation of the American Negro is that (legal) equality is not enough to insure his movement into larger society." ["The American Democracy", Mcgrath, Cornwell and Goodman, p. 18]

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

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> **79.** The State can adopt any measure which would ensure the adequate representation in public service of the members of the Scheduled Castes and scheduled tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure does not dispense with the acquisition of the minimum basic qualification necessary for the efficiency of administration."

81. His Lordship observed that there is no reason why this Court should not require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens. His Lordship observed that whenever differing conditions and circumstances stand in the way of a class of citizens in their equal access to the enjoyment of basic rights or claims, the State would be required to adopt a standard of proportional equality.

82. He observed that no member of the forward classes or communities should complain against a compensatory measure

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made by the Government to ensure that the members of Scheduled Castes and Scheduled Tribes get their due share of representation in public services.

83. His Lordship observed that if reservation is necessary either at the initial stage or at the stage of promotion or at both, to ensure for the members of the Scheduled Castes and Scheduled Tribes equality of opportunity, then this would be permissible under Article 16(1) as that alone would put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. It is observed that the formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. He observed that the equality of result is the test of equality of opportunity.

84. Mathew, J. rejects the contention that Article 16(4) is an exception to Article 16(1). He states that such an interpretation

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does not consider the social, economic, educational background of the members of the Scheduled Castes and Scheduled Tribes. He held that if equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1) and that it is only an emphatic way of putting the extent to which equality of opportunity could be carried i.e., even up to the point of making reservation.

85. His Lordship observed that the State can adopt any measure which would ensure the adequate representation in public service of the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure does not dispense with the acquisition of the minimum basic qualification necessary for the efficiency of administration.

86. Mathew, J. further observed thus:

> "**83.** A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the

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law. In other words, the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume a priori that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see no objection to a further classification within the class. It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons. In this view, I have no doubt that the principle laid down in *All India Station Masters and Assistant Station Masters Association* v. *General Manager, Central Railway* [(1960) 2 SCR 311 : AIR 1960 SC 384.] ; *S.G. Jaisinghani* v. *Union of India* and *State of J&K.* v. *Triloki Nath Khosa* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771.] has no application here."

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87. It has been observed that a classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. It has been observed that the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule. It specifically observed that it is a mistake to assume *a priori* that there can be no classification within a class. He held that if there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, such a further classification within the class would be permissible in law. He observed that though in one sense classification brings about inequality it is promotive of equality if its object is to bring those who share a common characteristic under a class, for differential treatment for sufficient and justifiable reasons.

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88. V.R. Krishna Iyer, J. in his concurring judgment observed thus:

> "**124.** A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell

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the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, *most backward* classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).] , the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one.

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> **125.** The core conclusion I seek to emphasise is that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice — not enshrinement of great rights in Part III and good goals in Part IV. Otherwise, the solemn undertakings in Articles 14 to 16 read with Articles 46 and 335 may be reduced to a "teasing illusion or promise of unreality". A clear vision of the true intendment of these provisions demands a deep understanding of the Indian spiritual-secular idea that divinity dwells in *all* and that ancient environmental pollution and social placement, which the State must extirpate, account for the current socio-economic backwardness of the blacked-out human areas described euphemistically as scheduled castes and scheduled tribes. The roots of our constitutional ideas — at least some of them — can be traced to our ancient culture. The noble Upanishadic behest of collective acquisition of cultural strength (**सह वीर्य करवावहे**) is involved in and must evolve out of "equality", if we are true to the subtle substance of our finer heritage."

89. His Lordship categorizes three-fold danger of reservation. According to him, firstly the benefits, by and large, are snatched

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away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim of backwardness is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment. However, they wish to wear the "weaker section" label to score over their near-equals formally categorized as the upper brackets. Thirdly, according to him, a lasting solution to the problem would come only from improvement of social environment, added educational facilities and cross-fertilization of castes by inter-caste and inter-class marriages sponsored as a massive State program.

90. His Lordship observed that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice. He observed that if this is not done, the solemn

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undertakings in Articles 14 to 16 read with Articles 46 and 335 may be reduced to a "teasing illusion or promise of unreality".

91. His Lordship further observed thus:

> "**136.** The next hurdle in the appellant's path relates to Article 16(4). To my mind, this sub-article serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to. In the language of Subba Rao, J. (as he then was), in *Devadasan* [AIR 1964 SC 179: (1964) 4 SCR 680, 700 : (1965) 2 LLJ 560] .
>
> > "The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."
>
> True, it may be loosely said that Article 16(4) is an exception but, closely examined, it is an illustration of constitutionally sanctified classification. Public services have been a fascination for Indians even in British days, being a

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symbol of State power and so a special article has been devoted to it. Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt (see, for instance, *CIT* v. *Shaw Wallace & Co.* [59 IA 206: AIR 1932 PC 138]).

137. "Reservation" based on classification of backward and forward classes, without detriment to administrative standards (as this Court has underscored) is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. Article 16(1) and (4) are concordant. This Court has viewed Article 16(4)as an exception to Article 16(1). Does classification based on desperate backwardness render Article 16(4) redundant? No. Reservation confers *pro tanto* monopoly, but classification grants under Article 16(1) ordinarily a lesser order of advantage. The former is more rigid, the latter more flexible, although they may overlap sometimes. Article 16(4) covers all backward classes; but to earn the benefit of grouping under Article 16(1) based on Articles 46 and 335 as I have explained, the twin considerations of terrible

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> backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied."

92. Referring to the observation of Subba Rao, J. in the case of ***T. Devadasan vs. Union of India***[9], Krishna Iyer, J. observed that Article 16(4) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to.

93. He observed that on a closer examination, it can be seen that clause (4) of Article 16 is an illustration of constitutionally sanctified classification. He observed that Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt.

94. It is observed that the "Reservation" based on classification of backward and forward classes, without detriment to administrative standards is an application of the principle of

[9] (1964) 4 SCR 680 : AIR 1964 SC 55.

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equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. His Lordship further observed that Article 16(4) covers all backward classes. He however states that for earning the benefit of grouping under Article 16(1) based on Articles 46 and 335, the twin considerations of terrible backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied.

95. His Lordship also held that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, whereas the other two applying it to sensitive areas which are historically important and politically polemical in a climate of communalism and jobbery.

96. Fazal Ali, J. in his concurring judgment observed thus:

> "**178.** The concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. Indeed if this artificial

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interpretation is put on the scope and ambit of Article 16 it will lead to channelisation of legislation or polarisation of rules. Differences and disparities exist among men and things and they cannot be treated alike by the application of the same laws but the law has to come to terms with life and must be able to recognise the genuine differences and disparities that exist in human nature. Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification. In *Morey* v. *Doud* [354 US 457, 473] it was so aptly observed:

> "To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic."

179. Coming now to Article 16 it may be analysed into three separate categories so far as the facts of the present case are concerned:

Category I—clause (1) of Article 16

Category II—clause (2) of Article 16.

Category Ill—clause (4) of Article 16.

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> **180.** Clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. It is important to note that the Constitution uses the words "equality of opportunity for *all citizens*". This inherently implies that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. This, therefore, can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. The classification, however, must be a reasonable one and must fulfil the following conditions:
>
> (*i*) It must have a rational basis;
>
> (*ii*) it must have a close nexus with the object sought to be achieved;
>
> (*iii*) it should not select any person for hostile discrimination at the cost of others."

97. His Lordship observed that differences and disparities exist among men and things, and they cannot be treated alike by the application of the same laws. He observed that the law must

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come to terms with life and must be able to recognize the genuine differences and disparities that exist in human nature. He observed that the Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification.

98. It has been observed that clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. His Lordship emphasized that the words "equality of opportunity for *all citizens*" used in the Constitution imply that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. According to the Learned Judge, this can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. He however culls out three conditions, viz., (i) it must have a rational basis; (ii) it must have a close nexus with

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the object sought to be achieved; and (iii) it should not select any person for hostile discrimination at the cost of others.

99. Echoing the sentiments of the other Learned Judges, by holding that Article 16(4) is not a proviso to Article 16(1), the Learned Judge observed thus:

> "**187.** For these reasons, therefore, I respectfully agree with the observations of Subba Rao, J., as he then was, in *T. Devadasan* v. *Union of India* [AIR 1964 SC 179 : (1964) 4 SCR 680 : (1965) 2 LLJ 560] where he observed:
>
> > "That is why the makers of the Constitution introduced clause (4) in Article 16. The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."
>
> My view that Article 16(4) is not a proviso to Article 16(1) but that this clause covers the whole field of Article 16 is amply supported by the decision of this Court in *General Manager, Southern*

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Railway v. *Ranga-chari* where it was observed: (p. 599)

> "It is common ground that Article 16(4) does not cover the entire field covered by Article 16(1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Article 16(1) and (2) do not fall within the mischief of non-obstantive clause in Article 16(4)."

C. ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) vs. Union of India***

100. Next is the case of ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association vs. Union of India and others***[10], where a bench of 3 Learned Judges of this Court was considering the policy directives issued by the Railway Board introducing reservation in cases of selection as well as non-selection posts and other related issues regarding affirmative action.

[10] (1981) 1 SCC 246.

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101. Krishna Iyer, J. in paragraph 12, observed thus:

> "**12.** Granville Austin [Granville Austin : The Indian Constitution — Cornerstone of a Nation] quotes profusely from the Constituent Assembly proceedings to prove the goal of the Indian Constitution to be social revolution. Radhakrishnan, representing the broad consensus, said that: [Ibid, p. 27]
>
> > "India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about 'a fundamental change in the structure of Indian society'."

102. The Learned Judge refers to the speech of Dr. Radhakrishnan, representing the broad consensus, wherein he said that India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about 'a fundamental change in the structure of Indian society'.

103. Explaining the inter-relation between Articles 16(1) and 16(4), the Learned Judge observed thus:

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"**21.** The preamble which promises justice, liberty and equality of status and opportunity within the framework of secular, socialist republic projects a holistic perspective. Article 16 which guarantees equal opportunity for all citizens in matters of State service inherently implies equalisation as a process towards equality but also hastens to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes Article 16(4) for this specific purpose. In a given situation of large social categories being submerged for long, the guarantee of equality with the rest is myth, not reality, unless it is combined with affirmative State action for equalisation geared to promotion of eventual equality. Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1). The prescription of Article 16(1) needs, in the living conditions of India, the concrete sanction of Article 16(4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung. To bury this truth is to

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sloganise Article 16(1) and sacrifice the facts of life.

22. This is not mere harmonious statutory construction of Article 16(1) and (4) but insightful perception of our constitutional culture, reflecting the current of resurgent India bent on making, out of a sick and stratified society of inequality and poverty, a brave new Bharat. If freedom, justice and equal opportunity to unfold one's own personality belong alike to *bhangi* and *brahmin,* prince and pauper, if the *panchama* proletariat is to *feel* the social transformation Article 16(4) promises, the State must apply equalising techniques which will enlarge their opportunities and thereby progressively diminish the need for props. The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception [Article 16(4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison d'etre, to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article

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16(1), to casteify "reservation" even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State.

23. The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the *pariah*, the *mlecha,* the bonded labour, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made — the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities. This synthesis of ends and means, of life's maladies and law's remedies is a part of the know-how of constitutional interpretation if alienation from the people were not to afflict the justicing process: [J. Landis : Note on Statutory Interpretation, 43 Harv L Rev 886, 891 (1930)]

A statute rarely stands alone. Back of Minerva was the brain of Jove, and

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> behind Venus was the spume of the ocean."

104. The Learned Judge observed that the guarantee of equal opportunity provided under Article 16 for all citizens in matters of State service inherently implies equalization as a process towards equality. However, he also emphasizes the need to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing. He states that Article 16(4) has been devoted for this very specific purpose. He observed that the guarantee of equality to the large social categories being submerged for long, with the rest, would be myth and not reality, unless it is combined with affirmative State action for equalization geared to promotion of eventual equality. He observed that Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1). He observed that the prescription of Article 16(1) needs the concrete sanction of Article 16(4) so that

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those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung.

105. The Learned Judge observed that this is not mere harmonious statutory construction of Article 16(1) and (4) but an insightful perception of our constitutional culture. He emphasized that the State must apply equalizing techniques which will enlarge their opportunities and thereby progressively diminish the need for props. He further emphasized that to casteify "reservation" even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. He further emphasized that to interpret the Constitution rightly we must understand the people for whom it is made. He observed that the synthesis of ends and means, of life's maladies and law's remedies is a part of the know-how of constitutional interpretation.

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106. Krishna Iyer, J. further observed thus:

> "**34.** Special provisions for depressed classes and even other *castes* have a pre-Constitution history. After the Constitution was enacted the legality of old rules based on caste became moot and the Central Government revised its policy. The post-Constitution reincarnation of the communal G.O. concentrated not on caste orientation but on elimination of socio-economic suppression and the diverse ways to achieve this objective.
>
> **xxx xxx xxx**
>
> **36.** Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. Nevertheless, our founding fathers were realists, and so did not declare the proposition of equality in its bald universality but subjected it to certain special provisions, not contradicting the soul of equality, but adapting that never-changing principle to the ever-changing social milieu. That is how Articles 15(4) and 16(4) have to be read together with Articles 15(1) and 16(1). The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination. Article 16(4)

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imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16(1) or as an exception to it. The same observation will hold good for the sub-articles of Article 15. Thus we have a constitutional fundamental guarantee in Articles 14 to 16; but it is a notorious fact of our cultural heritage that the Scheduled Castes and the Scheduled Tribes have been in unfree India nearly dehumanised, and a facet of the struggle for Freedom has been the restoration of full personhood to them together with the right to share in the social and economic development of the country. Article 46 is a Directive Principle contained in Part IV. Every Directive Principle is fundamental in the governance of the country and it shall be the duty of the State to apply that principle in making laws. Article 46, in emphatic terms, obligates the State "to promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the *Scheduled Castes and the Scheduled Tribes*, and shall protect them from social injustice and all forms of exploitation".

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Reading Article 46 together with Article 16(4) the luscent intent of the Constitution-framers emerges that the exploited lot of the *harijan-girijan* groups in the past shall be extirpated with special care by the State. The inference is obvious that administrative participation by SC & ST shall be promoted with special care by the State. Of course, reservations under Article 16(4) and promotional strategies envisaged by Article 46 may be important but shall not run berserk and imperil administrative efficiency in the name of concessions to backward classes. Article 335 enters a caveat in this behalf:

> "335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

The positive accent of this article is that the claims of SC & ST to equalisation of representation in services under the State, having regard to their sunken social status and impotence in the power system, shall be taken into consideration. The negative element, which is part of the

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article, is that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration".

xxx xxx xxx

39. Article 341 makes it clear that a "scheduled Caste" need not be a "caste" in the conventional sense and, therefore, may not be a caste within the meaning of Article 15(2) or 16(2). Scheduled Castes become such only if the President specifies any castes, races or tribes or *parts* or *groups within castes, races or tribes* for the purpose of the Constitution. So, a group or a section of a group, which need not be a caste and may even be a hotchpotch of many castes or tribes or even races, may still be a Scheduled Caste under Article 341. Likewise, races or tribal communities or parts thereof or part or parts of groups within them may still be Scheduled Tribes (Article 342) for the purpose of the Constitution. Under this definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be. It is the socio-economic backwardness of a social bracket, not mere birth in a caste, that is decisive. Conceptual errors creep in when

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> traditional obsessions obfuscate the vision."

107. The Learned Judge refers to the pre-Constitution history wherein special provisions for depressed classes and even other castes were made. He stated that after the Constitution was enacted the legality of old rules based on caste became moot and the Central Government revised its policy. He stated that the post-Constitution reincarnation of the communal G.O. concentrated not on caste orientation but on elimination of socio-economic suppression and the diverse ways to achieve this objective.

108. He then stated that Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. He then considered the interplay between Articles 15(4) and 16(4) on the one hand and Articles 15(1) and 16(1) on the other hand. He thereafter refers to the notorious fact of our cultural heritage that the Scheduled

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Castes and the Scheduled Tribes have been in unfree India nearly dehumanized, and a facet of the struggle for freedom has been the restoration of full personhood to them together with the right to share in the social and economic development of the country. He thereafter refers to Article 46 and the importance of the said Directive Principle in the governance of the country and observes that it shall be the duty of the State to apply that principle in making laws. He stated that reading Article 46 together with Article 16(4) expresses the intention of the Constitution-framers that the exploitation of the *harijan-girijan* groups in the past shall be extirpated with special care by the State. For completeness, he then refers to Article 335 to state that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration".

109. Krishna Iyer, J. then observed that Article 341 makes it clear that a "Scheduled Caste" need not be a "caste" in the

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conventional sense and, therefore, may not be a caste within the meaning of Article 15(2) or 16(2). He states that Scheduled Castes become such only if the President specifies any castes, races or tribes or *parts* or *groups within castes, races or tribes* for the purpose of the Constitution. He observed that under the definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be and that it is the socio-economic backwardness of a social bracket, not mere birth in a caste, that is decisive.

110. In paragraph 73, he refers to Dr. Ambedkar's address to the Constituent Assembly, which has already been extracted by us in the beginning of the judgment. Paragraph 73 is reproduced hereunder:

> "**73.** A luminous preface to the constitutional values nullified by social realities is found in Dr Ambedkar's address to the Constituent Assembly earlier extracted, which draws poignant attention to the life of contradictions between the explosive social and economic

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inequalities and the processes of political democracy. "How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?" was the interrogation before the framers of the Constitution and they wanted to enforce the principle of "one man, one value". This perspective must inform the code of equality contained in Articles 14 to 16. Equality being a dynamic concept with flexible import this Court has read into Articles 14 to 16 the pragmatic doctrine of classification and equal treatment to all who fall within each class. But care must be taken to see that classification is not pushed to such an extreme point as to make the fundamental right to equality cave in and collapse (see observations in *Triloki Nath Khosa* v. *State of J&K* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771] . Ray, C.J., in *Kerala* v. *Thomas* [(1976) 2 SCC 310, 331, 332, 333, 334 : 1976 SCC (L&S) 227, 248 249, 250, 251 : (1976) 1 SCR 906, 926-29] epitomised the position in a few passages: [SCC pp. 331, 332, 333 & 334: SCC (L&S) pp. 248, 249, 250 & 251, paras 21, 24, 27, 28, 30 & 31

> "Articles 14, 15 and 16 from part of a string of constitutional guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in

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matters relating to employment is an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to be the object to be achieved.

* * *

Discrimination is the essence of classification.... Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

* * *

There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection (*State of Mysore* v. *V.P. Narasing Rao* [AIR 1968 SC 349 : (1968) 1 SCR 407]).

This equality of opportunity need not be confused with absolute equality....

Under Article 16(1) equality of opportunity of employment means

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> equality as between members of the same class of employees and not equality between members of separate, independent class....
>
> The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.... A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. *The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.*"

The learned Chief Justice relied upon earlier decisions to substantiate this proposition. In *Triloki Nath Khosa* v. *State of J&K* [(1976) 2 SCC 310, 337 : 1976 SCC (L&S) 227, 254 : (1976) 1 SCR 906, 932] this Court had held that the State may make rules guided by realities just as the

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> legislature "is free to recognise degrees of harm and it may confine its restrictions to those classes of cases *where the need is deemed to be the clearest*". Thus we arrive at the constitutional truism that the State may classify, based upon substantial differentia, groups or classes and this process does not necessarily spell violation of Articles 14 to 16."

111. After referring to Dr. Ambedkar's speech, the Learned Judge observed that equality being a dynamic concept with flexible import, this Court has read into Articles 14 to 16 the pragmatic doctrine of classification and equal treatment to all who fall within each class. He, however, warns that classification should not be pushed to such an extreme point as to make the fundamental right to equality cave in and collapse.

112. The Learned Judge further observed as under:

> "**76.** Proceeding on this footing, the fundamental right of equality of opportunity has to be read as justifying the categorisation of SCs & STs separately for the purpose of "adequate representation" in the services under the State. The object is constitutionally

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> sanctioned in terms, as Articles 16 (4) and 46 specificate. The classification is just and reasonable. We may, however, have to test whether the means used to reach the end are reasonable and do not outrun the purposes of the classification. Thus the scope of the case is narrowed down."

113. His Lordship observed that the fundamental right of equality of opportunity must be read as justifying the categorization of SCs & STs separately for the purpose of "adequate representation" in the services under the State. He observed that the object is constitutionally sanctioned in terms, as Articles 16 (4) and 46 specificate.

114. While rejecting the argument that reservation in favour of Scheduled Castes and Scheduled Tribes could affect the efficiency in the administration, the Learned Judge observed thus:

> "**94.** It is fashionable to say — and there is, perhaps, some truth in it — that from generation to generation there is a deterioration in efficiency in all walks of life from politics to pedagogy to officialdom

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and other professions. Nevertheless, the world has been going forward and only parties whose personal interest is affected forecast a doom on account of progressive deficiency in efficiency. We are not impressed with the misfortune predicted about governmental personnel being manned by morons merely because a sprinkling of *harijans/girijans* happen to find their way into the services. Their apathy and backwardness are such that in spite of these favourable provisions, the unfortunates have neither the awareness nor qualified members to take their rightful place in the administration of the country. The malady of modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes. ***Nor does the specious plea that because a few harijans are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren***."

[emphasis supplied]

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115. The Learned Judge rejected the contention that merely because a sprinkling of *harijans/girijans* happen to find their way into the services, the efficiency of the administration of the country would be affected. On the contrary, he states that the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes.

116. It is pertinent to note the observations made by the Learned Judge towards the end of paragraph 94 and in paragraph 98 are most important for the purposes of the present reference. Paragraph 98 reads thus:

> "**98.** The argument is that there are rich and influential *harijans* who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf."

117. Chinnappa Reddy, J. in his separate concurring judgment observed thus:

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"**123.** Because fundamental rights are justiciable and directive principles are not, it was assumed, in the beginning, that fundamental rights held a superior position under the Constitution than the directive principles, and that the latter were only of secondary importance as compared with the Fundamental Rights. That way of thinking is of the past and has become obsolete. It is now universally recognised that the difference between the Fundamental rights and directive principles lies in this that Fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the directive principles are aimed at securing social and economic freedoms by appropriate State action. The Fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts. So they are made justiciable. But, it is also evident that notwithstanding their great importance, the directive principles cannot in the very nature of things be enforced in a court of law. It is unimaginable that any court can compel a legislature to make a law. If the court can

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compel Parliament to make laws then parliamentary democracy would soon be reduced to an oligarchy of Judges. It is in that sense that the Constitution says that the directive principles shall not be enforceable by courts. It does not mean that directive principles are less important than Fundamental rights or that they are not binding on the various organs of the State. Article 37 of the Constitution emphatically states that directive principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows that it becomes the duty of the court to apply the directive principles in interpreting the Constitution and the laws. The directive principles should serve the courts as a code of interpretation. Fundamental rights should thus be interpreted in the light of the directive principles and the latter should, whenever and wherever possible, be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the directive principles or if it is not in discharge of some of the undoubted obligations of the

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> State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the directive principles and other provisions of the Constitution.
>
> **124.** So, we have it that the constitutional goal is the establishment of a socialist democracy in which Justice, economic, social and political is secure and all men are equal and have equal opportunity. Inequality, whether of status, facility or opportunity, is to end, privilege is to cease and exploitation is to go. The underprivileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16."

118. The Learned Judge discussed the interplay between the Fundamental Rights and the Directive Principles. He observed that the Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against

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excessive State action while the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Learned Judge observed that merely because the Directive Principles are not enforceable by Courts, it does not mean that Directive Principles are less important than Fundamental rights or that they are not binding on the various organs of the State. Referring to Article 37 of the Constitution, the Learned Judge states that the Directive Principles are nevertheless fundamental in the governance of the country, and it shall be the duty of the State to apply these principles in making laws. He held that it becomes the duty of the court to apply the directive principles in interpreting the Constitution and the laws; that the directive principles should serve the courts as a code of interpretation. He held that the Fundamental rights should thus be interpreted in the light of the directive principles and the latter should, whenever and wherever possible, be read into the former.

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119. He observed that the constitutional goal is the establishment of a socialist democracy in which Justice, economic, social and political is to secure and all men are equal and have equal opportunity. He further observed that the inequality, whether of status, facility or opportunity, is to end, privilege is to cease, and exploitation is to go. He further observed that the underprivileged, the deprived and the exploited are to be protected and nourished to take their place in an egalitarian society.

120. Thereafter, the Learned Judge then while referring to interplay between Article 16(1) and Article 16(4) observed thus:

> "**125.** Let us now take a look at Article 16(1) and Article 16(4). Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. To the class of citizens who are economically and socially backward this guarantee will be no more than mere wishful thinking, and mere "vanity ... wind and confusion", if it is not translated into reality by necessary State action to protect

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and nurture such class of citizens so as to enable them to shake off the heart-crushing burden of a thousand years' deprivation from their shoulders and to claim a fair proportion of participation in the administration. Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and the Scheduled Tribes in the Public Services at all levels are in our opinion necessary consequences flowing from the Fundamental Right guaranteed by Article 16(1). This very idea is emphasised further by Article 16(4). Article 16(4) is not in the nature of an exception to Article 16(1). It is a facet of Article 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an underprivileged and deprived class of citizens to whom egalite de droit (formal or legal equality) is not egalite de fait (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between egalite de droit and egalite de fait. It recognises that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. Equality of opportunity must be such as to yield “Equality of Results” and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when

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the competition is itself otherwise equitable. John Rawls in *A Theory Of Justice* demands the priority of equality in a distributive sense and the setting up of the social system "so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return". His basic principle of social justice is: "All social primary goods — liberty and opportunity, income and wealth, and the bases of self-respect — are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured." One of the essential elements of his conception of social justice is what he calls the principle of redress: "This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for." Society must, therefore, treat more favourably those with fewer native assets and those born into less favourable social positions. If the statement that "Equality of Opportunity must yield Equality of Results" and if the fulfilment of Article 16(1) in Article 16(4) ever needed a philosophical foundation it is furnished by Rawls' theory of justice and the redress Principle."

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121. The Learned Judge observed that reading Article 16(1) and Article 16(4) together would reveal that they recognize that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. It is observed that the equality of opportunity must be such as to yield "Equality of Results" and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when the competition is itself otherwise equitable.

122. The Learned Judge thereafter refers to "A Theory of Justice" by John Rawls. He also refers to the 'Principle of Redress' according to which underserved inequalities call for redress; and since inequalities of birth and natural endowment are *undeserved*, these inequalities are somehow to be compensated for.

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D. *K.C. Vasanth Kumar vs. State of Karnataka*

123. The next judgment of the Constitution Bench of this Court that requires consideration is the case of ***K.C. Vasanth Kumar and another vs. State of Karnataka***[11]. In the said case, the Court was invited not so much to deliver judgment but to express its opinion on the issue of reservations in the context of Articles 15(4) and 16(4), which would serve as a guideline to the Commission which the Government of Karnataka had proposed to appoint, for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Each of the 5 Learned Judges comprising the Constitution Bench of this Court rendered their separate opinions.

124. Y.V. Chandrachud, C.J. laid down certain propositions. It will be relevant to refer to paragraph 2, which reads thus:

> "**2.** I would state my opinion in the shape of the following propositions:

[11] 1985 (Supp) SCC 714.

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(1) The reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present, there is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.

(2) The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.

(3) Insofar as the other backward classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be

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> comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.
>
> (4) The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (*i*) to the State to rectify distortions arising out of particular facets of the reservation policy and (*ii*) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations."

125. The Learned C.J. observed that for a further period of 15 years, the reservation in favour of Scheduled Castes and Scheduled Tribes must continue. He further observed that the means test, i.e., the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period of 15 years, as mentioned in clause (1).

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Insofar as the Other Backward Classes are concerned, the Learned C.J. observed that the twin tests should be applied; one, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions. It is also observed that the policy of reservations in employment, education and legislative institutions should be reviewed every 5 years or so.

126. It will also be appropriate to refer to the observations of D.A. Desai, J. made in paragraphs 30 and 31, which read thus:

> "**30.** Let me conclude. If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin

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constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty.

31. Let me make abundantly clear that this approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes. Thousands of years of discrimination and exploitation cannot be wiped out in one generation. But even here economic criterion is worth applying byrefusing preferred treatment to those amongst them who have already benefited by it and improved their position. And finally reservation must have a time span otherwise concessions tend to become vested interests. This is not a judgment in a lis in an adversary system. When the arguments concluded, a statement was made that the Government of State of Karnataka would appoint a Commission to determine constitutionally sound and nationally acceptable criteria for

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> identifying socially and educationally backward classes of citizens for whose benefit the State action would be taken. This does not purport to be an exhaustive essay on guide lines but may point to some extent, the direction in which the proposed Commission should move."

127. It could thus be seen that the Learned Judge supports applying the economic criterion for the purpose of compensatory discrimination or affirmative action. According to the Learned Judge, it would strike at the root cause of social and educational backwardness. He further states that simultaneously it would be a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation.

128. Though he cautioned that such an approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes, however, even in their cases, economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefited by it and improved their position.

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129. Rejecting the contention that the reservation is anti-imperialist, Chinnappa Reddy, J. observed thus:

> "**35.** One of the results of the superior, elitist approach is that the question of reservation is invariably viewed as the conflict between the *meritarian* principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is not enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences. Is not a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and Society, who has no books and magazines to read at home, no radio to listen, no TV to watch,

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no one to help him with his home work, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40 per cent or 50 per cent of the marks at a competitive examination where the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination may secure 70, 80 or even 90 per cent of the marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life. If spring flower he cannot be, autumn flower he may be. Why then, should he be stopped at the threshold on an alleged meritarian principle? The requirements of efficiency may always be safeguarded by the prescription of minimum standards. Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so-called meritarian principle be put against mediocrity when

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we come to Scheduled Castes, Scheduled Tribes and backward classes?"

130. The Learned Judge observed that the disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. The Learned Judge compared a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and Society, who has no books and magazines to read at home, no radio to listen, no TV to watch, no one to help him with his homework, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance. The Learned Judge observed that with all these disadvantages, if he is able to secure the qualifying 40% or 50% of the marks at a

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competitive examination, he cannot be said to have no merit, especially if he be compared with the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination and may secure 70, 80 or even 90% of the marks. The Learned Judge further observed that the requirements of efficiency may always be safeguarded by the prescription of minimum standards.

131. Emphasizing on the position of the Scheduled Castes, the Learned Judge observed thus:

> "**51.** .....Now, anyone acquainted with the rural scene in India would at once recognise the position that the Scheduled Castes occupy a peculiarly degraded position and are treated, not as persons of caste at all, but as outcastes. Even the other admittedly backward classes shun them and treat them as inferior beings. It was because of the special degradation to which they had been subjected that the Constitution itself had to come forward to make special provision for them. There is no point in attempting to determine the

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> social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes. Such a test would perpetuate the dominance of the existing upper classes. Such a test would take a substantial majority of the classes who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the "enlightened" classes will capture all the "open" posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. The bulk of those behind the "enlightened" classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of imposing themselves."

132. The Learned Judge rejects the argument that insofar as Other Backward Classes are concerned, their social backwardness has to be ascertained by applying the test of nearness to the conditions of existence of the Scheduled Castes.

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The Learned Judge observed that such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Scheduled Tribes. He observed that such a test would take a substantial majority of the classes, who are between the upper classes and the Scheduled Castes and Tribes, out of the category of backward classes and put them at a permanent disadvantage. He observed that only the "enlightened" classes will capture all the "open" posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. However, the bulk of those behind the "enlightened" classes and ahead of the near Scheduled Castes and Tribes would be left high and dry.

133. It will also be relevant to refer to the following observations of Venkataramiah, J. (as His Lordship then was) in the case of ***K.C. Vasanth Kumar*** (supra):

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"**143**. This view is in conformity with the intention underlying clause (6) of the resolution regarding the aims and objects of the Constitution moved by Jawaharlal Nehru on December 13, 1946 which asked the Constituent Assembly to frame a Constitution providing adequate safeguards for minorities, backward and tribal areas and depressed and other backward classes and also with the provisions of Article 338 and Article 340 of the Constitution. Unless the above restriction is imposed on the Government, it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the State as backward even though in fact it may be an advanced caste or group or community but just below some other forward community. There is another important reason why such advanced castes or groups or communities should not be included in the list of backward classes and that is that if castes or groups and communities which are fairly well advanced and castes and groups and communities which are really backward being at the rock-bottom level are classified together as backward classes, the benefit of reservation would invariably be eaten up by the more advanced sections and the really deserving sections would practically go without any benefit as more number of children of the

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more advanced castes or groups or communities amongst them would have scored higher marks than the children of more backward castes or groups or communities. In that event the whole object of reservation would become frustrated. It is stated that it was with a view to avoiding this anomalous situation, the Government of Devaraj Urs had to appoint the Havanur Commission to make recommendations for the purpose of effectively implementing the objects of Article 15(4) and Article 16(4). Hence as far as possible while preparing the list of backward classes, the State Government has to bear in mind the above principle as a guiding factor. The adoption of the above principle will not unduly reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4) of the Constitution since over the years the level of the Scheduled Castes and Scheduled Tribes is also going up by reason of several remedial measures taken in regard to them by the State and Central Governments. At the same time, it will also release the really backward castes, groups and communities from the stranglehold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades. It is time that more attention is given to those castes, groups and communities who have been at the

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lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many of the Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of the Scheduled Castes and the Scheduled Tribes.

144. Since economic condition is also a relevant criterion, it would be appropriate to incorporate a "means test" as one of the tests in determining the backwardness as was done by the Kerala Government in *Jayasree case*63. These two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). For the purpose of Article 16(4) however, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services."

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134. The Learned Judge observed that two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). The Learned Judge observed that insofar as Article 16(4) is concerned, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services.

E. *Indra Sawhney vs. Union of India*

135. Then next comes the 9-Judge Bench judgment of this Court in the case of ***Indra Sawhney and others vs. Union of India and others***[12], which could be considered as an important milestone laying down the law about reservations for Other

[12] 1992 Supp (3) SCC 217.

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Backward Classes. The extracts from the said judgment of 9-Judge Bench have in-extenso been reproduced in the referral judgment (***The State of Punjab & Ors. vs. Davinder Singh & Ors.***[13]).

136. I will refer to some of the observations made by B.P. Jeevan Reddy, J., who has authored the judgment for himself and M.H. Kania, C.J., M.N. Venkatachaliah, J. and A.M. Ahmadi, J. (as Their Lordships then were).

> "**781.** At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes."

137. His Lordship (Jeevan Reddy, J.) observed that with regard to identification of 'backward class of citizens', we keep aside the

[13] (2020) 8 SCC 1.

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Scheduled Tribes and Scheduled Castes. It will be relevant to note that in the said part of the judgment His Lordship (Jeevan Reddy, J.) was considering an issue with regard to identification of backward class of citizens. In this background, it was observed that the court was keeping aside Scheduled Tribes and Scheduled Castes since they are admittedly included within the backward classes. It was further observed that backward classes contemplated by Article 16(4) do comprise some castes since it cannot be denied that Scheduled Castes include quite a few castes.

138. From paragraph 790 onwards, His Lordship considered the 'Means-test' and 'creamy layer'. It will be apposite to reproduce paragraph 792, which reads thus:

> "**792.** In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class — a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them

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from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line — how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become — say a factory

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owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India

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Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

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139. His Lordship observed that if some of the members in a class are far too advanced socially, the connecting thread between them and the remaining class snaps. The Court observed that 'too advanced socially' means economically and may also mean educationally. It has been observed that they would be misfits in the class. The Court considered the difficulty in drawing the line. It is observed that it should not amount to taking away with one hand what is given with the other. The Court observed that the basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. The Court observed that the line to be drawn must be a realistic one. The Court posed a question as to whether such a line should be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. It has been observed that since it is difficult to assess income from agriculture, in the case of agriculturists, the line may have to be drawn with reference to

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the extent of holding. It is observed that the income limit must be such as to mean and signify social advancement. The Court observed that at the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. It has been observed that if a member of a designated backward class would become a member of IAS or IPS or any other All India Service, his status in the society rises and he is no longer socially disadvantaged. The Court observed that clause (4) of Article 16 aims at group backwardness, the exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). No doubt, it has been specified that the said discussion was confined to Other Backward Classes only and had no relevance in the case of Scheduled Tribes and Scheduled Castes.

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140. Then the question as to whether Backward Classes can be further divided into backward and more backward categories has been answered thus:

> "**802.** We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both

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included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State — and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes etc." Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and

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C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in *Balram* [(1972) 1 SCC 660 : (1972) 3 SCR 247] . This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say — we may reiterate

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> — that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

141. The Court in unequivocal terms held that even among backward classes, there can be a sub-classification on a reasonable basis. The Court held that there can be backward and more backward classes and the State may think it advisable to provide a special benefit to the more backward among the backward classes. It has been observed that where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State, and so long as it is reasonably done, the Court may not intervene.

142. The Court observed that Article 16(4) recognizes only one class i.e., "backward class of citizens". It is observed that it does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). It has therefore been observed that it is beyond controversy that Scheduled Castes and Scheduled Tribes

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are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour.

143. It has also been observed that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, the OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. It has been observed that the same logic also warrants categorization as between more backward and backward. The Court, however, cautioned that it may not be construed as implying that the State should do it, but it was only saying that if the State chooses to do so, it is not impermissible in law.

144. Similar view has also been expressed by P.B. Sawant, J. in paragraphs 523, 524 and 525, which read thus:

> "**523.** As regards the second part of the question, in *Balaji [1963 Supp 1 SCR 439 : AIR 1963 SC 649]* it was observed that the backward classes cannot be further classified in backward and more backward classes. These observations, although made in the context of Article 15(4) which

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fell for consideration there, will no doubt be equally applicable to Article 16(4). The observations were made while dealing with the recommendations of the Nagan Gowda Committee appointed by the State of Karnataka which had recommended the classification of the backward communities into two divisions, the Backward and the More Backward. While making those recommendations the Committee had applied one test, viz., "Was the standard of education in the community in question less than 50% of the State average? If it was, the community was regarded as more backward; if it was not, the community was regarded as backward." The Court opined that the sub-classification made by the Report and the order based thereupon was not justified under Article 15(4) which authorises special provision being made for 'really backward classes'. The Court further observed that in introducing two categories of backward classes, what the impugned order in substance purported to do was to devise measures "for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the State". That, according to the Court, was not the scope of Article 15(4). The result of the method adopted by

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the impugned order was that nearly 90% of the population of the State was treated as Backward and that, observed the Court, illustrated how the order in fact divided the population of the State into most advanced and the rest, putting the latter into two categories of the Backward and the More Backward. Thus, the view taken there against the sub-classification was on the facts of that case which showed that almost 90% of the population of the State was classified as backward, the backwardness of the Backward (as against that of the More Backward) being measured in comparison to the most advanced classes in the State. Those who were less advanced than the most advanced, were all classified as Backward. The Court held that it is the More Backward or who were really backward who alone would be entitled to the benefit of the provisions of Article 15(4). In other words, while the More Backward were classified there rightly as backward, the Backward were not classified rightly as backward.

524. It may be pointed out that in *Vasanth Kumar* [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] Chinnappa Reddy, J after referring to the aforesaid view

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in *Balaji* [1963 Supp 1 SCR 439 : AIR 1963 SC 649] observed that the propriety of such test may be open to question on the facts of each case but there was no reason why on principle there cannot be a classification into Backwards and More Backwards if both classes are not merely a little behind, but far far behind the most advanced classes. He further observed that in fact, such a classification would be necessary to help the more backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes, would walk away with all the seats just as if reservation was confined to the more backward classes and no reservation was made to the slightly more advanced of the backward classes, the backward classes would gain no seats since the advanced classes would walk away with all the seats available for the general category. With respect, this is the correct view of the matter. Whether the backward classes can be classified into Backward and More Backward, would depend upon the facts of each case. So long as both backward and more backward classes are not only comparatively but substantially backward than the advanced classes, and further, between themselves, there is a

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substantial difference in backwardness, not only it is advisable but also imperative to make the sub-classification if all the backward classes are to gain equitable benefit of the special provisions under the Constitution. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated October 13, 1986 on reservations issued after the decision in *Vasanth Kumar* [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] where the backward classes are grouped into five categories, viz., A, B, C, D and E. In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly

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stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential. However, for each of them a special quota has to be prescribed as is done in the Karnataka Government order. If it is not done, as in the present case, and the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward may take away all the posts leaving the backward with no posts. The backward will neither get his post in the reserved quota nor in the general category for want of capacity to compete with the forward.

525. Hence, it will have to be held that depending upon the facts of each case, sub-classification of the backward classes into the backward and more or most

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> backward would be justifiable provided separate quotas are prescribed for each of them."

145. His Lordship held that sub-classification of the backward classes into the backward and more or most backward would be justifiable provided separate quotas are prescribed for each of them.

146. The question as to whether Backward Classes can be further divided into backward and more backward categories has been answered by P.B. Sawant, J. as under (Paragraph 552):

> *"Question 5:*
>
> Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of the economic consideration alone.
>
> If backward classes are classified into backward and more or most backward classes, separate quotas of reservations will have to be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.

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> It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other consideration. The test of advancement lies in the capacity to compete with the forward classes. If the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4)."

147. It could thus be seen that Sawant, J. observed that if the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4).

F. *E.V. Chinnaiah vs. State of A.P.*

148. In the case of ***E.V. Chinnaiah***, the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act,

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2000 (A.P. Act 20 of 2000) was challenged before the High Court of Andhra Pradesh at Hyderabad. The same was dismissed by the 5-Judge Bench by a majority of 4:1. Under the said Act, the castes in the Presidential List of Scheduled Castes came to be classified in 4 groups. The seats were apportioned in different proportions amongst the said 4 groups.

149. N. Santosh Hegde, J. for himself, S.N. Variava, and B.P. Singh, JJ. (as Their Lordships then were) observed thus:

> "**13.** We will first consider the effect of Article 341 of the Constitution and examine whether the State could, in the guise of providing reservation for the weaker of the weakest, tinker with the Presidential List by subdividing the castes mentioned in the Presidential List into different groups. Article 341 which is found in Part XVI of the Constitution refers to special provisions relating to certain classes which includes the Scheduled Castes. This article provides that the President may with respect to any State or Union Territory after consultation with the Governor thereof by public notification, specify the castes, races or tribes or parts of or groups within castes,

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races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory. This indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any subclassification or division in the said list except, maybe, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of the People, which is not applicable to the facts of this case. It is also clear from Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to subdivide, subclassify or subgroup these castes which are found in the Presidential List of Scheduled Castes. Therefore, it is clear that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be

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> subdivided for any purpose. A reference to the Constituent Assembly in this regard may be useful at this stage."

150. His Lordship observed that from the perusal of Article 341 of the Constitution, there can be only one list of Scheduled Castes regarding a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. It has been observed that any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution. It is observed that it is also clear from Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to subdivide, subclassify or subgroup these castes which are found in the Presidential List of Scheduled Castes. It has been observed that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and that the said group could not be subdivided for any purpose.

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151. In paragraph 26, it has been observed thus:

> "**26.** Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of *N.M. Thomas* [(1976) 2 SCC 310 : 1976 SCC (L&S) 227] it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List."

152. The Court, relying on Article 341 and the opinions expressed in the case of ***N.M. Thomas***, observed that it was clear that the castes once included in the Presidential List, form a class by themselves. It has been observed that if they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to 'tinkering' with the Presidential List.

153. In paragraph 31, the Court observed thus:

> "**31.** On a detailed perusal of the Act it is seen that Section 3 is the only substantive provision in the Act, rest of the provisions

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are only procedural. Section 3 of the Act provides for the creation of 4 groups out of the castes enumerated in the Presidential List of the State. After the regrouping it provides for the proportionate allotment of the reservation already made in favour of the Scheduled Castes amongst these 4 groups. Beyond that the Act does not provide for anything else. Since the State had already allotted 15% of the total quota of the reservation available for the backward classes to the Scheduled Castes the question of allotting any reservation under this enactment to the backward classes does not arise. Therefore, it is clear that the purpose or the true intendment of this Act is only to first divide the castes in the Presidential List of the Scheduled Castes into 4 groups and then divide 15% of reservation allotted to the Scheduled Castes as a class, amongst these 4 groups. Thus it is clear that the Act does not for the first time provide for reservation to the Scheduled Castes but only intends to redistribute the reservation already made by subclassifying the Scheduled Castes which is otherwise held to be a class by itself. It is a well-settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which

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includes the Scheduled Castes, to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to subclassify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State-created subclass within the list of Scheduled Castes. From the discussion hereinabove, it is clear that the primary object of the impugned enactment is to create groups of subcastes in the list of Scheduled Castes applicable to the State and, in our opinion, apportionment of the reservation is only secondary and consequential. Whatever may be the object of this subclassification and apportionment of the reservation, we think the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. Therefore, we are of the opinion that in pith and substance the enactment is not a law governing the field of education or the field of State public services."

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154. It can thus be seen that this Court held that whatever may be the object of the sub-classification and apportionment of the reservation, the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. The Court held that, in pith and substance the enactment is not a law governing the field of education or the field of State public services.

155. Then the Court posed a question as to whether the impugned enactment creates sub-classification or micro-classification of the Scheduled Castes so as to violate Article 14 of the Constitution. The same is answered as under:

> "**41.** The conglomeration of castes given in the Presidential Order, in our opinion, should be considered as representing a class as a whole. The contrary approach of the High Court, in our opinion, was not correct. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary

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to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or subclassified further. If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list. Such subclassification would be violative of Article 14 of the Constitution. It may be true, as has been observed by the High Court, that the caste system has got stuck up in the society but with a view to do away with the evil effect thereof, a legislation which does not answer the constitutional scheme cannot be upheld. It is also difficult to agree with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalising the reservation to

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the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated.

42. Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.

43. The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The

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> logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained."

156. It has been held that the conglomeration of castes given in the Presidential Order should be considered as representing a class as a whole. It has been held that the very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or subclassified further. It has been held that if a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list. Such subclassification would be violative of Article 14 of the Constitution.

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157. The Court also held that classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness.

158. S.B. Sinha, J. in his separate concurring opinion held thus:

> "**93.** Scheduled Caste, however, is not a caste in terms of its definition as contained in Article 366(24) of the Constitution. They are brought within the purview of the said category by reason of their abysmal backwardness. Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of or groups within castes, races or tribes. They are not merely backward but the backwardmost. A person even does not cease to be a Scheduled Caste automatically even on his conversion to another religion. (See *Punit Rai* v. *Dinesh Chaudhary* [(2003) 8 SCC 204] and *State of Kerala* v. *Chandramohanan* [(2004) 3 SCC 429 : 2004 SCC (Cri) 818 : AIR 2004 SC 1672].)"

159. It could thus be seen that His Lordship has also recognized that the Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of

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or groups within castes, races or tribes and that they are not merely backward but the backwardmost.

160. After referring to the observations of this Court in ***Indra Sawhney*** (supra) regarding the applicability of 'means test' and 'creamy-layer test', the Learned Judge observed thus:

> "**96.** But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor."

161. It is further observed in paragraph 113 thus:

> "**113.** The power of the State Legislature to decide as regards grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including Scheduled Castes. But it cannot take away the said benefit on the premise that one or the other group

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> amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation. The impugned legislation, thus, must be held to be unconstitutional."

162. The Learned Judge observed that the State can lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including Scheduled Castes. However, it cannot take away the said benefit on the premise that one or the other group amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation.

G. ***M. Nagaraj vs. Union of India***

163. Next in line is the case of ***M. Nagaraj and others vs. Union of India and others***[14], where the Constitution Bench of this Court was considering, *inter alia*, the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the

[14] (2006) 8 SCC 212.

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Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001. Answering the aforesaid, the Court observed thus:

> "**121.** The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] , the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal* [(1995) 2 SCC

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745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] .

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of

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> representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.
>
> **124.** Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001."

164. It could thus be seen that in ***M. Nagaraj*** (supra), the Court applied the test of creamy layer and the requirement for collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class even insofar as the Scheduled Castes and Scheduled Tribes are concerned.

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H. *Jarnail Singh vs. Lachhmi Narain Gupta*

165. The correctness of the decision in ***M. Nagaraj*** was referred to the Constitution Bench in the case of ***Jarnail Singh and others vs. Lachhmi Narain Gupta and others***[15]. The Constitution Bench in the said case considered two issues: firstly, with regard to the correctness of the view taken in ***M. Nagaraj*** about the requirement of collecting quantifiable data showing backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in public employment; and secondly, with regard to applicability of the creamy layer principle even to the Scheduled Castes and Scheduled Tribes.

166. The Court, insofar as the first issue is concerned, held that the requirement of collection of quantifiable data on backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in public employment is concerned, is contrary to the 9-Judge Bench judgment in the case of ***Indra***

[15] (2018) 10 SCC 396.

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Sawhney and liable to be struck down to that extent. However, insofar as the second issue regarding making the creamy layer principle applicable even to Scheduled Castes and Scheduled Tribes is concerned, the Court observed thus:

> **"26.** The whole object of reservation is to see that Backward Classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons

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who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

27. We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that constitutional courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341

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and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, constitutional courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s statement in *Ashoka Kumar Thakur* [*Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1 : 3 SCEC 35] that the creamy layer principle is merely a principle of identification and not a principle of equality.

28. Therefore, when *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no

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need to refer *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] to a seven-Judge Bench. We may also add at this juncture that *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

28.1. *Anil Chandra* v. *Radha Krishna Gaur* [*Anil Chandra* v. *Radha Krishna Gaur*, (2009) 9 SCC 454 : (2009) 2 SCC (L&S) 683] (two-Judge Bench) (see paras 17 and 18).

28.2. *Suraj Bhan Meena* v. *State of Rajasthan* [*Suraj Bhan Meena* v. *State of Rajasthan*, (2011) 1 SCC 467 : (2011) 1 SCC (L&S) 1] (two-Judge Bench) (see paras 10, 50, and 67).

28.3. *U.P. Power Corpn. Ltd.* v. *Rajesh Kumar* [*U.P. Power Corpn. Ltd.* v. *Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289] (two-Judge Bench) [see paras 61, 81(*ix*), and 86].

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28.4. *S. Panneer Selvam* v. *State of T.N.* [*S. Panneer Selvam* v. *State of T.N.*, (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76] (two-Judge Bench) (see paras 18, 19, and 36).

28.5. *Central Bank of India* v. *SC/ST Employees Welfare Assn.* [*Central Bank of India* v. *SC/ST Employees Welfare Assn.*, (2015) 12 SCC 308 : (2016) 1 SCC (L&S) 355] (two-Judge Bench) (see paras 9 and 26).

28.6. *Suresh Chand Gautam* v. *State of U.P.* [*Suresh Chand Gautam* v. *State of U.P.*, (2016) 11 SCC 113 : (2016) 2 SCC (L&S) 291] (two-Judge Bench) (see paras 2 and 45).

28.7. *B.K. Pavitra* v. *Union of India* [*B.K. Pavitra* v. *Union of India*, (2017) 4 SCC 620 : (2017) 2 SCC (L&S) 128] (two-Judge Bench) (see paras 17 to 22)."

167. The Court in unequivocal terms held that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the

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Presidential List under Articles 341 or 342 of the Constitution of India. It is observed that the caste or group or sub-group named in the said List continues exactly as before. It has been further observed that it is only those persons within that group or sub-group, who, on account of belonging to the creamy layer, have come out of untouchability or backwardness would be excluded from the benefit of reservation.

168. The Court observed that even if we assume that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within the lists notified under Articles 341 and 342, constitutional courts, applying Articles 14 and 16 of the Constitution would be entitled to exclude the creamy layer. It has been held that the Constitutional Courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the

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principles of equality under Articles 14 and 16 of the Constitution of India.

IV. PRESENT REFERENCE

169. A 3-Judge Bench of this Court in the case of ***State of Punjab and others vs. Davinder Singh and others***[16] vide order dated 20th August 2014, doubted the correctness of the Constitution Bench decision of this Court in the case of ***E.V. Chinnaiah*** and referred it to the larger Bench. The larger Bench of 5-Learned Judges proposed the following issues[17].

> **"1.1.** (*i*) Whether the provisions contained under Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 are constitutionally valid?
>
> **1.2.** (*ii*) Whether the State had the legislative competence to enact the provisions contained under Section 4(5) of the Act?

[16] (2020) 8 SCC 65.
[17] (2020) 8 SCC 63.

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> **1.3.** (*iii*) Whether the decision in *E.V. Chinnaiah* v. *State of A.P.* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] is required to be revisited?"

170. Vide the judgment in ***The State of Punjab & Ors. vs. Davinder Singh & Ors.***[18], the Constitution Bench observed thus:

> "**52.** The State has the competence to grant reservation benefit to the Scheduled Castes and Scheduled Tribes in terms of Articles 15(4) and 16(4) and also Articles 341(1) and 342(1). It prescribes the extent/percentage of reservation to different classes. The State Government can decide the manner and quantum of reservation. As such, the State can also make sub-classification when providing reservation to all Scheduled Castes in the List based on the rationale that would conform with the very spirit of Articles 14, 15 and 16 of the Constitution providing reservation. The State Government cannot tamper with the List; it can neither include nor exclude any caste in the List or make enquiry whether any synonym exists as

[18] (2020) 8 SCC 1.

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held in *Milind* [*State of Maharashtra* v. *Milind*, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] .

53. The State Government is conferred with the power to provide reservation and to distribute it equitably. The State Government is the best judge as to the disparities in different areas. In our opinion, it is for the State Government to judge the equitable manner in which reservation has to be distributed. It can work out its methodology and give the preferential treatment to a particular class more backward out of Scheduled Castes without depriving others of benefit.

54. Apart from that, the other class out of Scheduled Castes/Scheduled Tribes/socially and educationally backward classes, who is not denied the benefit of reservation, cannot claim that whole or a particular percentage of reservation should have been made available to them. The State can provide such preference on rational criteria to the class within Lists requiring upliftment. There is no vested right to claim that reservation should be at a particular percentage. It has to accord with ground

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reality as no one can claim the right to enjoy the whole reservation, it can be proportionate one as per requirement. The State cannot be deprived of measures for upliftment of various classes, at the same time, which is the very purpose of providing such measure. The spirit of the reservation is the upliftment of all the classes essential for the nation's progress.

55. In the federal structure, the State, as well as Parliament, have a constitutional directive for the upliftment of Scheduled Castes, Scheduled Tribes, and socially and (*sic* educationally) backward classes. Only inclusion or exclusion in the Presidential notification is by Parliament. The State Government has the right to provide reservation in the fields of employment and education. There is no constitutional bar to take further affirmative action as taken by the State Government in the cases to achieve the goal. By allotting a specific percentage out of reserved seats and to provide preferential treatment to a particular class, cannot be said to be violative of the List under Articles 341, 342 and 342-A as no enlisted caste is denied the benefit of reservation.

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56. The "inadequate representation" is the fulcrum of the provisions of Article 16(4). In our opinion, it would be open to the State to provide on a rational basis the preferential treatment by fixing reasonable quota out of reserved seats to ensure adequate representation in services. Reservation is a very effective tool for emancipation of the oppressed class. The benefit by and large is not percolating down to the neediest and poorest of the poor.

57. The interpretation of Articles 14, 15, 16, 338, 341, 342 and 342-A is a matter of immense public importance, and correct interpretation of binding precedents in *Indra Sawhney* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and other decisions. Though we have full respect for the principle of stare decisis, at the same time, the Court cannot be a silent spectator and shut eyes to stark realities. The constitutional goal of social transformation cannot be achieved without taking into account changing social realities."

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171. Recording the above observations, the Constitution Bench requested the Hon'ble Chief Justice to place the matter before the 7 Judges or more as considered appropriate. The matter was thus placed before the present Bench.

V. CONSIDERATION

172. At one stage, the atrocious caste discrimination in India had even surpassed the racial discrimination and the slave trade, premised on the colour of skin, in other parts of the world. For centuries the people belonging to certain castes were inhumanly treated by the upper classes in society. They have been treated worse than animals. They were not permitted to be touched by the upper classes. In some areas, even the upper classes did not permit the shadow of such people to fall on them. As such, while walking, they were required to maintain a distance so that their shadow does not pollute the upper caste. In some areas, they were required to tie a broom to their back so that they clean the path after they travel from the same.

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173. These people were also denied water from the common places. In the villages where the water was drawn from the rivers, they were required to draw water from the downstream so that the water taken by the people from higher classes is not polluted. They were also denied the right to education. In schools, either they were required to sit separately or take their lessons standing outside their classroom.

174. While India was struggling to gain freedom from the colonial rulers, the country also witnessed a parallel movement for eradication of these inequalities and upliftment of the classes which were being treated inhumanly.

175. It would be apposite to refer to the statement by Dr. B.R. Ambedkar in 'Evidence before the Southborough Committee' (1919), where he gave several examples of the unjust treatment meted out to the untouchables by the oppressor castes as thus[19]:

[19] B.R. Ambedkar, 'Evidence before the Southborough Committee on Franchise' in Dr. Babasaheb Ambedkar: Writings and Speeches, ed. Vasant Moon, Ministry of Social Justice and Empowerment 2019, Vol.I, p. 255.

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"From an untouchable trader no Hindu will buy. An untouchable cannot be engaged in lucrative service. Military service had been the monopoly of the untouchables since the days of the East India Company. They had joined the Army in such large numbers ... But after the mutiny when the British were able to secure soldiers from the ranks of the Marathas, the position of the low-caste men who had been the prop of the Bombay Army became precarious, not because the Marathas were better soldiers but because their theological bias prevented them from serving under low-caste officers. The prejudice was so strong that even the non-caste British had to stop recruitment from the untouchable classes. In like manner, the untouchables are refused service in the Police Force. In a great many of the Government offices it is impossible for an untouchable to get a place. Even in the mills a distinction is observed. The untouchables are not admitted in Weaving Departments of the Cotton Mills though many of them are professional weavers. An instance at hand may be cited from the school system of the Bombay Municipality. This most cosmopolitan city ruled by a Corporation with a greater freedom than any other Corporation in India has two different sets of schools ... one for the children of touchables and the other for those of the untouchables. This

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> in itself is a point worthy of note. But there is something yet more noteworthy. Following the division of schools it has divided its teaching staff into untouchables and touchables. As the untouchable teachers are short of the demand, some of the untouchable schools are manned by teachers from the touchable class. The heart-killing fun of it is that if there is a higher grade open in untouchable school service, as there is bound to be because of a few untouchable trained teachers, a touchable teacher can be thrust into the grade. But if a higher grade is open in the touchable school service, no untouchable teacher can be thrust into that grade. He must wait till a vacancy occurs in the untouchable service! Such is the ethics of the Hindu social life."

176. Dr. Ambedkar in order to fight against the inhuman treatment of untouchables, who were not even allowed to draw water from the common place, held an agitation at Mahad known as "Mahad Satyagraha" on 20th March 1927 so that the untouchables could be permitted to draw water from a public tank at Mahad.

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177. Dr. Ambedkar also led agitations for opening the doors of places of worship to the untouchables. One such agitation which he led was in Nashik and was popularly known as "Kalaram Temple Satyagraha".

178. Dr. Ambedkar was of the view that if untouchables come out of that stigma and participate in nation-building, they will only contribute to the progress of the nation. He was of the view that the movement for removal of untouchability is in true sense a movement for nation-building and fraternity.

179. I can gainfully refer to the collection of views of Dr. Ambedkar as put together lucidly by Anurag Bhaskar in the book appropriately titled as "The Foresighted Ambedkar"[20], which reads thus:

> "He asserted that the issue of temple entry or access to public resources is an issue of equality. He stated:
>
> > "Another argument these Touchables give is that even if they do not allow

[20] Anurag Bhaskar, *The Foresighted Ambedkar: Ideas that shaped Indian constitutional Discourse* (Viking by Penguin Random House 2024).

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> the Untouchables into their temples, all are free to build a temple for themselves. I would like to ask those so-called learned ones why they object to Railways for having separate coaches for Whites and Indians? …There is only one answer to this and that is: it is not a matter of travel only, it is a matter of equality! … The Untouchables have the same reason for demanding the right to worship God in the same temple. They want to prove that the temple is not defiled by their entry ….. The Untouchables are not servants … On the basis of this alone they should accept the rights of the Untouchables. And when there are rights there is no question of custom of usage."[21]

He further added that public property cannot be used as the private property of the oppressor castes. He noted:

> "Legally, the right to public property is not required to be established by any deed; it is available automatically to everybody. Even if he has no usage or it was not continuous, it does not deprive him of that right. Suppose, somebody did

[21] Narendra Jadhav, *Ambedkar: Awakening India's Social Conscience*. (Konark Publishers Pvt. Ltd. 2014).

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> not walk on a particular road, does that mean he can never use that road? Therefore, it would be quite idiotic to say that since Untouchables never went to the temple or never drew water from the public wells, so now they cannot do that."[22]

Dr. Ambedkar also dismissed the contention of the oppressor castes that the Untouchables should wait for them to change and allow equal rights. He referred to the Thirteenth Amendment to the American Constitution, which abolished slavery, to demand accountability and action from the oppressor castes. He stated:

> "I am aware that some Touchables are suggesting that the matter of equal rights for the Untouchables should be allowed to be resolved by the Touchables amongst themselves. It cannot be resolved by the movement of the Untouchables. The Untouchables should wait till the Touchables willingly allow them such equal rights. How can it be trusted that they will willingly grant such rights to the Untouchables? It will be sheer stupidity to wait for such a miracle to happen … Another section

[22] Ibid.

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> of the Touchables tells us that even if we launch our movement, we will not succeed. If we launch a struggle, whatever few Touchables who have sympathy with our cause will feel offended and we will lose their sympathy. The progressive Touchables will then join the orthodox Hindus against us. I want to tell them that if they have sympathy for us, if they feel anguished about the injustice caused to us, then they should support us wholeheartedly like the Whites supported the Blacks in America to end slavery. Otherwise, it does not matter whether you have sympathy or hatred towards us.""[23]

180. Accordingly, when I consider the present issue, I will have to consider it in this background.

181. It is a matter of great coincidence that Dr. Ambedkar, who fought for the cause of social equality and eradication of inhuman treatment for generations, got an opportunity to work as the Chief Architect of the Constitution of India.

[23] Ibid.

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182. I have already referred to his speech on draft Article 300A and draft Article 300B (now Articles 341 and 342). It will also be apposite to refer to the relevant part of Dr. Ambedkar's speech on 30th November 1948 on Article 16 (which was draft Article 10), which reads thus:

> **"Article 16 (Article 10 in Draft Constitution)**
>
> The Hon'ble Dr. B.R. Ambedkar: .....As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind–the three principles, we had to reconcile,–they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain

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communities that the administration which has now–for historical reasons–been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this

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> position that we have to safeguard two things namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word `backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly....."

183. It could thus be seen that Dr. Ambedkar emphasized that a formula was required to be produced which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. Dr. Ambedkar states that the equality of opportunity as specified in clause (1) has to be reconciled with the demand made by certain communities. He

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states that on account of historical reasons, the administration has been controlled by one community or a few communities, that such a situation should disappear and that the others also must have an opportunity of getting into the public services. However, he states that if the demand of such communities, in full, is accepted, it will destroy the first principle of equality guaranteed in clause (1). He gives an instance that if certain communities which are unrepresented or a group of communities have a population of 70% and if 70% reservation is provided for such communities, leaving only 30% for the open competition, it will destroy the very concept of equality of opportunity. He therefore advocates for confinement of reservation to a minority of seats. He therefore states that unless some qualifying phrase as "backward" is used for making reservation, the entire rule would be unworkable. He therefore justifies the efforts of the Drafting Committee in employing the word 'backward'.

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184. It will further be apposite to refer to the following observation in the said speech.

> **Article 16 (Article 10 in Draft Constitution)**
>
> "The Hon'ble Dr. B.R. Ambedkar: ……..Somebody asked me: "What is a backward community"? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My honourable Friend, Mr. T. T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. ……"

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185. Dr. Ambedkar observed that "what is a backward community" will have to be determined by each local Government. A backward community, in his view, is a community which is backward in the opinion of the Government. He also foresighted that if the local Government included in this category of reservations such a large number of seats, one could very well go to the Federal Court and the Supreme Court and contend that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed. He also foresighted that the court will then conclude whether the local Government or the State Government has acted in a reasonable and prudent manner.

186. His foresight as to the debate regarding the identification of the backward classes and the extent of reservations can be judged from the spate of litigations that this country has witnessed for last 74 years.

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187. It could thus be seen that initially insofar as the issue regarding the identification of the backward classes except the Scheduled Castes and Scheduled Tribes was concerned, the same was left to the Executive. Insofar as the identification of Scheduled Castes and Scheduled Tribes is concerned, the Constitution of India under Articles 341 and 342 provided the issuance of a general notification specifying all the castes and tribes or groups thereof to be Scheduled Castes and Scheduled Tribes for the purposes of privileges which have been defined in the Constitution.

188. I have already referred to Dr. Ambedkar's speech about the introduction of the said provisions. He, however, stated that if any elimination was to be made from the list so notified or any addition was to be made then they must be made by Parliament and not by the President. He stated that the object behind the same was to eliminate any kind of political factors having play in the matter.

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189. As already discussed herein above, the question insofar as identification of Other Backward Classes is concerned, was left to the State. Insofar as the identification of Scheduled Castes and Scheduled Tribes is concerned, the same was complete at the stage of enactment of the Constitution in view of Articles 341 and 342 and any addition or alteration to the said notified list was permissible only by an Act of Parliament. It is further to be noted that the foundation of the Presidential List issued under Articles 341 and 342 finds place in the 1936 Order issued under the provisions of the 1935 Act.

190. No doubt that by the Constitution (One hundred and Second Amendment) Act, 2018, Article 342A regarding socially and educationally backward classes has been inserted. Clause (26C) in Article 366 of the Constitution of India has also been inserted by the said Amendment insofar as socially and educationally backward classes are concerned. It was sought to be argued before us that in view of the Constitution (One hundred

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and Second Amendment) Act, 2018, read with the law laid down by this Court in the case of ***Indra Sawhney*** regarding Other Backward Classes, the judgment of this Court in ***E.V. Chinnaiah*** needs a relook.

191. I do not find it necessary to go into that aspect of the matter, since I find that ***E.V. Chinnaiah*** does not correctly consider the provisions of Articles 46, 335, 14, 15 and 16 of the Constitution of India, as have been interpreted by the earlier precedents of this Court. I have discussed hereinbelow in depth as to how ***E.V. Chinnaiah*** incorrectly interpreted the earlier precedents.

192. This Court in ***E.V. Chinnaiah*** in paragraph 13, while considering the effect of Article 341 of the Constitution, held that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. It is further observed that any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the

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Constitution. This Court held that there is no reference to any sub-classification or division in the said list in any of the provisions of the Constitution except, maybe, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of the People. This Court held that it was clear to it that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be subdivided for any purpose.

193. Thereafter, referring to the view expressed by Mathew, J., Krishna Iyer, J and Fazal Ali, J. in the case of ***N.M. Thomas***, it is held in paragraph 26 that castes once included in the Presidential List, form a class by themselves. Then the Court held that if they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List.

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194. In paragraph 31, it is observed that once the State reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4) in fulfillment of its constitutional obligation, it is not open to the State to subclassify a class already recognized by the Constitution and allot a portion of the already reserved quota amongst the State-created subclass within the list of Scheduled Castes.

195. In paragraph 38, this Court after referring to the case of ***Indra Sawhney*** held that the principles laid down in ***Indra Sawhney*** for sub-classification of Other Backward Classes cannot be applied for subclassification or subgrouping of Scheduled Castes in the Presidential List because that very judgment itself specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes.

196. In paragraph 41, this Court held that the conglomeration of castes given in the Presidential Order, in their opinion, should be

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considered as representing a class as a whole. It is held that the very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggested that they were not to be subdivided or subclassified further. It goes on to hold that if a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list and would amount to violation of Article 14 of the Constitution. The Court then disagreed with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. The Court, taking note of the fact that the benefits of reservation are not percolating to them equitably, suggested that measures should be taken to see that they are given such adequate or additional training to enable them to compete with the others.

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197. This Court in paragraph 43 observed that the very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented, a further classification by way of micro-classification was not permissible.

198. To ascertain if ***E.V. Chinnaiah*** is good law, I will have to first examine whether the finding in ***E.V. Chinnaiah*** that ***N.M. Thomas*** held the Scheduled Castes to be a homogeneous group is correct or not.

199. ***E.V. Chinnaiah*** relies on the judgment of Mathew, J. in ***N.M. Thomas***. In paragraph 82, what Mathew, J. observed is that it is by virtue of the notification of the President that the Scheduled Castes come into being. It has been observed that though the members of the Scheduled Castes are drawn from castes, races or tribes, they attain a new status by virtue of the Presidential Notification.

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200. It cannot be disputed that there is no caste by the name of "Scheduled Castes". As has been discussed in earlier paragraphs, the term "Scheduled Castes" has come on account of the 1936 Order and the 1950 Order.

201. There can be no doubt that once the castes, races, tribes or part of or groups of such castes, races or tribes are included in the Presidential Notification they shall be deemed to be Scheduled Castes for the purposes of the Constitution.

202. Then ***E.V. Chinnaiah*** refers to the judgment of Krishna Iyer, J. in ***N.M. Thomas***. Krishna Iyer, J. in paragraph 135 observed that a bare reading of Article 341 and 342 shows that there are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President. The Learned Judge observed that to confuse this backwardmost social composition with castes is to commit a constitutional error.

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203. The observations made by the Learned Judge are in the context of the arguments that any special treatment on the ground of caste is prohibited under Article 16(2). The Learned Judge observed that Article 16(2) was not coming in the way to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division. The Learned Judge further observed that the Indian jurisprudence has generally regarded Scheduled Castes and Scheduled Tribes not as caste but as a large backward group deserving of societal compassion.

204. ***E.V. Chinnaiah*** thereafter relies on Fazal Ali, J.'s judgment.

205. Again, the observations made by Fazal Ali, J. in paragraph 169, are with regard to the arguments based on prohibition of Article 16(2). It is observed that the Scheduled Castes and Scheduled Tribes do not fall with the purview of Article 16(2) of the Constitution, which prohibits discrimination between the

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members of the same caste. It is observed that if, therefore, the members of the Scheduled Castes and the Scheduled Tribes are not castes, then it is open to the State to make reasonable classification to advance or lift these classes so that they may be able to be properly represented in the services under the State.

206. However, on reading of the majority judgments in ***N.M. Thomas*** it does not show that the Scheduled Castes are homogeneous group and sub-classification therein is not permissible.

207. In paragraph 44 of the judgment in ***N.M. Thomas***, Ray, C.J. observed that the equality of opportunity for unequals can only mean aggravation of inequality; equality of opportunity admits discrimination with reason and prohibits discrimination without reason; and discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. It is observed that preferential representation for the Backward Classes in services

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with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognized by the Constitution. He therefore held that the differential treatment in standards of selection is within the concept of equality.

208. Mathew, J. in paragraph 54, refers to the principle of proportional equality and held that it can be attained only when equals are treated equally and unequals unequally. He held that differential treatment would be allowed if there is significant difference among the persons who are treated differentially.

209. In paragraph 73, the Learned Judge observed that the State should adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.

210. In paragraph 75, the Learned Judge observed that such sort of preferential treatment would be permissible under Article 16(1)

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as such a preferential treatment alone would put the backward class people on a parity with the forward communities. The Learned Judge observed that whether there is equality of opportunity can be gauged only by the equality attained in the result. He states that formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. It is observed that the equality of result is the test of equality of opportunity.

211. Krishna Iyer, J. in paragraph 119 refers to the concept of 'social engineering'. He quotes from a book that "One law for the Lion and Ox is oppression".

212. In paragraph 129, after considering the constitutional scheme, the Learned Judge observed that the Constitution itself demarcates harijans from others. That this is based on the stark backwardness of this bottom layer of the community. It is observed that the differentiation has been made to cover

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specifically the area of appointments to posts under the State. He further held that the twin objects, blended into one, are the claims of harijans to be considered in such posts and the maintenance of administrative efficiency. The Learned Judge observed that the State has been obligated to promote the economic interests of harijans and like backward classes.

213. In paragraph 142, the Learned Judge observed that the genius of Articles 14 to 16 consists not in literal equality but in progressive elimination of pronounced inequality. He observed that to treat sharply dissimilar persons equally is subtle injustice.

214. In paragraph 149, Krishna Iyer, J. while concluding observed that "the heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers".

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215. Fazal Ali, J. in paragraph 165, referring to clauses (24) and (25) of Article 366 of the Constitution observed that the said provisions create a presumption in favour of Scheduled Castes and Scheduled Tribes that they are backward classes of citizens. It is observed that it is not disputed that the members of the Scheduled Castes and Scheduled Tribes are specified in the notifications issued under Articles 341 and 342 of the Constitution and, therefore, they must be deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the Constitution.

216. In paragraph 178, the Learned Judge observed that the concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. He observed that if this artificial interpretation is put on the scope and ambit of Article 16 it will lead to channelization of legislation or polarization of rules. It is observed that differences and disparities exist among

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men and things, and they cannot be treated alike by the application of the same laws. He observed that the law has to come to terms with life and must be able to recognize the genuine differences and disparities that exist in human nature.

217. The Learned Judge also held that the equality enshrined in clause (1) of Article 16 of the Constitution inherently implies that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. He observed that that this can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. He lays down the conditions for the classification to be a reasonable one.

218. It can thus be seen that in none of the judgments in ***N.M. Thomas*** it is held that the Scheduled Castes are a homogeneous class. It has been held that once the Scheduled Castes and

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Scheduled Tribes have been identified and they find a place in the Presidential List, they will continue to be the Scheduled Castes and Scheduled Tribes. It has been held that by the very fact of they being included in the Presidential List, they are deemed to be backward and no further enquiry regarding their backwardness would be warranted.

219. In ***Akhil Bharatiya Soshit Karamchari Sangh*** (supra), Krishna Iyer, J., in paragraph 94, rejects the plea that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions and that a swallow does not make a summer. He further observed that maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren.

220. Again, in paragraph 98, he considered the argument that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever. He advised

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the Administration to innovate and classify to weed out the creamy layer of Scheduled Castes/Scheduled Tribes. However, he observed that the Court cannot force the State in that behalf.

221. In ***K.C. Vasanth Kumar***, Chandrachud, C.J. in paragraph 2, observed that the reservation in employment and education in favour of Scheduled Castes and Scheduled Tribes must continue without the application of a means test for a further period not exceeding 15 years. He observed that after the said period of 15 years, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes. Insofar as Other Backward Classes are concerned, he stated that two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State

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Government may lay down in the context of prevailing economic conditions.

222. Desai, J. in paragraph 31, observed that the approach suggested by him does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes since thousands of years of discrimination and exploitation cannot be wiped out in one generation. However, he suggested that even in their cases economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefited by it and improved their position.

223. Chinnappa Reddy, J. in paragraph 51 did not agree with the view that while determining the social backwardness of other classes, the test to be applied is nearness to the conditions of existence of the Scheduled Castes. He observed that such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes.

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224. Chinnappa Reddy, J. in paragraph 79, notes that a few members of those castes or social groups may have progressed far enough and forged ahead to compare favourably with the leading forward class economically, socially and educationally. He suggests that in such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it.

225. As already discussed hereinabove, the 9-Judge Bench of this Court in ***Indra Sawhney*** has in unequivocal terms held that further classification of backward classes into more backward classes is permissible in law.

226. Jeevan Reddy, J. in paragraph 802, in the case of ***Indra Sawhney***, gives an illustration with regard to two occupational groups viz., goldsmiths and vaddes (traditional stonecutters in Andhra Pradesh). He stated that both are included within Other Backward Classes. He observed that none can deny that goldsmiths are far less backward than vaddes and so if both are

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grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. The Learned Judge further observed that in such a situation, a State may think it advisable to make a categorization even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. He stated that where to draw the line and how to effect the sub-classification, however, is a matter for the Commission and the State and so long as it is reasonably done, the Court may not intervene.

227. It will also be relevant to note that in paragraph 803, the Learned Judge observed that Article 16(4) recognizes only one class i.e., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). The Learned Judge observed that it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that

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separate reservations can be provided in their favour. The Learned Judge observed that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. He states that the same logic also warrants categorization as between more backward and backward.

228. As has already been noted before, in paragraph 781 of ***Indra Sawhney***, Jeevan Reddy, J. states that for the purpose of the discussion in the judgment, the Scheduled Castes and Scheduled Tribes, which were admittedly included within the backward classes, were kept aside.

229. It is pertinent to note that the said discussion in the judgment was pertaining to "identification" of backward classes of citizens. As discussed hereinabove, insofar as the Scheduled Castes and Scheduled Tribes are concerned, identification is

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already covered by the Presidential List issued under Artiles 341 and 342.

230. Sawant, J. in his judgment also held that Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only because of the degrees of social backwardness and not based on economic consideration alone. He held that if backward classes are classified into backward and more or most backward classes, separate quotas of reservations would be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.

231. This Court in ***E.V. Chinnaiah*** has observed that the law laid down in the case of ***Indra Sawhney*** would not be applicable since Jeevan Reddy, J. in his judgment has himself stated that the same would not be applicable to Scheduled Castes and Scheduled Tribes in paragraph 781, which paragraph deals with identification of backward classes of citizens. Jeevan Reddy, J.

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states that for the purpose of the said discussion, we keep aside the Scheduled Castes and Scheduled Tribes. He observed that this was done since they are admittedly included within the backward classes. However, in paragraph 803, he specifically observed that under Article 16(4) there is no mention of Scheduled Castes and Scheduled Tribes and that Scheduled Castes and Scheduled Tribes are also part of backward class of citizens.

232. Insofar as the observation in paragraph 792 wherein Jeevan Reddy, J. observed that the said discussion has no relevance in the case of Scheduled Tribes and Scheduled Castes is concerned, the said discussion was regarding applicability of the 'means test' or 'creamy layer test'.

233. That being the case, if the Scheduled Castes and Scheduled Tribes are a part of backward class of citizens under Article 16(4), then the question would be, as to why sub-classification which

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is permitted in case of Other Backward Classes cannot be permitted in case of Scheduled Castes and Scheduled Tribes?

234. Though the initial view of this Court was that Article 16(4) is by way of exception to Article 16(1), the same has undergone a thorough change, particularly after the judgment of this Court in the case of ***His Holiness Kesavananda Bharati Sripadagalavaru vs. State of Kerala***[24] in relation to interplay between the Fundamental Rights and the Directive Principles. Shortly after the judgment in ***Kesavananda Bharati***, came the judgment of 7-Judge Bench of this Court in ***N.M. Thomas*** wherein the 5-Learned Judges took a view that Article 16(4) was not by way of exception to Article 16(1). It was held that the trinity of Articles 14 to 16 embodied the concept of equality. It was emphasized that equality does not mean equality to all. It was held that equality as enshrined under the Constitution did not mean formal equality but real equality. It was held that to

[24] (1973) 4 SCC 225 : 1973 Supp. SCR 1.

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bring real equality unequal treatment to unequals was what was contemplated under the Constitution. It was held that if unequals are to be treated equally it will lead to nothing else but perpetuating inequality. It was held that only giving an unequal treatment to unequals so that they can march ahead can bring out real equality.

235. This Court in unequivocal terms held that preferential treatment for members of backward classes alone can mean equality of opportunity for all citizens. The Court held that clause (4) of Article 16 was an emphatic way of stating a principle implicit in Article 16 (1).

236. Ray, C.J. observed that all legitimate methods were available for equality of opportunity in services under Article 16(1). He stated that Article 16(4) indicates one of the methods of achieving equality embodied in Article 16(1)

237. Mathew, J. observed that the claim for equality is in fact a protest against unjust, underserved and unjustified inequalities.

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It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges. He stated that if equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried i.e., even up to the point of making reservation.

238. In paragraph 83, he emphatically states that it is a mistake to assume *a priori* that there can be no classification within a class. He states that if there are intelligible differentia which separates a group within that class from the rest and that differentia has nexus with the object of classification, then there should be no objection to a further classification within the class.

239. Krishna Iyer, J. in paragraph 124 refers to the research conducted by the A.N. Sinha Institute of Social Studies, Patna which would reveal a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances

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away from the special concessions. He observed that, for them, Articles 46 and 335 remain a 'noble romance', the bonanza going to the 'higher' harijans. He states in paragraph 136 that Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt. He observes in paragraph 142 that the genius of Articles 14 to 16 consists not in literal equality but in progressive elimination of pronounced inequality. According to him, to treat sharply dissimilar persons equally is subtle injustice. He held that if Article 16(4) admits of reasonable classification, so does Article 16(1).

240. In ***K.C. Vasanth Kumar,*** Y.V. Chandrachud, C.J. observed that the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after a period of 15 years from the date of the judgment. Desai, J. in the said judgment observed that even in the case of Scheduled Castes and Scheduled Tribes the economic criterion

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was worth applying by refusing preferred treatment to those amongst them who have already benefitted by it and improved their position.

241. Fazal Ali, J., after referring to all the judgments of the Learned Judges in ***Kesavananda Bharati*** with regard to interplay between Part III and Part IV of the Constitution, held that Fundamental Rights guaranteed by the Constitution has to be read in harmony with the Directive Principles contained in Part IV. He also reiterates that Article 16(4) is not a proviso to Article 16(1).

242. M.H. Beg, J. concurs with the views expressed by the aforesaid Learned Judges.

243. Further, Krishya Iyer, J. in ***Akhil Bharatiya Soshit Karamchari Sangh*** reiterates that Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. He states that Article 46, in emphatic terms, obligates the State "to

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promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the *Scheduled Castes and the Scheduled Tribes*, and shall protect them from social injustice and all forms of exploitation". He states that reading Article 46 together with Article 16(4), the inference is obvious that administrative participation by the Scheduled Castes and Scheduled Tribes shall be promoted with special care by the State.

244. While considering the criticism that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever, he suggested that the Administration may well innovate and classify to weed out the creamy layer of SCs/STs. However, records a caution that the Court cannot force the State in that behalf.

245. Chinnappa Reddy, J. in the same judgment states that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. He states that the

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Directive Principles should serve the courts as a code of interpretation. He states that the Fundamental Rights should be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former.

246. Chinnappa Reddy, J advocates that the State action should be towards protection and nourishment of the underprivileged, the deprived and the exploited so that they can take their place in an egalitarian society.

247. In ***Indra Sawhney***, 7 Learned Judges affirmed the position as laid down in ***N.M. Thomas*** that clause (4) of Article 16 is not by way of an exception to clause (1) of Article 16, but it is an emphatic way of stating a principle implicit in Article 16(1).

248. As already discussed hereinabove, it has been held that further classification of backward classes into backward and more backward classes is permissible under the Constitution. The only caveat put by Sawant, J. is that if it is done there has to be a reservation for both backward as well as for more or most

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backward classes. It has been held in ***Indra Sawhney*** that under Article 16(4) the Scheduled Castes are also included in the term 'backward class of citizens'.

249. If that be so, I find no justification in ***E.V. Chinnaiah*** holding that the State is not empowered to do the exercise of sub-classification among the Scheduled Castes.

250. The basic error that appears to have been committed in ***E.V. Chinnaiah*** is that it proceeds on the understanding that Article 341 has to do with the reservation of the seats.

251. As already discussed hereinabove, Articles 341 and 342 are only with regard to identification of the Scheduled Castes and Scheduled Tribes. Articles 341 and 342 read with clauses (24) and (25) of Article 366 of the Constitution provide that those castes included in the Presidential List shall be deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the Constitution. However, at the cost of repetition, I reiterate that Articles 341 and 342 do not deal with reservation.

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252. The provisions of affirmative action including reservations in the matter of public employment are contained in Article 16 of the Constitution of India.

253. As already discussed herein above, this Court in ***Indra Sawhney*** has held that further classification of backward classes into backward and more backward classes is permissible in law.

254. By that corollary, if a State finds that any of the castes, races, tribes or part of or groups within the castes, races or tribes are not adequately represented, could the State be denied its right to make a special provision for that?

255. In a catena of decisions, this Court held that the State must resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. It has been held that State should take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously

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placed, to bring about real equality. Reference in this respect may be made to the Constitution Bench judgment of this Court in the case of ***Marri Chandra Shekhar Rao vs. Dean, Seth G.S. Medical College and others***[25], wherein this Court observed thus:

> "**20.** .... Reservations should and must be adopted to advance the prospects of weaker sections of society, but while doing so care should be taken not to exclude the legitimate expectations of the other segments of the community."

256. Some startling facts have been brought to our notice. Though the Presidential List for the State of Andhra Pradesh has a list of 60 Scheduled Castes, Justice Usha Mehra Commission Report[26] shows that out of these 60 Scheduled Castes, only 4 or 5 had availed the benefits of reservation, leaving the rest of the Scheduled Castes in the Presidential List high and dry. The

[25] (1990) 3 SCC 130.
[26] Report of Justice Usha Mehra National Commission on Sub-Categorization of Scheduled Castes in Andhra Pradesh (submitted to Ministry of Social Justice and Empowerment, Government of India on 1st May 2008).

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Report shows that the same has resulted in an anomaly that none of the majority caste despite their inclusion in the Presidential List for the State of Andhra Pradesh, have been able to seek reservation benefits including entry into Government service under the State except for the job of Sweepers and/or Farash.

257. Insofar as the State of Punjab is concerned, it is sought to be urged on behalf of the State of Punjab that though Balmikis and Mazhabi Sikhs constitute 41.9% of the total population of the Scheduled Castes, the percentage of these categories in public employment is totally disproportionate to their population among the Scheduled Castes. In any case, it is urged that what is provided under the Act[27] was only differential treatment insofar as 50% of the vacancies reserved for Scheduled Castes is concerned. Only if the candidates from these categories are

[27] Section 4(5) of The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 (Punjab Act No. 22 of 2006).

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available, the seats would go to these categories. On account of non-availability of the candidates from these categories, the seats would fall into the other categories of the Scheduled Castes.

258. I find that, as has been observed by this Court in various judgments, it is the duty of the State to give preferential treatment to the backward class of citizens who are not adequately represented. If the State while discharging that duty finds that certain categories within the Scheduled Castes and Scheduled Tribes are not adequately represented and only the people belonging to few of the categories are enjoying the entire benefit reserved for Scheduled Castes and Scheduled Tribes, can the State be denied its right to give more preferential treatment for such categories? In my view, the answer would be in the negative, since the same would not amount to tinkering with the Presidential List.

259. No doubt that if the State decides to provide 100% of the reservation for Scheduled Castes to one or more categories

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enlisted in the Presidential List in that State to the exclusion of some categories, it may amount to tinkering with that list because, in effect, it would amount to denial of benefit of reservation to those Scheduled Caste categories which have been excluded. In my view, that would, in effect, amount to deletion of the said categories from the Presidential List notified under Article 341 of the Constitution, which power is exclusively reserved with Parliament, in my opinion, such an exercise would not be permissible.

260. In this respect, I may take support from the observations made by Sawant, J. in ***Indra Sawhney***. He held that if the reservation is provided only for the more or most backward classes, then the people belonging to higher echelons would grab the open seats whereas the people from more or most backward classes would eat up the entire reservation, leaving the other backward classes high and dry. He therefore held that the sub-classification of backward classes would be permissible provided

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the reserved seats are available for backward classes as well as more or most backward classes. I am therefore of the considered view that merely because more preferential treatment is provided to the more backward or more inadequately represented among the Scheduled Castes, it would not amount to tinkering with the Presidential List. In my view, the same would be permissible in view of the law laid down by the 9-Judge Bench in the case of ***Indra Sawhney***.

261. The ground realities cannot be denied. Even among the Scheduled Castes, there are some categories who have received more inhuman treatment for centuries and generations as compared to the other categories. The hardships and the backwardness which these categories have suffered historically would differ from category to category. In my view, therefore, merely because they are part of a single or a combined Presidential List, it cannot be said that they form part of a

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homogeneous group. I therefore have no hesitation in holding that ***E.V. Chinnaiah*** has been wrongly decided.

262. The concept of sub-classification was sought to be attacked on the ground that this would lead to giving reservation for political reasons. It was argued that a political party in power to gain political advantage may provide special treatment to a particular class in the list of Scheduled Castes. I see no merit in the argument.

263. Dr. Ambedkar had foreseen such a difficulty. In his speech in the Constituent Assembly, Dr. B.R. Ambedkar said that 'backward community" will have to be left to be determined by each local government. On a query by Shri T.T. Krishnamachari, as to whether this rule will be justiciable, he observed that it would be a justiciable matter. He stated that if the local Government included in this category of reservations such a large number of seats, one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a

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magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

264. Various judicial pronouncements referred to hereinabove have emphasized that a reasonable classification is implicit in the trinity of Articles 14 to 16. Therefore, if somebody approaches the Court, the Court can always examine as to whether such a classification is reasonable or not.

265. For a classification to be reasonable, it will have to be established that any group or sub-group carved out in the larger group is significantly different than the larger group and that the classification has a nexus with the object to be achieved.

266. In a case, like the present one, if a classification is made, it will have to be established that the group carved out from the larger group is more disadvantageous and not adequately represented. The result of classification would be to provide more

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preferential treatment to this more disadvantageous and less represented group. The ultimate object would be to achieve real equality among all the sub-groups in the larger group.

267. In any case, as has been held by judicial pronouncements, when the State does such an exercise, it will have to be supported by an empirical data. Unless the State or the Commission comes to a finding that the group carved out needs special treatment is more disadvantageous and not adequately represented as compared to the other categories in the group, such a sub-classification would not stand the scrutiny of the law. I, therefore, find that the fear that is posed is not substantiated.

268. I find that the attitude of the categories in the Presidential List opposing such a sub-classification is that of a person in the general compartment of the train. Firstly, the persons outside the compartment struggled to get into the general compartment. However, once they get inside it, they make every attempt

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possible to prevent the persons outside such a compartment from entering it.

269. In fact, what the people belonging to the categories who are availing of large chunk of reservations and denying a special treatment to the less privileged among them are doing, is what the people from the higher castes have done to these people for centuries as a result of which backward classes were kept away from the mainstream of society for ages, for no fault of theirs. Only on account of the principle of social and economic justice as enshrined under the Constitution, they have availed themselves of the benefits of special treatment. However, when the State endeavours to ensure that the said benefit percolates to the more underprivileged and less adequately represented, the sections from the Scheduled Castes who oppose them, stand in the shoes of those who oppressed them.

270. The categories in the Presidential List who have already enjoyed a major chunk of reservations should not object to the

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State providing a special treatment to those who have been deprived of such a benefit and particularly when such a benefit is not being taken away from them. Only part of that benefit is being reserved for percolating the same to the more disadvantageous and less represented.

271. I find that to achieve real equality as envisaged by this Court in various judicial pronouncements, sub-classification amongst the Scheduled Castes for giving more beneficial treatment is wholly permissible under the Constitution.

VI. THE WAY FORWARD

272. That leaves us with the question regarding the applicability of creamy layer principle to the Scheduled Castes and Scheduled Tribes.

273. No doubt that in ***Indra Sawhney***, Jeevan Reddy, J. while considering the applicability of 'means test' and 'creamy layer' has observed that the discussion therein is confined only to Other

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Backward Classes, and it has no relevance in the case of Scheduled Castes and Scheduled Tribes.

274. In paragraph 792, Jeevan Reddy, J. observed thus:

> "**792.** In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class — a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line — how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not

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merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become — say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of

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holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual

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> backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

275. It has been observed that the very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. It is observed that if some of the members are far too advanced socially (which in the context, necessarily means economically and may also mean educationally) the connecting thread between them and the remaining class snaps. He observed that they would be misfits in the class. It is further observed that after excluding them alone, would the class be a compact class. It is observed that in fact, such exclusion would benefit the truly backward.

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276. His Lordship gave an example that, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children would get full opportunity to realize their potential. They are in no way handicapped in the race of life. It is observed that it is logical that in such a situation, his children are not given the benefit of reservation. It is further observed that by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.

277. Rejecting the argument of 'one swallow doesn't make the summer', i.e. merely because few members of a caste/class become socially advanced the caste/class as such does not cease to be backward, the Learned Judge answered that though clause (4) of Article 16 aims at group backwardness, he was of the view that exclusion of such socially advanced members will make the

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'class' a truly backward class and would more appropriately serve the purpose and object of clause (4) of Article 16.

278. As early as in 1981, in ***Akhil Bharatiya Soshit Karamchari Sangh***, Krishna Iyer, J., in paragraph 94, while rejecting the argument that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions, had observed that the State may, when social conditions warrant, justifiably restrict *harijan* benefits to the *harijans* among the *harijans* and forbid the higher *harijans* from robbing the lowlier brethren.

279. Again, in paragraph 98, he observed that the Administration may well innovate and classify to weed out the creamy layer of Scheduled Castes and Scheduled Tribes. However, he cautioned that the Court cannot force the State in that behalf.

280. Chinnappa Reddy, J. also records that a few members of those castes or social groups may have progressed far enough

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and forged ahead so as to compare favourably with the leading forward class economically, socially and educationally. He observed that in such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it.

281. In ***M. Nagaraj***, the Court also applied the principle of quantifiable data and creamy layer even in the case of Scheduled Castes and Scheduled Tribes. The correctness of the same was considered in ***Jarnail Singh***.

282. Though ***Jarnail Singh*** held that insofar as applicability of quantifiable data on backwardness insofar as Scheduled Castes and Scheduled Tribes is concerned, ***M. Nagaraj*** was not correct, however, insofar as the applicability of creamy layer principle even to Scheduled Castes and Scheduled Tribes is concerned, it upheld the view taken in ***M. Nagaraj***. In doing so, ***Jarnail Singh*** is basically relying on the judgment of 7-Judge Bench of this

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Court in ***N.M. Thomas***. The view taken in ***Jarnail Singh*** has also been approved in ***Davinder Singh***.

283. The correctness of the view taken in ***Jarnail Singh*** and ***Davinder Singh*** is not questioned. However, since in the present reference we are dealing with the question about equality among the group of unequals, I find it appropriate to consider the said issue also.

284. I have already referred hereinabove to the observations made by Krishna Iyer, J. in ***N.M. Thomas*** and the observations made by Chinnappa Reddy, J. in ***K.C. Vasanth Kumar*** regarding applicability of creamy layer principle. It is worthwhile to note that the 7-Judge Bench in ***N.M. Thomas*** was considering the question about affirmative action in case of Scheduled Castes and Scheduled Tribes.

285. In ***N.M. Thomas***, Krishna Iyer, J., in more than one place, had observed that the State is entitled to take steps for weeding out the socially, economically and educationally advanced

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sections of the Scheduled Castes and Scheduled Tribes from the applicability of reservation.

286. Krishna Iyer, J. has again reiterated this position in paragraphs 94 and 98 in ***Akhil Bharatiya Soshit Karamchari Sangh***.

287. When the 9-Judge Bench in ***Indra Sawhney*** held that applicability of such a test insofar as Other Backward Classes are concerned would advance equality as enshrined in the Constitution, then why such a test should not also be made applicable to the Scheduled Castes and Scheduled Tribes.

288. As observed hereinabove, there are stark ground realities, and we cannot be ignorant of them. Nearly 75 years have elapsed from the day on which the Constitution was brought into effect. Special provisions have been made for the advancement of the Scheduled Castes and Scheduled Tribes and backward class of citizens. By judicial interpretation, the equality enshrined in the trinity of Articles 14 to 16 of the Constitution has been

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considered to be equal treatment among equals and unequal treatment among unequals. The question that will have to be posed is, whether equal treatment to unequals in the category of Scheduled Castes would advance the constitutional objective of equality or would thwart it? Can a child of IAS/IPS or Civil Service Officers be equated with a child of a disadvantaged member belonging to Scheduled Castes, studying in a Gram Panchayat/Zilla Parishad school in a village?

289. The education facilities and the other facilities that would be available to a child of a parent of the first category would be much higher, maybe the facilities for additional coaching would also be available; the atmosphere in the house will be far superior and conducive for educational upliftment.

290. *Per contra*, the child of parent of the second category would be having only the bare minimum education; the facilities of coaching, etc., would be totally unavailable to him. He will be

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living in the company of his parents who do not have education and have not even been in a position to guide such a child.

291. As observed by Chinnappa Reddy, J., in ***K.C. Vasanth Kumar***, a child studying in the St. Paul's High School and St. Stephen's College cannot be equated with a child studying in a rural school. He observed that if a child of the first category secures 90% marks and the child of the second category secures 50% of the marks, would treating both by the same standard achieve real justice.

292. It is also commonly known that disparities and social discrimination, which is highly prevalent in the rural areas, start diminishing when one travels to the urban and metropolitan areas. I have no hesitation to hold that putting a child studying in St. Paul's High School and St. Stephen's College and a child studying in a small village in the backward and remote area of the country in the same bracket would obliviate the equality principle enshrined in the Constitution.

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293. I may note that some of the officers from the Scheduled Castes and Scheduled Tribes categories, who after receiving the benefit of reservation under the Constitution have reached high positions, are doing their bit to pay back to society. They are providing coaching and other facilities to the less advantaged so that they can compete and come up in their life. However, putting the children of the parents from the Scheduled Castes and Scheduled Tribes who on account of benefit of reservation have reached a high position and ceased to be socially, economically and educationally backward and the children of parents doing manual work in the villages in the same category would defeat the constitutional mandate.

294. However, I may observe that taking into consideration that the Constitution itself recognizes the Scheduled Castes and Scheduled Tribes to be the most backward section of the society, the parameters for exclusion from affirmative action of the person belonging to this category may not be the same that is applicable

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to the other classes. If a person from such a category, by bagging the benefit of reservation achieved a position of a peon or maybe a sweeper, he would continue to belong to a socially, economically and educationally backward class. At the same time, the people from this category, who after having availed the benefits of reservation have reached the high echelons in life cannot be considered to be socially, economically and educationally backward so as to continue availing the benefit of affirmative action. They have already reached a stage where on their own accord they should walk out of the special provisions and give way to the deserving and needy. I may gainfully refer to the observations of Dr. B.R. Ambedkar as under:

> "History shows that where ethics and economics come in conflict, victory is always with economics. Vested interests have never been known to have willingly divested themselves unless there was sufficient force to compel them."[28]

[28] What Gandhi and Congress have done to Untouchables, Chap. VII.

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295. I am therefore of the view that the State must evolve a policy for identifying the creamy layer even from the Scheduled Castes and Scheduled Tribes so as exclude them from the benefit of affirmative action. In my view, only this and this alone can achieve the real equality as enshrined under the Constitution.

VII. CONCLUSION

296. I, therefore, hold:

(i) that ***E.V. Chinnaiah***, which held that sub-classification amongst the Scheduled Castes for the purpose of giving more beneficial treatment to a group in the larger group of the Scheduled Castes is not permissible, does not lay down a good law;

(ii) that sub-classification amongst the Scheduled Castes for giving more beneficial treatment is permissible in law;

(iii) that for doing so, the State will have to justify that the group for which more beneficial treatment is provided is

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inadequately represented as compared to the other castes in the said List;

(iv) that while doing so, the State will have to justify the same on the basis of empirical data that a sub-class in whose favour such more beneficial treatment is provided is not adequately represented;

(v) that, however, while providing for sub-classification, the State would not be entitled to reserve 100% seats available for Scheduled Castes in favour of a sub-class to the exclusion of other castes in the List;

(vi) that such a sub-classification would be permissible only if there is a reservation for a sub-class as well as the larger class;

(vii) that the finding of ***M. Nagaraj***, ***Jarnail Singh*** and ***Davinder Singh*** to the effect that creamy layer principle is also applicable to Scheduled Castes and Scheduled Tribes lays down the correct position of law;

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(viii) that the criteria for exclusion of the creamy layer from the Scheduled Castes and Scheduled Tribes for the purpose of affirmative action could be different from the criteria as applicable to the Other Backward Classes.

297. Before I part with the judgment, I place on record my deep appreciation for the valuable assistance rendered by learned counsel appearing for the parties.

.....J.
[B.R. GAVAI]

NEW DELHI;
AUGUST 01, 2024

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION
CIVIL APPEAL NO.2317 OF 2011ETC.ETC.

THE STATE OF PUNJAB & ORS. ...APPELLANT (S)

VERSUS

DAVINDER SINGH & ORS ...RESPONDENT(S)

J U D G M E N T

VIKRAM NATH, J.

1. I am generally in agreement with the reasons and conclusions arrived at in the opinions of Hon'ble the Chief Justice and Brother Justice Gavai in particular that the holding in **E.V.Chinnaih**, that sub-classification within Scheduled Castes was impermissible, does not lay down good law and stands over-ruled. Further, any exercise involving sub-classification by the State must be supported by empirical data.

2. I am also in agreement with the opinion of Brother Justice Gavai that '*creamy layer*' principle is

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also applicable to Scheduled Castes and Scheduled Tribes, and that the criteria for exclusion of creamy layer for the purpose of affirmative action could be different from the criteria as applicable to the Other Backward Classes.

.....J.
(VIKRAM NATH)

NEW DELHI
AUGUST 01, 2024

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REPORTABLE

IN THE SUPREME COURT OF INDIA
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CIVIL APPEAL NO. 2317 OF 2011

THE STATE OF PUNJAB AND OTHERS …APPELLANT(S)

VERSUS

DAVINDER SINGH AND OTHERS …RESPONDENT(S)

WITH

C.A. No. 5593/2010
SLP (C) No. 8701/2011
W.P. (C) No. 1477/2019
W.P.(C) No. 21/2023
W.P. (C) No. 562/2022
C.A. No. 5586/2010
C.A. No. 5597/2010
C.A. No. 5589/2010
C.A. No. 5600/2010
C.A. No. 5598/2010
C.A. No. 5587/2010
C.A. No. 5595-5596/2010
C.A. No. 2324/2011
C.A. No. 6936/2015
SLP (C) No. 30766/2010
SLP (C) No. 5454-5459/2011
C.A. No. 2318/2011
SLP (C) No. 36500-36501/2011
C.A. No. 289/2014
T.C. (C) No. 37/2011
T.C. (C) No. 38/2011
T.P. (C) No. 464/2015

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J U D G M E N T

BELA M. TRIVEDI, J.

1. Though unanimity and consensus in the opinions expressed by the larger Benches on the Constitutional matters are desirable for the sake of certainty and strength of the law laid down, I for one, believe that the "dissent" for well-chosen reasons would be equally important for an effective adjudication in a democratic functioning of judiciary, which would have a potential to develop the law in future.

2. Justice William O. Douglas of the US Supreme Court[1], a great dissenter who had written as many as 486 dissenting opinions, had stated:

> "The right to dissent is the only thing that makes life tolerable for a Judge of an Appellate Court……. It is the right of dissent, not the right or duty to conform, which gives dignity, worth, and individuality to man".

3. Justice Oliver Wendell Holmes, another great dissenter, in his first dissent in the Supreme Court in ***Northern Securities Company Vs. The United States (1903)***[2] had stated:

> "I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule,

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[1] **Bernard Schwartz, A Book of Legal Lists: The Best and Worst in American Law P.283**

[2] **193 U.S. 197 (1903)**

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> to express dissent, I feel bound to do so in this case and to give my reasons for it……"

4. With somewhat similar feelings, and with due respect, I beg to differ from the erudite expression of opinions expressed by the Learned Chief Justice and my esteemed Brothers Justice B.R. Gavai and Justice Pankaj Mithal, and pen down my own opinion with reasons for my dissent.

5. For the sake of brevity and avoid repetition, the facts and the submissions made by the learned advocates for the parties as narrated in the opinion expressed by the learned Chief Justice, are not reiterated. At the outset, it may be noted that neither the Referral Order made in the ***State of Punjab and Others vs. Davinder Singh and Others,***[3] contains a formulation of precise questions nor the Order dated 12.10.2023 made in the Reference case sets out specific questions for consideration by this Bench. Hence, having regard to the opinions expressed in ***Davinder Singh*** and in ***E.V. Chinnaiah vs. State of Andhra Pradesh and Others***[4], and having regard to the submissions - oral and written - made by the learned advocates for the parties, following substantial questions of law are formulated for consideration.

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[3] **(2020) 8 SCC 65**
[4] **(2005) 1 SCC 394**

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(I) Whether the law laid down by the Five-Judge Bench in ***E.V. Chinnaiah*** could have been doubted and referred to the larger Bench by the Bench of three judges, without recording any cogent reasons for their disagreement with the said decision in ***E.V. Chinnaiah,*** more particularly when the said decision held the field for a long period of fifteen years?

(II) Whether the States should be permitted to tinker with or vary the Presidential List specifying the "Scheduled Castes" as notified under Clause (1) of Article 341, by sub-classifying or sub-dividing or re-grouping the castes conglomerated in the said list, under the guise of providing reservation for the weaker of the weakest, and thereby commit the breach of the mandate contained in Clause (2) of Article 341?

(III) Whether the decision in ***E.V. Chinnaiah*** is required to be revisited in view of certain observations made by the Nine-Judge Bench in ***Indra Sawhney Vs. Union of India and Others***[5] concerning the Other Backward Class?

[5] **(1992) Suppl. 3 SCC 217**

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6. Before embarking on the issues involved, let us go through the trajectory of the Reference made by the Five-Judge Bench in the ***State of Punjab and Others vs. Davinder Singh and Others***[6] to this Bench.

TRAJECTORY OF THE REFERENCE TO SEVEN JUDGES

7. The State of Andhra Pradesh passed an enactment, namely the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 on 02.05.2000 dividing 57 castes enumerated in the Presidential List prepared under Article 341(1) of the Constitution, into 4 groups based on inter-state backwardness, and fixed separate quotas in reservation for each of these groups. The validity of the said Act of 2000 came to be challenged in the Writ Petitions filed in the High Court of Andhra Pradesh at Hyderabad. The said Writ Petitions came to be dismissed by a Five-Judge Bench by a majority of 4:1. The High Court having certified the case as being fit for appeal to the Supreme Court, the Appeals were filed before this Court. The same having been referred to the Constitution Bench of Five-Judges. The Constitution Bench after considering the various issues allowed the said Appeals being Civil Appeal No.6758/2000 and Others (***E.V. Chinnaiah vs. State of Andhra***

[6] **(2020) 8 SCC 65**

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Pradesh and Others)[*] declaring the impugned Act as *ultra vires* the Constitution. The Constitution Bench while considering the said Reference, had framed following three questions: -

(i) Whether the impugned Act is violative of Article 341(2) of the Constitution of India?

(ii) Whether the impugned enactment is constitutionally invalid for lack of legislative competence?

(iii) Whether the impugned enactment creates sub-classification or micro-classification of Scheduled Castes so as to violate Article 14 of the Constitution of India?

8. Justice Santosh Hegde (for himself and Justice S.N. Variava and Justice B.P. Singh), and Justice S.B. Sinha and Justice H.K. Sema concurring but by separate judgments, allowed the said Appeals by answering the above questions as under: -

(i) From the scheme of the Constitution, Article 341 and from the opinions in case of ***State of Kerala & Anr. vs. N.M. Thomas & Ors.***[7]**,** it was clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the

[*] **(2005) 1 SCC 394**
[7] **(1976) 2 SCC 310**

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Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List. (Paragraph 26)

(ii) It is well settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which include Scheduled Castes, to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation having been fulfilled by the State, it was not open to the State to sub-classify a class already recognized by the Constitution and allot a portion of the already reserved quota amongst the State created sub-class within the list of Scheduled Castes. (Paragraph 31)

(iii) The primary object of the impugned enactment was to create groups of sub-castes in the list of Scheduled Castes applicable to the State and, apportionment of the reservation was only secondary and consequential. Whatever may be the object of such sub-classification and apportionment of the reservation, the State cannot claim legislative power to make a law dividing the

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Scheduled Castes List of the State by pressing its legislative competence to Entry 41 of List II or Entry 25 of List III. In pith and substance, the enactment was not a law governing the field of education or the field of State Public Services. (Paragraph 31)

(iv) The conglomeration of castes given in the Presidential Order, should be considered as representing a class as a whole. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be sub-divided or sub-classified further. If a class within a class of members of the Scheduled Caste is created, the same would amount to tinkering with the list. Such sub-classification would be violative of Article 14 of the Constitution. If the benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others, but the same could not mean that in the process of rationalising the reservation to the Scheduled Castes,

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the constitutional mandate of Articles 14, 15 and 16 could be violated. (Paragraph 41)

(v) The Court therefore opined that the impugned legislation apart from being beyond the legislative competence of the State was also violative of Article 14 of the Constitution and hence was liable to be declared as *ultra-vires* the Constitution. The impugned Act therefore was declared as ultra-vires the Constitution. (Paragraph 44)

9. Justice H.K. Sema in his concurring opinion had observed in Paragraph 48 thereof* that in ***Indra Sawhney vs. Union of India and Others***[*], the discussion of creamy layer was confined to Other Backward Classes only, and had no relevance in the case of Scheduled Castes and Scheduled Tribes. Justice S.B. Sinha also in his concurring opinion referred to certain observations made in ***Indra Sawhney*** and observed in Paragraph 38 that the principle laid down in ***Indra Sawhney*** for sub-classification of Other Backward Classes cannot be applied as a precedent law for sub-classification or subgrouping Scheduled Castes in the Presidential List, because that very judgment itself has specifically

[*] **(1992) Supp. 3 SCC 217**

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held that sub-division of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. The Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments. In Paragraph 93 thereof [*], it has been held that "Scheduled Castes", is not a caste in terms of its definition as contained in Article 366 (24) of the Constitution. They are brought within the purview of the said category by reason of their abysmal backwardness. Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of groups within the castes, races, or tribes. They are not merely backward but the backward most. A person even does not cease to be a Scheduled Caste automatically even on his conversion to another religion. It was further observed that the two groups that is socially and educationally backward classes and Scheduled Castes were differentiated for the purpose of Clause (4) of Article 15 of the Constitution as therein Scheduled Castes had been recognized, in the nature of things, to be backward but it is also recognized that besides

[*] **(2005) 1 SCC 394**

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them, there may be other groups of persons who are backward and deserve preferential treatment.

10. Again, after referring to the observations made in ***Indra Sawhney*** regarding the "means-test and creamy layer test," it was observed by Justice Sinha in Paragraph 96 thereof that whenever such a situation arises in respect of Scheduled Castes, it will be Parliament alone to take the necessary legislative steps in terms of Clause (2) of Article 341 of the Constitution, and the States do not have the legislative competence therefor.

11. The aforesaid judgment in ***E.V. Chinnaiah**** held the field for about 15 years till the Three-Judge Bench of this Court in ***State of Punjab and Others vs. Davinder Singh and Others***[*] referred the matter to a larger Bench for consideration, opining that the judgment of Five-Judge Bench in ***E.V. Chinnaiah*** was required to be revisited in the light of Article 338 of the Constitution of India and exposition of law in ***Indra Sawhney***. The Three-Judge Bench passed the following Order on 20th August, 2014.[*]

[*] **(2005) 1 SCC 394**
[*] **(2020) 8 SCC 65**

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"ORDER

1. The learned counsel for the respondents heavily relies upon the Constitution Bench decision of this Court in *E.V. Chinnaiah* v. *State of A.P.* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] On the other hand, the learned Additional Solicitor General for the appellants, submits that *E.V. Chinnaiah* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] has no application on the controversy in hand. Moreover, he submits that *E.V. Chinnaiah* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] is not in accord with the 9-Judge Bench decision of this Court in *Indra Sawhney* v. *Union of India* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] .

2. Having heard the learned Additional Solicitor General and the learned counsel for the parties, we are of the view that *E.V Chinnaiah* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] needs to be revisited in the light of Article 338 of the Constitution of India and, inter alia, exposition of law in *Indra Sawhey* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . Moreover, the matter also involves interpretation and interplay between Article 16(1), Article 16(4), Article 338 and Article 341 of the Constitution of India as well.

3. In this view of the matter, we refer the matter for consideration of the above aspects by the larger Bench. Let the matter be placed before the Chief Justice on administrative side for appropriate order."

12. In the said case of ***Davinder Singh and Others***, the Writ Petitions were filed in the High Court of Punjab and Haryana at Chandigarh for declaring Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act 2006, which required 50% of the

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vacancies of the quota reserved for Scheduled Castes in direct recruitment, to be offered to Valmikis and Mazhbi Sikhs, if available as a first preference from amongst the Scheduled Castes, as unconstitutional. The Division Bench of the High Court placing reliance on the decision in ***E.V. Chinnaiah***, vide the judgment dated 29.03.2010 in CWP No. 18290 of 2009, declared the said provision contained in Section 4(5) of the Act 2006 as unconstitutional. The said Judgment came up for consideration before the Three-Judge Bench of this Court. On the Reference made by the Three-Judge Bench to the larger Bench, the Five-Judge Bench of this Court in the ***State of Punjab and Others vs. Davinder Singh and Others***[*] framed the following issues.

(i) Whether the provisions contained under Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services Act, 2006) are constitutionally valid?

(ii) Whether the State had the legislative competence to enact the provisions contained under Section 4(5) of the Act.

(iii) Whether the decision in ***E.V. Chinnaiah vs. State of Andhra Pradesh and Others*** is required to be revisited.

[*] **(2020) 8 SCC 1**

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13. The Five-Judge Bench however, after extensively referring various paragraphs of the decision in ***Indra Sawhney*** opined that ***E.V. Chinnaiah*** is required to be revisited by a larger bench. It was observed by the Five-Judge Bench therein* that: -

> **"44.** The question arises whether sub-classification for providing benefit to all castes can be said to be tinkering with the list under Articles 341, 342 and 342-A, in view of the decisions in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] , permitting sub-classifications of backward classes and in Jarnail Singh [Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396 : (2019) 1 SCC (L&S) 86] , in which, it was opined that "creamy layer concept" for exclusion of benefit can be applied to the Scheduled Castes and Scheduled Tribes and it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution. The caste or group or sub-group continued exactly as before in the List. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. The million dollar question is how to trickle down the benefit to the bottom rung; reports indicate that benefit is being usurped by those castes (class) who have come up and adequately represented. It is clear that caste, occupation, and poverty are interwoven. The State cannot be deprived of the power to take care of the qualitative and quantitative difference between different classes to take ameliorative measures.
>
> **45.** Reservation was not contemplated for all the time by the Framers of the Constitution. On the one hand, there is no exclusion of those who have come up, on the other hand, if sub-classification is denied, it would defeat right to equality by treating unequal as equal. In Chebrolu Leela Prasad Rao v. State of A.P. [Chebrolu Leela Prasad Rao v. State of A.P., (2021) 11 SCC 401 : 2020 SCC OnLine SC 383] , the necessity of revising lists was

* **(2020) 8 SCC 1**

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pointed out relying on Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and Union of India v. Rakesh Kumar [Union of India v. Rakesh Kumar, (2010) 4 SCC 50 : (2010) 1 SCC (L&S) 961] .

46. There is cry, and caste struggle within the reserved class as benefit of reservation in services and education is being enjoyed, who are doing better hereditary occupation. The scavenger class given the name of Balmikis remains more or less where it was, and so on, disparity within Scheduled Caste is writ large from various reports. The sub-classification was made under Section 4(5) of the Punjab Act to ensure that the benefit of the reservation percolate down to the deprived section and do not remain on paper and to provide benefit to all and give them equal treatment, whether it is violative of Article 14? In our opinion, it would be permissible on rationale basis to make such sub-classification to provide benefit to all to bring equality, and it would not amount to exclusion from the list as no class (caste) is deprived of reservation in totality. In case benefit which is meant for the emancipation of all the castes, included in the List of Scheduled Castes, is permitted to be usurped by few castes those who are adequately represented, have advanced and belonged to the creamy layer, then it would tantamount to creating inequality whereas in case of hunger every person is required to be fed and provided bread. The entire basket of fruits cannot be given to mighty at the cost of others under the guise of forming a homogeneous class.

47……

48……

49. Providing a percentage of the reservation within permissible limit is within the powers of the State Legislatures. It cannot be deprived of its concomitant power to make reasonable classification within the particular classes of Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes without depriving others in the list. To achieve the real purpose of reservation, within constitutional dynamics, needy can always be given benefit; otherwise, it would mean that

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inequality is being perpetuated within the class if preferential classification is not made ensuring benefit to all.

50. The sub-classification is to achieve the very purpose, as envisaged in the original classification itself and based thereupon evolved the very concept of reservation. Whether the sub-classification would be a further extension of the principle of the said dynamics is the question to be considered authoritatively by the Court.

51. The Scheduled Castes as per Presidential List are not frozen for all the time, and neither they are a homogeneous group as evident from the vast anthropological and statistical data collected by various Commissions. The State law of preferential treatment to a limited extent, does not amend the List. It adopts the List as it is. The State law intends to provide reservation for all Scheduled Castes in a pragmatic manner based on statistical data. It distributes the benefits of reservations based on the needs of each Scheduled Caste.

52. The State has the competence to grant reservation benefit to the Scheduled Castes and Scheduled Tribes in terms of Articles 15(4) and 16(4) and also Articles 341(1) and 342(1). It prescribes the extent/percentage of reservation to different classes. The State Government can decide the manner and quantum of reservation. As such, the State can also make sub-classification when providing reservation to all Scheduled Castes in the List based on the rationale that would conform with the very spirit of Articles 14, 15 and 16 of the Constitution providing reservation. The State Government cannot tamper with the List; it can neither include nor exclude any caste in the List or make enquiry whether any synonym exists as held in Milind [State of Maharashtra v. Milind, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] .

57. The interpretation of Articles 14, 15, 16, 338, 341, 342 and 342-A is a matter of immense public importance, and correct interpretation of binding precedents in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and other decisions. Though we have full respect for the principle of stare decisis, at the same time, the Court

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> cannot be a silent spectator and shut eyes to stark realities. The constitutional goal of social transformation cannot be achieved without taking into account changing social realities.
>
> **58.** We endorse the opinion of a Bench of 3 Judges that E.V. Chinnaiah [E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] is required to be revisited by a larger Bench; more so, in view of further development and the amendment of the Constitution, which have taken place. We cannot revisit E.V. Chinnaiah [E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] being Bench of coordinate strength. We request the Hon'ble Chief Justice to place the matters before a Bench comprising of 7 Judges or more as considered appropriate."

14. In view of the above, the matters have been placed before us for consideration whether the ***E.V. Chinnaiah*** requires revisitation or not. In other words, for consideration as to whether the law laid down by ***E.V. Chinnaiah*** is the correct law in the light of certain observations made in ***Indra Sawhney***.

RELEVANT CONSTITUTIONAL PROVISIONS

15. In order to appreciate the rival contentions raised in the instant Reference, it would be beneficial to reproduce the relevant provisions of the Constitution for ready reference.

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

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Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. —

1 to 3….

(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.]

Article 16. Equality of opportunity in matters of public employment. —

1 to 3 ….

(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 adequately represented in the services under the State.

Article 162. Extent of executive power of State. — Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by,

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the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof**.**

Article 166. Conduct of business of the Government of a State. -

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Advocate-General for the State. Conduct of business of the Government of a State.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States. —

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State 1*** also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

(3) Subject to clauses (1) and (2), the Legislature of any State 1*** has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2 [in a State]

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notwithstanding that such matter is a matter enumerated in the State List.

Article 335. Claims of Scheduled Castes and Scheduled Tribes to services and posts. —The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:
Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters or promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

Article 341. Scheduled Castes. —
(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor 4 thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.
(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Article 342. Scheduled Tribes. —
(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be

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deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Article 342A. Socially and educationally backward classes.

(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify 6 [the socially and educationally backward classes in the Central List which shall for the purposes of the Central Government] be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.]

(3) Notwithstanding any contained in clauses (1) and (2), every State or Union territory may, by law, prepare and maintain, for its own purposes, a list of socially and educationally backward classes, entries in which may be different from the Central List.

Article 366. Definitions. —In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(24) “Scheduled Castes” means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;

(25) “Scheduled Tribes” means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as

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are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;

(26) ……
****

(26A) ……..
(26B) ……..
(26C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of the Central Government or the State or Union territory, as the case may be;"

ANALYSIS

(I) WHETHER THE LAW LAID DOWN BY THE FIVE-JUDGE BENCH IN *E.V. CHINNAIAH VS. STATE OF ANDHRA PRADESH AND OTHERS*[*] COULD HAVE BEEN REFERRED TO THE LARGER BENCH BY THE BENCH OF THREE JUDGES, WITHOUT RECORDING ANY COGENT REASONS FOR DISAGREEMENT WITH THE SAID DECISION OF FIVE-JUDGE BENCH IN *E.V. CHINNAIAH* MORE PARTICULARLY WHEN THE SAID DECISION HELD THE FIELD FOR A LONG PERIOD OF FIFTEEN YEARS?

16. It may be noted that the Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000 has already been declared unconstitutional by the Five-Judge Bench in ***E.V. Chinnaiah*** as back as in 2005. Similarly, Section 4(5) of the Punjab Scheduled Caste and

[*] **(2005) 1 SCC 394**

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Backward Classes (Reservation in Services Act, 2006) has also been declared unconstitutional by the Division Bench of the High Court of Punjab and Haryana vide the judgment dated 29.03.2010 in respect of which the present reference is made. Hence, both these Acts as on the date have been declared as unconstitutional. It is further required to be noted that ***E.V. Chinnaiah*** decided in 2005 was holding the field for about 15 years till the Five-Judge Bench in ***Davinder Singh,*** on the reference made by the Three-Judge Bench, further referred the matters to the Seven-Judge Bench in 2020.

17. It is noteworthy that the Three-Judge Bench had referred the matters to the larger Bench without assigning any reason much less cogent reason as to why it could not agree with the decision in ***E.V. Chinnaiah*** delivered by the Constitution Bench. The law which was settled by the Constitution Bench and was prevalent since 15 years was sought to be doubted and unsettled by a Three-Judge Bench by passing a very cryptic and perfunctory order not supported by any reason, as quoted hereinabove.

18. A Five-Judge Bench in ***Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others***[8]***,*** while examining the propriety

[8] **2002 (1) SCC 1**

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of the Bench of two Judges doubting the correctness of a decision of a Bench of three Judges and directly referring the matter to the Bench of five Judges, had observed that judicial discipline and propriety demands that a Bench of two learned judges should follow a decision of a Bench of three learned judges, but if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances, can it be followed, the proper course for it to adopt would be to refer the matter before it to a Bench of three learned Judges setting out, the reasons why it could not agree with the earlier judgment.

19. The importance of the doctrine of binding Precedents in the administration of our judicial system hardly needs to be reiterated. The doctrines of Precedents and Stare decisis are the core values of our legal system. In series of cases, the Constitution Benches of this Court have time and again emphasized that when a decision is rendered by this Court, it acquires a reliance interest and the society organizes itself based on such legal order. When substantial judicial time and resources are spent on the References by the Constitution Benches, the same should not be further referred to the larger Bench by a smaller Bench, in a casual or cavalier manner, and without recording the reasons for disagreement.

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20. As back as in 1974 a Seven-Judge Bench in ***Maganlal ChhaganLal (P) Ltd. vs. Municipal Corporation of Greater Bombay & Others***[9], H.R. Khanna, J. had remarked that certainty in the law, which was an essential ingredient of the Rule of Law, would be considerably eroded if the highest Court of the land lightly overruled the view expressed by it in earlier cases. One instance where such overruling could be permissible, according to him, was a situation where contextual values giving birth to the earlier view had subsequently altered substantially.

21. In ***Lt. Col. Khajoor Singh Vs. Union of India & Another***[10] a Seven-Judge Bench emphasized that the Court should not depart from an interpretation given in an earlier judgment of the Court unless there was a fair amount of unanimity that the earlier decision was manifestly wrong.

22. A more compendious examination of the issue was considered by another Seven-Judge Bench in ***Keshav Mills Co. Ltd. vs. Commissioner of Income Tax, Bombay North, Ahmedabad*** [11] wherein it was observed that frequent exercise by this Court of its power to review its earlier decisions on the ground that the view placed before

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[9] (1974) 2 SCC 402
[10] AIR 1961 SC 532
[11] AIR 1965 SC 1636

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it later appeared to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. It was further stated that before a previous decision is pronounced plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified.

23. In a more recent decision in case of ***Dr. Shah Faesal and Others vs. Union of India and Another***[12] a Five-Judge Bench reiterated the doctrines of Precedents and Stare decisis, and observed as under: -

> **"17**. This Court's jurisprudence has shown that usually the courts do not overrule the established precedents unless there is a social, constitutional or economic change mandating such a development. The numbers themselves speak of restraint and the value this Court attaches to the doctrine of precedent. This Court regards the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the rule of law. As the Chief Justice of the Supreme Court of the United States, John Roberts observed during his Senate confirmation hearing, "It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness". [Congressional Record—Senate, Vol. 156, Pt. 7, 10018 (7-6-2010).]
>
> **"18.** Doctrines of precedents and stare decisis are the core values of our legal system. They form the tools which further the goal of certainty, stability and continuity in our legal system.

[12] **(2020) 4 SCC 1**

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> Arguably, Judges owe a duty to the concept of certainty of law, therefore they often justify their holdings by relying upon the established tenets of law."
>
> **"19.** When a decision is rendered by this Court, it acquires a reliance interest and the society organises itself based on the present legal order. When substantial judicial time and resources are spent on references, the same should not be made in a casual or cavalier manner. It is only when a proposition is contradicted by a subsequent judgment of the same Bench, or it is shown that the proposition laid down has become unworkable or contrary to a well-established principle, that a reference will be made to a larger Bench. In this context, a five-Judge Bench of this Court in Chandra Prakash v. State of U.P. [(2002) 4 SCC 234: 2002 SCC (Cri) 496: 2002 SCC (L&S) 496], after considering series of earlier rulings reiterated that: (SCC p. 245, para 22)
>
> > **"22.** … The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court."

24. The above exposition of law makes it clear that the doctrines of binding Precedents and *Stare decisis*, as also the judicial discipline and propriety, developed over the years, warrant that the decision of larger Bench should be followed by the smaller Bench. If the smaller bench had any doubt or disagreement with a decision of the larger bench, it could refer the same for reconsideration to the larger bench, however, after setting out the reasons and justification as to why it could not agree

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or follow the decision of earlier larger Bench. Such disagreement also has to be based on some justifiable reasons, like where the earlier decision of larger Bench is found to be manifestly wrong or where the contextual values giving birth to the earlier view had altered substantially etc. A casual exercise of power to refer the matter to the larger Bench without recording any reason or on the ground that the view placed before it later seems to be more reasonable, may incidentally tend to make law uncertain and introduce confusion, which must be avoided.

25. In the instant case, the reference was made by Three-Judge Bench to the larger Bench for revisitation of the earlier decision of Constitution Bench in ***E.V. Chinnaiah,*** without assigning any reason and in a very casual and cavalier manner, and that too after fifteen years of its attaining finality. Such reference could not and should not have been countenanced by the subsequent Five-Judge Bench for reference to the Seven-Judge Bench. When a law was settled by the previous Constitution Bench in ***E.V. Chinnaiah*** after considering all the previous judgments including ***Indra Sawhney,*** and after investing substantial judicial time and resources, and when the same had held the field for a substantially long period of fifteen years, in my opinion, the very

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reference by the Three-Judge Bench to the larger bench for reconsideration of the decision in ***E.V. Chinnaiah,*** that too without assigning any reason was inappropriate and not in consonance with the well settled doctrines of Precedents and *Stare decisis*. Having said that, let us proceed further with the other issues involved in the Reference.

(II) WHETHER THE STATES SHOULD BE PERMITTED TO TINKER WITH OR VARY THE PRESIDENTIAL LIST SPECIFYING THE "SCHEDULED CASTES," AS NOTIFIED UNDER CLAUSE (1) OF ARTICLE 341 BY SUB-CLASSIFYING OR SUB-DIVIDING OR RE-GROUPING THE CASTES CONGLOMERATED IN THE SAID LIST UNDER THE GUISE OF PROVIDING RESERVATION FOR THE WEAKER OF THE WEAKEST, AND THEREBY TO COMMIT BREACH OF THE MANDATE CONTAINED IN CLAUSE (2) OF ARTICLE 341?

26. The collateral issues which stem from the above question may be delineated as under: -

(a) Law on Constitution Interpretation.

(b) Object, Purpose and limits of Article 341.

(c) Etymology and Special Status of "Scheduled Castes" notified in the Presidential List.

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(d) State's competence to sub-classify or sub-divide or re-group the Castes specified as "Scheduled Castes" in the Presidential List for providing reservation under Article 15 and 16.

(a) <u>Constitutional Interpretation</u>

27. Before examining the correctness of the law laid down by Five Judge Bench in ***E.V. Chinnaiah*** in the context of exposition of law in ***Indra Sawhney*** and in the light of the constitutional provisions more particularly Article 14, 15, 16 and 341 of the Constitution of India, let us have glance over the cardinal principles of interpretation of the Constitution laid down by this Court over the years in catena of decisions.

28. It cannot be gainsaid that the Constitution is construed to be a living and organic document, as it is intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. It is required to be construed broadly and liberally however, in the words of Benjamin Cardozo, "a Judge is not a Knight errant roaming at will in pursuit of his own ideal of beauty and goodness. Judge is not to innovate at pleasure."***[13]***

[13] Benjamin Cardozo, The Nature of Judicial Process, (New Haven: Yale University Press, 13th Edition 1946) 141

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29. As consistently held by this Court, it may be desirable to give a broad and generous construction to the Constitutional Provisions, but while doing so, the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind.

30. In ***GVK Industries Limited and Another vs. Income Tax Officer and Another***[14], a Five-Judge Bench on the interpretation of Constitution observed as under: -

> **"37.** In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. However, in light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation—they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution.
>
> **38.** Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:
>
> > "To understand the Constitution as a legal text, it is essential to recognize the … sort of text it is: a *constitutive* text that purports, in the name of the people…, to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and to define the rules governing those institutions and practices." (See *Reflections on Free-*

[14] **(2011) 4 SCC 36**

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Form Method in Constitutional Interpretation. [108 Harv L Rev 1221, 1235 (1995)])"

39. It has been repeatedly appreciated by this Court that our Constitution is one of the most carefully drafted ones, where every situation conceivable, within the vast experience, expertise and knowledge of our framers, was considered, deliberated upon, and appropriate features and text chosen to enable the organs of the State in discharging their roles. While indeed dynamic interpretation is necessary, if the meaning necessary to fit the changed circumstances could be found in the text itself, we would always be better served by treading a path as close as possible to the text, by gathering the plain ordinary meaning, and by sweeping our vision and comprehension across the entire document to see whether that meaning is validated by the constitutional values and scheme."

31. Following ***GVK Industries Limited***, another Five-Judge Bench in ***Dr. JaiShri LaxmanRao Patil vs. Chief Minister and Others***[15] observed as under: -

"113. In examining provisions of the Constitution, courts should adopt the *primary rule*, and give effect to the plain meaning of the expressions; this rule can be departed, only when there are ambiguities. In *Kuldip Nayar* v. *Union of India* [(2006) 7 SCC 1] after quoting from *G. Narayanaswami* v. *G. Pannerselvam* [(1972) 3 SCC 717] this Court held that: (*Kuldip Nayar case* SCC p. 88, para 201)

"*201*. … We endorse and reiterate the view taken in the above quoted paragraph of the judgment. It may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal

[15] **(2021) 8 SCC 1**

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> construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results.""

32. Thus, it is quite well settled that in interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. Sometimes as a matter of constitutional necessity, it may be prudent to widen the search for the true meaning, purport, and ambit of the provision under consideration, however, one has to bear in mind that no provision, no word or expression in the Constitution exists in isolation. They are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. Even if a dynamic interpretation is necessary and the meaning necessary to fit the changed circumstances is found in the text itself, it would be always better to tread a path as close as possible to the text, by gathering the plain ordinary meaning, to see whether that meaning is validated by the constitutional values and the scheme. While giving a broad and generous construction to the constitutional provisions, the rule of "plain meaning," or "literal" interpretation, which remains "the primary rule" has to be kept in mind.

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(b) The Object, Purpose and Limits of Article 341: -

33. Since the whole matter hinges on the interpretation of Article 341 of the Constitution of India, let us see the Object and Purpose of its insertion in the Constitution.

34. Article 341 states that the President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races and tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be. Clause (2) of the said Article 341 states that Parliament may by law include in or exclude from the list of Scheduled Castes specified in the notification issued under Clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause which shall not be varied by any subsequent notification. Similar provision is made for Scheduled Tribes in Article 342. Article 342 (A) pertaining to the socially and educationally backward classes is slightly differently worded, which was inserted by the Constitution (102nd Amendment) Act, 2018 w.e.f 14.08.2018.

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35. As transpiring from the extracts of the Constituent Assembly Debates placed on record, there was no Article similar to Article 341 as found in the present Constitution. Noticing the need for creating a list of Scheduled Castes and Scheduled Tribes, some amendments in the draft Constitution were moved by Dr. Ambedkar, Chairman of the Drafting Committee of the Constitution. The relevant part of the proceedings of the Constituent Assembly debate on September 17, 1949 is reproduced hereunder: -

> "The Honourable Dr. B. R. Ambedkar: Sir, I move:
> "That with reference to amendment No. 147 of List IV (Eighth Week), for sub-clause (w) of clause (1) of article 303, the following sub-clause be substituted: —
> (w) Schedule Castes' means such castes, races or tribes or parts or groups within such castes, races or tribes as are deemed under article 300A of this Constitution to be Scheduled Castes for the purposes of this Constitution.
> The only change is, the word 'specified' has been changed to 'deemed'. Sir, I move: "That with reference to amendment No. 148 of List IV (Eighth Week), for sub-clause (x) of clause (1) of article 303, the following sub-clause be substituted: —
> (x) scheduled tribes' means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 300B of this Constitution to be scheduled tribes for the purposes of this Constitution;'
> I am incorporating the other amendment which has also been tabled. Shall we take up, the two other articles also at the same time?
> Mr. President: Yes.
> New articles 300A and 300B. [COI Articles 341 and 342]
> The Honourable Dr. B. R. Ambedkar: Sir, I move:
> "That after article 300, the following articles be inserted: — 300A. Scheduled Castes. — (1) The President may, after consultation

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with the Governor or Ruler of a State, by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes, which shall for purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.
(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued by the President under clause (1) of this article any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

300B. Schedule Tribes. — (1) The President may after consultation with the Governor or Ruler of a State, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for purposes of this Constitution be deemed to be scheduled tribes in relation to that State.
(2) Parliament may by law include in or exclude from the list of scheduled tribes specified in a notification issued by the President under clause (1) of this article any Tribe or Tribal community or part of or group within any Tribe or Tribal community but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."
The object of these two articles, as I stated, was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this : that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of

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political factors having a play in the matter of the disturbance in the Schedule so published by the President.

Mr. President: 218A.
Shri T. T. Krishnamachari: In reading it he has included that.
Mr. President: 224.
Pandit Thakur Das Bhargava: Sir, I move:
"That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300A the following be added at the end: — 'for a period of ten years from the commencement of this Constitution.'"
I also move:
"That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300B the following be added at the end: —
'for a period of ten years from the commencement of this Constitution.'" I agree with the principle that for ten years to come no variation of the notification originally made by the President should be possible. Because now that special privileges of reservation, etc., have been given to the Scheduled Castes, I do not like the idea that the Executive, President or Governor or any other person may be able to tamper with that right, but after a period of ten years, when this privilege will no longer be available to the Scheduled Castes, there will be no difference between the Scheduled Castes and other backward classes which will be declared under article 301 of the Constitution. At that time there will be no meaning in taking away this power from the President in consultation with the Governor. Therefore, my humble submission is that the proposed amendment be accepted to make the point absolutely clear and free from ambiguity. Unless we add these words for a period of ten years from the commencement of this Constitution, you will be taking away the power of the President to include or exclude proper classes from the purview of the notification which will be issued under 300A and B. After the first ten years the privileges which will be open to these classes are probably under article 10 and under articles 296 and 299. I do not know of any other privileges which have been specifically given to these Scheduled Castes. Whereas I am, very insistent and conscious that these provisions should not be tampered with, I do like that these castes may not become

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stereotyped and may not lose the capacity of travelling out of the schedule when the right occasion demands it. I, therefore, submit that if you put these words you will be making the whole thing elastic and the President will have the power of including or excluding after the lapse of ten years such tribes or castes within the notification.

Mr. President: Mr. Chaliha—you have two amendments. Once is 205 and the other is 225. I do not know if 205 arises now.

Shri Kuladhar Chaliha (Assam: General): Mr. President, I move; "That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300B after the words 'Parliament may' the words 'and subject to its decision the State Legislature' be inserted."

I have always been fighting that the Governor should have power to safeguard the rights of the Tribes. I am glad in some measure this has been conceded. Yet I find certain amount of suspicion in that the State Legislature is neglected. The Drafting Committee has not allowed the State Legislature to have a voice. In order to fill up that lacuna I have said that Parliament may and subject to its decision the State Legislature.

Shri. T. T. Krishnamachari: Then what is left to the State Legislature?

Shri Kuladhar Chaliha: Somehow or other I feel you have neglected it. In these you have covered a good deal which you had objected to in the past. The Governor has been given power I am glad to say. The only thing is provincial assemblies have no voice in this. Whatever Parliament says they are bound by it; but if there is anything which consistently with the orders of the Parliament they can do anything, they should be allowed to have the power. That is why I have moved this. However I am thankful this time that the Drafting Committee has assimilated good ideas and only provincial assemblies have been neglected. However, the Governor is there—that is an improvement—Parliament, is there and the President is there. Therefore, I thank the Drafting Committee for this.

Mr. President: Mr. Sidhva.

The Honourable Dr. B. R. Ambedkar: It is already covered.

Shri Brajeshwar Prasad (Bihar: General). There are some amendments seeking to add some more clauses.

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Mr. President: 'That is a separate matter. These were all the amendments.

Shri V. I. Muniswami Pillai: Mr. President, I come to support the amendments that have been moved by the Honourable Dr. Ambedkar. These amendments deal with the definition of Scheduled Castes. As far as I can see he has made it clear that according to the second part of it, the President on the 26th January 1950 will publish a list of such communities that come under the category of Scheduled Castes. But I would like to inform this House of the background which brought out the special name of Scheduled Castes. It was the intouchability, the social evil that has been practised by the Hindu Community for ages, that was responsible for the Government and the people to know the section of people coming under the category of Hindus and who were kept at the outskirts of the Hindu society. Going backwards to 1916 it was in that year when Government found that something had to be done for the untouchable classes, (when they said untouchable classes, they were always understood to be Hindus,) and they had to be recognised. In Madras there were six communities that came under this classification. During the Montago Chelmsford reforms they were made ten. In 1930 when the great epoch-making fast of Mahatma Gandhi came about, then only the country saw who were the real untouchable classes. And in the 1935 Act, the Government thoroughly examined the whole thing and as far as the Province of Madras is concerned they brought 86 communities into this list or category, though there were some touchable classes also. Now, after further examination the Provincial Governments have drawn up a list and I think according to the amendment mover's suggestions, all those communities that come under the category of untouchables and those who profess Hinduism will be the Scheduled Castes, because I want to emphasise about the religion. I emphasise this because of late there have been some movements here and there; there are people who have left Scheduled Castes and Hinduism and joined other religions and they also are claiming to be scheduled Castes. Such convert cannot come under the scope of this definition. While I have no objection to Government granting any concessions to these converts, I feel strongly that they should not be clubbed along with Scheduled Castes.

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Sir, I am grateful to the Drafting Committee and also to the Chairman of that Committee for making the second portion of it very clear, that in future, after the declaration by the President as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude anybody or any community from the list of Scheduled Castes that must be by the word of Parliament. I feel grateful to him for bringing in this clause, because I know, as a matter of fact, when Harijans behave independently or asserting their right on some matters, the Ministers in some Provinces not only take note and action against those members, but they bring the community to which that particular individual belongs; and thereby not only the individual, but also the community that comes under that category of Scheduled Castes are harassed. By this provision, I think the danger is removed. I strongly oppose the amendment moved by Pandit Bhargava. The reason is that he wants to have the ten years period for observing these amendments. But he has entirely forgotten that under another article that we have already passed, or will pass the Constitution provides for the appointment of a Special officer at the Centre and also various officers in all the Provinces to go into the various disabilities of these communities and to submit a report to the President who will then be able to know whether the Scheduled Castes have reached a stage when the facilities now given to them could be withdrawn. I do not think that the reasons that he has advanced are fair and square for the uplift of the Harijans.

With these few words, I support the amendment.

Mr. President: Does anyone else wish to speak? Do you wish to say anything Dr. Ambedkar?

The Honourable Dr. B. R. Ambedkar: I do not accept the amendment of Pandit Thakur Das Bhargava.

Mr. President: Then I put the amendments. The first is the one with reference to amendment 147.

The question is: “That with reference to amendment No. 147 of List IV (Eighth Week), for sub-clause (w) of clause (1) of article 303, the following sub-clause be substituted: —

‘(w) ‘Scheduled Castes’ means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 300A of this Constitution to be Scheduled

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> Castes for the purposes of this Constitution; The amendment was adopted".

36. It is seen from the above Debate that ultimately the original draft Article-300A was approved by the Constituent Assembly, and was re-numbered as Article 341 in the present Constitution. From the bare reading of the Article 341 it is clearly discernible that power of the President is limited to specify the castes or the tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or a Union Territory as the case may be. Once the notification is issued under Clause (1) of Article 341, it is only the Parliament which can by law, include in or exclude from the list of Scheduled Castes specified in the notification, any caste, race or tribe or part of or group within any caste, race or tribe, and the notification issued under Clause (1) could not be varied by any subsequent notification. As transpiring from the Constituent Assembly Debates quoted hereinabove, the object of inserting Article 341 was to eliminate the necessity of burdening the Constitution with long list of Scheduled Castes and Scheduled Tribes. It was proposed that the President, in consultation with the Governor or Ruler of a State should have power to issue a general notification in the Gazette specifying all

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the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation put was that once a notification has been issued by the President, any elimination from or any addition in the list must be made by the Parliament and not by the President. In the words of Dr. Ambedkar, "the object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."

37. A Five-Judge Bench in ***B. Basavalingappa vs. D. Munichinnappa & others***[16] had held that the object of the provision contained in Article 341 was to avoid all disputes as to whether a particular caste is a Scheduled Caste or not, and only those castes can be Scheduled Castes which are notified in the Order made by the President under Article 341 after consultation with the Governor where it relates to such caste in a State. It further held that Clause (2) provides that the Parliament may by law include in or exclude from the list of the Scheduled Castes specified in the notification issued under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe.

[16] **AIR (1965) SC 1269**

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The power was thus given to Parliament to modify the notification made by the President under Clause (1). A notification issued under Clause (1) could not be varied by any subsequent notification, thus making the notification by the President final for all times except for modification by law as provided by Clause (2).

38. The said law has also been reiterated by the Five-Judge Bench in case of ***Bhaiya Lal Vs. Harikishan Singh***[17] A similar view has been also taken by another Five-Judge Bench in case of ***State of Maharashtra vs. Milind and Others***[18]**,** by holding that:

> **"11.** By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the

[17] **AIR (1965) SC 1557**
[18] **(2001) 1 SCC 4**

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purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament.

12. Plain language and clear terms of these articles show (*1*) the President under clause (1) of the said articles may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification specify the castes, races or tribes or parts of or groups within the castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes/Scheduled Tribes in relation to that State or Union Territory as the case may be; (*2*) under clause (2) of the said articles, a notification issued under clause (1) cannot be varied by any subsequent notification except by law made by Parliament. In other words, Parliament alone is competent by law to include in or exclude a caste/tribe from the list of Scheduled Castes and Scheduled Tribes specified in notifications issued under clause (1) of the said articles. In including castes and tribes in Presidential Orders, the President is authorised to limit the notification to parts or groups within the caste or tribe depending on the educational and social backwardness. It is permissible that only parts or groups within them be specified and further to specify castes or tribes thereof in relation to parts of the State and not to the entire State on being satisfied that it was necessary to do so having regard to social and educational backwardness. The States had opportunity to present their views through Governors when consulted by the President in relation to castes or tribes, parts or groups within them either in relation to the entire State or parts of State. It appears that the object of clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be, within the meaning of the entries contained in the Presidential Orders issued under clause (1) of Articles 341 and 342, is to be

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> determined looking to them as they are. Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the entries in the schedules pertaining to each State whenever one caste/tribe has another name it is so mentioned in the brackets after it in the schedules. In this view it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Scheduled Caste/Scheduled Tribe for the purpose of Constitution, even though it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament. Hence it is not possible to say that State Governments or any other authority or courts or Tribunals are vested with any power to modify or vary the said Orders. If that be so, no inquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful".

39. In ***Bir Singh Vs. Delhi Jal Board and Others***[19]**,** a Five-Judge Bench after referring to the relevant clauses of the Constitution (Scheduled Castes) Order 1950, and the Constitution (Scheduled Tribes) Order 1950, observed as under:

[19] **(2018) 10 SCC 312**

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"36. The upshot of the aforesaid discussion would lead us to the conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Castes and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any authority including the Court. It is Parliament alone which has been vested with the power to so act, that too, by laws made. Scheduled Castes and Scheduled Tribes thus specified in relation to a State or a Union Territory does not carry the same status in another State or Union Territory. Any expansion/deletion of the list of Scheduled Castes/Scheduled Tribes by any authority except Parliament would be against the constitutional mandate under Articles 341 and 342 of the Constitution of India.

37…….

38. It is an unquestionable principle of interpretation that interrelated statutory as well as constitutional provisions have to be harmoniously construed and understood so as to avoid making any provision nugatory and redundant. If the list of Scheduled Castes/Scheduled Tribes in the Presidential Orders under Articles 341/342 is subject to alteration only by laws made by Parliament, operation of the lists of Scheduled Castes and Scheduled Tribes beyond the classes or categories enumerated under the Presidential Order for a particular State/Union Territory by exercise of the enabling power vested by Article 16(4)would have the obvious effect of circumventing the specific constitutional provisions in Articles 341/342. In this regard, it must also be noted that the power under Article 16(4) is not only capable of being exercised by a legislative provision/enactment but also by an Executive Order issued under Article 166 of the Constitution. It will, therefore, be in consonance with the constitutional scheme to understand the enabling provision under Article 16(4) to be available to provide reservation only to the classes or categories of Scheduled Castes/Scheduled Tribes enumerated in the Presidential Orders for a particular State/Union Territory within the geographical area of that State and not beyond. If in the opinion of a State it is necessary to extend the benefit of reservation to a class/category of Scheduled Castes/Scheduled Tribes beyond those specified in the Lists for that particular State, constitutional discipline would

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> require the State to make its views in the matter prevail with the central authority so as to enable an appropriate parliamentary exercise to be made by an amendment of the Lists of Scheduled Castes/Scheduled Tribes for that particular State. Unilateral action by States on the touchstone of Article 16(4) of the Constitution could be a possible trigger point of constitutional anarchy and therefore must be held to be impermissible under the Constitution."

40. From the afore stated legal position, there is no room for doubt that the Presidential List as notified under Article 341 assumes finality on the publication of the notification, and that the castes, races or tribes or parts of or groups within castes, races or tribes specified in the notification are, for the purposes of the Constitution, deemed to be the "Scheduled Castes" in relation to that State or Union Territory as the case may be. It is only the Parliament by law which can include in or exclude from the list of Scheduled Castes specified in the notification notified under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe. Such notification notified under Clause (1) cannot be varied even by the President by issuing any subsequent notification.

(c) Etymology and Special Status of "Scheduled Castes"

41. Since the arguments have been advanced before us, on the issue whether the Scheduled Castes specified in the Presidential List under

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Clause (1) of Article 341 should be treated as a homogenous group or heterogenous group, let us peep into the etymology of the nomenclatures “Scheduled Castes” and “Scheduled Tribes”. Briefly stated, the practice of untouchability or caste-based discrimination was rampant particularly amongst Hindus in India during British era. Shri V.I. Muniswamy Pillai, in his speech (quoted hereinbefore) had informed the members of the Constituent Assembly about the background which brought out the special name of “Scheduled Castes”, and stated that it was untouchability, the social evil that was being practised by the Hindu Community for ages, that was responsible for the Government and the people to know the section of people coming under the category of Hindus and who were kept at the outskirts of the Hindu Society. Such class of people were being discriminated on the basis of their castes and occupations they were engaged in, like Sweepers, Scavengers, Chamars, Mochis, etc. They were known as “depressed classes.” The term “depressed classes” however was not synonymous with “backward classes.” From the study material placed before us, it appears that the Census Commissioner J.H. Hutton who conducted Census in 1931 had explained that the “depressed castes” were those castes, ‘the contact with whom entailed purification on the part of high caste Hindus’. These

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were the communities which suffered social disabilities such as being denied access to temples, use separate wells, and not being allowed to sit inside a school house etc. The term 'depressed classes' was being used only for low caste Hindus who suffered from the stigma of untouchability. The word "class" in "depressed class" was in fact referred to for "caste." Eventually, the Government of India Act 1935 referred to the "depressed classes" as "Scheduled Castes". The 1935 Act made it clear that "Scheduled castes" were none other than those who were previously known as "depressed classes". Clause 26 of Schedule I appended to the said Act 1935 mentioned as under:

> "26(I) …….the 'scheduled castes' means such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes or parts or groups which appear to be His Majesty in Council to correspondence to the classes of persons formerly known as 'depressed classes', as His Majesty in Council may specify".

42. The identification of the different castes for inclusion as Scheduled Castes in the said Schedule was based on an elaborate exercise conducted for each of the provinces as could be seen from the Schedule consisting of nine parts, to the 1935 Act. Thereafter, a gazette notification was published on 06.06.1936 promulgating the Government of India (Scheduled Castes) Order 1936 notifying the list of castes that

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were to be considered as "the Scheduled Castes" across the territory of India. The post constitutional exercise by the Constitution (Scheduled Castes) Order 1950 and Constitution (Scheduled Tribes), Order 1950, as originally enacted under Articles 341 and 342 of the Constitution was basically an exercise in recasting the Schedule to the 1935 Act. The relevant clauses of the said two Presidential Orders were in the following terms:

> "*Clause 2 of the Constitution (Scheduled Castes) Order, 1950*
>
> **2.** Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes specified in Parts I to XXV of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Castes so far as regards member thereof resident in the localities specified in relation to them in those Parts of that Schedule.
>
> *Clause 2 of the Constitution (Scheduled Tribes) Order, 1950*
>
> **2.** The Tribes or tribal communities, or parts of, or groups within, tribes or tribal communities, specified in Parts I to XXII of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof residents in the localities specified in relation to them respectively in those Parts of that Schedule".

43. The subsequent amendments to the aforesaid two Orders, from time to time were made to bring the position in tune with the amendments to the First Schedule to the Constitution made at different points of time by

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creation of new States and alterations in the area and boundaries of existing States.

44. As discussed earlier, the Presidential Orders made under Article 341(1) or Article 342(1) enumerating the lists of castes/races, tribes recognized as “Scheduled Castes/Scheduled Tribes” cannot be altered or varied by any State or any authority including the Court. It is Parliament alone which has been vested with the powers to so act, that too, by law made, as well settled by catena of decisions discussed hereinabove.

45. The very language employed in Article 341 that “the castes, races or tribes or parts of or groups within castes, races or tribes, shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be”, mandates that each caste, each race, each tribe or each part of or group within the castes, races or tribes shall by the deeming fiction be the “Scheduled Castes” for the purposes of the Constitution, irrespective of the parameters by which such caste/ race or tribe is recognised as “Scheduled Caste” in relation to that State. Though the members of “Scheduled Castes” are drawn from different castes, races and tribes, they attain special status by virtue of Presidential Notification under Article 341. Thus, the etymological and evolutionary history and

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background of the nomenclature "Scheduled Castes," coupled with the Presidential Orders published under Article 341 of the Constitution, make the "Scheduled Castes", a homogenous class. The necessary corollary would be that all the members of all the castes, races and tribes enumerated in the Presidential List are deemed to be "Scheduled Castes" for the purposes of the Constitution and they all would be entitled to all the benefits granted or reserved for the "Scheduled Castes".

46. A very pertinent observations in this regard have been made by a Seven-Judge Bench in ***State of Kerala and Another vs. N.M. Thomas and Other***[20] which deserve to be reproduced. The issues involved in the said case *inter alia* were whether Article 16(1) permits preferences to Scheduled Castes, Scheduled Tribes and weaker sections on the basis of reasonable classification, or whether Article 16(4) is an exception to Articles 16(1) and 16(2). The majority of five Judges in their separate but concurring opinions opined as under: -

> ***Per A.N. Ray, J.***
>
> "**40.** The Constitution makes a classification of Scheduled Castes and scheduled tribes in numerous provisions and gives a mandate to the State to accord special or favoured treatment to them. Article 46 contains a directive principle of State policy — fundamental in the governance of the country enjoining the State

[20] **(1976) 2 SCC 310**

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to promote with special care educational and economic interests of the Scheduled Castes and scheduled tribes and to protect them from any social injustice and exploitation. Article 335 enjoins that the claims of the members of the Scheduled Castes and scheduled tribes to the services and posts in the Union and the States shall be taken into consideration. Article 338 provides for appointment by the President of a Special Officer for the Scheduled Castes and scheduled tribes to investigate all matters relating to the safeguards provided for them under the Constitution. Article 341 enables the President by public notification to specify castes, races or tribes which shall be deemed to be Scheduled Castes in the States and the Union Territories. Article 342 contains provision for similar notification in respect of scheduled tribes. Article 366(24) and (25) defines Scheduled Castes and scheduled tribes. The classification by the impugned rule and the orders is with a view to securing adequate representation to Scheduled Castes and scheduled tribes in the services of the State as otherwise they would stagnate in the lowest rung of the State services.

41. to 42…….

43. Scheduled Castes and scheduled tribes are not a caste within the ordinary meaning of caste. In *Bhaiyalal* v. *Harikishan Singh* [AIR 1965 SC 1557 : (1965) 2 SCR 877] this Court held that an enquiry whether the appellant there belonged to the Dohar caste which was not recognised as a scheduled caste and his declaration that he belonged to the Chamar caste which was a scheduled caste could not be premitted because of the provisions contained in Article 341. No court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. Scheduled caste is a caste as notified under Article 366(25). A notification is issued by the President under Article 341 as a result of an elaborate enquiry. The object of Article 341 is to provide protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

Per Methew, J.

82. The word “caste” in Article 16(2) does not include “scheduled caste”. The definition of “Scheduled Castes” in Article 366(24) means

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> "such castes, races or tribes or parts of or groups within such castes, races, or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution."
>
> This shows that it is by virtue of the notification of the President that the Scheduled Castes come into being. Though the members of the Scheduled Castes are drawn from castes, races or tribes, they attain a new status by virtue of the Presidential notification. Moreover, though the members of tribe might be included in Scheduled Castes, tribe as such is not mentioned in Article 16(2)."
>
> ***Per Krishna Iyer, J.***
>
> **"135.** We may clear the clog of Article 16(2) as it stems from a confusion about *caste* in the terminology of scheduled castes and scheduled tribes. This latter expression has been defined in Articles 341 and 342. A bare reading brings out the quintessential concept that they (*sic there*) are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President. To confuse this backwardmost social composition with *castes* is to commit a constitutional error, misled by a compendious appellation. So that, to protect harijans is not to prejudice any *caste* but to promote citizen solidarity. Article 16(2) is out of the way and to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division is not to compromise with the acceleration of castelessness enshrined in the sub-article. The discerning sense of the Indian Corpus Juris has generally regarded scheduled castes and scheduled tribes, not as caste but as a large backward group deserving of societal compassion."

47. The above observations made in ***N.M. Thomas*** leaves no room of doubt that "Scheduled Castes" are not a caste within the ordinary meaning of caste. It is by virtue of the notification of the President under Article 341

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that the "Scheduled Castes" come into being. Though, the members of the Scheduled Castes are drawn from different castes, races or tribes, they attain a new Special Status by virtue of the Presidential notification. A bare reading of Article 341 brings out the quintessential concept that "Scheduled Castes" is an amalgam of castes, races, groups, tribes, communities or parts thereof, and is a homogenous group, and that once notified by Presidential List, they acquire Special Status of "Scheduled Castes" which cannot be varied except by the Parliament by law.

(d) State's Competence to sub-classify or sub-divide or re-group the Castes specified as "Scheduled Castes" in the Presidential List for providing the reservation under Article 15 and 16: -

48. It may be noted that the terminology "Backward Class" has not been defined or described anywhere in the Constitution, however the said terminology finds place in the various provisions in the Constitution. Part XVI of the Constitution deals with special provisions relating to certain classes, i.e. for Scheduled Castes, Scheduled Tribes, Anglo-Indian Community, Backward Class, Socially and Educationally Backward Class etc. Articles 330 and 332 provide for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the House of the People

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and in the Legislative Assemblies of the States. Article 335 states that the claims of the member of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently, with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union and of a State. Article 338, 338(A) and 338(B) provides for the constitution of the National Commissions for the Scheduled Castes, Scheduled Tribes and for Backward Classes respectively. As per the definition of "Scheduled Castes" contained in Article 366(24), "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of the Constitution. Similar definitions are contained in Article 366(25) for the "Scheduled Tribes" and in Article 366(26C) for the "socially and educationally backward classes".

49. Article 15(4) enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The newly added Clause (5) in Article 15 (w.e.f. 20.01.2006) enables the State, by law to make special provisions for the advancement of any socially and

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educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes, so far as such provisions relate to their admission to educational institutions. Article 16(4) enables the State to make 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. Subsequently inserted Clause (4A) in Article 16 (w.e.f. 17.6.1995) enables the State to make provision for reservation in the matters of promotions in the posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State. Article 16(6) inserted by the Constitution (One Hundred and Third Amendment) Act, 2019 enables the State to make provision for the reservation in favour of any economically weaker sections of citizens other than the classes mentioned in Clause 4 i.e. backward class of citizens. Article 46 states that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

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50. Thus, the terms “Scheduled Castes” and “Scheduled Tribes” are used in Article 15(4) along with the “socially and educationally backward classes of citizens”, used in Article 16(4A) exclusively and used in Article 46 along with “weaker sections of people”. However, the term “backward class” is used in Article 16(4) only. Further, Article 340 empowers the President to appoint a Commission to investigate the conditions of Socially and Educationally Backward Classes within the territory of India and to make recommendations as to the steps that should be taken by the Union or any State to remove the difficulties of the members of such class. As discussed in detail earlier, Article 341 empowers the President to issue notification specifying the Scheduled Castes in relation to the States and Union Territory. Similar provision is found in Article 342 for the Scheduled Tribes. Article 342A inserted by the Constitution (One Hundred and Second Amendment Act, 2018) with effect from 14th August, 2018, empowers the President to specify the Socially and Educationally Backward Classes in the Central List which are deemed to be Socially and Educationally Backward Classes in relation to that State or Union Territory as the case may be. By virtue of the Constitution (One Hundred and Fifth) Amendment Act, 2021, an explanation to Clause (2) and new Clause (3) have been added to

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Article 342(A). The difference between the Article 341, 342 and 342A is that, whereas the notifications issued under Article 341 and 342 cannot be varied except by the Parliament by law, the newly added Clause (3) of Article 342A permits the State or Union Territory by law, to prepare and maintain for its own purposes a list of Socially and Educationally Backward Classes entries which may be different from the Central List.

51. The mandate contained in Clause (2) of Article 341 specifically prohibits any variation in the notification issued under Clause (1) thereof, except by Parliament by law. There is no provision in the Constitution which would empower the States to make any variation in such notification issued under Clause (1) of Article 341, for the purpose of reservations under Article 15 or 16. It cannot be gainsaid that as per Article 162, the executive power of a State would extend to the matters with respect to which the Legislature of the State has power to make laws. The Proviso to the said Article states that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. The source of legislative power of the State is found in Article 246, by virtue of which

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the Legislature of any State has power to make laws with respect to any matters enumerated in List III of the Seventh Schedule along with the Parliament, and has exclusive power to make laws with respect to any of the matters enumerated in List II of the said Schedule.

52. As held in ***Bharat Coking Coal Ltd. vs. State of Bihar and Others***[21]

> **"19……..** …. Article 162 prescribes the extent of executive power of the State, it lays down that the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws. Thus, the executive power of the State Government is co-extensive with the legislative power of the State legislature. If the State legislature has power to enact laws on a matter enumerated in the State List or in the Concurrent List the State has executive power to deal with those matters subject to other provisions of the Constitution……. Moreover, the proviso to Article 162 itself contains limitation on the exercise of the executive power of the State. It lays down that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of State shall be subject to limitation of the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authority thereof. The limitation as contained in the proviso to Article 162 was necessary to avoid conflict in the exercise of executive power of State and the Union Government in respect of matters enumerated in List III of the Seventh Schedule. ..……."

53. Though the executive power of the State Government is co-extensive with the legislative power of the State Legislature, none of the entries, either in List II or List III of the Seventh Schedule confers any legislative

[21] **(1990) 4 SCC 557**

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power upon the State to rationalize the reservations, by sub-classifying or sub-dividing the castes enumerated in the Presidential List prepared under Article 341(1), as was sought to be done by the State of Andhra Pradesh by passing Andhra Pradesh Scheduled Castes (Rationalization of Reservations), Act 2000, nor does it confer any power to provide or reserve the quota for a particular caste or castes from amongst the "Scheduled Castes" enumerated in the Presidential List prepared under Article 341(1) of the Constitution, as was sought to be done by the State of Punjab and Haryana by passing the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006. In absence of any executive or legislative powers, the States are not competent to divide/ sub-divide/ sub-classify/ regroup the castes, races or tribes from amongst the "Scheduled Castes" nor could they give any preferential treatment by reserving a quota for a particular caste, race, tribe out of the quota reserved for the entire "Scheduled Castes".

54. Though sub-classification or sub division of castes from amongst the Scheduled Castes by the State for the purpose of reservation *per se* may not amount to inclusion or exclusion of any caste from the Presidential List of Scheduled Castes, it would certainly amount to tinkering with or varying the notification notified under Clause (1), which

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is clearly prohibited under Clause (2). When all castes, races or tribes enumerated in the Presidential List are deemed to be the "Scheduled Castes" for the purposes of the Constitution, any preference given to or any quota reserved for a particular caste or race or tribe out of the quota reserved for the entire class of the Scheduled Castes for the government jobs by the State, would certainly deprive the other members of the "Scheduled Castes" from having the benefit of reservation to the extent the quota is reserved for such particular caste or castes. Any such action on the part of the State would not only tantamount to discrimination in reverse and violation of Article 14 but would also tantamount to tinkering with Article 341 of the Constitution.

55. As per the settled legal position, every word or expression used in the Constitution has a purpose, and all the provisions of the Constitution have to be read in harmony so that the meaning of such word or expression is validated by the Constitutional values and the scheme. A person belonging to any of the castes, races or tribes enumerated in the Presidential List acquiring special status as the member of the "Scheduled Caste" in relation to a particular State, would be entitled to all the rights including the fundamental rights enshrined under the Constitution, and therefore would also be entitled to be treated equally

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from amongst the other members of the "Scheduled Castes" enumerated in such Presidential List, in that particular State. If any State makes special provision of reservation by fixing quota for the entire "Scheduled Castes" for admission to educational institutions or for the appointments on the posts in the public services as permitted under Article 15 and 16, such quota of reservation should be made available to all the members of the "Scheduled Castes" specified in the Presidential List, as all the members of the castes, races and tribes specified in such List are deemed to be "Scheduled Castes" for the purposes of the Constitution, and the State has no power to further sub-classify or sub-divide the "Scheduled Castes" for giving preferential treatment to a particular caste from the said list of "Scheduled Castes". As stated earlier, the very object of Article 341 is to give new special status to the "Scheduled Castes" for the purposes of the Constitution and to keep the political interference of the States outside the purview of the said provisions. Therefore, under the guise of providing reservation for the weaker of the weakest castes, the State could not be permitted to make any variation in the notification nor could it be permitted to indirectly tinker with such notification published under Article 341(1).

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56. Article 15(4) is an enabling provision which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, and Clause (5) thereof enables the State to make special provisions for them in respect of the admission to educational institutions. Similarly, Article 16(4) enables the State to make 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. These provisions under Article 15 and 16 are merely enabling provisions, and could not be treated as the source of power to legislate the law for sub-dividing or reclassifying/ sub-classifying or regrouping the castes, races or tribes enumerated as the “Scheduled Castes”, which have acquired special status by virtue of Article 341 of the Constitution.

57. Under the guise of providing reservation or under the pretext of taking affirmative action for the weaker of the weakest sections of the society, the State cannot vary the Presidential List and tinker with Article 341. Such power if exercised by the State in absence of any executive or legislative power would be colourable exercise of powers. It hardly needs to be reiterated that the idea conveyed by the ‘doctrine of

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colourable legislation' is that although apparently a legislature in passing a statute, purports to act within the limits of its powers, yet in substance and in reality, it transgresses its powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As well-settled, the whole doctrine of "colourable exercise" is based on the maxim - "you cannot do indirectly what you cannot do directly."* Any action of the State in the name of affirmative action, if not permitted by the Constitution, could not be validated or vindicated by the Courts by moulding or tinkering with the specific provisions of the Constitution.

(III) **WHETHER E.V. CHINNAIAH IS REQUIRED TO BE REVISITED IN VIEW OF CERTAIN OBSERVATIONS MADE IN INDRA SAWHNEY CONCERNING "OTHER BACKWARD CLASSES"?**

58. Much reliance has been placed by the Five-Judge Bench in ***Davinder Singh*** for making reference to this Bench, on the decision of ***Indra Sawhney*** for opining that the view taken in ***E.V. Chinnaiah*** was not in consonance with ***Indra Sawhney*** however, in my opinion, ***Indra Sawhney*** had not dealt with the issue of sub-classification of the

* **K.C. Gajapati Narayan Deo vs. State of Orissa, (1953) 2 SCC 178**

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"Scheduled Castes" much less had dealt with the State's power to sub-classify or sub-divide or re-group the Castes specified as "Scheduled Castes" under Article 341 of the Constitution.

59. So far as ***Indra Sawhney*** is concerned, the factual matrix was that the Government of India under Article 340 of the Constitution had constituted the "Second Backward Classes Commission" on January 1, 1979 under the Chairmanship of Shri B. P. Mandal (known as the Mandal Commission). The terms of the reference of the said Commission were *inter alia* to determine the criteria for defining the socially and educationally backward classes, to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified, and to examine the desirability or otherwise of making provision for reservation of appointments or posts in favour of such backward classes of citizens which were not adequately represented in the public services and posts in connection with the affairs of the Union or of any State. The Government of India itself on the recommendations of the Mandal Commission issued an office memorandum on August 13, 1990 purporting to extend reservations for socially and educationally backward classes in its services w.e.f. August 7, 1990. The said O.M reserved 27% of the seats

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for SEBC in addition to those already reserved for the Scheduled Castes and Scheduled Tribes. The issuance of the said O.M led to widespread protest and filing of writ petitions in the Supreme Court questioning the said Memorandum. The Five-Judge Bench of this Court by its order dated October 1, 1990 stayed the operation of the said O.M. dated 13th August, 1990, however, the process of identification of castes for locating the SEBCs was permitted to continue. Thereafter, as a consequence of the change in the Government at the Centre, another O.M on September 25th, 1991 modifying the earlier O.M. of August 13, 1990 was issued, by introducing the economic criteria in the grant of reservation by giving preference to the poorer sections of the SEBC's in the 27% quota and reserving another 10% of the vacancies in the civil services for other economically backward sections not covered by any of the existing schemes of reservation, which was explained to extend to the poorest amongst the higher caste and other religions also. The constitutionality of the said O.M dated September 25, 1991 was challenged before this Court and the Nine-Judge Bench was constituted to hear the matters. The matter was heard by the Nine-Judge Bench and by a 6:3 decision, the constitutionality, validity and enforceability of the impugned O.M dated 13.08.1990 subject to certain conditionalities

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and prerequisites was upheld, whereas paragraph 2(ii) of the second O.M. dated September 25, 1991 providing 10% additional reservation for the economically backward was held unconstitutional and struck down. Six separate judgments were delivered. The leading judgment was by ***B. P. Jeevan Reddy***, J, (for M.H. Kania, C.J., and M.N. Venkatchaliah, A.M. Ahmadi and himself) with ***S. Ratnavel Pandian*** and ***P.B Sawant, J.J*** concurring by their separate judgments.

60. Several questions were posed before the Nine-Judge Bench in ***Indra Sawhney*** which have been broadly indicated and discussed in the leading judgment of ***Jeevan Reddy, J*** along with the miscellaneous questions discussed therein. The questions particularly germane to the Scheduled Castes/Scheduled Tribes were the Question-3(a), Question-3(e) and Question-10. The Question-3(a) was, “what does the expression “backward class of citizens” in Article 16(4) mean?” The Question-3(e) was, “whether the class, to be designated as a backward class, should be situated similarly to the Scheduled Castes/Scheduled Tribes?” The Question-10 was, “whether the distinction made in the second memorandum between poorer sections of the backward classes and others was permissible under Article 16?”

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61. **Justice Jeevan Reddy** in his leading judgment while answering question 3(b) with regard to identification of "backward class of citizens" observed in Paragraph 781 as under: -

> **"781.** At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes."

62. Justice ***Jeevan Reddy*** further discussed the issue with regard to the "means test" and "creamy layer test" qua question no. 3 (d) and made a special note in paragraph 792 at page 725 that: -

> "This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes."

63. While summarising the issues involved in Question no. 3, **Justice Jeevan Reddy** held in Para 796 and 797 as under: -

> **"796.-797.** We may now summarise our discussion under Question No. 3. (*a*) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (*b*) Neither the constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks

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> convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does — what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (*c*) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (*d*) 'Creamy layer' can be, and must be, excluded. (*e*) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens". The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4)."

64. ***Pandian*, J**. in his concurring opinion observed in Paragraph 39 that the words "backward class of citizens", occurring in Article 16(4) are neither defined nor explained in the Constitution though the same words occurring in Article 15(4) are followed by a qualifying phrase, "socially

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and educationally". In paragraph-126, he observed that it is not necessary for a class to be designated as backward class that it should be situated similarly to the Scheduled Castes and Scheduled Tribes.

65. Justice ***P.B. Sawant*** in his concurring judgment observed as under in paragraph 417: -

> **"417.** Under Article 16(4), the reservation in the State employment is to be provided for a "class of people" which must be "backward" and "in the opinion of the State" is "not adequately represented" in the services of the State. Under Article 46, the State is required to "promote with special care" the "educational and economic interests" of the "weaker sections" of the people and "in particular", of the Scheduled Castes and Scheduled Tribes, and "to protect" them from "social injustice" and "all forms of exploitation". Since in the present case, we are not concerned with the reservations in favour of the SCs/STs, it is not necessary to refer to Article 335 except to point out that, it is in terms provided there that the claims of SCs/STs in the services are to be taken into consideration, consistently with the maintenance of efficiency of administration. It must, therefore, mean that the claims of other backward class of citizens and weaker sections must also be considered consistently with the maintenance of the efficiency. For, whomsoever, therefore, reservation is made, the efficiency of administration is not to be sacrificed, whatever the efficiency may mean. That is the mandate of the Constitution itself."

66. After taking into consideration, the principles laid down in ***Indra Sawhney***, ***Justice Hegde in E.V. Chinnaiah*** rightly observed in paragraph 38 as under: -

> **"38.** On behalf of the respondents, it was pointed out that in *Indra Sawhney case* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] the Court had permitted subclassification

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of Other Backward Communities, as backward and more backward based on their comparative underdevelopment, therefore, the similar classification amongst the class enumerated in the Presidential List of Scheduled Castes is permissible in law. We do not think the principles laid down in *Indra Sawhney case* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] for subclassification of Other Backward Classes can be applied as a precedent law for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments."

67. ***Justice H.K. Sema***, J. concurring with ***Justice Hegde*** in ***E.V. Chinnaiah*** observed in Paragraph 48 as under: -

> **"48.** In *Indra Sawhney* v. *Union of India* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] this Court observed at SCC p. 725 that the discussion of creamy layer is confined to Other Backward Classes only and has no relevance in the case of Scheduled Castes and Scheduled Tribes."

68. ***Justice S.B.*** **Sinha** also in his concurring opinion observed in paragraph 76 and 92 as under: -

> **"76.** Having regard to the decision of this Court in *Indra Sawhney* v. *Union of India* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] backward class citizens can be classified in four different categories — (*i*) more backward, (*ii*) backward, (*iii*) Scheduled Caste, and (*iv*) Scheduled Tribe. A contention has been raised that in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] the Court permitted a classification amongst Other Backward Classes and as such there is no reason as to why the said

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principle shall not be applied to the members of the Scheduled Castes. In *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] itself this Court categorically stated that it was not concerned with the question as regards members of Scheduled Castes and Scheduled Tribes. (SCC para 792 at p. 725) It is relevant to note that Question 5 formulated by Jeevan Reddy, J. was only in relation to the further division in the backward classes into backward and more backward categories. Advisedly, no question was framed as regards division of Scheduled Castes into more backward and backward Scheduled Castes.

92. The impugned Act as also the judgment of the High Court are premised on the observations in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] that there is no constitutional or legal bar for a State in categorising the backward classes as backward and more backward class. This Court, however, while referring to Article 16(4) of the Constitution stated that it recognised only one class viz. backward class of citizens in the following terms: (SCC p. 716, para 781)

"*781*. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes."

69. In ***Ashok Kumar Thakur vs. Union of India and Others***[22]**,** another Five-Bench judgment, after considering earlier judgments on the issue whether the "creamy layer" principle is applicable to the Scheduled Castes and Scheduled Tribes, held that the said Principle cannot be

[22] **(2008) 6 SCC 1**

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applied to Scheduled Castes and Scheduled Tribes as they are separate classes by themselves. To be precise, it held as under: -

> **"184.** So far, this Court has not applied the "creamy layer" principle to the general principle of equality for the purpose of reservation. The "creamy layer" so far has been applied only to identify the backward class, as it required certain parameters to determine the backward classes. "Creamy layer" principle is one of the parameters to identify backward classes. Therefore, principally, the "creamy layer" principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves. Ray, C.J., in an earlier decision, stated that "Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste". And they are so identified by virtue of the notification issued by the President of India under Articles 341 and 342 of the Constitution. The President may, after consultation with the Governor, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which for the purpose of the Constitution shall be deemed to be Scheduled Castes or Scheduled Tribes. Once the notification is issued, they are deemed to be the members of Scheduled Castes or Scheduled Tribes, whichever is applicable. In *E.V. Chinnaiah* [(2005) 1 SCC 394] concurring with the majority judgment, S.B. Sinha, J. said : (SCC p. 403)
>
> "The Scheduled Castes and Scheduled Tribes occupy a special place in our Constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive. The object of Articles 341 and 342 is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and education backwardness wherefrom they suffer. *Any legislation which would bring them out of the purview thereof or tinker with the order issued by the President of India would be unconstitutional*. (Paras 52, 111 and 84)
>
> (emphasis supplied)

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> **186.** Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes. So long as "creamy layer" is not applied as one of the principles of equality, it cannot be applied to the Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. We make it clear that for the purpose of reservation, the principles of "creamy layer" are not applicable for Scheduled Castes and Scheduled Tribes."

70. In view of the above, I am of the opinion that though ***Indra Sawhney*** had sought to define "backward class" in terms of social backwardness, while considering the ambit of "backward class" for the purpose of Article 16(4), it did not deal with the issue qua the Scheduled Castes/ Scheduled Tribes particularly in the light of Article 341/342, rather it categorically kept the Scheduled Castes/ Scheduled Tribes outside the purview of consideration. The Scheduled Castes being the most backward class amongst the backward classes, and having acquired a special status by virtue of Article 341, the question of defining "backward class" qua the "Scheduled Castes" did not arise, and rightly not dealt with in ***Indra Sawhney*** for the purposes of Article 16(4) of the Constitution.

71. In so far as Article 15(4) and 15(5) are concerned, the use of the word "any" before the words "socially and educationally backward classes"

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and the use of the word "the" before "Scheduled Castes/ Scheduled Tribes" clearly indicate that the said provisions pertain to the "Other Backward Classes" which are socially and educationally backward, and that the said provisions also pertain to the "Scheduled Castes" and "Scheduled Tribes", however the "Scheduled Castes" do not require any further identification once they are notified under Article 341. As rightly held in ***Ashok Kumar Thakur***[*], the "creamy layer" principle is one of the parameters to identify backward classes. The "Scheduled Castes" having already been specified in the Presidential List under Article 341, the said creamy layer principle cannot be applied to the "Scheduled Castes" for their identification as backward class. In my opinion, the Five-Judge Bench has thoroughly misread and misinterpreted ***Indra Sawhney,*** to opine that ***Indra Sawhney*** permitted sub-classification of backward classes including the Scheduled Castes/Scheduled Tribes, rather they were categorically kept outside the purview of consideration by the Nine-Judge Bench in ***Indra Sawhney.***

72. The reliance placed on ***Jarnail Singh*** is also thoroughly erroneous. In ***Jarnail Singh,*** the Five-Judge Bench was called upon to examine the

[*] **(2008) 6 SCC 1**

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correctness of the law laid down in ***Nagaraj.*** In para-17 of ***Jarnail Singh***, the Bench observed that: -

> "The judgment in ***Chinnaiah*** has been referred by the three Judge Bench to a larger bench by an Order dated 20th August, 2014. This is because, according to the three Judge Bench, ***Chinnaiah*** is contrary to Article 338 of the Constitution of India and ***Indra Sawhney***. Since the correctness of ***Chinnaiah*** does not arise before us, we need not say more about this reference which will be decided on its own merits."

73. After noting above, the Five-Judge Bench in ***Jarnail Singh*** did not agree with the view taken by the Five-Judge Bench in ***Ashok Kumar***[*] that the creamy layer principle is merely a principle of identification and not a principle of equality. The Bench in ***Jarnail Singh*** agreed with that part of decision in ***M. Nagaraj and Others vs. Union of India and Others***[*] which held that the creamy layer test is applicable to the Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test, however, it did not agree with ***Nagaraj***, when ***Nagaraj*** required the States to collect quantifiable data on backwardness, in so far as Scheduled Castes and Scheduled Tribes are concerned. The Bench in ***Jarnail Singh*** held that "it would clearly be contrary to ***Indra Sawhney***, which had held that the requirement of

[*] **(2008) 6 SCC 1**
[*] **(2006) 8 SCC 212**

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social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who inevitably fall within the expression "Backward Class of Citizens" and therefore the decision the judgment in ***Nagaraj*** would have to be declared to be bad on this ground." In my opinion, such observations in ***Jarnail Singh*** are self-contradictory. In any case, the Bench had no occasion to deal with nor had dealt with the issue whether sub-classification of "Scheduled Castes" notified in the Presidential List under Article 341 was permissible to be made by the States.

74. It is very common that the Constitutional Benches in their judgments deal with many complex facts and legal issues. Not all that has been said in the body of judgment would become a precedent or binding for other Courts. The judgments of the Constitution Benches have to be read in the context of questions which arose for consideration before them. Certain observations made in the judgment may be necessary for deciding the issues involved, but every observation made on law in the course of delivering the judgment may not have a binding effect as a precedent. Any observation or remark made or opinion expressed incidentally or collaterally, and not directly upon the question posed before the Court would be an 'obiter dicta' and not a 'precedent'. A

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decision is an authority for what it decides and not what can logically be deduced therefrom, as held in ***State of Haryana vs. Ranbir alias Rana***[23]***.*** It was also observed in ***ADM Jabalpur vs. Shivakant Shukla***[24] that the statements which are not part of ratio decidendi constitute obiter dicta and are not authoritative.

75. In none of the cases – ***Indra Sawhney*** or ***Jarnail Singh***, the issue of sub-classification of "Scheduled Castes" in the context of Article 341 was raised or argued, nor was decided by the concerned Benches, as was raised and decided in ***E.V. Chinnaiah***. Hence, it would be a fallacy to hold that the law laid down in ***E.V. Chinnaiah*** was not in consonance with ***Indra Sawhney*** or ***Jarnail Singh.***

76. Since I have held that the State has neither executive nor legislative power to sub-classify or sub-divide or re-group the castes, races or tribes specified as the "Scheduled Castes" in the Presidential List notified under Article 341, the other questions pertaining to the criteria or yardstick for sub-classification, or requirement for collecting quantifiable data etc. by the State for sub-classification, are not required to be addressed.

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[23] (2006) 5 SCC 167
[24] (1976) 8 SCC 521

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AFFIRMATIVE ACTION AND CONSTITUTIONAL FRAMEWORK

77. The affirmative actions of the States have to be within the Constitutional framework, and if they are not, the Courts cannot ratify the same by bending or moulding the specific mandates contained in the Constitution. Article 142 even with the width of its amplitude cannot be used to build a new edifice where none existed earlier, by ignoring Constitutional provisions dealing with the subject and thereby achieve something indirectly which cannot be achieved directly.* As held by the Constitution Bench in the landmark judgment in case of ***Supreme Court Bar Association vs. Union of India and Another[25].***

> **"47.** The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are *complementary* to those powers which are *specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of *supplementary* powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, *to prevent injustice* in the process of litigation and *to do complete justice between the parties*. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary *whenever it is just and equitable to do so* and in particular to ensure the observance of the due process of law, *to do complete justice between the*

[25] **(1998) 4 SCC 409**

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> *parties*, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., *to do complete justice between the parties*. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties."

78. The action of the State though well-intentioned and affirmative in nature, if violates the specific provision of the Constitution, cannot be validated by the Supreme Court in exercise of its jurisdiction under Article 142. The removal of inequalities or remedy to remove inequalities cannot be permitted at the cost of violation of the specific provision of the Constitution. When the wordings of the provision of the statutes, in the instant case of Article 341 of the Constitution are clear, as also the

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intention of the draftsmen of the Constitution, the Court cannot add or subtract words from such provision to give it a meaning which the Court feels would achieve the goal of social transformation. Sometimes the affirmative action and the Constitution intersect with each other in complex ways, as the affirmative action policies are framed by the States to promote diversity and to address historical inequalities, while the legal frameworks have to ensure that these policies are implemented within the bounds of the Constitution. The implementation of the affirmative action policies must align with the Constitutional and legal principles, particularly those related to equality and non-discrimination. In short, the affirmative action and the legal frameworks, though both do aim at more equitable society, they must navigate complex legal principles to ensure fairness and Constitutionality.

79. The upshot of the above discussion may be summarised as under: -

(i) When the law was settled by the Constitution Bench in ***E.V. Chinnaiah*** after considering all the previous judgments including ***Indra Sawhney*** and after investing substantial judicial time and resources, the same should not have been doubted and referred to the larger bench by the Three-Judge Bench in ***Davinder Singh***, and that too without assigning any reason much less cogent reason

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for their disagreement disregarding the well settled doctrines of Precedents and *Stare decisis.*

(ii) While giving a broad and generous construction to the Constitutional provisions, the rule of "plain meaning", or "literal" interpretation, which is the "primary rule" has to be kept in mind.

(iii) The Presidential List specifying "Scheduled Castes" under Article 341 assumes finality on the publication of the notification, and the castes, races or tribes, or groups within castes, races or tribes specified in the notification are deemed to be the "Scheduled Castes" in relation to that State or Union Territory as the case may be, for the purposes of the Constitution and as such assume special status of "Scheduled Castes".

(iv) It is only the Parliament by law which can include in or exclude from the list of the "Scheduled Castes" specified in the notification notified under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe. Such notification notified under Clause (1) cannot be varied even by the President by issuing any subsequent notification.

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(v) It is by virtue of the notification of the President under Article 341 that the "Scheduled Castes" come into being. Though the members of Scheduled Castes are drawn from different castes, races or tribes, they attain special status of "Scheduled Castes" by virtue of Presidential Notification. The etymological and evolutionary history and the background of the nomenclature "Scheduled Castes", coupled with the Presidential orders published under Article 341 of the Constitution, make the "Scheduled Castes", a homogenous class, which cannot be tinkered with by the States.

(vi) The States have no legislative competence to enact the law for providing reservation or giving preferential treatment to a particular caste/castes by dividing/sub-dividing/sub-classifying or regrouping the castes, races or tribes enumerated as the "Scheduled Castes" in the notification under Article 341.

(vii) Under the guise of providing reservation or under the pretext of taking affirmative action for the weaker of the weakest sections of the society, the State cannot vary the Presidential List, nor can tinker with Article 341 of the Constitution.

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(viii) The Nine-Judge Bench in ***Indra Sawhney*** and the Five-Judge Bench in ***Jarnail Singh*** had not dealt with the issue of sub-classification of the "Scheduled Castes" in the context of Article 341, much less had dealt with the State's powers to sub-classify or sub-divide or regroup the castes specified as "Scheduled Castes" under Article 341 of the Constitution, and therefore, it could not be held that the law laid down in ***E.V. Chinnaiah*** was not in consonance with ***Indra Sawhney*** or ***Jarnail Singh.***

(ix) The power conferred upon the Supreme Court under Article 142 cannot be used to supplant the substantive law applicable to the case under consideration. Even with the width of its amplitude, Article 142 cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with the subject, and thereby to achieve something indirectly which cannot be achieved directly. The action of the State, though well intentioned and affirmative in nature, if violates the specific provision of the Constitution, cannot be validated by the Supreme Court in exercise of its jurisdiction under Article 142.

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(x) The affirmative action and legal frameworks, though both do aim at more equitable society, they must navigate complex legal principles to ensure fairness and constitutionality.

80. In that view of the matter, I am of the opinion that the law laid down by the Five-Judge Bench in ***E.V. Chinnaiah*** is the correct law and deserves to be confirmed.

.....J.
[BELA M. TRIVEDI]

NEW DELHI;
AUGUST 01ST, 2024.

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.2317 OF 2011

THE STATE OF PUNJAB & ORS. ...APPELLANTS

VERSUS

DAVINDER SINGH & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NO.6936 OF 2015
With

CIVIL APPEAL NO.5597 OF 2010
With

WRIT PETITION (Civil) NO.21 OF 2023
With

CIVIL APPEAL NO.5593 OF 2010
With

SPECIAL LEAVE PETITION (Civil) NO.30766 OF 2010
With

SPECIAL LEAVE PETITION (Civil) NO.8701 OF 2011
With

SPECIAL LEAVE PETITION (Civil) NO.36500-36501 OF 2011
With

T.C. (C) NO.38 OF 2011
With

T.P. (C) NO.464 OF 2015

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With

WRIT PETITION (Civil) NO.1477 OF 2019

With

CIVIL APPEAL NO.5586 OF 2010

With

CIVIL APPEAL NO.5598 OF 2010

With

CIVIL APPEAL NOs.5595-5596 OF 2010

With

CIVIL APPEAL NO.2324 OF 2011

With

T.C (C) NO.37 OF 2011

With

CIVIL APPEAL NO.5589 OF 2010

With

CIVIL APPEAL NO.5600 OF 2010

With

CIVIL APPEAL NO.5587 OF 2010

With

SPECIAL LEAVE PETITION (Civil) NOs.5454-5459 OF 2011

With

CIVIL APPEAL NO.2318 OF 2011

With

CIVIL APPEAL NO.289 OF 2014

With

WRIT PETITION (Civil) NO.562 OF 2022

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J U D G M E N T

PANKAJ MITHAL, J.

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INTRODUCTION

1. The issue under reference to this Constitution Bench as succinctly described by the Chief Justice in his opinion is whether sub-classification of the scheduled castes is constitutionally permissible for the purposes of reservation.

2. The issue arose as the Punjab legislature enacted the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006, *inter alia* providing for reservation of 25% in favour of scheduled castes and that 50% of the aforesaid percentage shall be offered to particular scheduled castes such as *Balmikis* and *Mazhbi Sikhs* in direct recruitment.

3. The validity of providing 50% reservation in favour of the above two categories of scheduled castes, out of the various mentioned in the Presidential list of scheduled castes, was challenged before the High Court by invoking the writ jurisdiction under Article 226 of the Constitution of India. The High Court of Punjab and Haryana relying upon the Constitution Bench decision of this Court in **E.V. Chinnaiah vs. State of Andhra**

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Pradesh and Ors.[1] declared Section 4(5) of the aforesaid Act which sub-classified the scheduled castes and provided for 50% reservation of the 25% admissible to the scheduled castes in favour of the above two categories of scheduled castes only to be invalid.

4. The **Chinnaiah case** *(supra)* arose from the decision of the Andhra Pradesh High Court whereby it rejected the challenge to the provision of Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000, which provided for apportionment of reservation among scheduled castes by classifying them into four groups: 1% for Group A, 7% for Group B, 6% for Group C and 1% again for Group D.

5. The Constitution Bench in **Chinnaiah's case** was of the unanimous opinion that the provision of the above Act of sub-classifying the scheduled castes into four groups and apportioning the reservation criteria group wise was unconstitutional. It was held that the sub-classification permitted by **Indra Sawhney and Ors. vs. Union of India and**

[1] (2005) 1 SCC 394

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Ors.[2] was limited only to backward and other backward classes and is not applicable to scheduled castes.

6. It is in the above background that the Constitution Bench dealing with one of the cases at hand i.e. State of Punjab and Ors. vs. Davinder Singh and Ors. held that the matter requires to be revisited by a larger Bench.

7. In somewhat similar fashion, a matter came to be referred from the State of Haryana and another from the State of Tamil Nadu wherein by notification in the State of Haryana scheduled castes were classified into two categories i.e. A and B for the purposes of applying reservation and in the State of Tamil Nadu by an Act of 2009, reservation of seats was provided to Arunthathiyar's in educational institution and for appointment in services.

8. All the three categories of matters i.e. from the State of Punjab, State of Haryana and the State of Tamil Nadu are before the Bench in the form of Civil Appeals, Writ Petitions, TP (C) & TC (C) and Special Leave Petition (Civil) and have been taken up as

[2] (1992) Supp (3) SCC 217

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clubbed matters as the issue is common as described in the beginning.

9. The issue of sub-classification of scheduled castes has been appropriately answered by the Chief Justice and my esteemed brother Justice Gavai by their separate opinions with which I respectfully agree but at the same time since the matter in issue is basically concerning "reservation", I consider it to be of utmost importance and, therefore, deem it appropriate to pen down my own views separately.

10. Man/human as rightly understood is a social animal and has to live in a society. An ideal form of society is one which progresses on merit or where merit alone prevails. This is evident from Articles 14 and 15 of the Constitution which provides for equality before law and that State shall not discriminate on grounds of religion, race, caste, sex or place of birth. Articles 14 and 15 (as it originally stood) are quoted below:

> **"*Article14- Equality before law***
> *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*

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

11. However, no society can exist in its ideal form as all citizens are not alike. The basic needs of everyone are different and have to be taken into account to carry the society forward. Therefore, there is pressing need to consider the social, economic and political need of all persons or classes of persons. In the context of India, the trinity of social, economic and political justice has to be balanced and to promote social justice, provisions have to be made for the upliftment of the so-called marginalized citizens or the depressed classes of persons who later came to be known as backward class of persons and scheduled castes as well as scheduled tribes etc. It is to achieve the above social objective of bringing every citizen or a class of citizen on equal level and

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at par in law that provision for reservation came to be made in the Constitution.

12. The provision for reservation for any class of persons at first sight may appear to be anti-merit but if weighed on the scales of social justice, it is imperative.

13. The poor and the downtrodden sections of the Indian society were earlier described by the ruling class as the "depressed classes" which included a wide range of persons such as untouchables, persons of various backward communities and those living in tribes in hills and forests or in remote areas of the country. Slowly, these depressed classes of persons came to be classified into various groups according to their vocation such as scavengers, leather workers, ironsmiths, carpenters, watchman and other menial workers and were referred to as scheduled castes; and those living in tribes in hills, forests or remote areas came to be recognized as scheduled tribes. The remaining depressed classes of persons or marginalized classes were later classified as other backward classes.

14. The Government of India Act, 1935, for the first time, recognized the above referred depressed classes of persons as scheduled

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castes and the primitive tribes as backward tribes and *inter alia* provided reservation of seats for the scheduled castes and backward tribes in the federal legislature. The objective was of bringing about political equality only.

15. The Constitution of India as enacted and adopted on 26th November, 1949 and enforced w.e.f. 26th January, 1950, originally provided for two categories of reservation, one for the political purposes and the other for social purposes *vide* Articles 330 & 332 and Articles 15(3) & 16(4).

16. Articles 330 and 332 of the Constitution aimed to achieve political justice by providing reservation of seats for scheduled castes and scheduled tribes in Lok Sabha and State Legislatures whereas Article 15(3) and 16(4) were aimed at social justice and provided for special provision for women & children and for reservation in the services in favour of backward classes of persons respectively.

AMENDMENTS TO CONSTITUTION WITH REFERENCE TO CASE LAWS

17. On the legislative front, in the wake of various verdicts of the apex court concerning reservation, a constitutional amendment

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regime commenced bringing about amendments after amendments in the Constitution to overcome the difficulties in the implementation of the reservation policy in the light of the decisions of the courts in context with reservation.

18. The Constitution (First Amendment) Act, 1951 w.e.f. 18th June, 1951, was brought about in order to solve the problems posed by the decision of 5 Judges Constitution Bench of this Court in **State of Madras vs. Champakam Dorairajan**[3] which struck down caste-based reservation for admission in medical colleges being violative of Article 29(2) of the Constitution and by an other 5 Judges Constitution Bench decision in **B. Venkataramana vs. State of Madras and Ors.**[4] which held that the appointment of judicial officers as unconstitutional as Article 16(4) permitted reservation for backward classes of citizens only. Thus, Sub-Article (4) to Article 15 of the Constitution of India was introduced so as to empower the State for making special provision for the advancement of any socially

[3] AIR (1951) SC 226
[4] AIR (1951) SC 229

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and educationally backward classes of citizens or for scheduled castes and scheduled tribes.

19. In this manner, Articles 16(4), 15(3) and 15(4) as introduced, envisaged to bring about social justice amongst the citizens of the country.

20. After the Constitution Bench decision in **Indra Sawhney *(supra)***, there was a spate of amendments in the Constitution to overcome the difficulties caused by various observations of the court.

21. The Constitution (Seventy-seventh Amendment) Act, 1995 added Article 16(4)(A) to the Constitution so as to provide reservation in promotion in favour of scheduled castes and scheduled tribes which are not adequately represented in the services of the State.

22. It was followed by the Constitution (Eighty-first Amendment) Act, 2000 which inserted Article 16(4)(B) so as to make provisions for carry forward of unfilled vacancies of the reserved category. The new Article 16(4)(B) provided that the State is not denuded of power to consider any unfilled vacancies of a year reserved for being filled up in that year in accordance with the

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provisions for reservation made under Clause 4 or Clause 4(A) of Article 16 to be carried forward to be filled up in any succeeding year or years and that such carried forward vacancies shall not be counted for determining the sealing of 50% reservation in total number of vacancies of that year.

23. In immediate succession came the Constitution (Eighty-second Amendment) Act, 2000 which was necessitated to overcome one of the decisions of this Court in case of **S. Vinod Kumar and Anr. vs. Union of India and Ors.**[5] which held that even if reservation in promotion is permissible, no lower qualifying marks or lesser level of evaluation for promotion is legally permissible for the reserved categories. The said amendment permitted provision for relaxation in qualifying marks in any examination or for lowering the standards of evaluation for reservation in the matters of promotion to any class or classes of services for posts in connection with the affairs of the Union or the State.

[5] (1996) 6 SCC 580

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24. In **Union of India vs. Virpal Singh Chauhan**[6], this Court held that the accelerated promotion to the persons of the reserved categories would not give them consequential seniority and that their seniority in promoted category shall be governed by their seniority in the feeder cadre.

25. The above view was reaffirmed in **Ajit Singh Januja vs. State of Punjab**[7] and it was held that reserved category persons are entitled only for accelerated promotion and not consequential seniority.

26. The above two decisions were followed by **Ajit Singh (II) vs. State of Punjab**[8] wherein upholding the principles of accelerated promotion and consequential seniority as laid down in the above two cases it was clarified that the general candidates on promotion will get seniority over reserved candidates who were already promoted by way of accelerated promotion, if both were in the same cadre.

27. The Constitution (Eighty-Fifth Amendment) Act, 2002, was enacted to undo the principles laid down by the above decisions

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[6] (1995) 6 SCC 684
[7] (1996) 2 SCC 715
[8] (1999) 7 SCC 209

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especially in **Ajit Singh (II) case** (supra) and the expression "with consequential seniority" was inserted in Article 16 (4)(A) of the Constitution. This amendment was given retrospective effect w.e.f. 07.06.1995, the date on which Article 14(4)(A) was inserted into Article 16 of the Constitution by the Constitution (Seventy-Seventh Amendment) Act, 1995.

28. In the meantime, following the directions of the Supreme Court in **Indra Sawhney's case** *(supra)*, an office memorandum was issued by the Government of India on 08.09.1993 designating certain categories of people as "creamy layer". The State of Bihar and Uttar Pradesh *vide* The Bihar Reservation of Vacancies in Post and Services (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995, and Uttar Pradesh Public Services Reservation for Scheduled Castes and Scheduled Tribes and Other Backward Classes Act, 1994, provided that IAS and IPS Officers would be within "creamy layer" if they have a *(i)* salary of Rs.10,000/- per month; *(ii)* either of the spouse is a graduate; and *(iii)* one of them owns a house in an urban area. Similarly, professionals with income of Rs.10 lakhs per annum were also categorized under the

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"creamy layer" with additional criteria that either of the spouse should be a graduate and the family owns an immovable property of at least Rs.20 lakhs.

29. In **Ashoka Kumar Thakur vs. State of Bihar**[9], this Court struck down the additional conditions of education and property prescribed in the Bihar and by U.P. enactment to be unconstitutional for identifying the "creamy layer" as violative of Articles 16(4) and 14 of the Constitution.

30. In **Indra Sawhney (II) vs. Union of India**[10], the Kerala State Backward Classes Act, 1995, which provided that there are no socially advanced sections in any backward classes of the State and that the backward classes in the State are not adequately represented in the services under the State and as such backward classes would continue to avail the benefit of reservation, thus, declaring that there was no 'creamy layer' amongst the OBC in the State, was struck down holding that 'creamy layer' in the backward classes is to be treated at par with the forward classes and are not entitled to benefit of

[9] (1995) 5 SCC 403
[10] (2000) 1 SCC 168

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reservation. It was also observed that "creamy layer" is to be excluded otherwise it will be discriminatory and violative of Articles 14 and 16 as "forwards" and "creamy layer of backward classes" cannot be treated unequally.

31. In **M. Nagaraj vs. Union of India**[11], the validity of the constitutional amendments namely Constitution (Seventy-Seventh Amendment) Act, 1995, Constitution (Eighty-first Amendment) Act, 2000, Constitution (Eighty-second Amendment) Act, 2000 and Constitution (Eighty-fifth Amendment) Act, 2002, were upheld.

32. In **TMA Pai Foundation vs. State of Karnataka**[12], the 11 Judges Constitution Bench of this Court laid down various principles regarding right to establish educational institutions, the procedure for grant of admission, the right of minorities and the extent of State regulatory mechanism. The said judgment came to be interpreted and clarified by **Islamic Academia Education vs. State of Karnataka**[13]. In **P.A. Inamdar vs.**

[11] (2006) 8 SCC 212
[12] (2002) 8 SCC 481
[13] (2003) 6 SCC 697

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State of Maharashtra[14], the 7 Judges Constitution Bench held that the 5 Judges Constitution Bench in Islamic Academia Education case did not interpret the TMA Pai Foundation case correctly. In such a situation, Constitution (Ninety-Third Amendment) Act, 2006, was brought about to overcome the confusion alleged to have been created in the interpretation of TMA Pai Foundation case and Sub-Article (5) was inserted in Article 15 of the Constitution which reads as under:

> ***"Article 15 (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."*

33. The validity of the Constitution (Ninety-Third Amendment) Act, 2006, was upheld by the 5 Judges Constitution Bench in **Ashok Kumar Thakur case** (supra) which provided reservation for socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes in educational

[14] (2005) 6 SCC 537

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institutions insofar as it relates to State maintained institutions and Government aided educational institutions.

34. A similar view was expressed in **Pramati Educational & Cultural Trust vs. Union of India**[15], wherein also the constitutional validity of the Constitution (Ninety-Third Amendment) Act, 2006, was upheld and reservation for socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes in unaided private institutions as well was upheld.

35. In **Ram Singh vs. Union of India**[16], reservation for *Jats* in various States was struck down as no such reservation in their favour was recommended by the National Commission for Backward Classes and there was no quantifiable data for justifying reservation in their favour. Accordingly, Constitution (One Hundred and Second Amendment) Act, 2018, was brought about and Articles 338B & 342A were inserted constituting a separate commission for socially and educationally backward

[15] (2014) 8 SCC 1
[16] (2015) 4 SCC 697

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classes and empowering the President to specify socially and educationally backward classes.

36. In **Jaishri Laxmanrao Patil vs. State of Maharashtra**[17], 5 Judges Constitution Bench struck down the reservation for Marathas in the State of Maharashtra on the ground that the State does not have power to declare any class of people as socially and educationally backward classes.

37. In order to overcome the difficulty created by the above decision, Constitution (One Hundred and Fifth Amendment) Act, 2021 was brought about amending Article 342A so as to provide that the list of socially and educationally backward classes of citizens prepared by the President is only for the Central Government but the State can also prepare its own list.

38. In between, Constitution (One Hundred and Third Amendment) Act, 2019, was enacted whereby Sub-Article (6) was inserted in Articles 15 and 16 in the following terms:

> ***"Article 15 (6)****- Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—*
>
> *(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and*

[17] (2021) 8 SCC 1

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

Article 16 (6)*- Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.**"*

39. The validity of the aforesaid amendment was upheld in **Janhit Abhiyan vs. Union of India (EWS Reservation)**[18]**.**

40. The various amendments carried out in the Constitution since its adoption in relation to making provision for reservation can be summarised as under:-

1.	Constitution (First Amendment) Act, 1951	Inserting Sub-Article (4) to Article 15 providing reservation for socially and educationally backward classes.
2.	Constitution (Seventy-seventh Amendment) Act, 1995	Inserting Sub-Article (4)(A) to Article 16 providing reservation in promotion.
3.	Constitution (Eighty-first Amendment) Act, 2000	Inserting Sub-Article (4)(B) to Article 16 providing for carry forward of vacancies.

[18] (2023) 5 SCC 1

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4.	Constitution (Eighty-second Amendment) Act, 2000	Inserting proviso to Article 335 providing relaxation of qualifying marks for the reserved category of persons.
5.	Constitution (Eighty-Fifth Amendment) Act, 2002	Inserting the phrase "with consequential seniority" in Article 16(4)(A) providing not only accelerated promotion but consequential seniority as well to the reserved category.
6.	Constitution (Ninety-Third Amendment) Act, 2006	Inserting Sub-Article (5) to Article 15 providing for mechanism of admission in Education Institution to the reserved category.
7.	Constitution (One Hundred and Second Amendment) Act, 2018, and Constitution (One Hundred and Fifth Amendment) Act, 2021	Providing for identification of backward classes by the Centre and the States by inserting Article 342A.
8.	Constitution (One Hundred and Third Amendment) Act, 2019	Providing for reservation of equally weaker section EWS by inserting Sub-Article (6) of Article 16.

41. The above summary of the constitutional amendments carried out for the purposes of extending the benefit of reservation to the reserved categories would reveal that the Constitution has been amended as many as 9 times in order to implement the reservation policy in a fair and impartial manner so that the so-called depressed classes may be elevated at par with the forward classes. Most of the times the amendments to the Constitution were carried out either to undo the decisions of this Court or to

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carry out the directions or the observations made by this Court in implementation of the reservation policy in a more fair and reasonable manner so that the benefit of reservation trickles down to the most backward of the other backward classes/scheduled castes/scheduled tribes.

CENTRAL GOVERNMENT AND STATE GOVERNMENT COMMISSIONS ON SC/ST AND OBCs

42. Apart from the above legislative exercise, the Union Government after independence, set up a Backward Class Commission in the year 1953 under the chairpersonship of Kaka Saheb Kalelkar. The Commission in its Report recommended *inter alia* that all women as a 'class' be treated as 'backward'; all qualified students of backward classes be granted benefit of 70% seats reservation in all technical and professional Institutions; in all Government services and local bodies backward classes should be provided minimum reservation that is 25% in Class-I, 33-½% in Class-II, 40% in Class-III and 40% in Class-IV. The said Commission in its Report observed :

> *"if entire communities, with some exceptions, are treated to be backward, actual needy would lose in*

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the mob and they seldom attract attention towards them and get sufficient help."

43. The Commission also observed that in certain States such as Rajasthan vagabond/restless movers/wanderers who groom and breed animals should be given special protection. The report was placed in the Parliament with an action plan but it went undebated. The Central Government at that time had spent a sum of Rs. 4.5 lakh which is equivalent to about Rs. 5 crore as of today.

44. In 1965, the Central Government appointed a Committee to advise on the revision of the existing list of scheduled castes and scheduled tribes. This Committee popularly known as B.N. Lokur Committee, reported and concluded that the question of de-scheduling (or excluding) of relatively advanced communities should receive serious and urgent consideration. It recommended for the intensive periodical survey of the socio-economic progress made by each of the scheduled castes and scheduled tribes, probably to exclude certain communities that have progressed and to include those that have been left behind. It further recommended that in framing of development

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schemes for scheduled castes and scheduled tribes, priority ought to be given to the welfare of the most backward amongst them. It also prepared a list of communities (castes/tribes) that were relatively forward and recommended to de-schedule or exclude 14 scheduled tribes and 28 scheduled castes from the list.

45. The Constitution though aimed at a casteless society, it defined certain depressed/disadvantageous classes as Scheduled Castes and certain tribes living in forest, hilly areas and other remote areas as Scheduled Tribes. However, a significant segment of the population that was otherwise socially, economically and politically backward were not given any privileges or benefits of upliftment. They were marginalised and were left behind in education as well as employment. In order to address this anomaly, the most talked about second backward class Commission was constituted on 1st January, 1979 by the Government of India which is popularly known as B. P. Mandal Commission. This Commission was entrusted with the job to investigate the conditions of socially and educationally backward classes, to recommend the criteria for

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defining such classes of citizens, steps to be taken for their advancement and upliftment and the manner in which they can be extending the benefit of the reservation.

46. The Commission submitted its report on 31st December, 1980. The Commission on the basis of 1961 census compiled a national list of 3743 classes of persons under the heading 'Other Backward Classes' out of which 2108 were classified as 'depressed backward classes'. The Commission recorded that 52 per cent (including 44 per cent hindus and 8 per cent non-hindus) of the citizens are Other Backward Classes whereas 22.5 per cent are Scheduled Castes and Scheduled Tribes in India.

47. The Government while implementing the recommendations of the Mandal Commission took a historic decision on 6th August, 1990 to introduce 27 per cent reservation for Other Backward Classes which were socially and educationally backward classes. This was in addition to 22.5 per cent reservation for Scheduled Castes and Scheduled Tribes. The 27 per cent reservation in favour of other backward classes was confined as

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this Court in ***M.R Balaji vs. State of Mysore***[19] has put a cap of 50 per cent mark for the purposes of reservation.

48. The Mandal Commission thus recommended for 27 per cent reservation for OBCs in public sector and Government jobs and in promotion at all levels. It is also recommended that in the event the above quota remains unfilled in a particular year, the remaining vacancies be carried forward for a period of 3 years whereupon the unfilled vacancies if any would stand de-reserved. It further recommended for age relaxation to the OBCs at par with the Scheduled Castes & Scheduled Tribes. The validity of the aforesaid 27 per cent reservation in favour of OBCs was upheld by this Court in the year 1992 in **Indra Sawhney *(supra)***.

49. In addition to the above exercise of the Government on the executive/administrative side, on the direction of this Court in the case of **E.V. Chinnaiah's (supra)**, the Government of India appointed a single Member Justice Usha Mehra Commission of a National level to examine the issue of sub-categorization of

[19] AIR 1963 SC 649

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scheduled castes in Andhra Pradesh. This Commission appointed in the year 2006 was followed by another Commission set up by the Central Government in 2007 under the chairpersonship of Justice G. Rohini. It was also entrusted with the task of studying the entries in the Centre list of the OBCs and to examine the extent of equitable distribution of benefits of reservation amongst the OBCs. One important aspect which was also entrusted to this Commission was to work out a mechanism for sub-categorization of OBCs.

50. This apart, different States on different occasions had set up various State Level Committees and Commissions to study and report about the improvements to be made in reservation policy and the smooth implementation of the provisions of reservations *vis-a-vis* the concerned State. In this context, it may be beneficial to refer to some of the such Committees and Commissions set up by different States:

1.	1961	Dr R. Naganna Gowda Committee, **Karnataka**	It suggested 50% reservation in technical and professional institutions and 45% in Government services.
2.	1963	V.K. Vishwanathan Commission, **Kerala**	It recommended reserving 40% seats in technical and professional colleges for OBC

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			students and 10% for SC/ST students.
3.	1964	B.D. Deshmukh Committee, **Maharashtra**	It recommended grouping of backward classes into four categories and reservation in Government services and educational institutions related in the ratio of their percentage in the State.
4.	1969	A.N. Sattanathan Commission, **Tamil Nadu**	It submitted its Report in 1970 and recommended 33% reservation in State Government jobs and in educational institutions.
5.	1970	Manohar Pershad Commission, **Andhra Pradesh**	It identified four different categories of OBCs and recommended reservations in their favour, in both professional colleges and in Government services.
6.	1970	J.N. Wazir Committee, **Jammu and Kashmir**	On the basis of the recommendations of this Committee "The Jammu and Kashmir Scheduled Castes and Backward Classes (Reservation) Rules, 1970" were framed by the State Government.
7.	1973	Dhebar Commission **Ministry of Tribal Affairs**	This Commission was set up to study the vulnerable tribal groups. It suggested creation of separate category for the less developed among the tribal groups. In 1975 Government of India carried out an exercise to identify the most vulnerable tribal groups as a separate category and declared 52 of them to be in such a group wherein 23 new groups were added in 1993 making it a total of 75 out of 705 scheduled tribes.

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8.	1975	L.G. Havanur Commission, **Karnataka**	It recommended 16% reservation for backward communities, 10% for backward castes and 6% for backward tribes in Government vacancies and educational institutions.
9.	1976	Mungeri Lal Commission, **Bihar**	It identified 128 communities as backward and 94 of them as most backward. It recommended 20% reservation in Government services and 24% in professional institutions.
10.	1976	A.R. Bakshi Commission, **Gujarat**	It listed 82 castes and communities as socially and educationally backward and recommended 10% reservation in Government services and in professional institutions.
11.	1977	Chhedi Lal Sathi Commission, **Uttar Pradesh**	It is one of the most talked about Commission on most backward classes. It recommended classification of backward classes into 3 categories and suggested reservation in Government services and educational institutions under a separate quota.
12	1990	Justice Gurnam Singh Commission, **Haryana**	The Commission found that reservation benefits have been primarily availed by one particular scheduled caste and the overall benefits have not percolated down to rest of the 36 scheduled castes. Consequently, the scheduled castes' list for the purposes of reservation in Haryana was divided into Block 'A' and Block 'B' putting the 36 scheduled castes in Block 'A' and the one

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			that has availed most of the benefits in Block 'B'.
13.	1997	Justice P. Ramchandra Raju Commission, **Andhra Pradesh**	This Commission was set up on the demand of the extremely backward castes within the scheduled castes of the State of Andhra Pradesh. The Report opined that largely the benefits of reservation had gone to a particular caste among the scheduled castes and therefore recommended for categorizing of the scheduled castes into Group A, B, C and D. It is on the basis of the recommendation of this Commission that scheduled castes in Andhra Pradesh were categorized in Group A, B, C and D which enactment led to **E.V. Chinnaiah** where this Court declared such classification as unconstitutional opining that scheduled castes/scheduled tribes are one homogenous class and cannot be sub-categorised for the purposes of reservation.
14.	2001	Hukam Singh Committee, **Uttar Pradesh**	The Committee upon study found that the benefits of reservation was not percolating down to the most depressed classes of persons rather the Yadav's alone had a maximum share of jobs. Thus, it recommended sub-categorisation of list of scheduled castes/OBC.
15.	2003	Lahuji Salve Commission, **Maharashtra**	This Commission was appointed to study the socio-economic condition of Mangs caste which was within the list of scheduled castes. The Commission recommended the

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			sub-classification of the scheduled castes as Mangs being the lowest in the hierarchy of caste system were not being adequately benefited.
16.	2005	Justice A.J. Sadashiva Commission, **Karnataka**	This Commission was appointed to identify the castes, races and tribes of scheduled castes in the State to whom the benefit of reservation was not being adequately extended. The Commission recommended the division of 101 castes specified in the Presidential List into four categories with 15% of the total reservation of scheduled castes to each of the categories.
17.	2007	Mahadalit Commission, **Bihar**	The Commission was to identify the castes within the scheduled castes that lagged behind. The Commission recommended inclusion of 18 castes as extremely weaker castes from amongst the list of scheduled castes.
18.	2007	Justice Jasraj Chopra Committee, **Rajasthan**	The Committee reported that Gurjar's live in remote, isolated and uninhabited areas and are extremely backward and therefore recommended that they may be provided with better facilities than those available to the other backward classes.
19.	2008	Justice Thiru M.S. Janarthanam Committee, **Tamil Nadu**	The Committee recommended that the Arunthathiyar's deserve differential treatment in reservation.
20.	2017	K. Ratna Prabha Committee,	Based upon the recommendation of this Committee, The Karnataka

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		Karnataka	Extension of Consequential Seniority to Govt. Servants Promoted on the Basis of Reservation (to the posts in the Civil Services of the State) Act, 2018 was enacted and the matter came up to the Supreme Court wherein the validity of the Act was upheld and it was opined that the reserved category candidates are not only entitled to accelerated promotion but to consequential seniority.
21.	2018	Justice Raghvendra Kumar Committee, **Uttar Pradesh**	According to the Report there are 79 castes under the OBC category in the State out of which 9 are backward, 37 are more backward and 33 are most backward classes. Therefore, it recommended splitting of 27% quota of OBC in the State: 7% for backward classes, 11% for more backward classes and 9% for most backward classes.

THE RAMIFICATIONS OF RESERVATION

51. The above history of "Reservation" in the country would amply indicate that tremendous amount of effort has been put in by all the three organs of the State i.e. the Legislature, the Executive and the Judiciary to bring about social justice by promoting the reservation policy and its implementation in such a manner that not only the backwards but the most backwards

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of the backwards are brought into the forefront with the mainstream. So the question arises that how far has the reservation policy succeeded in someone's wild guess? Notwithstanding, the success or failure of the reservation policy, one thing is for sure that it has burdened the Judiciary at all levels specially the High Courts and the Supreme Courts with enormous litigation which could have been avoided if a robust reservation policy with a vision would have been envisaged under the constitutional provisions in the very beginning instead of making piecemeal changes.

52. It is a matter of experience that every kind of process of selection and appointment in the government services and admission at higher level has come to be challenged before the courts *inter-alia* on the grounds of misapplication of the rule of reservation. Most of the times, the appointments and admissions get stuck up for years on account of litigation. This has caused enormous delay in the recruitment process and the vacancies remaining unfilled for long, giving rise to stop-gap/ad-hoc appointments resulting in further litigation. It is also noticeable that enough time and energy has been spent by all the three wings of the

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State in streamlining the process of reservation and to evolve a flawless mechanism for implementing the reservation policy but still the non-visionary approach to handle the upliftment of the backward castes has created more difficulties rather than ironing them out.

53. It is a matter of record that in pro-reservation agitations and anti-reservation agitations, the peace and tranquillity of the entire country, at times, stood disturbed. Specially, during the anti-Mandal Commission agitation somewhere in 1990, most of the States witnessed large scale disturbances. The turmoil so created by such agitations and demonstrations particularly in the months of August-November of 1990 is the ample indication of the wide spread violence.

54. It may not be out of context to point out that apart from the anti-Mandal Commission violence, the country witnessed similar violence in the year 2006 when the students of IITs and AIIMS came out on the streets opposing reservation. Also, there was violence in Maharashtra against the Maratha reservation, to talk about the few.

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55. After independence, a special provision was made in the Directive Principles of State Policy to provide compulsory primary education to all children within a period of 10 years but the target could not be achieved even after 77 years of independence. The Central Government, few years back, in order to provide free education to children enacted Right to Education Act, 2009. The aforesaid Act proved to be a very weak legislation and have not been able to provide primary education to one and all irrespective of the caste, creed, race, religion and sex as most of the children of the so-called depressed class either fail to attend schools or drop out after one and two years of education. There is no compulsion to give education to such children. The policy of reservation is applicable at the higher level only and for the purposes of employment. Thus, depriving such children or the drop outs, at the primary level of the benefit of reservation or upliftment in any other manner, as a result of which these children ultimately remain the most backward of the backwards.

56. The statistics proves that the deprived and the marginalized persons have not been able to achieve the benefit of reservation

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which is permissible at higher level as about 50% of the students from the most backward classes drop out of school before Class-V and 75% drop out before Class-VIII. The figure goes to even 95 per cent when it comes to the level of high school. Thus, only the children of some of the castes, who are already affluent or urbanized, are able to obtain higher education and the benefits of reservation.

57. By referring to the above agitations, disturbances, violence, litigation and shortcomings, I do not to intend to suggest that the task of upliftment of the downtrodden be brought to an end or that the government should give up the reservation policy. But the issue is how to carry out the process to bring about equality and development of all, the manner of identification of the so-called depressed classes or the downtrodden and the form/nature of steps to be taken for their upliftment. The Government has used caste as the basis for the upliftment rather than identifying the class of people on the basis of vocation or their social and economic conditions who actually requires help to be promoted to the level of the forward class. It is for this reason, today we are grappling with a situation of sub-

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classification of the castes notified for the purpose of reservation. The experience shows that the better of the class amongst the backwards eats up most of the vacancies/seats reserved leaving the most backward with nothing in their hands.

58. This may be illustrated and better explained by taking three students namely 'A', 'B' and 'C'. Both 'A' & 'B' are equals in every manner as they come from well-to-do family having same kind of status, family background, education and financial capacity. 'A' being a general category candidate, qualifies for admission in higher education on merits whereas 'B' who belongs to a backward class competes and qualifies for admission in the reserved category. The student 'C' who is also of the backward class but has no advantage as that which is available to both 'A' and 'B', despite competing in the backward category remains unsuccessful. He continues to remain unsuccessful in the following years as well, as again and again backward category candidates having the status equivalent to that of a forward class or that which is available to 'A' and 'B' keeps on qualifying leaving the most backward of the backwards far behind. In this

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manner, the most backward of the backward category loses the battle even with the backward classes who are practically enjoying the status of the forward class people.

CASTELESS SOCIETY-CASTE SYSTEM VIS-À-VIS THE *VARNA* SYSTEM

59. The Constitution virtually visualises a casteless society and a unified society but in the name of 'equality' to accord facility and privileges to the depressed class/downtrodden, it is said that we have continued with the so-called *Manuwadi System* of caste. I am not an expert of religious scriptures nor do I claim that I have any knowledge of any one of them though I may have gone through *Bhagwad Gita* and *Ramcharit Manas* some times. According to my limited understanding of the scriptures specially the *Gita,* I am of the firm view that in primitive India there was no existence of any caste system rather there was categorisation of the people according to their profession, talent, qualities and nature. This can very well be reflected by *verse 13 of chapter 4* and *verse 41 of chapter 18* of the *Bhagwat Gita* which I quote below.

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60. ***चातुर्वर्ण्यं मया सृष्टं गुणकर्मविभागशः*** **/ (Chapter 4, Verse 13, Bhagwat Gita)**

ब्राह्मणक्षत्रियविशां शूद्राणां च परन्तप।
कर्माणि प्रविभक्तानि स्वभावप्रभवैर्गुणैः **// (Chapter 18, Verse 41, Bhagwat Gita)**

Lord Krishna says that I have categorised humans in 4 ***varnas*** according to their nature and characteristics.

Gita thus only promotes *varna* system which is different from present day caste system. It lays emphasis on abilities, qualities and consciousness of a person to have a balanced structure of society and to bring out the best in every person. The four *varnas* (occupational categories) are: -

1.	Bharama	Teachers, Priests and Intellectuals (Priestly class)
2.	Kshatriyas	Warriors, Police and Administrators (Administrative class)
3.	Vaishayas	Farmers, Merchants, Traders and Businessman (Mercantile and Farmer class)
4.	Shudras	Artisans, Workers and Labour class (Worker class)

61. The *Bhagvad Gita* in subsequent verses describes the intrinsic qualities of each of the *varnas.* The *varna* system depicting occupational categories can also be explained with the physical body of a person wherein the head of a person which does

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intellectual work is called '*Bharaman*'. The hands which protect him and his family does the job of a '*Kshatriya*'. The abdomen which requires food to convert it into energy refers to '*Vaishayas*', who are predominantly the farmers and the merchants invested to earn livelihood. The lower limbs (legs) do all kind of labour work and are referred to as '*Shudras*'.

62. The *Skanda Purana* also contains a *shloka:*

जन्मना जायते शूद्रः संस्कारात् द्विज उच्यते[20] ।

which means that everyone is born as Shudra i.e. to work and slowly each one of them elevates himself to a higher status of *Vaishya, Kshatriya* and *Brahmin* on the strength of his talent, quality, character and nature.

63. It means the duties of *Brahmins, Kshatriyas, Vaishyas* and *Shudras* were distributed according to their qualities (*guns*) and nature (and not by birth). All people have different nature and characteristics. Their personality is shaped according to their qualities (*gunas*). Thus, different professionals duties are suited to persons of different nature and character. Since the center of

[20] Skanda Purana Vol.18 Book VI, Nagar Kanda, Chapter 239, Verse 31-34.

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society is God (*Parmatma*), everyone (*atma*) works according to their intrinsic qualities to sustain themselves and the society.

64. According to the *varna* system no one is to be considered as lower or higher, rather it is preached that everyone is equal fragment and a part and parcel of Him, the Almighty. *Gita* nowhere preaches that the aforesaid *varnas* are on the basis of birth and are not interchangeable. However, with the passage of time, the *varna* system deteriorated and the people started labelling these *varnas* on the basis of birth, ignoring the nature and characteristics of a person which is exactly the opposite to what is preached in *Gita.* The *varnas* were given the nomenclature of castes in a very loose manner.

65. Later, children of Brahmins started calling themselves as Brahmins, irrespective of whether they possessed the corresponding qualities or not. Similarly, the children of other *varnas* also adopted the *varna* of their father ignoring their own nature, talent and qualities. When this system grew rigid & birth based, it became dysfunctional.

66. In short, what is intended to be conveyed is that according to *Gita* there is no caste system and the *varna* system

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(categorization) referred to therein is quite distinct, based upon persons nature & qualities. Thus, there was no caste system in ancient India i.e., Bharat. The misconstruction of the *varna* system as a caste system was a social defect that crept in with time and was not considered to be good as it divided the society and brought about discrimination & inequality.

67. The social problems created by the so-called caste system or the problem of untouchability etc. were widely considered to be bad practices prevailing in the Indian society. Thus, social reformers always propagated giving up of such malpractices.

68. Mahatma Gandhi, the Father of the Nation, during the entire freedom struggle strenuously worked for the upliftment of the so-called depressed classes including 'untouchables'. He described the untouchables as 'persons of God' - 'Harijans'. After independence with the adoption of the constitution, we decided to move towards the unified casteless society and vide Article 17 envisaged to abolish the practice of untouchability in any form and contemplated to make untouchability 'a punishable offence'. Notwithstanding, the objective of casteless society and the principle of equality; the original Constitution

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made provision by Article 15 (3) enabling the State to make special provision for women and children despite prohibition of discrimination on grounds religion, race, caste, sex or place of birth. Similarly, Article 16 (4) enabled the State for making special provision for reservation of appointments or post in favour of any backward class of citizens. This was done with the object to bring about social equity and justice.

69. The Constitution at the same time vide Article 341 conferred power upon the President to notify certain castes, races or tribes or part of such caste, races and tribes to be deemed to be Scheduled Castes. In fact, the constitution otherwise does not recognise any caste except for the above deeming provision. The country as such had moved into a casteless society except for the above legal fiction only for the purposes of the constitution and not otherwise.

70. In other words, to put it summarily there was no caste system in primitive India. Slowly the *varna* system prevalent was misconstrued to be a caste system which practice was found to be socially non-acceptable and as such after independence with the adoption of the Constitution we again tried to move into a

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casteless society but in the name of social welfare to uplift the depressed and the backward classes, we again fell into the trap of caste system. We gave privilege of reservation to the depressed or the backward class or the Scheduled Caste to bring about equality.

71. It is common understanding that what is conceded once to appease any class cannot be taken back. So are the benefits extended to the reserved category of persons under the constitution. Each concession once made, just goes on swelling like a raisin/balloon. This actually happened with the policy of reservation also.

RESERVATION IS ONLY A MEDIUM OF FACILITY BUT ITS EXECUTION REVIVES CASTEISM

72. 'Reservation' is one of the modes of helping or uplifting the status of the OBCs/SCs/STs. Anyone who suggests another or a better way of helping the so-called depressed classes or the downtrodden or the marginalised persons of the society is immediately pounced upon as 'Anti Dalit'. At the cost of being

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called 'Anti Dalit', I quote Nani A Palkiwala from his book 'We, The Nation, The Lost Decades)[21]

> *"The basic structure of the Constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism, the judgment fractures the nation and disregards the basic structure of the Constitution. The decision would revitalise casteism, cleave the nation into two – forward and backward - and open new vistas for internecine conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgments will revive casteism which the Constitution emphatically intended to end; and the pre-independence tragedy would be re-enacted with the roles reversed – the erstwhile underprivileged would not become the privileged."*

73. In fact, Scheduled Castes, Scheduled Tribes and other backward classes simply deserve equality with the other forward classes of people. Justice O. Chinnappa Reddy in ***K C Vasantha Kumar & Anr. vs. State of Karnataka***[22] said "*they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of rights and not of philanthrophy. They ask for parity and not charity.*"

[21] NANI PALKIWALA, WE, THE NATION: THE LOST DECADES 179 (Mehta Publishing House 1995)
[22] 1985 SCC Suppl. 714

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74. In ***State of Kerala vs. N M Thomas***[23], Justice V R Krishna Ayer said "you can't throw to the winds considerations of administrative capability and grind the wheels of Government to a hault in the name of *'harijan welfare'*."

75. This Court in ***A. Periakaruppan Chettiar vs. State of Tamil Nadu & Ors.***[24] observed that reservations should not be allowed to become a vested interest. In ***Akhil Bharatiya Soshit Karamchari Sangh vs. Union of India & Ors.*** [25] it was observed that efficacy of the reservation policy will depend upon how soon reservations can be done away with. The then Chief Justice of India Y.V. Chandrachud counselled in ***Vasanth Kumar*** (supra), "the policy of reservation in employment, education and legislative institutions should be reviewed every five years or so."

76. Pandit Jawahar Lal Nehru in his letter dated 27th June 1961 addressed to all the Chief Ministers of all the States laments upon the habit of giving reservations and privileges to any caste or group and expresses that such practice ought to be given up

[23] (1976) 2 SCC 310
[24] (1971) 1 SCC 38
[25] (1981) 1 SCC 246

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and emphasis to help the citizens on economic considerations and not on caste basis and that the Scheduled Castes and Scheduled Tribes do deserve help but not in the shape of any kind of reservation more particularly in services. He wrote:

> *"I want my country to be a first-class country in everything. The moment we encourage the second-rate, we are lost.*
>
> *The only real way to help a backward group is to give opportunities of good education, this includes technical education which is becoming more and more important. Everything else is a provision of some kind of crutches which do not add to the strength or health of the body."*

In the same letter he went on to speak about two very important decisions, "*one is, universal free elementary education that is the base; and the second is scholarship on a very wide scale at every grade of education to the bright boys and girls".* He went on to express if reservation on communal and caste basis continues, India will remain second rate or third rate. He said *"This way lies not only folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency."*

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CONCLUSION

77. Our predecessors, not only the Judges but also the former Prime Minister have appeared to be against providing reservation to any class or caste of persons on purely caste basis and wanted to take the country forward on merit basis. Despite the views so expressed, the Constitutional amendments envisaged to promote the depressed and the backward classes of persons to bring them to the level of the privileged class enjoying the status of an urban elite. Thus, the reservation policy was rightly applied and since its implementation faced difficulties as some in the backward classes have marched ahead, it has become imperative to uplift the backward of the backwards, for which purpose sub-classification has become the order of the day.

78. I had the privilege of going through the erudite judgments of the Chief Justice and my esteemed brother Justice Gavai.

79. The Chief Justice in his opinion has dwelled upon the legal aspects to answer the core issue whether sub-classification of the scheduled castes is constitutionally permissible for the

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purposes of reservation. He has clearly opined that this Court in **Indra Sawhney** (Supra) never intended to limit the application of sub-classification to the other backward classes only. If any class is not integrated it can be further classified and such sub-classification of a class would not be violative of Article 14 of the Constitution, so long persons in a class are not similarly situated. There is no violation of Article 341(2) of the Constitution in sub-classification within the scheduled caste as by such sub-classification no caste is being included or excluded from the list of scheduled castes.

80. His Lordship Justice Gavai in his opinion quoted an example where a member of a backward class becomes an IAS or an IPS or any other officer of the All India Service and improves upon his status in the society but even then his children get full benefits of reservation. No doubt, "*one swallow does not make a summer*" meaning thereby that if few members of a particular caste/class advances in the society the entire caste or class would not cease to be backward. Nonetheless if any member of designated backward class acquires a higher status and attains equality with the forward class, it is difficult to comprehend how

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his children would be treated as depressed, downtrodden or backward in any manner be it socially, economically or educationally. Therefore, the caste to which this person belongs may not be excluded as a whole from the benefit of reservation but certainly the family which has obtained the benefit once shall not be allowed to take advantage of reservation in the next generation. The reservation to such families has to be confined to one generation only.

81. It has rightly been stated by my brother Justice Gavai in his opinion that Justice Krishna Iyer in ***N. M. Thomas*** (supra) has repeatedly observed that State is entitled to take steps for weeding out socially, economically and educationally advanced sections of scheduled castes and scheduled tribes from the ambit of reservation.

82. It has rightly been observed that a child studying in St. Stephen's College or any good urban college cannot be equated with a child studying in a rural school/college and that he cannot be grouped into a same bracket.

83. In these circumstances my brother Justice Gavai has rightly concluded that the State must evolve a policy of identifying the

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creamy layer even from the scheduled castes and scheduled tribes so as to exclude them from the benefit of reservation.

84. Agreeing with the scholarly separate opinions authored by the Chief Justice and Brother Gavai, J., I summarise my views as under:

(i) The policy of reservation as enshrined under the Constitution and by its various amendments requires a fresh re-look and evolvement of other methods for helping and uplifting the depressed class or the downtrodden or the persons belonging to SC/ST/OBC communities. So long no new method is evolved or adopted, the system of reservation as prevailing may continue to occupy the field with power to permit sub-classification of a class particularly scheduled caste as I would not be suggesting dismantling of an existing building without erecting a new one in its place which may prove to be more useful;

(ii) In the Constitutional regime, there is no caste system and the country has moved into a casteless society

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except for the deeming provision under the Constitution for the limited purposes of affording reservation to the depressed class of persons, downtrodden or belonging to SC/ST/OBC. Therefore, any facility or privilege for the promotion of the above categories of persons has to be on a totally different criteria other than the caste may be on economic or financial factors, status of living, vocation and the facilities available to each one of them based upon their place of living (urban or rural);

(iii) The reservation, if any, has to be limited only for the first generation or one generation and if any generation in the family has taken advantage of the reservation and have achieved higher status, the benefit of reservation would not be logically available to the second generation; and

(iv) It is reiterated that periodical exercise has to be undertaken to exclude the class of person who after taking advantage of reservation has come to march, shoulder to shoulder with the general category.

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85. The reference is accordingly answered and it is held that sub-classification of scheduled castes is permissible in law for the purposes of reservation.

..... J.
(PANKAJ MITHAL)

NEW DELHI;
AUGUST 1, 2024.

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE / ORIGINAL JURISDICTION

CIVIL APPEAL NO. 2317 of 2011 ETC. ETC.

THE STATE OF PUNJAB & ORS. ***…APPELLANT(S)***

VERSUS

DAVINDER SINGH & ORS. ***…RESPONDENT(S)***

J U D G M E N T

SATISH CHANDRA SHARMA, J.

1. I have had the privilege of reading the lucid and detailed opinion(s) authored by Hon'ble Dr. Justice D.Y.Chandrachud, Chief Justice of India and Hon'ble Mr. Justice B.R. Gavai, respectively. I am fully in agreement with both opinions to the extent that the validity of sub-classification within Scheduled Castes has been held to be constitutionally permissible. Moreover, I am fully in agreement with the opinion(s) to the extent that any exercise involving sub-classification by the State, must be supported by empirical data that ought to underscore the more 'disadvantaged' status of the sub-group to which such preferential treatment is sought to be provided *vis-à-vis* the Constitutional Class as a whole.

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2. However, on the question of applicability of the '*creamy layer principle'* to Scheduled Castes and Scheduled Tribes, I find myself in agreement with the view expressed by Justice Gavai i.e., for the full realisation of substantive equality *inter se* the Scheduled Castes and Scheduled Tribes, the identification of the '*creamy layer'* qua Scheduled Castes and Scheduled Tribes ought to become a constitutional imperative for the State.

…….J.
[SATISH CHANDRA SHARMA]

New Delhi
August 01, 2024.