CIVIL APPEAL NO. 3128/2020

CIVIL APPEAL NO. 3130/2020

WRIT PETITION (C) NO. 938/2020

J U D G M E N T

S. RAVINDRA BHAT, J.

1. Franklin D. Roosevelt, the great American leader, once said that *"The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."* In these batch of appeals arising from a common judgment of the Bombay High Court[1], this court is called to adjudicate upon the extent to which reservations are permissible by the state, the correctness of its approach in designating a community[2] as a "Backward Class" for the purposes of the Constitution, and, by an enactment[3] (hereafter referred to as "the SEBC Act") defining who could benefit from, and the extent of reservations that could be made in various state established facilities and educational institutions, and in the public services of the State of Maharashtra.

A Brief Prelude

1 In WP No 937/2017; 1208/2019; 2126/2019, PIL No. 175/2018 and connected batch of cases.

2 The Maratha community (hereafter "the Marathas").

3 Maharashtra State Reservation for Seats for Admission in Educational Institutions in the State and for appointments in the public services and posts under the State (for Socially and Educationally Backward Classes) SEBC Act, 2018 i.e., Maharashtra Act No. LXII of 2018 (for short 'SEBC Act').

2. Dr. Babasaheb Ambedkar, when he spoke on November 25, 1949, in the Constituent Assembly of India at the time of the adoption of the Constitution, presciently said:

> *"From January 26, 1950, onwards we are going to enter into a life of contradictions. In politics, we will have equality, one man, one vote, one vote and one value. In society and economy, we will still have inequality. 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."*

3. The quest for one person, one value, of true equality, and of fraternity of Indians, where caste, race, gender, and religion are irrelevant, has produced mixed results. As long as there is no true equality, of opportunity, of access, and of the true worth of human beings, and as long as the world is *"broken up into fragments by narrow domestic walls"*[4] the quest remains incomplete. The present judgment is part of an ongoing debate, which every generation of Indians has to grapple with, and this court confront, at different points in time.

4. The Maratha community, in the State of Maharashtra repeatedly sought reservations through diverse nature of demands through public meetings, marches etc, by members of the community. It also led to representatives and organizations of the community taking the demands to the streets, resulting in the State of Maharashtra promulgating an Ordinance for the first time in the year 2014, which granted reservation to the community in public employment and in the field of education. Later, the Ordinance was given the shape of an Act[5], which was challenged before the Bombay High Court.[6] The court, after considering the rival submissions, including the arguments of the state stayed the operation of the enactment. The State Government then set up a backward class commission to

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4 Rabindranath Tagore's Gitanjali, Verse 35.

5 Maharashtra Act No. I of 2015.

6 In Writ Petition No. 3151/2014.

ascertain the social and educational status of the community. Initially, the commission was headed by Justice S. B. Mhase. His demise led to the appointment of Justice MG Gaikwad (Retired) as chairperson of the commission; it comprised of 10 other members.The Committee headed by Justice Gaikwad was thus reconstituted on 3rd November, 2017. By its report dated 13.11.2018 (the Gaikwad Commission Report)[7], the Commission, on the basis of the surveys and studies it commissioned, and the analysis of the data collected during its proceedings, recommended that the Maratha class of citizens be declared as a Socially and Educationally Backward Class ("SEBC" hereafter). This soon led to the enactment of the SEBC Act, giving effect to the recommendations of the Gaikwad Commission, resulting in reservation to the extent of 16% in favour of that community; consequently, the aggregate reservations exceeded 50%.

5. The SEBC Act was brought into force on 30th November, 2018. Close on its heels a spate of writ petitions was filed before the Bombay High Court, challenging the identification of Marathas as SEBCs, the conclusions of the Commission, which culminated in its adoption by the State of Maharashtra and enactment of the SEBC Act, the quantum of reservations, and the provisions of the Act itself, on diverse grounds. All writ petitions were clubbed together and considered. By the impugned judgment, the High Court turned down the challenge and upheld the identification of Marathas as SEBCs, and further upheld the reasons presented before it, that extraordinary circumstances existed, warranting the breach of the 50% mark, which was held to be the outer limit in the nine-judge decision of this court in *Indra Sawhney v. Union of India*[8] (hereafter variously "*Indra Sawhney*" or "*Sawhney*").

6. The special leave petitions, filed against the impugned judgment, were heard, and eventually, leave granted. Some writ petitions too were filed,

7 Report of the Committee, page 10.

8 *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

challenging provisions of the SEBC Act. The validity of the Constitution (102nd) Amendment Act[9] too is the subject matter of challenge, on the ground that it violates the basic structure, or essential features of the Constitution.[10]A Bench of three judges, after hearing counsel for the parties, referred the issues arising from these batch of petitions and appeals, to a Constitution bench, for consideration, as important questions arising for interpretation

7. The five-judge bench, by its order dated 08.03.2021, referred the following points, for decision:

> (1) Whether judgment in case of Indra Sawhney v. Union of India [1992 Suppl. (3) SCC 217] needs to be referred to larger bench or require re-look by the larger bench in the light of subsequent Constitutional Amendments, judgments and changed social dynamics of the society etc.?
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> (2) Whether Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments in the public services and posts under the State) for Socially and Educationally Backward Classes (SEBC) Act, 2018 as amended in 2019 granting 12% and 13% reservation for Maratha community in addition to 50% social reservation is covered by exceptional circumstances as contemplated by Constitution Bench in Indra Sawhney's case?
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> (3) Whether the State Government on the strength of Maharashtra State Backward Commission Report chaired by M.C. Gaikwad has made out a case of existence of extraordinary situation and exceptional circumstances in the State to fall within the exception carved out in the judgment of Indra Sawhney?
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> (4) Whether the Constitution One Hundred and Second Amendment deprives the State Legislature of its power to enact a legislation determining the

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9 Hereafter referred to as "the 103rd Amendment".

10 Writ petition 938/2020.

socially and economically backward classes and conferring the benefits on the said community under its enabling power?

(5) Whether, States' power to legislate in relation to "any backward class" under Articles 15(4) and 16(4) is anyway abridged by Article 342(A) read with Article 366(26c) of the Constitution of India?

(6) Whether Article 342A of the Constitution abrogates States' power to legislate or classify in respect of "any backward class of citizens" and thereby affects the federal policy / structure of the Constitution of India?

8. I had the benefit of reading the draft judgment of Ashok Bhushan, J. which has exhaustively dealt with each point. I am in agreement with his draft, and the conclusions with respect to Point Nos (1) (2) and (3). In addition to the reasons in the draft judgment of Ashok Bhushan, J., I am also giving my separate reasons, in respect of Point No. (1). I am however, not in agreement with the reasons and conclusions recorded in respect of Point Nos. (4) and (5), for reasons to be discussed elaborately hereafter. I agree with the conclusions of Ashok Bhushan, J., in respect of Point No (6); however, I have given my separate reasons on this point too.

9. With these prefatory remarks, I would proceed to discuss my reasons, leading to the conclusions, on both the points of concurrence, as well as disagreement with the draft judgment of Ashok Bhushan, J.

Re Point No. 1: Whether judgment in case of Indra Sawhney v. Union of India,1992 Supp. (3) SCC 217 needs to referred to larger bench of require re-look by the larger bench in the light of subsequent Constitutional Amendments, judgments and changed social dynamics of the society etc.?

10. A careful reading of the judgments in *Indra Sawhney v. Union of India*[11], clarifies that seven out of nine judges concurred that there exists a quantitative limit on reservation – spelt out @ 50%. In the opinion of four judges, therefore, per

11 1992 Supp. (3) SCC 217.

the judgment of B.P. Jeevan Reddy, J., this limit could be exceeded under extraordinary circumstances and in conditions for which separate justification has to be forthcoming by the State or the concerned agency. However, there is unanimity in the conclusion by all seven judges that an outer limit for reservation should be50%. Undoubtedly, the other two judges, Ratnavel Pandian and P.B. Sawant, JJ. indicated that there is no general rule of 50% limit on reservation. In these circumstances, given the general common agreement about the existence of an outer limit, i.e. 50%, the petitioner's argument about the incoherence or uncertainty about the existence of the rule or that there were contrary observations with respect to absence of any ceiling limit in other judgments (the dissenting judgments of K. Subbarao, in *T. Devadasan v Union of India*[12], the judgments of S.M. Fazal Ali and Krishna Iyer, JJ. in *State of Kerala v N.M. Thomas*[13] and the judgment of Chinnappa Reddy, J. in *K.C. Vasanth Kumar v. State of Karnataka*[14]*)* is not an argument compelling a review or reconsideration of *Indra Sawhney* rule.

11. The respondents had urged that discordant voices in different subjects (*Devadasan*, *N.M. Thomas* and *Indra* Sawhney) should lead to re-examination of the *ratio* in *Indra Sawhney.* It would be useful to notice that unanimity in a given bench (termed as a "supermajority") – denoting a 5-0 unanimous decision in a Constitution Bench cannot be construed as *per se* a strong or compelling reason to doubt the legitimacy of a larger bench ruling that might contain a narrow majority (say, for instance with a 4-3 vote, resulting in overruling of a previous unanimous precedent). The principle of *stare decisis* operates both vertically- in the sense that decisions of appellate courts in the superior in vertical hierarchy, bind tribunals and courts lower in the hierarchy, and horizontally- in the sense that a larger bench formation ruling, would be binding and prevail upon the ruling of a smaller bench

12 1964 (4) SCR 680.

13 1976 (2) SCC 310.

14 1985 SCR Suppl. (1) 352.

formation. The logic in this stems from the *raison d'etre* for the doctrine of precedents, i.e. stability in the law. If this rule were to be departed from and the legitimacy of a subsequent larger bench ruling were to be doubted on the ground that it comprises of either plurality of opinions or a narrow majority as compared with a previous bench ruling (which might be either unanimous or of a larger majority, but of lower bench strength), there would uncertainty and lack of clarity in the realm of precedential certainty. If precedential legitimacy of a larger bench ruling were thus to be doubted, there are no rules to guide the courts' hierarchy or even later benches of the same court about which is the appropriate reading to be adopted (such as for instance, the number of previous judgments to be considered for determining the majority, and consequently the *correct law*).

12. In view of the above reasoning, it is held that the existence of a plurality of opinions or discordant or dissident judgments in the past – which might even have led to a majority (on an overall headcount) supporting a particular rule in a particular case cannot detract from the legitimacy of a rule enunciated by a later, larger bench, such as the nine-judge ruling in *Indra Sawhney*.

13. So far as the argument that *Indra Sawhney* was concerned only with reservations under Article 16(4) is concerned, this Court is inclined to accept the submissions of the petitioner. The painstaking reasoning in various judgments, in *Indra Sawhney*, including the judgments of Pandian and Sawant, JJ. would show that almost all the previous precedents on both Article 15(4) and 16(4) were considered[15].

14. The tenor of all the judgments shows the anxiety of this Court to decisively rule on the subject of reservations under the Constitution – in regard to backward classes and socially and educationally backward classes. This is also evident from

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15 *M.R. Balaji v. State of Mysore* 1963 Supp. 1 SCR 439*; P. Rajendran v. State of T.N. (1968) 2 SCR 786 [Articles 15(4)]; A Peeriakaruppan v. State of T.N. (1971) 1 SCC 38 [Article 15(4)]; State of A.P. v. USV Balram (1972) 1 SCC 660 [Article 15(4)]; T. Devadasan (supra); State of U.P. v. Pradeep Tandon (1975) 1 SCC 267; Janki Prasad Parimoo v. State of J&K (1973) 1 SCC 420; N.M. Thomas [Article 16(4) & K.C. Vasanth Kumar [Article 15(4)].*

the history of Article 15(4) which was noticed and the phraseology adopted (socially and educationally backward classes) which was held to be wider than "backward classes" though the later expression pointed to social backwardness. Such conclusions cannot be brushed aside by sweeping submission pointing to the *context* of the adjudication in *Indra Sawhney*.

15. The argument on behalf of the States –that a decision is to be considered as a *ratio* only as regards the principles decided, having regard to the material facts, in the opinion of this Court, the reliance upon a judgment of this Court in *Krishena Kumar and Anr. v. Union of India & Ors.*[16] in the opinion of this Court is insubstantial. The reference of the dispute, i.e. notification of various backward classes for the purpose of Union public employment under Article 16(4) and the issuance of the OM dated 1990 no doubt provided the context for the Court to decide as it did in *Indra Sawhney*. However, to characterize its conclusions and the considerations through the judgments of various judges, as not *ratios* but mere *obiter* or observations not binding upon the states is an over-simplification. The OM did lead to widespread protests and discontent. Initially, the writ petitions were referred to a five-judge bench which, upon deliberation and hearing felt that the matter required consideration by a larger bench (presumably in view of the previous ruling by the seven judges in *N.M. Thomas* where two judges had expressly stated that there was no ceiling on reservation and the later five judge judgment in *K.C. Vasanth Kumar* where one judge had expressed a similar reservation). It was for the purpose of decisively declaring the law that the nine-judge bench was formed and the question formulated by it. Not only did the judges who constituted a majority speak about this rule; even the two other judges who

16 (1990) 4 SCC 207.

did not agree with the 50% ceiling rule, dealt with this aspect. This is evident from the judgment of Sawant, J[17]:

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

16. Likewise, Pandian, J., after elaborate discussion,[18]recorded his conclusions in this manner:

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

17. Both show that the extent of whether a 50% limit is applicable, was considered by all the judges. Therefore, the arguments on behalf of the States and the contesting respondents in this regard are unmerited. Likewise, to say that whether a 50% limit of reservation existed or not was not an issue or a point of reference, is without basis; clearly that issue did engage the anxious consideration of the court.

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17 At page 552, SCC Report.

18 In paras 177-178 at page 407-413 and the conclusions in para 189 at page 413 in *Indra Sawhney (supra).*

18. The States had argued that providing a ceiling (of 50%) amounts to restricting the scope of Part III and Part IV of the Constitution. A provision of the constitution cannot be *"read down"* as to curtail its width, or shackle state power, which is dynamic. The state legislatures and executives are a product of contemporary democratic processes. They not only are alive to the needs of the society, but are rightfully entitled to frame policies for the people. Given the absence of any caste census, but admitted growth of population, there can be no doubt that the proportion of the backward classes has swelled, calling for greater protection under Articles 15 (4) and 16 (4). Also, every generation has aspirations, which democratically elected governments are bound to meet and consider, while framing policies. In view of these factors, the fixed limit of 50% on reservations, requires to be reconsidered. Counsel submitted that whether reservations in a given case are unreasonable and excessive, can always be considered in judicial review, having regard to the circumstances of the particular case, the needs of the state and by weighing the rights, in the context of the states' priorities, having regard to their obligations under the Directive Principles of State Policy, which are now deemed as fundamental as the rights under Part III of the Constitution. The court's flexibility in testing whether a measure is reasonable or not can always be retained and moulded appropriately.

19. *Lt. Col Khajoor Singh v. Union of India* (supra) is an authority for the approach that this court should adopt, when it is asked to reconsider a previous precedent of long standing. The court observed that:

> *"We are of opinion that unless there are clear and compelling reasons, which cannot be denied, we should not depart from the interpretation given in these two cases and indeed from any interpretation given in an earlier judgment of this Court, unless there is a fair amount of unanimity that the earlier decisions are manifestly wrong. This Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due*

deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue."

20. In *Keshav Mills* (supra) the court elaborated what considerations would weigh with it, when a demand for review of the law declared in a previous judgment is made:

"..Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. …it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations: What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions."

21. Identical observations were made in *Jindal Stainless* (supra). In *Union of India v Raghubir Singh*[19], a Constitution Bench articulated the challenges often faced by this court:

"….The social forces which demand attention in the cauldron of change from which a new society is emerging appear to call for new perceptions and new perspectives…..The acceptance of this principle ensured the preservation and legitimation provided to the doctrine of

19 1989 (3) SCR 316.

> *binding precedent, and therefore, certainty and finality in the law, while permitting necessary scope for judicial creativity and adaptability of the law to the changing demands of society. The question then is not whether the Supreme Court is bound by its own previous decisions. It is not. The question is under what circumstances and within what limits and in what manner should the highest Court over-turn its own pronouncements."*

22. What the respondents seek, in asking this court to refer the issue to a larger bench, strikes at the very essence of equality. The review of precedents undertaken by *Indra Sawhney* not only spanned four turbulent decades, which saw several amendments to the Constitution, but led to a debate initiated by five judges in *M.R. Balaji*, (and followed up in at least more than 10 decisions) later continued by seven judges in *N.M. Thomas.* This debate- i.e., between *Balaji* and *Indra Sawhney,* saw the court's initial declaration that a 50% ceiling on reservations should be imposed, which was questioned in three judgments, though not in majority decisions of various benches. Therefore, to decisively settle this important issue- among other issues, the nine-judge bench was constituted. *Indra Sawhney* decisively ruled that reservations through special provisions should not exceed 50% by a 7-2 majority. Two judges did not indicate any limit on reservations, they did not also indicate any clear guiding principle about what should be the court's approach, when a party complains that reservations are excessive or unreasonable. *Indra Sawhney* is equally decisive on whether reservations can be introduced for any new class, or the quantum of reservations, when introduced, or changed, can be the subject matter of judicial review, for which according to the majority of judges, the guiding principle would be the one enunciated in *Barium Chemicals v. Company Law Board*[20].

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20 1966 (Suppl.) 3 S.C.R. 311, to the effect that where a statutory power can be exercised through the subjective satisfaction of any authority or the state, it should be based on objective materials, and on relevant considerations, eschewing extraneous factors and considerations.

23. The salience of the issue under consideration is that equality has many dimensions. In the context of Articles 15 (4) and 16 (4,) and indeed the power of classification vested in the state, to adopt protective discrimination policies, there is an element of obligation, or a duty, to equalize those sections of the population who were hitherto, "invisible" or did not matter. The reach of the *equalizing principle*, in that sense is compelling. Thus while, as explained by this court in *Mukesh Kumar* v. *State of Uttarakhand*[21] there is no right to claim a direction that reservations should be provided (the direction in that case being sought was reservation in promotions in the state of Uttarakhand), the court would intervene if the state acts without due justification, but not to the extent of directing reservations.[22]Equally, the states' obligation to ensure that measures to uplift the educational and employment opportunities of all sections, especially vulnerable sections such as scheduled castes and STs and backward class of citizens, is underscored- not only in Article 15 (4) but also by Article 46, though it is a directive principle.[23] It is wrong therefore, to suggest that *Indra Sawhney* did not examine the states' obligations in the light of Directive Principles; it clearly did- as is evident from the express discussion on that aspect in several judgments.[24]

21(2020) 3 SCC 1.

22As this court did, in *P & T Scheduled Caste/Tribe Employee Welfare Association vs Union of India &Ors.* 1988 SCR Suppl. (2) 623, when, upon withdrawal of a government order resulted in denial of reservation in promotion, hitherto enjoyed by the employees. The court held:

> *"While it may be true that no writ can be issued ordinarily competing the Government to make reservation under Article 16 (4) which PG NO 630 is only an enabling clause, the circumstances in which the members belonging to the Scheduled Castes and the Scheduled Tribes in the Posts and Telegraphs Department are deprived of indirectly the advantage of such reservation which they were enjoying earlier while others who are similarly situated in the other departments are allowed to enjoy it make the action of Government discriminatory and invite intervention by this Court."*

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

24There is discussion about the states' obligations, in the context of reservations, in the judgments of Pandian (paras 173,194); Dr. Thommen, J (Para 297); Kuldip Singh, J (para 387); P.B. Sawant, J (paras 416-418, 433-34, 479-451); R.M. Sahai, J (Para 593) and B.P. Jeevan Reddy, for himself, Kania, CJ, M.N. Venkatachalaiah and A.M.

24. Protective discrimination, affirmative action, or any other term used by this court, means the measure of the state to ensure that past inequities are not carried on as today's burdens, that full (and one may add, meaningful) opportunities are given to all in participation in governance structures: access to public institutions (through special provisions under Article 15 (4)) and adequate representation (through reservations under Article 16 (4)). They are tools in the *repertoire* of the states to *empower* those hitherto barred from sharing power- and all that went with it, of bringing first hand perspectives in policy making, of acting as pathbreakers, of those breaking the glass ceiling- in short, imparting dimensions in democratic governance which were absent.[25]

25. A constant and recurring theme in the several judgments of *Indra Sawhney* was the concept of *balance.* This expression was used in two senses- one, to correct the existing *imbalance* which existed, due to past discriminatory practices that kept large sections of the society backward; two, the quest for achieving the balance between the guarantee of equality *to all*, and the positive or affirmative discrimination sanctioned by Article 15 (4) and 16 (4).[26] B.P. Jeevan Reddy, J (for himself and four other judges) held that (para 808, SCC reports):

> *"It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of*

Ahmadi, JJ (in Paras 648-49, 695, 747, Paras 834-835 and Para 860- all SCC references).

25 The idea of empowerment is articulated in the judgment of Jeevan Reddy, in *Indra Sawhney* firstly in Para 694: *"The above material makes it amply clear that the objective behind clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted thereinto and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. 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."* and then, in Para 788. that *"the object of Article 16(4) was "empowerment" of the backward classes. The idea was to enable them to share the state power."*

26 This theme of *balance* occurs 49 times in various judgments. All the judges deal with it; although Pandian and Sawant, JJ, reject the numerical ceiling of 50%, their judgments acknowledge the need to maintain the balance between the main parts of Articles 15 and 16, while ensuring that past discrimination is remedied.

> *Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision — though not an exception to clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the re-statements of the principle of equality enshrined in Article 14. The provision under Article 16(4) — conceived in the interest of certain sections of society — should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society."*

26. There is more discussion on this subject by the same judgment.[27]Dr. Thommen, J, expressed that reservations should not be an end all, and should not be perpetuated, beyond the objectives they were designed to achieve and that *"A balance has to be maintained between the competing values and the rival claims and interests so as to achieve equality and freedom for all."* (Ref. Para 255, SCC reports).R.M. Sahai, J, expressed the idea in these terms (Ref. Para 560, SCC reports):

> *"Any State action whether 'affirmative' or 'benign', 'protective' or 'competing' is constitutionally restricted first by operation of Article 16(4) and then by interplay of Articles 16(4) and 16(1). State has been empowered to invade the constitutional guarantee of 'all' citizens under Article 16(1) in favour of 'any' backward class of citizens only if in the opinion of the government it is inadequately represented. Objective being to remove disparity and enable the unfortunate ones in the society to share the services to secure equality in, 'opportunity and status' any State action must be founded on firm evidence of clear and legitimate identification of such backward class and their inadequate representation. Absence of either renders the action suspect. Both must exist in fact to enable State to assume jurisdiction to enable it to take remedial measures….States' latitude is further narrowed when on existence of the two primary, basic or jurisdictional facts it proceeds to make reservation as the wisdom and legality of it has to be weighed in the balance of equality pledged and guaranteed to every citizen and tested on the anvil of reasonableness to "smoke out" any illegitimate use and restrict the State from crossing the clear constitutional limits."*

27Paras 614 and 814, SCC reports.

27. Constitutional adjudication involves making choices, which necessarily means that lines have to be drawn, and at times re-drawn- depending on *"the cauldron of change"*[28]. It has been remarked that decisions dealing with fundamental concepts such as the equality clause are *"heavily value-laden, and necessarily so, since value premises (other than the values of "equality" and "rationality") are necessary to the determination that the clause requires."*[29]

28. Interpretation of the Constitution, is in the light of its uniqueness, Dr. Aharon Barak, the distinguished former President of the Israeli Supreme Court remarked, in his work:[30]

> *"Some argue that giving a modern meaning to the language of the constitution is inconsistent with regarding the constitution as a source of protection of the individual from society*[31]*. Under this approach, if the constitution is interpreted in accordance with modern views, it will reflect the view of the majority to the detriment of the minority. My reply to this claim is inter alia, that a modern conception of human rights is not simply the current majority's conception of human rights. The objective purpose refers to fundamental values that reflect the deeply held beliefs of modern society, not passing trends. These beliefs are not the results of public opinion polls or mere populism; they are fundamental beliefs that have passed the test of time, changing their form but not their substance."*

29. As the organ entrusted with the task of interpreting the laws and the Constitution, the word of this court is final. Undoubtedly its role is as a co-equal branch of governance; nevertheless, its duty to interpret the law and say what its silences (or ambiguities) denote, in the particular contexts that it has to contend

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28 A phrase used in *Raghubir Singh* (supra).

29 *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). *Cf*. C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 1-60 (1963).

30 Aharon Barak, *The Judge in a Democracy,* p.132.

31 See *generally* Antonin Scalia, "Originalism: The Lesser Evil, "57 U. Cin. L. Rev. 849, 862-863 (1989).

with, involve making choices. These choices are not made randomly, or arbitrarily[32], but based on a careful analysis of the rights involved, the remedies proposed by the legislative or executive measure, the extent of limits imposed by the Constitution, and so on. The history of the legislation or the measure, or indeed the provision of the Constitution plays a role in this process. Interpretation involves an element of line drawing, of making choices. This court's decisions are replete with such instances. The doctrine of classification is the first instance where this court drew a line, and indicated a choice of interpretation of Article 14; likewise, right from *In re Kerala Education Bill*[33]to *T.M.A Pai Foundation v. State of Karnataka*,[34] a textually absolute fundamental right, i.e. Article 30 has been interpreted not to prevent regulation for maintenance of educational standards, and legislation to prevent mal-administration. Yet, whenever a choice is made in the interpretation of a provision of this constitution, and a limit indicated by a decision, it is on the basis of *principle and principle alone*.

30. As noticed previously, the search of this court, in *Indra Sawhney* – after an exhaustive review of all previous precedents, was to indicate an enduring *principle* for application by courts, that would strike the just balance between the aspirational rights – and the corresponding duty of the states to introduce affirmative measures to combat inequality (under Articles 15 [4] and 16 [4]) on the one hand, and the principle of equality and its command against practising inequality in proscribed areas (caste being one, in both Articles 15 and 16). It was suggested during the hearing that the quantitative criteria (50% limit on

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32Michael Kirby, *Indian and Australian Constitutional Law: A Recent Study in Contrasts'*, 60 JILI (2018) 1, p. 30; Also see Herbert Weschler, *'Towards Neutral Principles of Constitutional Law'*, (1959) 73 Harv. L. Rev. 1.

331959 SCR 995.

342002 (8) SCC 481.

reservation) is too restrictive leaving no breathing room for democratically elected governments. This court remarked in *R.C. Poudyal* v. *Union of India*[35] that

> *"124. … In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details"."*

31. The idea of a definitive and objective principle, in the form of a 50% ceiling on limitation, emerges on an overall reading of *Indra Sawhney.* The argument made by the respondents was that this court should not go by such a ceiling limit, but rather, while exercising its judicial review power, proceed on a case-by-case approach, and resting its conclusions on fact dependent exercises, using other criteria, such as reasonableness, proportionality, etc. for judging excessive reservations. However, what constitutes reasonableness and what is proportionate in a given case, would be unchartered and indeterminate areas. It is one thing to try persuading the court to discard a known principle, in the light of its loss of relevance, yet for that argument to prevail, not only should the harm caused by the existing principle be proved, but also a principle that is sought to be substituted, should have clarity, or else, the argument would be one asking the court to take a leap in the dark. It is not enough, therefore to resort to observations such as *"the length of the leap to be provided depends upon the gap to be covered"*[36] or the *proportionality* doctrine (deployed to judge validity of an executive or legislative measure), because they reveal no discernible principle. Reasonableness is no

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35 1994 Supp (1) SCC 324.

36 *State of Punjab v. Hiralal*, 1971 (3) SCR 267.

doubt a familiar phrase in the constitutional lexicon; yet there is considerable subjectivity and relativity in its practise. Again, to quote Dr. Barak there are *"zones of reasonableness"*[37]. This places the court in a difficult situation, where the state's choices require greater deference, and a corresponding narrowing of judicial review, given that the standard of review is the one indicated in *Barium Chemicals.* The South African Constitutional Court voiced a similar idea, in connection with an affirmative action program, when it observed that:

> *"The fairness of a measure differentiating on any prohibited ground depends not only on its purpose, but on the cumulative effect of all relevant factors, including the extent of its detrimental effects on non-designated groups".*[38]

32. In another case, *City Council of Pretoria v. Walker,*[39]Sachs J.(of the South African Constitutional Court)remarked that:

> *"[p]rocesses of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage."*

33. In that case, the question for judicial review was whether a local authority in a period of transition, could impose a lower flat rate tariff in one locality (inhabited by the historically discriminated black community, with poor infrastructure) and a higher metered tariff in a locality with better infrastructure, inhabited by the white community. Sachs J. held that this was not unfair discrimination against the applicant, a white resident, but rather a failure on the part of the local authority to put down a basis for the differential levy of tariffs, rooted in substantive equality:

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37 *The Judge in a Democracy,* Aharon Barak at p. 248.

38 *Harksen v. Lane* 1997 (11) BCLR 1489 (CC) at 1511C.

39 1998 (3) BCLR 257 (CC) at para. 123.

> *"Yet, any form of systematic deviation from the principle of equal and impartial application of the law (as was the practice in the present case for a certain period), might well have to be expressed in a law of general application which would be justiciable according to the criteria of reasonableness and justifiability".*

34. Upon examination of the issue from this perspective, the ceiling of 50% with the "*extraordinary circumstances*" exception, is the just balance- what is termed as the "Goldilocks solution"[40]- i.e. the solution containing the *right balance* that allows the state sufficient latitude to ensure meaningful affirmative action, to those who deserve it, and at the same time ensures that the essential content of equality, and its injunction not to discriminate on the various proscribed grounds (caste, religion, sex, place of residence) is retained. This court in *M. Nagaraj v. Union of India*[41]observed that *"a numerical benchmark is the surest immunity against charges of discrimination."* To dilute the 50% benchmark further, would be to effectively destroy the guarantee of equality, especially the right *not to be discriminated against on the grounds of caste* (under Articles 15 and 16).

35. In view of all these reasons, the argument that *Indra Sawhney* requires reconsideration, and ought to be referred to a larger bench, is hereby rejected.

Affirmative Action and the Reservation Paradigm

Special Provisions

36. Before parting with this section, this opinion would dwell upon affirmative action, and possibilities under the Constitution, from a larger perspective. Most debates, and precedents in the country have centred round the extent of reservation

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40"Having or producing the optimal balance between two extremes" *The Merriman Webster* Dictionary https://www.merriam-webster.com/dictionary/Goldilocks. The term was used by Justice Elena Kagan in her dissent, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) *"the difficulty then, is finding the Goldilocks solution-not too large, not too small, but just right."* This term is also used to denote a proper balance, in management parlance.

41(2006) 8 SCC 212.

and administration of quotas (reservations) under Articles 15 (4) and 16(4). The term *"special provision"* in Article 15 (4) is of wider import, than reservations. Unlike the United States of America which – in the absence of a provision enabling such special provisions, and which has witnessed a turbulent affirmative action policy jurisprudence, the 1960s and 1970s witnessing the framing of policies and legislation, and the subsequent narrowing of minority and racial criteria, to support affirmative action, our Constitution has a specific provision.

37. During the hearing, it was pointed out that there are not enough opportunities for education of backward classes of citizens, and that schools and educational institutions are lacking. It was argued by the states that sufficient number of backward classes of young adults are unable to secure admissions in institutions of higher learning.

38. It would be, in this context, relevant to notice that two important amendments to the Constitution of India, which have the effect of transforming the notion of equality, were made in the last 15 years. The first was the eighty sixth amendment – which inserted Article 21A[42]- which had the effect of enjoining the state to provide *free and compulsory education* to all children in the age group 6-14. The second was the Constitution Ninety Third Amendment Act, which inserted Article 15 (5)[43] enabling the state to make special provisions *"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."* The transformative potential of these provisions (both

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42 ***"21A. Right to education.*** *— The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."*

43 ***"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth ..****[(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."*

of which have been upheld by this court – in *Pramati Educational & Cultural Trust v. Union of India*[44]) is yet to be fully realized. Article 21A guarantees minimum universal education; whereas Article 15(5) enables access to backward classes of citizens admissions, through special provisions by the state, *in private educational institutions.* The Right to Education Act, 2009 provides a broad statutory framework for realization of Article 21A.

39. The availability of these constitutional provisions, however does not mean that those belonging to backward class of citizens would be better off or would reap any automatic benefits. Here, it is relevant to consider that often, any debate as to the efficacy or extent of reservation, invariably turns to one stereotypical argument- of merit. Long ago, in his important work[45]– Marc Galanter had dealt with the issue of merit in this manner:

> *"Let us take merit to mean performance on tests (examinations, interview, character references or whatever) thought to be related to performance relevant to the position (or other opportunity) in question and commonly used as a measure of qualification for that position. (In every case it is an empirical question whether the test performance is actually a good predictor of performance in the position, much less of subsequent positions for which it is a preparation.) Performance on these tests is presumably a composite of native ability, situational advantages (stimulation in the family setting, good schools, sufficient wealth to avoid malnutrition or exhausting work, etc.), and individual effort. The latter may be regarded as evidence of moral desert, but neither native ability nor situational advantages would seem to be. The common forms of selection by merit do not purport to measure the moral desert dimension of performance. Unless one is willing to assume that such virtue is directly proportionate to the total performance, the argument for merit selection cannot rest on the moral deservingness of individual candidates….."*

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44 2014 (8) SCC 1.

45 Marc Galanter, *Competing Equalities – Law and the Backward Classes in India.*

40. In his judgment, (in *Indra Sawhney*) Sawant,J. too spoke of this phenomenon:

> *"405. The inequalities in Indian society are born in homes and sustained through every medium of social advancement. Inhuman habitations, limited and crippling social intercourse, low-grade educational institutions and degrading occupations perpetuate the inequities in myriad ways. Those who are fortunate to make their escape from these all-pervasive dragnets by managing to attain at least the minimum of attainments in spite of the paralysing effects of the debilitating social environment, have to compete with others to cross the threshold of their backwardness. Are not those attainments, however low by the traditional standards of measuring them, in the circumstances in which they are gained, more creditable? Do they not show sufficient grit and determination, intelligence, diligence, potentiality and inclination towards learning and scholarship? Is it fair to compare these attainments with those of one who had all the advantages of decent accommodation with all the comforts and facilities, enlightened and affluent family and social life, and high quality education? Can the advantages gained on account of the superior social circumstances be put in the scales to claim merit and flaunted as fundamental rights? May be in many cases, those coming from the high classes have not utilised their advantages fully and their score, though compared with others, is high, is in fact not so when evaluated against the backdrop of their superior advantages - may even be lower…..*
>
> *406. Those who advance merit contention, unfortunately, also ignore the very basic fact - (though in other contexts, they may be the first to accept it) - that the traditional method of evaluating merit is neither scientific nor realistic. Marks in one-time oral or written test do not necessarily prove the worth or suitability of an individual to a particular post, much less do they indicate his comparative calibre. What is more, for different posts, different tests have to be applied to judge the suitability. The basic problems of this country are mass-oriented. India lives in villages, and in slums in towns and cities. To tackle their problems and to implement measures to better their lot, the country needs personnel who have firsthand knowledge of their problems and have personal interest in solving them. What is needed*

> *is empathy and not mere sympathy. One of the major reasons why during all these years after Independence, the lot of the downtrodden has not even been marginally improved and why majority of the schemes for their welfare have remained on paper, is perceptibly traceable to the fact that the implementing machinery dominated as it is by the high classes, is indifferent to their problems…."*

There were observations earlier in the judgment of Chinnappa Reddy, J, in *K.C. Vasant Kumar* (*supra*).

Anatole France had – in his ironic (and iconic) observations remarked once, that

> *"In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread."*

41. The previous rulings in *Vasant Kumar (supra)*, and the comments of Dr. Amartya Sen in his work *"Merit and Justice"* were considered in some detail, in the recent ruling in *B.K. Pavitra v. Union of India*[46],

> *""Merit" must not be limited to narrow and inflexible criteria such as one's rank in a standardised exam, but rather must flow from the actions a society seeks to reward, including the promotion of equality in society and diversity in public administration."*

This court also noted that merit as we understand - i.e. performance in standardised tests, is largely dependent upon neutral factors, which discriminate in favour of those who are privileged.

42. The argument of merit thus ignores the inherent and situational inequity between those who have no access to the *means of achieving* the goal of meaningful education, i.e. to colleges and professional institutions, based on competitive evaluations like tests, and those who have all the wherewithal for it.

46(2019) 16 SCC 129.

Those from low-income groups cannot join coaching programmes, which hone candidates' skills in succeeding in an entrance test.

43. Overemphasis on merit therefore, ignores the burdens of the past, assumes that everything is perfectly fair now and asks the question of how the candidate fares in examinations that test only a narrow range of skills, mainly of linear-type thought. This decontextualized, neutrality-based thinking glosses over historical and centuries old inequalities, the burdens of which continue to plague those who labour under disadvantage, and through the so called "level playing field" of a common exam, or evaluation, privileges those who had, and continue to have, access to wealth, power, premium education and other privileges, thus consolidating these advantages. Merit is a resource attractor. Those with it, accumulate more of it, more wealth and acquire more power. They use that money and power to purchase more increments of merit for themselves and their children.

44. The eminent legal thinker, Michael Sandel, in his *Tyranny of Merit,* bemoans that the US has now become a sorting machine "*that promises mobility on the basis of merit but entrenches privilege and promotes attitudes toward success corrosive of the commonality democracy requires"* (p. 155)He further says that first, all are told that although the promise of a mobile society based on merit is better than a hereditary hierarchy, it is important to comprehend that this promise does not come with any attendant promise to attenuate inequality in society. On the contrary, this promise legitimizes *"inequalities that arise from merit rather than birth" (*p. 161).Second, we learn that a system that rewards the most talented is likely to undervalue the rest, either explicitly or implicitly.

45. The context of these observations is to highlight that even when reservations are provided in education, sufficient numbers of the targeted students may not be able to achieve the goal of admission, because of the nature of the entrance criteria. Equality of opportunity then, to be real and meaningful, should imply that the necessary elements to create those conditions, should also be provided for. It would

therefore be useful to examine – only by way of illustration- the schemes that exist, for advancing educational opportunities, to Scheduled Caste ("SC" hereafter)/ Scheduled Tribe ("ST" hereafter) and SEBC students.

46. Central government scholarships are available to students from SC communities, for studies in Class IX and X, conditional to income of parents/ guardians being less than ₹2,50,000 per annum. Eligible students must also not be covered by any other central government scholarships or funding, but may be eligible for the National Means-cum-Merit Scholarship Scheme.[47] Under the pre matric scholarship scheme, day scholars are provided with ₹225 per month for a period of ten months, with a books and ad hoc grant, at ₹750 p.a. Hostellers receive ₹525 per month, for a period of ten months, with a similar grant at ₹1000 p.a. For 2020-21 a total amount of ₹ 750 crores was allocated, of which ₹ 404.93 crores was released. The previous years, from 2015-16 to 2019-20, the total allocated budget was ₹ 1,922 crores, of which ₹ 1,561.90 crores was released to 121.85 lakh beneficiaries.[48]

47. Pre-matric scholarships are provided for students of Class I to X, whose parents are manual scavengers, tanners and flyers, waste-pickers, or persons engaged in hazardous cleaning, as defined under the Manual Scavengers Act, 2013.[49] Hostellers are provided ₹700 per month, while day scholars, ₹225 per month through the academic year (ten months). Grants of ₹750 and ₹1000 p.a. are available to day-scholars and hostellers respectively. Here too, selected candidates are excluded from all other scholarships.

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47 Scheme List, Ministry of Social Justice and Empowerment, available at http://socialjustice.nic.in/SchemeList/Send/23?mid=24541 (Last accessed on 21.04.2021). See also, Notification dated 06.09.2019, 'Funding pattern for Pre-Matric Scholarship Scheme for SC Students studying in Class 9th and 10th for the year 2019-20', available at http://socialjustice.nic.in/writereaddata/UploadFile/Scm_guidelines_06092019.pdf (Last accessed on 21.04.2021).

48 Annual Report, 2020-2021, Department of Social Justice & Empowerment, Ministry of Social Justice and Empowerment, p.50, available at http://socialjustice.nic.in/writereaddata/UploadFile/ANNUAL_REPORT_2021_ENG.pdf , (Last accessed on 23.04.2021).

49 Ministry of Social Justice and Empowerment, Notification dated 2.04.2018, available at http://socialjustice.nic.in/writereaddata/UploadFile/Pre-Matric_Scholarship_haz.pdf (Last accessed on 21.04.2021).

48. At the post matric level, the Central Sector Scholarship Scheme of Top Class for SC Students, makes scholarships available to SC students who have secured admission at IIMs, IITs, AIIMS, NITs, NLUs, other central government institutions, institutions of national importance, etc.[50] The scholarship covers tuition fee (capped at ₹2 lakhs per annum for private institutions), living expenses at ₹2220 per month, allowance for books and stationery, and a computer and accessories (capped at ₹45,000, as one time assistance). Eligibility criteria require total family income from all sources to be less than ₹8,00,000 per annum. Under this scheme, in 2020-21, the total budget allocation was ₹ 40 crores; of this, as on 31.12.2020 ₹ 24.03 crores were spent on 1550 beneficiaries.[51] For the previous years, i.e. 2016-17 to 2019-2020, the total allocated budget was ₹ 131.50 crores, with a total expenditure of ₹ 127.62 crores, on 6676 beneficiaries.[52]

49. Similar pre-matric and post-matric scholarships are also available to ST students. At the state level too, various such scholarship schemes are made available to SC and ST students, and students belonging to minority communities and backward classes.[53]Similar pre-matric and post-matric scholarships are also available to ST students. At the state level too, various such scholarship schemes are made available to SC and ST students, and students belonging to minority communities and backward classes.[54] In respect of the post-matric scholarship for ST students, for the financial year 2020-21, an amount of ₹1833 crores was

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50Scheme List, Ministry of Social Justice and Empowerment, available at http://socialjustice.nic.in/SchemeList/Send/27?mid=24541 (Last accessed on 21.04.2021).

51Annual Report, 2020-2021, pg. 68, Department of Social Justice & Empowerment, Ministry of Social Justice and Empowerment, available at http://socialjustice.nic.in/writereaddata/UploadFile/ANNUAL_REPORT_2021_ENG.pdf , (Last accessed on 23.04.2021)

52*Ibid*

53See generally, https://pib.gov.in/PressReleasePage.aspx?PRID=1593767 (Last accessed on 21.04.2021).

54See generally, https://pib.gov.in/PressReleasePage.aspx?PRID=1593767 (Last accessed on 21.04.2021).

budgeted, out of which ₹1829.08 crore was released.[55] For the pre-matric scholarship for ST students, for the financial year 2020-21, an amount of ₹250 crores was budgeted, out of which ₹248.9 crores were released.

50. Under the Central Scholarship Scheme of Top-Class for ST students, in the year 2020-2021, a total budget of ₹29.31 Crores was allocated, out of which ₹20 Crore was disbursed among 2449 (1973 male and 512 female) beneficiaries.[56] In the year 2019-2020, a total budget of ₹20 Crores was allocated, with disbursement of ₹19.1 Crores to 1914 beneficiaries.[57] The State of Telangana had the highest number of beneficiaries, at 988, followed by Rajasthan at 363 and Andhra Pradesh at 147. The States of Chattisgarh and Madhya Pradesh had 69 and 49 beneficiaries respectively.[58]

51. Under the National Fellowship Scheme for ST students (at higher levels of education such as Ph.D., M.Phil), an amount of ₹90.78 Cr was disbursed to 2525 fellowship scholars.[59] Under the National Overseas Scholarship for ST students, for post-graduate study abroad, in the year 2020-21, an amount of ₹4.76 crore was disbursed to 30 beneficiaries.[60]

52. In respect of Other Backward Classes (OBCs), central government pre-matric and post-matric (Class 11-12th and above) are available, for students whose parents'/guardian's income from all sources does not exceed ₹2.5 lakhs. Under the pre-matric scholarship, ₹100/- per month for 10 months is given to day scholars and ₹500/- per month for 10 months is given to hostellers. For the year 2020-2021 (as on 31.12.2020) a total budget of ₹175 crore was allocated, out of which

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55 Post-Matric Scholarship, Ministry of Tribal Affairs, data available at https://dashboard.tribal.gov.in/ (Last accessed on 23.04.2021).

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

₹118.09 crore was provided to 200 lakh beneficiaries. In the previous years, from 2015-16 to 2019-20, a total of ₹759.9 crore was allocated, out of which ₹701.42 Crores was released to 463.08 lakh beneficiaries.[61]

53. Under the post-matric scholarship for OBCs, for the year 2020-2021, a total budget of ₹1100 crore was allocated, out of which, ₹802.27 crores were provided to 80 lakh beneficiaries. In the previous years, from 2015-16 to 2019-20, a total budget of ₹5,035.75 crore was allocated, out of which ₹4,827.89 crore was released for 207.96 lakh beneficiaries.[62]

54. A national fellowship is also available to OBC students at the degree levels of M.Phil and Ph.D. Fellowships are awarded to research students, at ₹31,000 per month for junior research fellows and at ₹35,000 per month for senior research fellows. Under this fellowship, for the year 2020-21, a budget of ₹45 crore was allocated, out of which ₹18 crore is expected to be provided to 2900 anticipated beneficiaries. In the previous years, from 2016-17 to 2019-20, ₹149.5 crore was allocated, out of which approx. ₹154 crore was provided to 7,200 beneficiaries (5,100 provisional).[63]

55. A report of the NITI Aayog[64], based on data from the 2001 Census, analysed that the gap between literacy rates of the general population and that of the SC population had not reduced over the years. The rate of school drop-outs was seen as a crucial indicator of lack of educational development. The dropout rates for SC children were seen to be very high – 32.7% in Classes I to V; 55.2% in Classes I to VIII; and 69.1% in classes I to X in 2004–05. The gap between the SC population

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61 Annual Report, 2020-2021, Department of Social Justice & Empowerment, Ministry of Social Justice and Empowerment, p. 104-105, available at http://socialjustice.nic.in/writereaddata/UploadFile/ANNUAL_REPORT_2021_ENG.pdf (Last accessed on 23.04.2021).

62 *Ibid.*, at p. 105.

63 *Ibid.*, at p. 107-108.

64 Available at https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/11th/11_v1/11v1_ch6.pdf (Last accessed on 21.04.2021).

and the general category was seen to increase at higher levels of schooling. Data on dropout rates for ST students in the year 2006-07 shows that the primary level (Class I-V), 33.2% ST students drop out. At the elementary level (Class I – VIII), this increases to 62.5%, while at the secondary level (Class I- X), the drop-out rate is 78.7%.[65] For the same time frame, the drop out rates for SC students at the primary level was 36%; at the elementary level, 53.1%; and at the secondary level, 69%.[66]According to the Annual Report (Periodic Labour Force Survey) for the year 2018-19, the literacy rate for age 7 and above was 69.4% for STs, 72.2% for SCs, 77.5% for OBCs, and 85.9% for others.[67]

56. This data makes a case for an intensive study into diverse areas such as the adequacy or otherwise of scholarships, quantum disbursed, eligibility criteria (the maximum family income limit of ₹ 2,50,000/- possibly *excludes* large segments of beneficiaries, given that even Group D employment in the Central Government can result in exclusion of any scholarships to children of such employees), and reconsideration about introducing other facilities, such as incentivising scholarships, grants and interest free or extremely low interest education loans to widen the net of recipients and beneficiaries. States and the Union government may also revisit the threshold limits and their tendency to exclude otherwise deserving candidates. For instance, even if an SC/ST or SEBC household has an income of ₹ 6,00,000/- year, the denial of scholarship to a deserving student from that background cannot equate her or him with another candidate, whose family

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65Reports and Publications, Ministry of Statistics and Program Implementation, available at http://mospi.nic.in/sites/default/files/reports_and_publication/cso_research_and_publication_unit/COSIOIESIOTSDVOL-2/Pages%20from%20educations-1.13.pdf (Last accessed on 22.04.2021).

66Reports and Publications, Ministry of Statistics and Program Implementation, available at http://mospi.nic.in/sites/default/files/reports_and_publication/cso_research_and_publication_unit/COSIOIESIOTSDVOL-2/Pages%20from%20educations-1.12.pdf(Last accessed on 22.04.2021).

67Table 49, Annual Report (Periodic Labour Force Survey) 2018-19, available at http://mospi.nic.in/sites/default/files/publication_reports/Annual_Report_PLFS_2018_19_HL.pdf, p. A-363 (Last accessed on 22.04.2021).

income might be four times that amount, and who might be able to pay annual fees for medical education, in private educational institutions. In other words, there needs to be constant scrutiny, review and revision of these policies and their effectiveness, besides the aspect of increasing funding, etc.

The wider possibilities of affirmative action- USA, South Africa and Canada

The US Experience

57. In the US, in *Fullilove v. Klutznick*,[68] the US Supreme Court rejected a challenge to the constitutionality of a federal law demanding preferential treatment of minority-owned businesses through a racial quota system. The challenged law[69] prescribed pre-conditions for receipt of state and local government public works grants upon the private entity's assurance that at least 10% of the amount of each grant would be spent on contracts with minority business enterprises (MBEs). Public contracts normally were awarded to the lowest bidder; the provision operated to grant public works contracts to the lowest bidder who complied with the 10% set-aside (quota) goal. The executive policy framed pursuant to the Act imposed upon those receiving grants and their prime contractors an affirmative duty to seek out and employ available, qualified, and *bona fide* MBEs. As the objective of the MBE provision was to overcome longstanding barriers to minority participation in public contracting opportunities, the set-aside provision i.e. condition favoured a higher MBE bid as long as the higher price reflected inflated costs resulting from past disadvantage and discrimination. The administrative program therefore authorized the Economic Development Agency to waive the minority participation requirement where a high minority business bid is not attributable to the present effects of past discrimination. The plaintiffs in Fullilove

68 448 U.S. 448 (1980).

69 Section 103(f)(2), Public Works Employment Act of 1977

were non-minority associations of construction contractors and subcontractors. They alleged that enforcement of the Public Works Act's MBE requirement caused economic injury to the non-minority business plaintiffs. In addition, the plaintiffs asserted that the MBE 10% quota provision violated the equal protection clause of the fourteenth amendment and the equal protection element of the due process clause of the fifth amendment.

58. The US Supreme Court held that the interference with the business opportunities of non-minority firms caused by the 10% set-aside program did not render the Act constitutionally defective. The Court rejected the alleged equal protection violation on the grounds that the Act ensured equal protection of the laws by providing minority businesses an equal opportunity to participate in federal grants. The later decision *Adarand Constructors, Inc. v. Penal*[70] held that federal affirmative action programs are now subject to strict scrutiny, just as state and local programs were since 1989. The court held that *"federal racial classifications, like those of a state, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."*

South Africa

59. Under South Africa's Constitution of 1998, Chapter 2, Article 9(3) dealing with "Equality" reads thus:

> "*The state may not unfairly discriminate directly or indirectly against any one on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth*".
>
> Chapter 10 says that public administration *"must be broadly representative of the South African people, with objectivity [and]*

70 515 U.S. 200 (1995)

fairness," and it needs *"to redress the imbalances of the past to achieve broad representation"*.

60. In furtherance of these provisions, in October 1998, the Employment Equity Act was legislated. The Act starts with the premise that "pronounced disadvantages" created by past policies cannot be redressed by a simple repeal of past discriminatory laws, and there was a need to enforce *"employment equity to redress the effects of discrimination,"* and *"achieve a diverse workforce broadly representative"* of the people of South Africa. The Act has two purposes: (1) to promote *"equal opportunity and fair treatment in employment through the elimination of unfair discrimination,"* and (2) to implement *"affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."* Designated groups are defined as black people (who include Africans, Coloureds and Indians), women, and people with disabilities.

61. Affirmative action measures for designated groups must include identification and removal of barriers adversely affecting them, actions to further diversity, reasonable accommodations to ensure equal opportunity and equitable representation, and efforts at training to retain and develop them. Representation is extended to all occupational categories and levels in the workforce and this is to be ensured through preferential treatment and numerical goals, but not with quotas. The Employment Equity Plan itself must state the objectives to be achieved each year, the affirmative action measures with timetables and strategies to be implemented to accomplish them, and the procedure to evaluate the plan. Each plan ought not to be for a period of less than one year, and not longer than five years. (At the expiration of one plan, another may follow.) While preferential treatment is meant for only suitably qualified people, such suitability may be a

product of formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job.

62. Under the Employment Equity Act, employers must consult with their employees and representative trade unions, after which an audit of employment policies and practices in the workplace must be undertaken. Analysis of the information garnered in the audit is meant to assist in developing demographic profiles of the work force, and identifying barriers to the employment or advancement of designated groups. Under-representation of designated groups in all categories of work must also be identified. Quotas are expressly prohibited under Section 15(3) of the Act. In 2003, the Black Economic Empowerment Act was legislated. This Act has as its purpose the *"economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas"*. To measure compliance with black economic empowerment (BEE) requirements, the Department of Trade and Industry uses a balanced scorecard, consisting of three broad components. The scorecard will be used for government procurement, public-private partnerships, sale of state-owned enterprises, when licenses are applied for, and for any other relevant economic activity. Strategies aimed at levelling the playing field may include the elimination of employment barriers such as adapting testing requirements to compensate for educational disadvantage or lack of work experience[71]; reviewing recruitment, selection and promotion procedures to ensure fairness in job competition[72]; accelerated and corrective training; and the transformation of work environments that exclude or otherwise disadvantage designated groups, e.g. measures aimed at

71 Durban City Council (Physical Environment Service Unit) v. Durban Municipal Employees' Society (DMES) (1995) 4 ARB 6.9.14.

72 Durban Metro Council (Consolidated Billing) v. IMATU obo Van Zyl and Another (1998) 7 ARB 6.14. 1.

integrating career and family responsibilities[73] (flexible work schedules, child care structures, facilitating career breaks, etc).

Canada

63. In *Canadian National Railway Co v. Canada (Canadian Human Rights Commission)*[74], Dickson J. reasoned that the purpose of an affirmative action programme is to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, but to ensure that future applicants and workers from the affected groups will not face the same insidious barriers that blocked their forebears.

64. In *Ontario (Human Rights Commission) v Ontario (Ministry of Health)*[75], the Ontario Court of Appeal interpreted the affirmative action provisions of the Ontario Human Rights Code 1990 and the Canadian Human Rights Act 1985, to reinforce the important insight that substantive equality requires positive action to ameliorate the conditions of disadvantaged groups. One of the important purposes of the provisions is to protect affirmative action programmes from being challenged as violating the formal equality provisions contained elsewhere in the Code or Act. Affirmative action, according to the court, is aimed at

> "*achieving substantive equality by enabling or assisting disadvantaged persons to acquire skills so that they can compete equally for jobs on a level playing field with those who do not have the disadvantage. The purpose of s. 14(l) is not simply to exempt or protect affirmative action programs from challenge. It is also an interpretative aid that clarifies the full meaning of equal rights by promoting substantive equality*".[76]

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73 Kalanke v. Frete Hansestadt Bremen Case C-450/93 [1996] 1 CMLR 175 (ECJ) at 181.

74 [1987] 1 SCR 1114 at 1143.

75 (1994) 21 CHRR (Ont CA) D/259 at D/265, quoting with approval Sheppard 'Litigating the relationship between equity and equality' (Study paper of the Ontario Law Reform Commission) Toronto (1993) 28.

76 (1994) 21 CHRR (Ont CA) D/259 at D/265.

Possibilities for Affirmative Action other than Reservation in India

65. The US practice of encouraging diversity by incentivising it by for instance, the award of government contracts to firms that have a good record of recruiting members from racially or ethnically disadvantaged groups, has found echo in policies in Madhya Pradesh. Other States such as UP, Bihar, Karnataka, AP and Telangana have followed a policy of affirmative action in awarding contracts and in that manner protecting SC and ST entrepreneurs' entry into trade, business and other public works as contractors. Recently, Karnataka enacted a legislation, namely, the Karnataka Transparency in Public Procurement (Amendment) Act, 2016, which reserves 24.1% for SC and ST contracts in all Government works, public contracts up to ₹ 50 lakh. This law aims to ensure the presence of SC and ST contractors and to get the award of Government work without rigid tender process. Orissa, too provides for a price preference to SC/ST entrepreneurs to the extent of 10% of contracts of a certain value.

66. There is empirical evidence, in India, in different sectors that access to productive employment is confined to a few sections of the workforce, among the most backward of classes, while the rest eke out a living in the informal economy. The faultlines of division between those who are employed in good jobs and those who are "excluded" run deep, and are based on caste, religion, region, and other sectarian divisions all of which overlap with class and gender, such that even within the small section of the workforce which is productively employed in decent jobs, some groups are better represented than others, placed higher than others, while some castes and communities are practically absent in the top echelons of the private corporate sector. While private employers firmly believe that jobs should be allocated on the basis of *individual merit*, their views about

how merit is distributed overlaps strongly with existing stereotypes around caste, religion, gender and regional differences.

67. A method by which the private sector can substantively contribute to alleviate discrimination and inequality, is through its corporate social responsibility (CSR) programmes. CSR has been compulsory in India since 2013. These initiatives have taken two major forms: education of the under-privileged either through special schools or other programmes to support school-going children, and support to poor women through home-based work or micro-finance. While these measures are significant, there are other spheres where CSR could be directed, with even greater benefits. The definition and scope of CSR needs to be broadened to include measures to counteract the natural tendencies towards exclusion of certain groups. Private sector managements need to show sensitivity to societal patterns of exclusion and must consciously make an attempt not to fall prey dominant social stereotypes, which penalize people due to their birth into stigmatizing jobs, even if they might be individually qualified and competent.

68. In addition to being sensitized to the problem of under-representation at the time of employment (by actively pursuing policies to promote and/or by equal opportunity employment policies), private companies can also pay attention to supplier diversity in matters of procurement. By encouraging supplies from firms owned by SCs, STs, or those from backward class or deprived classes, the large organized private sector in India could give a huge boost to the micro, medium and small enterprises owned by entrepreneurs from such marginalized groups. Indeed, this is also one of the planks used in the USA, for instance, where minority-owned businesses are not only given active financial incentives by the government, but larger firms are expected to source a part of their supplies from minority-owned businesses. Given that typically, SC, ST and backward class individuals owned micro enterprises are likely to employ greater proportion of persons from these

communities (as compared to enterprises owned by upper-caste groups), an active supplier diversity programme would also boost employment.

69. In view of all these developments, it is time that the states and the Union government gather data about the extent and reach of the existing schemes for employment, and in the field of education, take steps to ensure greater access, by wherever necessary, increasing funding, increasing the number and extent of coverage of scholarships, and setting up all manner of special institutions which can train candidates aspiring for higher education, to increase their chances of entry in admission tests, etc. Likewise, innovative employment incentives to the private sector, especially in the manner of employment in contracts or projects awarded by the state or its instrumentalities, need to be closely examined and implemented. These welfare measures can also include giving tax incentives to schemes that fund scholarships and easy (or interest free) loans to SC, ST and SEBC students, which can enhance their access to educational institutions. Today, even if an SC, or SEBC candidate secures admission in a common entrance examination for a medical seat, in a private institution, the amounts charged as annual fees would exclude most of such candidates (even those who are ineligible to government scholarships, as being marginally above the threshold of ₹ 2,50,000/- per annum annual family income). Other incentives, such as awarding marks while evaluating private entities for the purpose of public tenders, and giving them appropriate scores or advantage, if their workforce employs defined percentages of SC/ST or SEBC individuals, etc. too would make a substantial difference.

Re Point No (2) Whether Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments in the public services and posts under the State) for Socially and Educationally Backward Classes (SEBC) Act, 2018 as amended in 2019 granting 12% and 13% reservation for Maratha community in addition to 50% social reservation is

covered by exceptional circumstances as contemplated by Constitution Bench in Indra Sawhney's case?

and Re Point No (3) Whether the State Government on the strength of Maharashtra State Backward Commission Report chaired by M.C. Gaikwad has made out a case of existence of extraordinary situation and exceptional circumstances in the State to fall within the exception carved out in the judgment of Indra Sawhney?

70. I agree, with respect, with the reasoning and conclusions of Ashok Bhushan, J. on the above two points of reference and have nothing to add.

Re: Point No. 4 Whether Article 342 of the Constitution abrogates State power to legislate or classify in respect of "any backward class of citizens" and thereby affect the federal policy/structure of the Constitution of India? And

Point No. 5 Whether, States' power to legislate in relation to "any backward class" under Articles 15(4) and 16(4) is anyway abridged by Article 342(A) read with Article 366(26c) of the Constitution of India?

I. Relevant provisions in consideration

71. Both the above points of reference, by their nature, have to be and therefore, are considered together. The Constitution (123rd Amendment) Bill, 2017, after its passage became the Constitution (One Hundred and Second Amendment) Act, 2018; it received the assent of the President of India and came into force on 15.08.2018. The amendment inserted Articles 338B and 342A. These are reproduced below:

> *"338B. (1) There shall be a Commission for the socially and educationally backward classes to be known as the National Commission for Backward Classes.*
>
> *(2) Subject to the provisions of any law made in this behalf by Parliament, the 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 the duty of the Commission— (a) to investigate and monitor all matters relating to the safeguards provided for the socially and educationally backward classes 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 socially and educationally backward classes;

(c) to participate and advise on the socio-economic development of the socially and educationally backward classes and to evaluate the progress 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 reports the 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 socially and educationally backward classes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the socially and educationally backward classes 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.

(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 State Government which 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;

(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 the socially and educationally backward classes."

xxxxxx xxxxxx xxxxxx

"342A. (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 socially and educationally backward classes which shall for the purposes of this Constitution 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."

72. Article 366(26C), which defined "socially and educationally backward classes "too was inserted; it is reproduced below, for the sake of reference:

*'**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-*

(1)….

xxxxxx xxxxxx xxxxxx

(26C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of this Constitution;'

73. The Bill which was moved in Parliament by which the 102nd amendment was introduced, *interalia*, stated as follows:

"STATEMENT OF OBJECTS AND REASONS

xxxxxx xxxxxx xxxxxx

2. Vide the Constitution (Eighty-ninth Amendment) Act, 2003, a separate National Commission for Scheduled Tribes was created by inserting a new article 338A in the Constitution. Consequently, under article 338 of the Constitution, the reference was restricted to the National Commission for the Scheduled Castes. Under clause (10) of article 338 of the Constitution, the National Commission for Scheduled Castes is presently empowered to look into the grievances and complaints of discrimination of Other Backward Classes also.

3. In the year 1992, the Supreme Court of India in the matter of Indra Sawhney and others Vs. Union of India and others (AIR 1993, SC 477) had directed the Government of India to constitute a permanent body for entertaining, examining and recommending requests for inclusion and complaints of over-inclusion and under-inclusion in the Central List of Other Backward Classes. Pursuant to the said Judgment, the National Commission for Backward Classes Act was enacted in April, 1993 and the National Commission for Backward Classes was constituted on 14th August, 1993 under the

said Act. At present the functions of the National Commission for Backward Classes is limited to examining the requests for inclusion of any class of citizens as a backward class in the Lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate. Now, in order to safeguard the interests of the Socially and Educationally Backward Classes more effectively, it is proposed to create a National Commission for Backward Classes with constitutional status at par with the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes.

4. The National Commission for the Scheduled Castes has recommended in its Report for 2014-15 that the handling of the grievances of the Socially and Educationally Backward Classes under clause (10) of article 338 should be given to the National Commission for Backward Classes.

5. In view of the above, it is proposed to amend the Constitution of India, inter alia, to provide the following, namely:—

(a) to insert a new article 338 so as to constitute the National Commission for Backward Classes which shall consist of a Chairperson, Vice-Chairperson and three other Members. The said Commission will hear the grievances of Socially and Educationally Backward Classes, a function which has been discharged so far by the National Commission for Scheduled Castes under clause (10) of article 338; and

(b) to insert a new article 342A so as to provide that the President may, by public notification, specify the Socially and Educationally Backward Classes which shall for the purposes of the Constitution be deemed to be Socially and Educationally Backward Classes."

II. Contentions of parties

74. The appellants argue that the Maharashtra SEBC Act (which was enacted and brought into force on 30.11.2018), could not have been enacted, and is clearly void. It is argued that on a plain reading of Article 342A read with Article 366(26C), it is clear that States were denuded of their power to identify backward classes and the task was to be performed exclusively by the National Commission

for Backward Classes set up under Article 338B (hereafter "NCBC"). Mr. Arvind Datar, Mr. Shyam Divan and Mr. Gopal Sankaranarayanan, learned senior counsel emphasized that the expression *"for the purposes of this Constitution"* under Article 366(26C) and Article 342A(1) can only imply that the States' jurisdiction and power to identify a community as a backward class stood denuded. Consequently, it is only upon the recommendation of the NCBC that any community can henceforth be included in the list of SEBCs. It was submitted that by virtue of Article 342A, even the Union or the Central Government ceases to have any power to modify, add to or delete from the list so notified under Article 342A(1). It is Parliament alone which can make such modification, deletion or alteration. The term 'Central List' in Article 342(2) is not the list published by the Union for the affairs of the Union. The Constitution has used the word "Union" wherever the reference is made to the Government of India or Central Government, i.e., Articles 53, 73, 79, 309, List I of Schedule VII whereas the word 'Central Government' has been used recently in certain amendments which is not the expression used in the Constitution originally adopted. Thus, the reference to "Central List" means only the List in relation to states and union territories, for the purpose of the Constitution notified under Article 342A (1).

75. Learned senior counsel argued that the decision in *Indra Sawhney* (*supra*)[77] had required the setting up of permanent Commissions for identifying communities or castes such as backward classes to enable their notification by their respective governments. In the light of this recommendation and having regard to the principal existing provision under Article 340, Parliament had enacted the National Commission for Backward Classes Act, 1993 (hereafter "the NCBC Act"). That enactment used the expression, "Central list" in Section 2(c)[78].

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77 Paras 847, 855 (c) and 859 (13)- SCC report.

78 Defined as "*lists" means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or*

76. Learned counsel for the appellants submitted that while amending the Constitution, the expression “Central List” meant the List to be published by the President on the aid and advice of the Council of Ministers, after consultation with the Governors, i.e., the aid and advice of the State Governments. Thus, having regard to plain language of Article 366(26C) and Article 342A as well as the provisions in Article 338B (7), (8) and (9), there is no question of the State Governments or State Legislatures retaining any power to identify backward classes. That power is with the President.

77. It was submitted by Mr. Gopal Sankaranarayan, learned senior counsel that the object which impelled the Constitution (102nd Amendment) Act, 2018 appears to be to set up a national body for evolving scientific criteria of uniform application with regard to the identification of communities as backward classes. It was submitted that the frequent demands by various communities to be included in the list of backward classes to garner/gain access to State funded institutions and for public employment meant that States either succumb to such pressure or apply *ad-hoc* criteria and set up *ad-hoc* bodies which did not or could not consider issues in a dispassionate and holistic manner. Learned counsel relied upon the decision of this Court in *Ram Singh &Ors. v. Union of India (supra)*[79] to say that demands made by such communities led to States providing special reservation, which became the subject matter of judicial scrutiny.

78. Learned counsel also referred to agitations for inclusion of communities in other States such as Rajasthan which also led to repeated litigation. It was,

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other authority within the territory of India or under the control of the Government of India;

79 “*54. The perception of a self-proclaimed socially backward class of citizens or even the perception of the "advanced classes" as to the social status of the "less fortunates" cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can any longer backwardness be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative; possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State.”*

therefore, argued that to avoid these instances, and to ensure that a national standard for considering the relevant *indicia* for backwardness is constitutionally applied, an amendment to the Constitution was made. Learned counsel urged that the position adopted by the States, i.e., that they were not denuded of executive and legislative power and that the amendment only sought to give additional constitutional status to the existing NCBC is unfounded. It was pointed out that before the coming into force of the Constitution (102nd Amendment) Act, 2018, Article 340 existed under the original Constitution. Parliament, in exercise of its legislative power, enacted the NCBC Act. The NCBC had existed for 27 years and had conducted surveys and identified several communities as backward. The lists published by it were in existence and were in use by the Central Government for its purposes, including in public employment. Undoubtedly, not all communities included in the States' lists were part of the NCBC list. However, the list was broadly common to a large extent. Learned counsel emphasized that there was no necessity for bringing any constitutional amendment if the new Commission were to be given constitutional status and the lists published by it, made binding only on the Central Government which was to acquire such high degree of status that it could be modified by Parliament alone. It was submitted that surely, State interference with the Central list did not warrant such a drastic measure as a constitutional amendment.

79. Mr. Sankaranarayanan submitted that although there are passages in the report of the Select Committee of the Rajya Sabha, Parliament had discussed the amendment and taken into account the views of certain individuals; the fact remains that it is the text of the Constitution as amended, which is to be interpreted. Learned counsel relied upon the decisions reported as *State of Travancore-Cochin v. Bombay Company Ltd*[80]; *Aswini Kumar Ghose &Anr. v.*

80 1952 SCR 1112

Arabinda Ghose & Anr.[81]and *P.V. Narasimha Rao v. State*[82]. He also referred to the decision in *Sanjeev Coke Manufacturing v. Bharat Coking Coal Ltd. &Anr*[83].It was submitted that the consistent opinion of this Court has been the one adopted in *Pepper v. Hart*[84], which permits reference to the statements made in the House at the time of the introduction of Bill as an aid to construction of legislation which is ambiguous or obscure, and not in any other circumstances. It was thus submitted that the intention of the amendment was to ensure that a uniform standard and one aware of looking at backwardness in an objective manner, was to be adopted and applied, for the purposes of the Constitution. This also was aimed at eliminating the mischief that led to the introduction of communities as a consequence of protests – having been triggered by political considerations on the eve of elections.

80. The submissions articulated on behalf of the respondent States by Mr. Mukul Rohatgi, Mr. Kapil Sibal, Dr. A.M. Singhvi and Mr. Naphade, Additional Advocates General and Standing Counsel appearing on behalf of the various States, was that the interpretation suggested by the appellants is drastic. It was emphasized that the States' responsibility under Article 15(4) and 16(4) to make special provisions including reservations is undeniable. In the absence of any amendment to these provisions, learned counsel submitted that the Constitution (102nd Amendment) Act, 2018 cannot be so interpreted as to denude the States of their powers altogether. Learned counsel submitted that pursuant to the recommendations and directions in *Indra Sawhney (supra)*, not only was the NCBC Act enacted; in addition, different States also set up permanent commissions to identify communities as backward classes for the purpose of Constitution. Those Commissions were set up in exercise of legislative powers

81AIR 1953 SC 75

82(1998) 4 SCC 626.

83 (1983) 1 SCR 1000.

841993 (1) All. ER 42.

traceable to one or the other Entry in List II of the Seventh Schedule to the Constitution. The plenary legislative power of the States remains unaltered. That being the case, this Court should not accept the appellants' submission that Articles 338B and 342A place fetters upon the exercise of such legislative power as well as executive power of the States.

81. Learned counsel submitted that this Court should closely examine the contents of the report of the Select Committee of the Rajya Sabha, and the statements made by the Government, particularly that the power and jurisdiction of the States would remain unaffected. It was further urged that this Court can and should and ought to have looked into the contents of these reports to discern the true meaning and intent behind the Constitution (One Hundred and Second Amendment) Act, 2018, which was not to disrupt the existing legislative arrangement between the Centre and the State. In this regard, learned counsel placed reliance upon the judgment of this Court in *Kalpana Mehta and Ors. v. Union of India and Ors.*[85],and submitted that the Court can take aid of reports of Parliamentary Committees for the purpose of appreciating the historical background of statutory provisions, and also to resolve the ambiguity in the legislation.

82. It was submitted that if the matter were to be considered in the true perspective and the report of the Select Committee, examined as an aid to interpretation of the Constitution (102nd Amendment) Act, 2018, especially Article 342A, it would be apparent that the Parliament never intended, by the amendment, to disturb the existing order and denude the States of their executive or legislative power to identity backward classes while making special provisions under Articles 15(4) and 16(4). It was submitted that *Indra Sawhney (supra)* only created a larger movement for the setting-up of Commissions by the Union and the States. Learned counsel emphasized that even while identifying the communities for the purpose of

85(2018) 7 SCC 1

the Central List, the views of the States were always ascertained. Parliament merely sought to replicate the amendment by which collection of data has been undertaken under Article 338 (in relation to SCs). The introduction of Article 338B was in line with the introduction of Articles 338A and 338 – which enables the setting-up of National Commissions for Scheduled Castes and Scheduled Tribes(the latter through another amendment which was brought into force on 19.02.2004).

83. It was submitted that Articles 366(26C), 338B and 342A(1) have to, therefore, be read harmoniously in the light of the expression "Central List" which occurs in Article 342A(2). This would be in keeping with the debates and assurances held out in the Select Committee report that States' power would continue to remain unaffected. It was submitted that such construction would result in a harmonious interpretation of all provisions of the Constitution.

84. The learned Attorney General, appearing on account of notice issued by this Court, urged that the 102nd Amendment did not bring about a radical change in the power of identification of backward classes, in relation to states, and that this power continues to remain with states. He submitted that the comparison by the appellants, with the powers conferred by Article 338 and the Presidential power under Article 341 and Article 342, is inapt, because those were original provisions of the Constitution, having a historical background. It was submitted that the states' responsibilities to uplift the lot of weaker sections, apparent from the directive principle under Article 46, is through affirmative policies under Articles 15(4) and 16(4). To alter this balance, which had existed from the beginning of the coming into force of the Constitution, is too drastic, and nothing in the debates leading to the 102nd Amendment, or in any material, such as the Select Committee Report, suggests that end.

85. The learned Attorney General also submitted that the object of the 102nd amendment was to ensure that a commission with constitutional status would

periodically examine the needs of socially and educationally backward classes ("SEBC" hereafter), and suggest inclusion or exclusion of such classes, in a list for the purposes of Central Government, or central public sector corporation employment, and extension of other benefits under union educational and other institutions, under Articles 15 (4) and 16 (4). In case such a list is drawn and published under Article 342A (1), it is only Parliament that has the power to modify it. This does not, in any manner disturb or take away the states' power to identify or include communities as backward classes of citizens for the purposes of benefits that they wish to extend to them, through state policies and legislation, or for reservation in state employment under Article 16 (4). He highlighted that the term *"Unless the context otherwise requires"* is the controlling phrase, which precedes the definition of various terms under Article 366 of the Constitution. Therefore, if the context is different- as is evident from Article 342A (2), by the use of the term "Central List", that should be given meaning, and the interpretation based on that meaning should prevail in the construction of the entire provision (i.e. Article 342A).

86. The learned Attorney General further argued that this court had specifically recognized the states' power to identify, make special provisions, and reservations, in *Indra Sawhney*. He urged that the 102nd Amendment was not meant to limit this constitutional obligation of the states, but rather to streamline the method of identification of socially and educationally backward class of citizens, for the purpose of central employment, and centrally funded and sponsored schemes, institutions and facilities. It was urged that this is apparent from the use of the expression "Central List" in Article 342A (2), which has to guide the interpretation of the list referred to in Article 342A (1).

III. Provisions relating to Scheduled Castes and Scheduled Tribes, in the Constitution of India

87. Before proceeding with the interpretation of the provisions of the 102nd Amendment, it would be useful to briefly recapitulate the provisions that existed for the identification of SCs and STs. Before the Constitution was framed, the Government of India Act, by Section 26 defined SCs[86]. One Dr. J.H. Hutton, a Census Commissioner of India, framed a list of the depressed classes systematically, and that list was made the basis of an order promulgated by the British Government in India called the Government of India (Scheduled Castes) Order, 1936. This court, in one of its decisions noticed that such list became the basis for the Constitution (Scheduled Castes) Order, 1950.[87] Article 338 as originally enacted, provided for appointment of a special officer for the SCs and STs to investigate all matters relating to the safeguards provided for the SCs and STs under the Constitution and to report to the President on their working. In 1990, this position changed, and the Constitution (Sixty Fifth) Amendment Act was enacted to create a five-member commission under Article 338. The statement of objects[88] envisioned that such a commission would be

> *"a more effective arrangement in respect of the constitutional safeguards for Scheduled Castes and Scheduled Tribes than a single Special Officer as at present. It is also felt that it is necessary to elaborate the functions of the said Commission so as to cover 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 Scheduled Tribes."*

88. The composite Commission for SCs and STs was bifurcated by another amendment- the Constitution (Eighty Ninth Amendment) Act, 2003, which inserted

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86*" 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"*

87*Soosai Etc vs Union of India*1985 Supp (3) SCR 242.

88Statement of Objects and Reasons, Constitution Sixty fifth Amendment Act, 1990

Article 338A, enabling the creation of a commission exclusively to consider measures and make recommendations for amelioration of STs. Article 338B has now been introduced through the 102nd amendment, which is in issue.

89. The relevant provisions relating to SCs and STs under the Constitution are extracted below:

> *"**Article 366***
>
> ***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-*
>
> *(1) xxxxxx xxxxxx xxxxxx*
>
> *(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;"*
>
> ***Article 338***
>
> ***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 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 the 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 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 reports 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.

(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 documents;

(c) receiving evidence on affidavits;

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

(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."

Before the 102nd Amendment Act, the following sub-Article formed part of Article 338:

"(10) In this article, references to the Scheduled Castes and to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also shall be construed as including references to the Anglo-Indian community."

By the 102nd Amendment Act, the words *"and to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify"* were deleted[89]. The other provisions relating to SCs and STs are as follows:

"338A. National Commission for Scheduled Tribes.—

89By Section 2 which is as follows: *"2. In article 338 of the Constitution, in clause (10), the words, brackets and figures "to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also" shall be omitted".*

(1) There shall be a Commission for the Scheduled Tribes to be known as the National Commission for the Scheduled Tribes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the 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 the duty of the Commission— (a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes 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 Tribes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress 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 reports recommendation 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 Tribes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Tribes 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 such recommendations.

(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;

(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 Tribes.]

Article 341

***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 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

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."

IV. Previous commissions set up to identify SEBCs

90. It would be useful at this stage to recollect that before *Indra Sawhney*, two commissions were set up at the national level, to examine and make suitable recommendations in respect of identification of other backward classes. These were the Kaka Kalelkar Commission[90] and the B.P. Mandal Commission[91]. The Kalelkar Commission, after an exhaustive survey and study, through its report, identified 2399 backward groups and recommended several measures for their advancement, as steps that could be taken by the Union and the states. The Mandal Commission report identified individuals belonging to 3,743 different castes and communities, as "backward".

V. Interpretation of provisions similar to Article 342A- i.e. Articles 341 and 342 of the Constitution of India

90 Set up by the Central Government, in January 1953.

91 Set up by the Central Government on 1 January, 1979.

91. The consistent view while interpreting Articles 341 and 342 has been that the power which the Constitution conferred is initially upon the President, who, after the introduction of the 65th and 89th Amendments and the insertion of Articles 338 and 338A, is aided in the task of identification of the SCs and STs, by two separate Commissions, to include or exclude members claiming to be SCs or STs. The view of this Court has been that once a determination has been done, no court can, by interpretive process, or even the executive through its policies, include members of other communities as falling within a particular class or described community or even in any manner extend the terms of the determination under Articles 341 or 342. The power to further include, or modify contents of the existing list (of SC/STs) is with Parliament only [by reason of Article341 (2) and Article 342 (2)] This position has been consistently followed in a series of decisions. Likewise, in the interpretation as to which communities are categorized as SCs or STs, this Court has been definite, i.e. that only such classes or communities who specifically fall within one or the other lists, that constitute SCs or such STs for the purpose of this Constitution under Article 366(24) and Article 366 (25). This has been established in the decision of this Court in *Bhaiya Lal v. Harikishan Singh*[92]*; Basavalingappa v Munichinnappa*[93] and *Kishori Lal Hans v. Raja Ram Singh*[94]The recent Constitution Bench decision in *Bir Singh v. Delhi Jal Board*[95], reiterated this position clearly:

> *"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*

92 1965 (2) SCR 877.

93 1965 (1) SCR 316.
94 1972 (3) SCC 1.
95 (2018) 10 SCC 312.

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.

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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 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."

VI. Pre-102nd Amendment position in the Constitution in relation to SEBCs

92. The original Constitution did not contain any special provision of like manner as Articles 341 and 342. It did not define SEBCs. The only reference to SEBCs was in Article 340, which enabled the Central Government to setup a Commission for recommending measures for the progress and upliftment of backward classes of citizens. That provision is as follows:

> *"**340. Appointment of a Commission to investigate the conditions of backward classes***
> *(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission*
> *(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper*
> *(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament"*

93. After the decision of this Court in *Champakam Dorairajan v. State of Madras*[96], Article 15 was amended and Article 15 (4) was introduced. The term *"socially and educationally backward class of citizens"* was inserted, conferring power upon the State to make special provisions for their advancement. This term *"socially and educationally backward"* has been held to also provide colour the term "backward class" in the decision in *Indra Sawhney* – as indeed in the earlier decision in *NM Thomas (supra)*. This court noticed that 'backward class' of

96 AIR 1951 SC 226.

citizens, though wider in context, has to take colour from social backwardness, which also results in educational backwardness.

94. *Indra Sawhney* in para 859 (13)[97], had issued directions with regard to the desirability of setting up Commissions by the Central and State Governments, to ascertain the position and identification of backward class of citizens, evaluation of rational criteria and periodic review of such lists. Pursuant to this direction, Parliament introduced the NCBC Act, 1993. This Act defined 'Central List' under Section 2(c). The terms of this enactment make it clear that the lists of backward class of citizens prepared by the Commission and recommended to the Central Government were to be for the purposes of providing reservations in employment under Article 16(4), and for reservations and other ameliorate measures that the Central Government can initiate and introduce under Article 15(4). Acting on the recommendations of this court, *post Indra Sawhney,* several State Governments appeared to have enacted other laws for setting up commissions for backward class and backward caste groups[98]. In four States – Tamil Nadu, Gujarat, Punjab and Haryana, the Commissions were set up by executive action.

95. This Court had at the earlier part of this section, set out the provisions of Article 366(26C), Article 338B and Article 342A. The Statement of Objects and Reasons for the introduction of these provisions – referred to compendiously as the 102nd Amendment – do not indicate any concrete purpose for the insertion of those provisions, except the general comment that Parliament wished to confer constitutional status on the Commission for determination of SEBCs.

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97 SCC report.

98 The Maharashtra SCBC Act, 2006 is one such institution. The others are *Karnataka State Commission for Backward Classes, 1995; A.P. Commission for Backward Classes Act, 1995; U.P. State Commission for Backward Classes Act, 1996; Kerala State Commission for Backward Classes Act, 1993; Madhya Pradesh Rajya PichdaVargAdhiniyam, 1995; Bihar State Commission for Backward Classes Act, 1993; Assam Backward Classes Commission Act, 1993; Orissa State Commission for Backward Classes Act, 1993; West Bengal Commission for Backward Classes Act, 1993; J&K State Commission for Backward Classes Act, 1997; Chhatisgarth Rajya Pichhda Varga Adhiniyam, 1993 & Telangana Commission for Backward Classes Act, 1993.*

VII. The Constitution 123rd Amendment Bill, the 102nd Amendment Act and report of the Parliamentary Standing Committee

96. Learned counsel for the respondents as indeed the appellants referred extensively to the deliberations recorded in and assurances given, and reflected in the Report of the Select Committee of the Rajya Sabha, submitted to the Parliament at the time when the 123rd amendment bill was introduced. A brief reference of this can now be made. The introduction (to the Report dated (July 2017) disclosed that in all, seven meetings were held by the Select Committee. The committee comprised 25 members, with a Secretariat of 7 officials. It took note of statements made by three representatives of the Ministry of Social Justice, two from the Department of Legal Affairs and three from the Legislative Department.

97. The Report noted the background of introduction of the 123rd Amendment Bill including the amendments to Article 338 and the introduction of Article 338B. It traces the history of the Backward Class Commissions set up under Article 340, the office memoranda which led to the Judgment in *Indra Sahwney,* as well as the direction by this Court in that Judgment regarding setting up of commissions. It further noted the existing legal regime i.e., the NCBC Act, and noted that several experts felt that there was no change or amendment needed to alter the existing regime for identification of backward classes. In Para 20 of the Report, it was noted that in the Fifth Consultation Meeting, the members had raised the concern as to whether Article 342A(1) would exclude state consultation. The relevant para reads as follows:

> *"18. It was also submitted that the powers and functions of the State Government and the State Backward Classes Commissions with regard to identification, exclusion and inclusion of classes in the State List should be clarified. Further, the process of consultation with the Governor should also be clarified in the Bill.*

19. In response to the above issues raised, the Ministry clarified that sub-clause (9) of article 338B does not in any way interfere with the powers of the State Governments to prepare their own list. The Committee was further informed that classes so included in the State Backward Classes List do not automatically come in the Central List of OBCs.

20. In its fifth meeting representatives/Members raised a concern about clause (1) of Article 342A, whether the list would be issued by the President after consultation with the State Government or consultation with only Governor of the State. It was clarified by the Ministry that clause (1) of Article 154 and Article 163 of the Constitution clearly state that the Governor shall act on the advice of the Council of Ministers. It is also clarified that under the above Constitutional provisions, the Governor shall exercise his authority either directly or indirectly through officers of respective State Government. Article 341 of Constitution provides for consultation with Governor of State with respect to Scheduled Castes and Article 342 of the Constitution provides consultation of President with Governor of State in respect of Scheduled Tribes. As is the practice, at not time has the State Government been excluded in the consultation process. It is always invariably the State Government which recommends to the President the category of inclusion/exclusion in Scheduled Castes and Scheduled Tribes. Similar provision is provided for in the case of conferring of constitutional status for backward classes for inclusion in Central list of socially and educationally backward classes. Consultation with Governor thereby implies consultation with the State Government."

98. In its clause-by-clause consideration of the Bill, the Committee noted the apprehension with respect to setting up of a new Commission in Article 342B instead of creating it under Article 340. In this context, a clarification was issued that Article 340 enabled setting up of *adhoc* bodies like the Kaka Kalelkar Commission and Mandal Commission, whereas Article 338B sought to confer Constitutional status on a multi-member permanent body. Paras 31-34 of the Report discussed the membership of the composition of the Commission under Article 338B and also whether the NCBC Act would be repealed. Interestingly,

Para 47 reflects the discussion regarding an amendment by which new Sub-Article 10 was proposed to Article 338B. It read as follows:

> *"47. The Committee discussed the amendment wherein in article 338B a new sub-clause (10) was proposed to be inserted. This sub-clause (10) would read as follows:*
>
> '*Notwithstanding anything provided in clause 9, the State Government shall continue to have powers to identify Socially and Educationally Backward Classes'*.

99. The Committee was satisfied, in the Report with the clarification issued by the concerned Ministry in the following terms:

> "*48. It was clarified by the Ministry of Social Justice and Empowerment to the Committee that the proposed amendment does not interfere with the powers of the State Governments to identify the Socially and Educationally Backward Classes. The existing powers of the State Backward Classes Commission would continue to be there even after the passage of the Constitution (One Hundred and Twenty-third Amendment) Bill, 2017."*

100. Para 50-53 (of the Report) set out proposals to amend Article 342A which limited it to making provisions for reservations in appointments or posts under the Government of India or under the authority of the Government of India and also consequential amendment to Article 342A (2). Further, a proposed Article 342A(3) sought to empower the State Government - i.e. the Governor which could by public notification, specify SEBCs for the purposes of reservation of posts under the State or under any authority of the State. A like amendment was proposed, i.e., Article 342A (4) that:

> *"the Governor may on the advice of the State Commission of Backward Classes include or exclude from the State list of socially and educationally backward classes specified in a notification issued under Clause (3)"*.

101. The other set of amendments discussed were firstly, to Article 342A(1) that with respect to a State or Union Territory, the President could make inclusions *"with prior recommendation of the State Government, given due regard to such recommendations"*, and secondly, for the introduction of Article 342A(3) and (4) enabling the State to issue public notifications - like in the case of Article 342A(1) and the consequential amendment thereof through legislation alone, via proposed Article 342A (4).

102. Other amendments with respect to placing the report of the Commission under Article 338B before both Houses of Parliament, consultation with the governor to be based upon advice given to the governor by the state commission for backward classes, and amendment of the list under Article 342A (1) being only through a law based upon recommendations of the Commission under Article 338A and 338B and also obliging and revision of the list in ten year periods, were suggested.

103. <u>All these were duly considered in the Committee's Report and not accepted, stating as follows</u>:

> *"54. The Ministry, on the amendments moved, clarified that time bound decadal revision of lists by the proposed Commission, is a continuous process. The Commission however, is empowered to enquire into specific complaints with respect to the deprivation of right and safeguards of the socially and educationally backward classes.*
>
> *55. The Ministry clarified that the aspect of reservation of posts under that State or under any other authority of the State or under the control of the State, or seats in the educational institutions within that State was beyond the purview of the instant Bill and hence the amendments proposed are not allowed.*
>
> *56. It was clarified by the Ministry that clause (1) of article 154 and article 163 of the Constitution clearly state that Governor shall act on the advice of the Council of Ministers. It was informed that under the above Constitutional provisions the Governor shall exercise his*

authority either directly or indirectly through officers of respective State Government. Article 341 of Constitution provides for consultation by the President with Governor of State with respect to Scheduled Castes and article 342 of the Constitution provides consultation by the President with Governor of State in respect of Scheduled Tribes. As is the practice at no time has the State Government been excluded in the consultation process. It is always invariably the State Government which recommends to the President the category of inclusion /exclusion in Scheduled Castes and Scheduled Tribes. Similar provision is provided for in the case of conferring of constitutional status for backward classes for inclusion in Central list of SEBC. Consultation with Governor thereby implies consultation with the State Government.

57. The Ministry also clarified to the Committee that the phrase "for the purpose of this Constitution" as provided under clause (1) of article 342A is on lines similar to articles 341 and 342 of the Constitution. The setting up of the proposed Commission will not be retrograde to the interest of the socially and educationally backward classes. The article 342A will provide for a comprehensive examination of each case of inclusion/exclusion from the Central List. The ultimate power for such inclusion/exclusion would stand vested with the Parliament.

58. The Committee held discussion on the proposed amendments and in view of the detailed explanations furnished by the Ministry, the Committee adopted the Clause 4 of the Bill without any amendments.

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104. The section dealing with the amendment to Article 366 reads as follows:

*"**Clause 5:Provides for amendment of article 366***

59. This Clause proposes to insert a new clause (26C) in article 366 which reads as under:-

"(26C) socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of this Constitution;"

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105. The Report of the Select Committee, made certain concluding general observations, a part of which stated that:

> *"66. The Committee feels that the Constitutional Amendments proposed in this Bill would further strengthen affirmative action in favour of socially and educationally backward classes as well as further boost concept of cooperative federalism between the Centre and States.*
>
> *67. The Committee observes that the amendments do not in any way affect the independence and functioning of State Backward Classes Commissions' and they will continue to exercise unhindered their powers of inclusion/exclusion of other backward classes with relation to State List.*
>
> *68. The Committee also took note of the concerns raised by some Members regarding the composition of the Commission and would like to impress upon the Ministry that while addressing the concerns of the Members the rules framed for the Chairperson and Members of the National Commission for Scheduled Casts and National Commission for Scheduled Tribes may be taken into consideration. The Committee is of the view that while framing the rules for composition of the proposed Commission and selection of its Chairperson it should be ensured that the persons belonging to socially and educationally backward classes be given due representation to inspire confidence amongst the socially and educationally backward classes. It may further be ensured that at least one-woman member is part of the Commission.*
>
> *69. The Committee hopes that the Bill would bring a sea change by putting in place effective and efficient delivery mechanism for the welfare of socially and educationally backward classes."*

VIII Extrinsic aids to interpretation of statutes: the extent to which they can be relied upon

106. The parties presented rival submissions with respect to interpretation of the words of the statute in the light of the reports of the Select Committee report as

well as the debates in Parliament at the time of introduction of the amendment, or the law as enacted. The appellants asserted that such debates are of limited assistance only as external aids in the case of an ambiguity and had relied upon a line of decisions starting with *State of Travancore-Cochin v. Bombay Trading Company (supra)* and culminating in *P.V. Narasimha Rao (supra)*. On the other hand, the respondent States alluded to the larger bench decision of this Court in *Kalpana Mehta (supra)* which emphatically held that Standing Committee reports and statements made on the floor of House can be limited extrinsic aids for considering and interpreting express terms of a statute, or even the Constitution.

107. In the present case, the Statement of Objects and Reasons do not throw much light on why the provisions of the 102nd Amendment Act were introduced. No doubt, there are certain passages in the Select Committee Report suggestive of the fact that the power of identification carved out through the newly inserted Articles 338B and 342A would not in any manner disturb the powers of the State to carry on their work in relation to special provisions or reservations for backward classes (through appropriate measures, be it legislative or executive). A holistic reading of the report also suggests that the Select Committee reflected both points of view and recorded the assurances given by the Ministry that the State's power would not be disturbed. At the same time, in conclusion, it was emphatically stated that the States' concerns would be given due regard and that the exercise would be in line with the existing procedure under Articles 341 and 342.[99] The report also contains notes of dissent, which highlight that the amendments would deprive the States of their existing power to identify, and provide reservations and other special provisions for the benefit of SEBCs.

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99 *"57. The Ministry also clarified to the Committee that the phrase "for the purpose of this Constitution" as provided under clause (1) of article 342A is on lines similar to articles 341 and 342 of the Constitution. The setting up of the proposed Commission will not be retrograde to the interest of the socially and educationally backward classes. The article 342A will provide for a comprehensive examination of each case of inclusion/exclusion from the Central List. The ultimate power for such inclusion/exclusion would stand vested with the Parliament."*

108. There cannot be a disagreement with the proposition that where the provisions of the statute or its wordings are ambiguous, the first attempt should be to find meaning, through internal aids, in the statute itself. Failing this, it is open to the court to find meaning, and resolve the ambiguity, by turning to external aids, which include the statements of objects and reasons, as well as Parliamentary reports, or debates in Parliament. To this Court, it appears that the task of interpreting the provisions of 102nd Amendment does not begin by relying on external aids such as Statement of Objects and Reasons (which throw practically no light on the meaning of the provisions), or even the Select Committee Report. The task of interpretation is first to consider the overall scheme of the provisions, and secondly, after considering the provision, proceed to resolve any perceived ambiguity, if found, by resorting to aids within the statute. It is at the third stage, when such resolution is impossible, that external aids are to be looked into. Thus, in a seven-judge bench decision, this court, in *State of Karnataka v. Union of India*[100] administered the following caution, while outlining the court's task of interpreting the Constitution:

> *"The dynamic needs of the nation, which a Constitution must fulfil, leave no room for merely pedantic hair-splitting play with words or semantic quibblings. This, however, does not mean that the Courts, acting under the guise of a judicial power, which certainly extends to even making the Constitution, in the sense that they may supplement it in those parts of it where the letter of the Constitution is silent or may leave room for its development by either ordinary legislation or judicial interpretation, can actually nullify, defeat, or distort the reasonably clear meaning of any part of the Constitution in order to give expression to some theories of their own about the broad or basic scheme of the Constitution. The theory behind the Constitution which can be taken into account for purposes of interpretation, by going even so far as to fill what have been called the "interstices" or spaces left unfilled, due perhaps to some deliberate vagueness or*

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100 1978 (2) SCR 1.

indefiniteness in the letter of the Constitution, must itself be gathered from express provisions of the Constitution. The dubiousness of expressions used may be cured by Court by making their meanings clear and definite if necessary in the light of the broad and basic purposes set before themselves by the Constitution makers. And, these meanings may, in keeping with the objectives or ends which the Constitution of every nation must serve, change with changing requirements of the times. The power of judicial interpretation, even if it includes what may be termed as "interstitial" law making, cannot extend to direct conflict with express provisions of the Constitution or to ruling them out of existence."

109. The primary duty of this court, while interpreting a constitutional provision(in the present case, an amendment to the Constitution, no less) was underlined thus, in *GVK Industries Ltd. v. Income Tax Officer*[101]

"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:

"[T]o 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."

101(2011) 4 SCC 36.

> *(See Reflections on Free-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.”*

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* [102] after quoting from *G. Narayanaswami* v. *G. Panneerselvam*[103] this court held that

> *“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 construction” is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results.”*

110. Whilst dealing the task of the court, and the permissible extent to which it can resort to internal and extrinsic aids to construction of a statute, this court remarked, in *Pushpa Devi v. Milkhi Ram*[104]that:

> ***“18.*** *It is true when a word has been defined in the interpretation clause, prima facie that definition governs wherever that word is used*

102(2006) 7 SCC 1.

103(1972) 3 SCC 717.

104(1990) 2 SCC 134.

in the body of the statute unless the context requires otherwise. "The context" as pointed out in the book Cross-Statutory Interpretation (2nd edn. p. 48) "is both internal and external". The internal context requires the interpreter to situate the disputed words within the section of which they are part and in relation to the rest of the Act. The external context involves determining the meaning from ordinary linguistic usage (including any special technical meanings), from the purpose for which the provision was passed, and from the place of the provisions within the general scheme of statutory and common law rules and principles.

19. *The opening sentence in the definition of the section states "unless there is anything repugnant in the subject or context". In view of this qualification, the court has not only to look at the words but also to examine the context and collocation in the light of the object of the Act and the purpose for which a particular provision was made by the legislature."*

111. Again, in *Karnataka State Financial Corporation. v. N. Narasimahaiah*[105]it was observed that:

*"**42.** Interpretation of a statute would not depend upon a contingency. It has to be interpreted on its own. It is a trite law that the court would ordinarily take recourse to the golden rule of literal interpretation. It is not a case where we are dealing with a defect in the legislative drafting. We cannot presume any. In a case where a court has to weigh between a right of recovery and protection of a right, it would also lean in favour of the person who is going to be deprived therefrom. It would not be the other way round. Only because a speedy remedy is provided for that would itself (sic not) lead to the conclusion that the provisions of the Act have to be extended although the statute does not say so. The object of the Act would be a relevant factor for interpretation only when the language is not clear and when two meanings are possible and not in a case where the plain language leads to only one conclusion."*

105(2008) 5 SCC 176.

112. In another recent decision, *Laurel Energetics (P) Ltd. v. Securities Exchange Board of India*[106] this court observed that:

> *"**24.** In Utkal Contractors and Joinery (P) Ltd. v. State of Orissa [Utkal Contractors and Joinery (P) Ltd. v. State of Orissa, 1987 Supp SCC 751] , a similar argument was turned down in the following terms: (SCC pp. 757-58, paras 11-12)*
> *'11. Secondly, the validity of the statutory notification cannot be judged merely on the basis of Statement of Objects and Reasons accompanying the Bill. Nor it could be tested by the government policy taken from time to time. The executive policy of the Government, or the Statement of Objects and Reasons of the Act or Ordinance cannot control the actual words used in the legislation. In Central Bank of India v. Workmen [Central Bank of India v. Workmen, AIR 1960 SC 12] S.K. Das, J. said: (AIR p. 21, para 12)*
>
> *'12. … The Statement of Objects and Reasons is not admissible, however, for construing the section; far less can it control the actual words used.'*
>
> *12. In State of W.B. v. Union of India [State of W.B. v. Union of India, AIR 1963 SC 1241] , Sinha, C.J. observed: (AIR p. 1247, para 13)*
> *'13. … It is however, well settled that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, cannot be used to determine the true meaning and effect of substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. But we cannot use this statement as an aid to the construction of the enactment or to show that the legislature did not intend to acquire the proprietary right vested in the State or in any way to affect the State Governments' rights as owner of minerals. A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute."*

106(2017) 8 SCC 541

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> ***25.*** *In the factual scenario before us, having regard to the aforesaid judgment, it is not possible to construe the Regulation in the light of its object, when the words used are clear. This statement of the law is of course with the well-known caveat that the object of a provision can certainly be used as an extrinsic aid to the interpretation of statutes and subordinate legislation where there is ambiguity in the words used."*

113. The position in UK is that that the report of a Select Committee may be considered as background to the construction of an Act; however, such reports could not be invested with any kind of interpretive authority.[107] In *R. (Baiai) v. Home Secretary,*[108]a report of the Parliamentary Joint Committee on Human Rights was considered. The committee's opinions on compatibility and other matters of law were held to have persuasive value, however, they could have no greater weight than, for example, the views of distinguished academic writers.[109]

IX Interpretation of the Constitution, the definition clause under Article 366 and Amendments to the Constitution

114. The Court has to interpret provisions of the Constitution, in this case, introduced through an amendment. The proper method of interpreting such an amendment was indicated by a five-judge bench in *Kihoto Hollohan v. Zachillhu*[110], where it was held that:

> *"26. In expounding the processes of the fundamental law, the Constitution must be treated as a logical whole. Westel Woodbury Willoughby in The Constitutional Law of the United States (2nd edn., Vol. 1, p. 65) states:*

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107 See *Ryanair Ltd. v. HM Revenue and Customs* [2014] EWCA Civ. 410.

108 [2006] EWHC 823 (Admin).

109 Also see *Craies on Statutory Interpretation,* Eleventh Edition(Sweet & Maxwell) 2017 Chap. 27 @ para 27.1.13.1, page 952

110 1992 Supp (2) SCC 651

"The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of the other parts."

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"28. In considering the validity of a constitutional amendment the changing and the changed circumstances that compelled the amendment are important criteria. The observations of the U.S. Supreme Court in Maxwell v. Dow [176 US 581 : 44 L Ed 597, 605 (1899)] are worthy of note: (L Ed p. 605)

"… to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted …."

115. Recollecting these principles, this court is mindful of the first circumstance that the 102nd Amendment brought in an entirely new dimension - an attempt to identify backward classes, firstly by inserting Sub-Article (26C) into the definition clause under Article 366. This insertion, in the opinion of the court, accords with the statutory scheme of defining terms *for the purposes of the Constitution.* This term "*for the purposes of this Constitution"* occurs twelve times[111] in the Constitution.

116. The interpretation of the definition in relation to the Constitution, is truly indicative that for the purpose of the entire constitution, the meaning ascribed in the definition clause – in this case, by Article 366 (26C), has to prevail. While interpreting whether members of SCs/ STs who communities find mention in the Presidential notification in two states, could claim reservation benefits in both states, this court had occasion to consider a *parimateria* provision, i.e. Articles 366 (24) and (25) which defined SCs "*for the purposes of this constitution"*. In *Marri*

111 Articles 108 (4); 299 (2); 341(1); 342 (1); 342A (1); 366 (14); 366 (24); 366 (25); 366 (26C) and 367 (3)

Chandra Shekhar Rao v. Dean, Seth G.S. Medical College[112], a Constitution Bench of this Court held as follows:

> *"12. It is, however, necessary to give proper meaning to the expressions 'for the purposes of this Constitution' and 'in relation to that State' appearing in Articles 341 and 342 of the Constitution."*

This court then noticed the divergent views of the High Courts and then observed:

> *"13. It is trite knowledge that the statutory and constitutional provisions should be interpreted broadly and harmoniously. It is trite saying that where there is conflict between two provisions, these should be so interpreted as to give effect to both. Nothing is surplus in a Constitution and no part should be made nugatory. This is well settled. See the observations of this Court in Venkataramana Devaru v. State of Mysore [1958 SCR 895, 918 : AIR 1958 SC 255] , where Venkatarama Aiyer, J. reiterated that the rule of construction is well settled and where there are in an enactment two provisions which cannot be reconciled with each other, these should be so interpreted that, if possible, effect could be given to both. It, however, appears to us that the expression 'for the purposes of this Constitution' in Article 341 as well as in Article 342 do imply that the Scheduled Caste and the Scheduled Tribes so specified would be entitled to enjoy all the constitutional rights that are enjoyable by all the citizens as such. Constitutional right, e.g., it has been argued that right to migration or right to move from one part to another is a right given to all — to Scheduled Castes or Tribes and to non-scheduled castes or tribes. But when a Scheduled Caste or Tribe migrates, there is no inhibition in migrating but when he migrates, he does not and cannot carry any special rights or privileges attributed to him or granted to him in the original State specified for that State or area or part thereof. If that right is not given in the migrated State it does not interfere with his constitutional right of equality or of migration or of carrying on his trade, business or profession. Neither Article 14, 16, 19 nor Article 21 is denuded by migration but he must enjoy those rights in accordance with the law if they are otherwise followed in the place where he migrates. There should be harmonious construction, harmonious in*

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112 1990 SCC (3) 130.

the sense that both parts or all parts of a constitutional provision should be so read that one part does not become nugatory to the other or denuded to the other but all parts must be read in the context in which these are used. It was contended that the only way in which the fundamental rights of the petitioner under Articles 14, 19(1)(d), 19(1)(e) and 19(1)(f) could be given effect to is by construing Article 342 in a manner by which a member of a Scheduled Tribe gets the benefit of that status for the purposes of the Constitution throughout the territory of India. It was submitted that the words "for the purposes of this Constitution" must be given full effect. There is no dispute about that. The words "for the purposes of this Constitution" must mean that a Scheduled Caste so designated must have right under Articles 14, 19(1)(d), 19(1)(e) and 19(1)(f) inasmuch as these are applicable to him in his area where he migrates or where he goes. The expression "in relation to that State" would become nugatory if in all States the special privileges or the rights granted to Scheduled Castes or Scheduled Tribes are carried forward. It will also be inconsistent with the whole purpose of the scheme of reservation. In Andhra Pradesh, a Scheduled Caste or a Scheduled Tribe may require protection because a boy or a child who grows in that area is inhibited or is at disadvantage. In Maharashtra that caste or that tribe may not be so inhibited but other castes or tribes might be. If a boy or a child goes to that atmosphere of Maharashtra as a young boy or a child and goes in a completely different atmosphere or Maharashtra where this inhibition or this disadvantage is not there, then he cannot be said to have that reservation which will denude the children or the people of Maharashtra belonging to any segment of that State who may still require that protection. After all, it has to be borne in mind that the protection is necessary for the disadvantaged castes or tribes of Maharashtra as well as disadvantaged castes or tribes of Andhra Pradesh. Thus, balancing must be done as between those who need protection and those who need no protection, i.e., who belong to advantaged castes or tribes and who do not. Treating the determination under Articles 341 and 342 of the Constitution to be valid for all over the country would be in negation to the very purpose and scheme and language of Article 341 read with Article 15(4) of the Constitution.

***14.** Our attention was drawn to certain observations in Elizabeth Warburton v. James Loveland [1832 HL 499] . It is true that all*

provisions should be read harmoniously. It is also true that no provision should be so read as to make other provisions nugatory or restricted. But having regard to the purpose, it appears to us that harmonious construction enjoins that we should give to each expression —"in relation to that State" or "for the purposes of this Constitution" — its full meaning and give their full effect. This must be so construed that one must not negate the other. The construction that reservation made in respect of the Scheduled Caste or Tribe of that State is so determined to be entitled to all the privileges and rights under the Constitution in that State would be the most correct way of reading, consistent with the language, purpose and scheme of the Constitution. Otherwise, one has to bear in mind that if reservations to those who are treated as Scheduled Caste or Tribe in Andhra Pradesh are also given to a boy or a girl who migrates and gets deducted (sic inducted) in the State of Maharashtra or other States where that caste or tribe is not treated as Scheduled Caste or Scheduled Tribe then either reservation will have the effect of depriving the percentage to the member of that caste or tribe in Maharashtra who would be entitled to protection or it would denude the other non-Scheduled Castes or non-Scheduled Tribes in Maharashtra to the proportion that they are entitled to. This cannot be logical or correct result designed by the Constitution."

(emphasis supplied)

117. This Constitution Bench decision was followed in another decision, again by five judges in *Action Committee on Issue of Caste Certificate to Scheduled Castes & Scheduled Tribes in the State of Maharashtra &Anr v. Union of India & Anr.*[113], when this court reiterated its previous view in *Marri (supra)* and observed further as follows:

"16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same

113(1994) 5 SCC 244.

nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the Constitution-makers as is evident from the choice of language of Articles 341 and 342 of the Constitution."

118. The recent judgment in *Bir Singh v. Delhi Jal Board* (*supra*) reiterated the previous two Constitution Bench judgments. It is useful to notice the partly concurring judgment of Bhanumati, J. who observed that

"80. *Clause (24) of Article 366 defines "Scheduled Castes" and clause (25) of Article 366 defines "Scheduled Tribes". The latter 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".

81. *Article 341(1) of the Constitution empowers the President, in consultation with the Governor of the State concerned, to specify Scheduled Castes by public notification. Equally, Article 342(1) of the Constitution empowers the President*

"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".

Article 342(2) of the Constitution empowers

"Parliament, by law, to 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."

Until the Presidential Notification is modified by appropriate amendment by Parliament in exercise of the power under Article 341(2) of the Constitution, the Presidential Notification issued under Article 341(1) is final and conclusive and any caste or group cannot be added to it or subtracted by any action either by the State Government or by a court on adducing of evidence. In other words, it is the constitutional mandate that the tribes or tribal communities or parts of or groups within such tribes or tribal communities specified by the President, after consultation with the Governor in the public notification, will be "Scheduled Tribes" subject to the law made by Parliament alone, which may, by law, include in or exclude from the list of "Scheduled Tribes" specified by the President. Thereafter, it cannot be varied except by law made by Parliament.

82. *The President of India alone is competent or authorised to issue an appropriate notification in terms of Articles 341(1) and 342(1). Cumulative reading of Articles 338, 341 and 342 indicate that:*

(a) Only the President could notify castes/tribes as Scheduled Castes/Tribes and also indicate conditions attaching to such declaration. A public notification by the President specifying the particular castes or tribes as SC/ST shall be final for the purpose of Constitution and shall be exhaustive.

(b) Once a notification is issued under clause (1) of Articles 341 and 342 of the Constitution, Parliament can by law include in or exclude from the list of Scheduled Castes or Scheduled Tribes, specified in the notification, any caste or tribe but save for that limited purpose the notification issued under clause (1), shall not be varied by any subsequent notification [Ref. Action Committee on Issue of Caste Certificate to SCs/STs in State of Maharashtra v. Union of India, (1994) 5 SCC 244] ."

119. These three Constitution Bench judgments, *Marri (supra)*, *Action Committee (supra)* and *Bir Singh (supra)* therefore, have set the tone as it were, for the manner in which determination by the President is to be interpreted, having

regard to the definition clause in Article 366, which has to apply for interpreting the particular expression in a consistent manner, for the purpose of the Constitution. Thus, the expression SCs *in relation to a State* for the *"purpose of this Constitution"*, means the member of a SC declared to be so under the Presidential Notification. The terms of such Presidential Notification insist that such a citizen ought to be a resident of that concerned State or Union Territory. This aspect is of some importance, given that there are a large number of communities which are common in several States. However, the decisions of this Court are uniform since *Marri (supra)* stated that it is only the citizens residing in a particular state who can claim the benefit of reservation – either of that State or of the Centre for the purposes of the Constitution in *relation to that State*. Necessarily, therefore, the resident of State A is entitled to claim reservation benefits under Articles 15(4) and 16(4) if he or she resides (the residential qualification that needs to be fulfilled is that specified by the concerned State) in that State, (i.e. A) and none else. As a sequitur, if such a person or community or caste (of state A) is also described as a Scheduled Caste in State B, for the purposes of State services or admission to State institutions, he cannot claim the benefits of reservation as a scheduled caste in such B State. However, *Bir Singh (supra)* has made it clear that for the purposes of Union employment and admissions to Union institutions the position is different because SCs living within the territory of India in relation to one State or the other, are deemed to be SCs or STs for the purposes of this Constitution in relation for the purposes of Union employment.

120. The interpretation of Articles 341 and 342 of the Constitution, read with Articles 366 (24) and 366 (25), have to, in our opinion, be the guiding factors in interpreting Article 366 (26C), which follows a similar pattern, i.e. of defining, *for the purpose of the entire constitution*, with reference to the determination of those

communities who are notified as SEBCs, under Article 342A (which again uses the expression *"for the purpose of this constitution"*).

121. Quite similarly, when Article 366 was amended by the Forty Sixth amendment Act, and Article 366(29A) was introduced to Article 366, this Court considered the previous amendments, which are the 6th Amendment to the Constitution and the 46th Amendment which amended Article 269 and Article 286, besides introducing Entry 92A to the Union List. The Court went on to hold in a five-judge bench decision in *20th Century Finance Corpn. Ltd. v. State of Maharashtra*[114], that the interpretation adopted by this Court led to the inexorable conclusion that a limitation was placed upon the States' power of taxation. Article 366(29A) on the one hand, expanded the *specie* of sale which could be the legitimate subject of taxation by the State, but at the same time, on the other hand, the amendment also introduced limitations upon the State power which was subjected to controls by Parliament. Therefore, in the context of the amendment the expression "*sale*" underwent alteration, partly allowing and partly restricting states' power to tax goods. This court, after recounting the history of the previous litigation, held that:

> *"19. Following the decisions referred to above, we are of the view that the power of State Legislatures to enact law to levy tax on the transfer of right to use any goods under Entry 54 of List II of the Seventh Schedule has two limitations — one arising out of the entry itself; which is subject to Entry 92-A of List I, and the other flowing from the restrictions embodied in Article 286. By virtue of Entry 92-A of List I, Parliament has power to legislate in regard to taxes on sales or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. Article 269 provides for levy and collection of such taxes. Because of these restrictions, State Legislatures are not competent to enact law imposing tax on the transactions of transfer of right to use any goods which take place in the course of inter-State trade or commerce. Further, by virtue of clause (1) of Article 286, the State Legislature is*

114 (2000) 6 SCC 12

> *precluded from making law imposing tax on the transactions of transfer of right to use any goods where such deemed sales take place (a) outside the State; and (b) in the course of import of goods into the territory of India. Yet, there are other limitations on the taxing power of the State Legislature by virtue of clause (3) of Article 286. Although Parliament has enacted law under clause (3)(a) of Article 286 but no law so far has been enacted by Parliament under clause (3)(b) of Article 286. When such law is enacted by Parliament, the State Legislature would be required to exercise its legislative power in conformity with such law. Thus, what we have stated above, are the limitations on the powers of State Legislatures on levy of sales tax on deemed sales envisaged under sub-clause (d) of clause (29-A) of Article 366 of the Constitution."*

122. In a similar manner, the expression, "*unless the context otherwise provides*"[which is the controlling expression in Article 366(1)] was interpreted by an earlier Constitution Bench in *Builders' Association of India v. Union of India*[115]when the amendment to Article 366 was considered:

> *"32. Before proceeding further, it is necessary to understand what sub-clause (b) of clause (29-A) of Article 366 of the Constitution means. Article 366 is the definition clause of the Constitution. It says that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression 'goods' is defined in clause (12) of Article 366 of the Constitution as including all materials, commodities and articles."*

After discussing the previous decisions in respect of the unamended provisions, the court stated that:

> *"The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods*

115(1989) 2 SCC 645

under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of 'tax on sale or purchase of goods' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. Clause (1) of Article 286 says that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place — (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Here again we have to read the expression "a tax on the sale or purchase of goods" found in Article 286 as including the transfer of goods referred to in sub-clause (b) of clause (29-A) of Article 366 which is deemed to be a sale of goods and the tax leviable thereon would be subject to the terms of clause (1) of Article 286. Similarly the restrictions mentioned in clause (2) of Article 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of Article 286 would also be attracted to a transfer of goods contemplated under Article 366(29-A)(b). Similarly clause (3) of Article 286 is also applicable to a tax on a transfer of property referred to in sub-clause (b) of clause (29-A) of Article 366. Clause (3) of Article 286 consists of two parts. Sub-clause (a) of clause (3) of Article 286 deals with a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under clause (29-A) of Article 366 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in clause (29-A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in Section 15 of the Central Sales Tax Act, 1956.

…. We are of the view that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A)

of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution."

123. In *Commissioner of Income Tax v. Willamson Financial Services*[116],this court had to interpret "agricultural income", a term defined in Article 366(1) as follows:

"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—

(1) 'agricultural income' means agricultural income as defined for the purposes of the enactments relating to Indian income tax;"

124. Noticing that the definition (Article 366 (1) (1)) itself referred to the term as defined by the Income tax Act, and after considering the definition in the existing enactment, this court held that:

"30. The expression "agricultural income", for the purpose of abovementioned entries, means agricultural income as defined for the purpose of the enactments relating to Indian income tax vide Article 366(1) of the Constitution. Therefore, the definition of "agricultural income" in Article 366(1) indicates that it is open to the income tax enactments in force from time to time to define "agricultural income" in any particular manner and that would be the meaning not only for tax enactments but also for the Constitution. This mechanism has been devised to avoid a conflict with the legislative power of States in respect of agricultural income."

125. Another important decision is *Tata Consultancy Services v. State of A.P.*[117]The issue involved was interpretation of the expression in Article 366(12), i.e. "goods" which reads as follows:

"(12) "goods" includes all materials, commodities, and articles".

116(2008) 2 SCC 202.

117(2005) 1 SCC 308.

126. This court expansively interpreted the definition and held that the it includes software programmes, observing that the term *"goods"* included intangible property:

> *"27. In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. [(2001) 4 SCC 593] A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". …… The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes."*

127. It is therefore, apparent that whenever the definition clause, i.e. Article 366 has arisen for interpretation, this court has consistently given effect to the express terms, and in the broadest manner. Whenever new definitions were introduced, full effect was given, to the plain and grammatical terms, often, limiting existing legislative powers conferred upon the states.

128. Before proceeding to examine whether the term *"the Central List"* in Article 342A indicates an expression to the contrary, [*per* Article 366 (1)] it is also necessary to consider some decisions that have interpreted amendments which introduced entirely new provisions, either affecting state's legislative powers, or limiting fundamental rights.

129. In *Bimolangshu Roy v. State of Assam*[118] the state's legislative competence to enact a law providing for appointment of Parliamentary Secretaries, in the context of provisions of the Constitution (Ninety-First Amendment) Bill, 2003 which was passed by both the Houses of Parliament and after receiving the assent of the President, became a provision of the Constitution. It introduced Article 164(1-A), which had the effect of limiting the total number of Ministers in the Council of Ministers in a State, including the Chief Minister, to fifteen per cent of the total number of members of the Legislative Assembly of that State; the minimum number of ministers was to be 12. The state assembly sought to create offices that had the effect of exceeding the number mandated (15%). Upon a challenge, it was argued that the state had legislative competence to enact the law, by virtue of Article 194. That argument was repelled by this court, which held:

> *"**36.** As rightly pointed out by the petitioners, the existence of a dedicated article in the Constitution authorising the making of law on a particular topic would certainly eliminate the possibility of the existence of the legislative authority to legislate in Article 246 read with any entry in the Seventh Schedule indicating a field of legislation which appears to be closely associated with the topic dealt with by the dedicated article. For example, even if the Constitution were not to contain Entries 38, 39, 40 in List II the State Legislatures would still be competent to make laws w.r.t. the topics indicated in those three entries, because of the authority contained in Articles 164(5), 186, 194, 195, etc. Therefore, to place a construction on those entries which would have the effect of enabling the legislative body concerned to make a law not within the contemplation of the said articles would be plainly repugnant to the scheme of the Constitution."*
>
> *******
>
> *"**39.** The distinction between the scheme of Article 262 Entry 56 of List I and Entry 17 of List II and the scheme of Article 194 and Entry 39 of List II is this that in the case of inter-State water disputes neither of the abovementioned two entries make any mention of the*

118(2018) 14 SCC 408

adjudication of water disputes and only Article 262 deals with the topic. In the case on hand, the relevant portion of the text of Article 194(3) and Entry 39 of List II are almost identical and speak about the "powers, privileges and immunities" of the House, its Members and committees.

40. *The question therefore is — Whether the text of Article 194(3) and Entry 39 is wide enough to authorise the legislature to make the Act?*

41. *In view of the fact that the text of both Article 194(3) and the relevant portion of Entry 39 are substantially similar, the meaning of the clause "the powers, privileges and the immunities of a House of the legislature of a State … and of the Members of a House of such legislature" must be examined."*

***

"43. *Article 194 deals exclusively with the powers and privileges of the legislature, its Members and committees thereof. While clause (1) declares that there shall be freedom of speech in the legislature subject to the limitations enumerated therein, clause (2) provides immunity in favour of the Members of the legislature from any legal proceedings in any court for anything said or any vote given by such Members in the legislature or any committees, etc. Clause (3) deals with the powers, privileges and immunities of a House of the Legislature and its Members with respect to matters other than the ones covered under clauses (1) and (2).*

44. *Thus, it can be seen from the scheme of Article 194 that it does not expressly authorise the State Legislature to create offices such as the one in question. On the other hand, Article 178 speaks about the offices of Speaker and Deputy Speaker. Article 179 deals with the vacation of those offices or resignations of incumbents of those offices whereas Articles 182 and 183 deal with the Chairman and Deputy Chairman of the Legislative Council wherever the Council exists. In our opinion, the most crucial article in this Chapter is Article 187 which makes stipulations even with reference to the secretarial staff of the legislature. On the face of such elaborate and explicit constitutional arrangement with respect to the legislature and the various offices connected with the legislature and matters incidental to them to read the authority to create new offices by legislation would be a wholly irrational way of construing the scope of Article 194(3) and Entry 39 of List II. Such a construction would be enabling the legislature to make a law which has no rational connection with*

> *the subject-matter of the entry. "The powers, privileges and immunities" contemplated by Article 194(3) and Entry 39 are those of the legislators qua legislators."*

130. In *Ashoka Kumar Thakur v. Union of India*[119] the issue which arose for consideration was the correct interpretation of Article 15(5)(extracted below in a footnote)[120], introduced by virtue of the Constitution (Ninety Third Amendment) Act, 2005. It enabled the state to make special provisions for the advancement of any SEBCs or for SCs or STs as far as they related 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"*. This court held that on a true construction, special provisions for admission to such category of candidates, *even in private educational institutions,* was permissible. The court *inter alia,* held that:

> *"125. Both Articles 15(4) and 15(5) are enabling provisions. Article 15(4) was introduced when the "Communal G.O." in the State of Madras was struck down by this Court in Champakam Dorairajan case [1951 SCR 525] . In Unni Krishnan [(1993) 1 SCC 645] this Court held that Article 19(1)(g) is not attracted for establishing and running educational institutions. However, in T.M.A. Pai Foundation case [(2002) 8 SCC 481] it was held that the right to establish and run educational institutions is an occupation within the meaning of Article 19(1)(g). The scope of the decision in T.M.A. Pai Foundation case [(2002) 8 SCC 481] was later explained in P.A. Inamdar case [(2005) 6 SCC 537] . It was held that as regards unaided institutions, the State has no control and such institutions are free to admit students of their own choice. The said decision necessitated the enactment of the Constitution (Ninety-third Amendment) Act, 2005. Thus, both Articles 15(4) and 15(5) operate in different areas. The*

119(2008) 6 SCC 1.

120*[(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.]*

"nothing in this article" [mentioned at the beginning of Article 15(5)] would only mean that the nothing in this article which prohibits the State on grounds which are mentioned in Article 15(1) alone be given importance. Article 15(5) does not exclude Article 15(4) of the Constitution.

126. *It is a well-settled principle of constitutional interpretation that while interpreting the provisions of the Constitution, effect shall be given to all the provisions of the Constitution and no provision shall be interpreted in a manner as to make any other provision in the Constitution inoperative or otiose. If the intention of Parliament was to exclude Article 15(4), they could have very well deleted Article 15(4) of the Constitution. Minority institutions are also entitled to the exercise of fundamental rights under Article 19(1)(g) of the Constitution, whether they be aided or unaided. But in the case of Article 15(5), the minority educational institutions, whether aided or unaided, are excluded from the purview of Article 15(5) of the Constitution. Both, being enabling provisions, would operate in their own field and the validity of any legislation made on the basis of Article 15(4) or 15(5) has to be examined on the basis of provisions contained in such legislation or the special provision that may be made under Article 15(4) or 15(5)…."*

131. The Court, similarly, gave full effect to the definition clause in Article 366 [in the definition of Union territory, under Article 366(30)]while examining the soundness of the argument that immunity from intergovernmental taxation (i.e., under Article 289 which exempts states from Union taxation), extends to Union Territories and municipalities. It was argued that in many cases, the Union Territories had Legislative Assemblies, by statutory enactments, or special provisions, and in the case of municipalities, the Constitution had, through amendment, and introduction of Article 243X, authorized states to authorize municipal levies. The court repelled this argument, in *New Delhi Municipal Council v. State of Punjab*[121]in a nine-judge ruling, stating as follows:

121(1997) 7 SCC 339 at page 370.

"53. *Before dealing with the specific circumstances of, and the decision in, each of these cases, it is necessary that a few provisions which figure prominently be dealt with. Article 246(4) of the Constitution, as it stood on 26-1-1950, allowed Parliament to "make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule". The Seventh Amendment Act brought about a number of changes affecting Union Territories, some of which have already been noticed by us. The other changes brought about by it are also relevant; it caused Article 246 to be changed to its present form where Parliament is empowered to make laws with respect to "any part of the territory of India not included in a State". The word "State" has not been defined in the Constitution. Article 1(3) defines the territory of India as comprising: (a) the territories of the States; (b) the Union Territories specified in the First Schedule; and (c) such other territories as may be acquired. The word "Union Territory" has been defined in Article 366(30) to mean "any Union Territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule*

54. *Though not defined in the Constitution, the word "State" has been defined in the General Clauses Act, 1897 (hereinafter called "the General Clauses Act"). Article 367 of the Constitution states that the General Clauses Act, 1897 shall, unless the context otherwise requires and subject to any adaptations and modifications made under Article 372, apply for the interpretation of the Constitution. Therefore, on a plain reading of the provisions involved, it would appear that the definition of "State" in the General Clauses Act would be applicable for the purposes of interpreting the Constitution. Article 372 is the saving clause of the Constitution which enables all laws in force before the commencement of the Constitution to continue in the territory of India. Article 372-A, which, once again, owes its origin to the Seventh Amendment Act, empowers the President to make further adaptations in particular situations.*

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"99. *It is, therefore, clear that even under the new scheme, Municipalities do not have an independent power to levy taxes. Although they can now be granted more substantial powers than ever before, they continue to be dependent upon their parent legislatures*

> *for the bestowal of such privileges. In the case of Municipalities within States, they have to be specifically delegated the power to tax by the State Legislature concerned. In Union Territories which do not have Legislative Assemblies of their own, such a power would have to be delegated by Parliament. Of the rest, those which have Legislative Assemblies of their own would have to specifically empower Municipalities within them with the power to levy taxes.*
>
> ***100.*** *We have already held that despite the fact that certain Union Territories have Legislative Assemblies of their own, they are very much under the supervision of the Union Government and cannot be said to have an independent status. Under our constitutional scheme, all taxation must fall within either of two categories: State taxation or Union taxation. Since it is axiomatic that taxes levied by authorities within a State would amount to State taxation, it would appear that the words "or by any authority within a State" have been added in Article 285(1) by way of abundant caution. It could also be that these words owe their presence in the provision to historical reasons; it may be noted that Section 154 of the 1935 Act was similarly worded. The fact that Article 289(1), which in its phraseology is different from Section 155 of the 1935 Act having been drafted by the Drafting Committee to meet specific objections, does not contain words similar to those in Article 285(1), will not in any way further the case of the appellant, because the phrase "Union taxation" will encompass municipal taxes levied by Municipalities in Union Territories."*

It is noteworthy that the court was *inter alia,* guided by the definition of "State" in Article 367 of the Constitution of India.

X. Interpreting provisions of the 102nd Amendment- Article 366 (26C), 338B and 342A

132. What is noticeable in the lines of decisions preceding this section, including those dealing with constitutional amendments- is that whenever the definition clause (Article 366) arose for consideration, the court gave full effect to the substantive amendments as well as the definition (as in the case of *Builders Association [supra]* and *Twentieth Century Leasing [supra]*), as well as the newly introduced provisions (as in the case of *Bimolangshu Roy* [*supra*] and *Ashoka*

Kumar Thakur [*supra*]). In *Williamson Financial Services (supra)*and *New Delhi Municipal Council (supra)*, this court gave full effect to the plain meaning of the definition clause, in Article 366 (1) (1) and (30) respectively.

133. In this background, the crucial point to be decided is - did Parliament, acting in its *constituent* capacity, whereby any amendment needed a special majority of two thirds of its members present and voting, in both the Houses separately, wish to bring about a change in *status quo* or not?

134. Parliament was aware that the procedure for identification of SCs and STs, culminated with the final decision by the President on the aid and advice of the Union Council of Ministers. This position in law underwent little change, despite the Constitution (Sixty Fifth) and Constitution (Eighty Ninth)Amendment Acts, which set up commissions for SCs and STs, replacing the provisions of the original constitution which had created an authority called the “Special Officer”. Through the amended Articles 338 and 338A, consultation with the states in the matter of inclusion or exclusion, was and continues to be given due consideration. It is also possible for states to initiate the process and propose the inclusion (or deletion of) new communities or castes, by sending their proposals, duly supported by relevant material, for consideration. This constitutional procedure, so to say, culminating in the final word of Parliament was well known, in relation to SCs and STs. The states were, and are, bound to consult these two commissions, for SCs and STs (under Articles 338 and 338A).Till the 102nd Amendment, when it came to backward classes, or SEBCs, the Constitution was silent- definitionally, as well as the manner by which their identification could take place.

135. The interpretive exercise carried out in *Indra Sawhney* saw this court enjoining the Central and State governments to set up some permanent mechanisms in the form of commissions, to identify SEBCs through a systematic and scientific manner and carry on regular periodic reviews. The respondent states emphasize that pursuant to this direction, state enactments were framed and

brought into force. The arguments on their behalf as well as the Attorney General was that given these directions by a nine-judge bench, it could not be inferred that the 102nd Amendment was ever intended to bring about such a drastic change as to exclude the state's role altogether, in the task of making special provisions under Article 15 (4) and Article 16 (4), in regard to identification of SEBCs.

136. It is correct that *Indra Sawhney* clearly voiced the need for the Central Government and the states to take measures for setting up permanent commissions or bodies, if need be through legislation, to carry out the task of identification of communities as SEBCs for the purposes of Articles 15 and 16. However, that articulation or even direction, could not have, in the opinion of this court, been an injunction never to depart from the existing mechanisms of setting standards for identification of such classes, nor was it to be a direction in perpetuity, that *status quo* remain forever. It cannot be seriously assumed that if Parliament were so minded, it cannot bring about changes *at all* to the Constitution, in regard to how identification of backward classes is to take place. The existence of the provision in Article 368, enabling amendments, and the inapplicability of the *proviso* to Article 368(2) in relation to the *kind of changes* to the Constitution, brought about by introduction of Articles 366 (26C), Article 338B and Article 342A, negates this argument.

137. A reading of the Select Committee's Report (in relation to the 102nd Amendment) bears out that various changes to the proposed amendments were suggested <u>on the ground that on a fair and reasonable interpretation of its terms, State's powers to make reservations could be impacted</u>. The Central Government's representatives and officials assured that the *State's role in the process* of backward class identification and listing, would be maintained. None of the amendments proposed, <u>*expressly preserving the state power*</u>, were accepted. The dissenting members were aware that a fair and reasonable interpretation of the terms of the

amendment clearly ousted the State's powers to identify backward classes of citizens. This emerges on a reading of a note by Shri Sukhendu Shekhar Roy, a Member of Parliament who relied on extracts of the judgment in *Indra Sawhney* and observed that the amendments prescribed *"for the unitary authority which in effect shall encroach upon the jurisdiction of the States in the matter of identifying and specifying the socially and educationally backward classes"*. Three Members, Shri Digvijaya Singh, Shri B.K. Hariprasad, and Shri Hussain Dalwai, submitted a joint note of dissent which dealt with the powers of the commission under Article 342A, and also suggested changes in its composition. Shri Sharad Yadav, another Member of Parliament, was of the view that there was no need of any inclusion or exclusion of the castes and approval thereof should not be left to the Governor, Parliament and President as it will be a step backward. Dr.Dalip Kumar Tirkey, Member of the Rajya Sabha, proposed sub-articles (3) and (4) to Article 342A, enabling the State to publish a list which could be modified by State Assemblies. Ms. Kanimozhi in her long letter of dissent, also highlighted the effect of a proposed amendment and insertion of Article 342A which had the effect of ousting the states' power, which they had hitherto exercised to identify SEBCs.

138. The debates in Parliament also witnessed members voicing apprehensions that the power hitherto enjoyed by the states, would be whittled down drastically. These fears were allayed by the concerned Minister who piloted the Bill before both Houses of Parliament. Extracts of these statements have been set out *in extenso* in the judgment of Ashok Bhushan, J.; they are not reproduced here, for the sake of brevity.

139. These materials show that there was on the one hand, an assumption that the changes ushered by the amendments would not disturb any part of states' powers; however, a sizeable number- 8 members, after a careful reading of the terms of the amendment, dissented, saying that state power would be adversely impacted. In

these circumstances, the debate which ensued at the time of passing of the Bill into the 102nd Amendment was by way of an assurance by the Minister concerned that the existing power of the states would not be affected. To the same effect, are debates on the floor of the Houses of Parliament. Given all these circumstances, it is difficult to accept the contention that the Select Committee's Report, to the extent it holds out an assurance, should be used as a determinative external aid for interpretation of the actual terms of the 102nd Amendment. Likewise, debates and statements cannot be conclusive about the terms of the changes brought about by an amendment to the Constitution. The duty of the court always is to first interpret the text, and only if there is ambiguity in the meaning, to resort first to internal aids, before seeking external aids outside the text.

140. It would be useful to recollect that this Court had, through a seven-judge bench, held that the words of the statute are to be construed on their own terms and that the task of interpretation should not be determined by statements made by Ministers and Members of Parliament. In *Sanjeev Coke Manufacturing (supra)* it was held that:

> *"No one may speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids."*

141. This aspect was highlighted somewhat more vividly in a recent decision of this Court in *Shivraj Singh Chauhan v. Speaker, Madhya Pradesh Legislative Assembly*[122], where it was held that:

> *"In interpreting the Constitution, it would be not be correct to rely on the speeches Constituent Assembly of India, Volume VIII (debate of 1*

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> *June 1949) made by individual members of the Constituent Assembly. Each speech represents the view of one individual in the Assembly which taken as a whole formed a kaleidoscope of competing political ideologies. There may arise instances where the court is of the independent opinion that the views raised by individual Members of the Constituent Assembly in their speeches lay down considerations that warrant examination and approval by the Court. The general rule however, would be to examine the decisions taken by Constituent Assembly taken by majority vote. The votes of the Constituent Assembly represent equally the views of all the members of the Assembly and are the final and dispositive expressions of the constitutional choices taken in framing our Constitution."*

142. The use of external aids such as speeches and parliamentary reports was commented upon earlier, rather strongly, by Sabyasachi Mukherjee, CJ in the decision reported as *DTC Mazdoor Congress v. Delhi Transport Corporation:*[123]

> *"Construction or interpretation of legislative or rule provisions proceeds on the assumption that courts must seek to discover and translate the intention of the legislature or the rule-making body. This is one of the legal fictions upon the hypothesis of which the framework of adjudication of the intention of a piece of legislation or rule proceeds. But these are fictional myths to a large extent as experience should tell us. In most of the cases legislature, that is to say, vast majority of the people who are supposed to represent the views and opinions of the people, do not have any intention, even if they have, they cannot and do not articulate those intentions. On most of these issues their is no comprehension or understanding. Reality would reveal that it is only those who are able to exert their view- points, in a common parliamentary jargon, the power lobby, gets what it wants, and the machinery is of a bureaucratic set up who draft the legislation or rule or law. So, there- fore, what is passed on very often as the will of the people in a particular enactment is the handy work of a bureaucratic machine produced at the behest of a power lobby control- ling the corridors of power in a particular situation. This takes the mythical shape of the 'intention of the people' in the form of legislation. Again, very often, the bureaucratic machine is not able to correctly and properly transmute what was intended to be conveyed.*

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123 1990 SCR Supp. (1) 142

> *In such a situation, is it or is it not better, one would ponder to ask, whether the courts should attribute to the law-making body the knowledge of the values and limitations of the Constitution, and knowledge of the evils that should be remedied at a particular time and in a situation that should be met by a particular piece of legislation, and the court with the experience and knowledge of law, with the assistance of lawyers trained in this behalf, should endeavour to find out what will be the correct and appropriate solution, and construe the rule of the legislation within the ambit of constitutional limitations and upon reasonable judgment of what should have been expressed. In reality, that happens in most of the cases. Can it be condemned as judicial usurpation of law-making functions of the legislature thereby depriving the people of their right to express their will? This is a practical dilemma which Judges must always, in cases of interpretation and construction, face and a question which they must answer."*

143. The polyvocality of parliamentary proceedings where the views expressed by Ministers or Parliamentarians may not be common or unanimous and the danger of attributing a particular intention to the terms of a statute, through the words of a Minister or other functionary which may be at odds with the plain words, cannot be lost sight of.

144. In the decision reported as *BBC Enterprises v.Hi-Tech Xtravision Ltd.*,[124] the court cautioned against the use of the purposive interpretation rule, saying that

> *"the courts should now be very reluctant to hold that Parliament has achieved nothing by the language it used, when it is tolerably plain what Parliament wished to achieve."*

145. This caution was accepted in *Balram Kumawat* v. *Union of India* [125] where it was held as follows:

> *"26. The courts will therefore reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.*

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124 1990) 2 All ER 118

125 (2003) 7 SCC 628

[See Salmon v. Duncombe [Salmon v. Duncombe, (1886) LR 11 AC 627 (PC)] (AC at p. 634).] Reducing the legislation futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. [See B.B.C. Enterprises Ltd. v. Hi-Tech Xtravision Ltd. [B.B.C. Enterprises Ltd. v. Hi-Tech Xtravision Ltd., (1990) 2 All ER 118 : 1990 Ch 609 : (1990) 2 WLR 1123 (CA)] (All ER at pp. 122-23).]"

146. Taking into consideration the amendment to Section 123 of the Representation of People's Act, which introduced a new corrupt practice, i.e. the candidate making an appeal on the basis of his religion or caste, this court took the aid of the doctrine of purposive construction, in *Abhiram Singh v. C.D. Commachen*[126]. The majority judgment adopted a wide interpretation, whereby any appeal on proscribed grounds, by the candidate, for himself, against his rival, or to the voter, would constitute a corrupt practice:

"47. There is no doubt in our mind that keeping in view the social context in which clause (3) of Section 123 of the Act was enacted and today's social and technological context, it is absolutely necessary to give a purposive interpretation to the provision rather than a literal or strict interpretation as suggested by the learned counsel for the appellants, which, as he suggested, should be limited only to the candidate's religion or that of his rival candidates. To the extent that this Court has limited the scope of Section 123(3) of the Act in Jagdev Singh Sidhanti [Jagdev Singh Sidhanti v. Pratap Singh Daulta, (1964) 6 SCR 750 : AIR 1965 SC 183] , Kanti Prasad Jayshanker Yagnik [Kanti Prasad Jayshanker Yagnik v. Purshottamdas Ranchhoddas Patel, (1969) 1 SCC 455] and Ramesh Yeshwant Prabhoo [Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130 : (1995) 7 Scale 1] to an appeal based on the religion of the candidate or the rival candidate(s), we are not in

126(2017) 2 SCC 629

agreement with the view expressed in these decisions. We have nothing to say with regard to an appeal concerning the conservation of language dealt with in Jagdev Singh Sidhanti [Jagdev Singh Sidhanti v. Pratap Singh Daulta, (1964) 6 SCR 750 : AIR 1965 SC 183] . That issue does not arise for our consideration.

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Conclusion

50. On a consideration of the entire material placed before us by the learned counsel, we record our conclusions as follows:

50.1. The provisions of clause (3) of Section 123 of the Representation of the People Act, 1951 are required to be read and appreciated in the context of simultaneous and contemporaneous amendments inserting clause (3-A) in Section 123 of the Act and inserting Section 153-A in the Penal Code, 1860.

50.2. So read together, and for maintaining the purity of the electoral process and not vitiating it, clause (3) of Section 123 of the Representation of the People Act, 1951 must be given a broad and purposive interpretation thereby bringing within the sweep of a corrupt practice any appeal made to an elector by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate on the grounds of the religion, race, caste, community or language of (i) any candidate, or (ii) his agent, or (iii) any other person making the appeal with the consent of the candidate, or (iv) the elector.

50.3. It is a matter of evidence for determining whether an appeal has at all been made to an elector and whether the appeal if made is in violation of the provisions of clause (3) of Section 123 of the Representation of the People Act, 1951."

147. After the decision in *Indra Sawhney,* the NCBC Act was enacted by Parliament in 1993. The scheme of that enactment showed that the NCBC was tasked with making recommendations for various purposes; especially, (by Section 9 (1)) to *"examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any*

backward class in such lists and tender such advice to the Central Government as it deems appropriate". By all accounts, that commission embarked on its task and identified SEBCs in all the 31 states and union territories in India. According to the information available[127], as many as 2479 castes and communities have been notified as backward classes, throughout the entire country, in relation to each state and union territory. It is nobody's case that the statutory commission – NCBC was not functioning properly, or that there was any interference with its work. Nor is there any suggestion that states voiced resentment at the decisions or recommendations of the NCBC. Given these, the important question that hangs in the air- if one can say so- is why did Parliament have to go to such great lengths, to merely confer constitutional status, upon the NCBC, and at the same time, tie the hands of the Union Government, robbing it of the flexibility it always had, of modifying or amending the list of OBCs for the purposes of the Union Government and Central public sector employment, and for purposes of schemes and admission to institutions, under Article 15(4).

148. It was asserted by the Attorney General and the states, that the move to amend the Constitution was only to empower the Central Government to publish a list, for union employment and Central PSU posts. *That power always existed- under the NCBC Act*. Concededly, the *states* were not interfering with those lists. The Union always had and exercised power to add or vary the contents of such lists for central posts, PSUs and institutions, whether it enacted a law or not. There is no reason why rigidity had to be imparted to the position with regard to preparation of a list, by taking away the flexibility of the President to amend the lists, and requiring it to approach Parliament, after initially publishing a list under Article 342A. Again, if this court's direction in *Indra Sawhney* is the reason, then there is no enabling legislation in all states, for setting up commissions. Rather, to require

127 Website of the Ministry of Social Justice, Central Government: http://socialjustice.nic.in/UserView/index?mid=76674 accessed on 12.04.2012 at 22.02 hrs.

the President on the aid and advice of the Union Council of Ministers to issue a notification which can be only changed by Parliament (by reason of Article 342A), is mystifying.

149. The interpretation suggested by the respondents, and by Ashok Bhushan, J., that the power of the states, which existed till the 102nd Amendment was made, continues unimpeded, is not borne out. Such an interpretation amounts to saying that Parliament went to great lengths by defining, for the first time, the term SEBC[128] in the Constitution, and provided for one notification under Article 342Aissued by the President, which would *"specify the socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in relation to that State or Union territory"*, and then, restricted the width of the term "*deemed for purposes of this Constitution"* by giving primacy to the term "Central List". Such an interpretation restricts the specification of a community as backward, *in relation to that State or Union territory*, only for purposes of the Central List, i.e., for purposes of central government employment and Central Institutions. Such an interpretation with respect, is strained; it deprives plain and grammatical meaning to the provisions introduced by the 102nd Amendment, has the effect of tying the hands of the Central Government, and at the same time, grants the states unlimited latitude in the manner of inclusion of any class of citizens as backward.

150. The claim that the interpretation suggested by the respondents is pragmatic and conforms to the doctrine of purposive interpretation, with respect, cannot be accepted. It completely undermines the width and amplitude of the following:

(a) The deeming fiction introduced by the 102nd Amendment, while inserting Article 366 (26C);

128which *per* Article 366 (26C) *"means such backward classes as are so deemed under article 342A for the purposes of this Constitution"*

(b) The use of the term *"means"* which has been interpreted to imply an exhaustive definitional expression, in several decisions of this court[129], as a device to place the matter beyond the pale of interpretation, to ensure that the only meaning attributable is the one directed by the provision. Thus, SEBCs are, by reason of Article 366 (26C) *only those deemed to be so under Article 342A.*

(c) The emphasis is on the community- upon being included, under Article 342A, *for the purposes of this Constitution* being *"deemed to be"* socially and educationally backward classes, in Article 366 (26C). Thus, for all purposes under the Constitution, such communities are deemed to be SEBCs.

(d) The logical corollary is that such inclusion is for the purposes of the constitution, to enable state and central government benefits, i.e. welfare measures, special provisions under Articles 15 (4) and 15 (5), as well as employment, under Article 16 (4). The enactment of this provision excludes all other methods of identification, by any other body - either the state, or any state commission or authority.

(e) The use of the expression *for the purposes of this Constitution*, - in Article 342A (1), also emphasizes the idea that for *all purposes*, i.e under Article 15 (4), 15 (5), and 16 (4), only the communities or classes deemed to be SEBCs under Article342A would be treated as such, *in relation to the State or Union territory concerned.*

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129 *Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court*, (1990) 3 SCC 682 where a Constitution Bench stated:

"72. The definition has used the word 'means'. When a statute says that a word or phrase shall "mean"— not merely that it shall "include" — certain things or acts, "the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition" (per Esher, M.R., Gough v. Gough [(1891) 2 QB 665]). A definition is an explicit statement of the full connotation of a term."

Also *P. Kasilingam v PSG College of Technology* 1995 Supp (2) SCC 348; *Black Diamond Beverages v Commercial Tax Officer* 1998 (1) SCC 458; *Godrej and Boyce Manufacturing Co v State of Maharashtra* 2014 (3) SCC 430.

(f) Article 338 (10) was *amended, to delete references to* backward class of citizens. It originally stated that scheduled castes also included references *"to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also"*. These expressions were omitted and an entirely new provision, exclusively for purpose of socially and educationally backward classes, was inserted (Article 338B), which has to independently consider all aspects relating to SCBCs, in a manner identical to SCs and STs.

151. If all these factors are kept in mind, there can be no room for doubt that *"the Central List"* in Article 342A (2) is none other than the list published in Article 342A(1) *for the purposes of the Constitution*. This means that after the introduction of these provisions, the final say in regard to inclusion or exclusion (or modification of lists) of SEBCs is firstly with the President, and thereafter, in case of modification or exclusion from the lists initially published, with the Parliament.

152. This sequitur is the only reason why change was envisioned in the first placeby Parliament, sitting in its *constituent capacity*, no less, which is to alter the entire *regime* by ensuring that the final say in the matter of identification of SEBCs would follow the same pattern as exists, in relation to the most backward classes among all citizens, (i.e. the SCs and STs, through Articles 338, 338A, 341 and 342). Too much cannot be read into the use of the expression *the Central list* for the simple reason that it is a list, prepared and published by the President, on the aid and advice of the Union Council of Ministers. The term *Central* is no doubt, unusual, but it occurs in the Constitution in several places. At the same time, the Council of Ministers headed by the Prime Minister advices the President and provides information *relating to the administration of the affairs of the Union and proposals for legislation* (Article 78). Similarly, Article 77 uses the term *"the*

Government of India". Given that these terms are used interchangeably, and mean the same, "*the Central List"* carries no other signification than the list notified under Article 342A(1), by the President at the behest of the Central Government.

153. It is noticeable that Article 367 of the Constitution of India incorporates, by reference, the definitions set out in the General Clauses Act, 1897, as those operating in relation to expressions not defined expressly in the Constitution itself[130]. By Section 3 (8) (b) of that Act, "Central Government" *means, after commencement of the Constitution*, the President of India.[131]In a recent decision, *K. Lakshminarayanan v. Union of India*[132] this court held that

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130***367. Interpretation.****—(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.*

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be.

(3) For the purposes of this Constitution —"foreign State" means any State other than India:

Provided that, subject to the provisions of any law made by Parliament, the President may by order4 declare any State not to be a foreign State for such purposes as may be specified in the order."

131*General Clauses Act*

"*3.* ***Definitions****—In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,*

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(8) "Central Government" shall—

(a) in relation to anything done before the commencement of the Constitution, mean the Governor General or the Governor General in Council, as the case may be; and shall include—

(i) in relation to functions entrusted under sub-section (1) of section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that subsection; and

(ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act; and

(b) in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include—

*(i) in relation to functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause; 1 ****

(ii) in relation to the administration of a Part C State 2 before the commencement of the Constitution (Seventh Amendment) Act, 1956], the Chief Commissioner or the Lieutenant Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be; and

(iii) in relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution"

132(2020) 14 SCC 664

> *"24. Thus, it is clear that the definition of Central Government, which means the President is not controlled by the second expression "and shall include the Administrator". The ordinary or popular meaning of the words "the President" occurring in Section 3(8)(b) has to be given and the second part of the definition shall not in any way control or affect the first part of the definition as observed above. In the definition of Central Government, an Administrator shall be read when he has been authorised or delegated a particular function under the circumstances as indicated above. No statutory rules or any delegation has been referred to or brought on record under which the Administrator is entitled or authorised to make nomination in the Legislative Assembly of the Union Territory of Puducherry. Thus, in the present case, the definition of Central Government, as occurring in Section 3(3) of the 1963 Act has to be read as to mean the President and not the Administrator. The issue is answered accordingly."*

Article 342A (1) does not use the expression "Central Government". Nevertheless, Article 342A (2) uses the expression "Central List" which has led to an elaborate interpretive discourse. If the logic of Article 367 (1) of the Constitution, together with Section 3 (8) (b) of the General Clauses Act, were to be applied, "Central List" necessarily refers to the list under Article 342A (1), which is prepared by the President, *for the purpose of the Constitution.* The other interpretation, with respect, would be unduly narrow and restrictive; it would have the effect of adding words such as to the effect that the Central List, would *"apply in relation to the Central Government"*. Such an addition of terms, with respect, cannot be resorted to, when interpreting a Constitutional amendment, The amended provisions clearly state that the determination is *for the purpose of the Constitution* and that SEBCs (*per* Article 366 (26C) are *deemed* to be as determined in Article 342A; Article 342A states that the President shall by notification publish SEBCs *in relation to* states and union territories, *for the purpose of the Constitution*.

154. There are other compelling reasons too, why the restrictive interpretation of Article 342A, limiting the exercise of identification for the purpose of central

employment and central benefits(and not made applicable to states) is to be avoided as opposed to the interpretation based on the plain language of the new provisions, which has to be adopted.

155. Parliament, through the 102nd Amendment clearly intended that the existing legal *regime* for identification of communities as SCs and STs and for their inclusion in the list of SCs and STs under Articles 341 and 342, which had hitherto existed, ought to be replicated in relation to identification of SEBCs. To achieve that, Parliament inserted Article 338B – which is a mirror image of Articles 338 and 338A. The tasks assigned to the new Commission for Backward Classes which is envisioned as a multi-member Commission, are radically different from the duties which were assigned by Parliament in the NCBC Act. Under Section 9 of the erstwhile NCBC Act, which was repealed just before the commencement of the 102nd amendment, the NCBC was to examine requests for inclusion of any class of citizens as backward classes in the list and the advice of the Commission was ordinarily binding upon the Central Government. Section 11 provided for a periodical revision of lists. As noticed by Ashok Bhushan, J., Article 338B envisions a larger role for the new Commission. This Commission not only advises the Central Government but also the States. It is impossible to read Article 338B in isolation from the pre-existing *parimateria* provisions; it must be interpreted in the light of the other two provisions which had existed all this while – Articles 338 and 338A. Those provisions clearly contemplate the same consultative role with the Commission on policy matters, of the Central Government as well as the State Governments. This is evident from sub-article (9) of these Articles. Thus, the Commission – under Article 338B is not only assigned a constitutional role but is also expected to act as an expert and engage with experts in the determination of the communities. Article 338B(5) uses the term “SEBC” no less than on six occasions. The expression also occurs in Article 338B(9). Thus, for the purposes of

the Constitution, the Commission newly established under Article 338B, i.e., the National Commission for Backward Classes shall be the only body to whom both the Central Government and the State Governments have to turn, in all matters of policy. Necessarily, the question of matters of policy would also include identification of castes or communities as backward classes.

156. If the intention of the Parliament in amending the Constitution were to merely confer or clothe the National Commission with constitutional status, the matter would have ended by inserting Article 338B. To that end, the argument of the respondents is understandable. Short of the task of identification, (which could have continued with the states), if the amendment had not inserted Article 342A, the States would have been duty bound to consult the Commission under Article 338B. The interpretation by Ashok Bhushan, J. to that extent might have been acceptable. However, that the Constitution was amended further to introduce Article 342A, containing the phraseology that it does, adding an entirely new dimension which the court has to interpret, after considering the light of the previous authorities, as also whenever new provisions were added to the Constitution and more importantly, when such amendments were also accompanied by changes in the definition clause.

157. The previous part of this judgment has discussed various authorities which had considered one or the other clauses of Article 366, i.e the *NDMC case*, *Tata Consultancy (supra)*, *Willamson Financial Services (supra)*. The *NDMC* case was decided by a nine-judge bench; in all the other decisions, this court gave the fullest latitude to the expressions in the definition clause while interpreting them in the peculiar facts of the case. Similarly, when constitutional amendments introduced new definitions such as in Article 366(29A), judicial interpretation leaned in favour of giving literal meaning to the terms used which had led to change in the existing tax regime. Such changes too limited the State’s legislative powers. Thus, for

instance, in the Constitution bench judgments in *Builders Association (supra)* and in *20th Century Leasing (supra)*, this Court had decisively ruled that the taxing power of the States was explained by the amendment but at the same time was limited in more than one manner by the express terms which had introduced a new entry in the Central or Union legislative field. Furthermore, the principles on which taxation could be resorted to by the States too had to be defined by the Union Government. In other cases, whenever constitutional amendments brought about changes in the existing *status quo* like in *Kihoto Hollohan (supra)* or limited the legislative power constraining the state from expanding its council of ministers beyond a certain percentage as with the introduction of Article 164(1A)in *Bimolangshu Roy*(supra). This Court gave full literal effect to the terms of the amendment after understanding the rationale for the change.

158. In *Ashok Kumar Thakur (supra)* and *N. Nagraj (supra)* the changes brought through Constitutional Amendments were the subject matter of interpretation. In *Nagaraj*, they were also the subject matter of challenge on the ground that the amendments violated the basic structure of the Constitution. There too, the Court interpreted the terms of the amendment by adopting a plain and literal meaning and not by cutting down or reading down any term or phrase. In *Ashok Kumar Thakur (supra)*, the introduction of the new and radical Article 15(5) enabled States to make special provisions for socially and educationally backward classes of citizens, in unaided private educational institutions.

159. Given the weight of such precedents- which point to this court(i) giving full effect to newly added provisions, (ii) by adopting the literal meaning in the definition, set out in the Constitution (iii) as well as in the amendments to the definition clause, and (iv) all of which noticed the changes brought about through the amendments, and gave them plain effect, it is difficult to accept that the power of amendment of the Constitution, in accordance with the special procedure set out

in Article 368 – was used to about bring cosmetic changes conferring constitutional status to NCBC. The conferment of constitutional status – as was noticed previously, is achieved by only inserting Article 338B. However, the fact that it mirrors the previous two provisions of Articles 338 and 338A and borrows from that pattern clearly suggests that the new Commission is to have an identical role much like the Commissions that advice the Central Government and Parliament with respect to all matters pertaining to SCs and STs. Therefore, the new Commission is expected to play a decisive role in the preparation of lists, which the Constitution set apart as one list, deemed to be the list of SEBCs for the purposes of Constitution in relation to every State and Union Territory. The interplay between Articles 366(26C) and 338B is therefore crucial. The term *"deemed to be for the purposes of this Constitution"* and a reference to Article 342A would necessarily mean that even the provision under Article 338B, is to be interpreted in the same light. In other words, were the intention merely to confer constitutional status, that would have been achieved by an insertion of the provision in Article 338B without any other amendment, such as being in the definition clause under 366 or the insertion of 342A.

160. The change brought about by the 102nd Amendment by introducing Sub-Article (26C) to Article 366 and inserting a new provision - Article 342A, to my mind, brings about a total alignment with the existing constitutional scheme for identification of backward classes, with the manner and the way in which identification of SCs and STs has been undertaken hitherto, by the Central Government culminating in Presidential notifications. That task is aided by two Commissions - respectively for SCs and STs, much as in the case of the new National Commission for Backward Classes which will undertake the task of aiding and advising the Central Government for issuing the notification for the purposes of the Constitution under Article 342A. The pattern of finality and a

single list, in relation to every State and UT – which exists in relation to SCs and STs (Articles 341 and 342) now has been replicated with the introduction of Article 342A.

161. There have to be strong, compelling reasons for this Court to depart from the interpretation which has been hitherto placed on the definition clause. As has been demonstrated in more than one case, the interpretation of the definition clause in its own terms in respect of the original constitutional provisions as well as the new terms brought in by way of amendment (which also brought in substantive amendments) have consistently shown a particular trend. If one keeps in mind the interpretation of Articles 341 and 342 from the earliest decision in *Bhayalal (supra)* and *Bir Singh (supra)*, the only conclusion is that the task of examining requests or demands for inclusion or exclusion is in the first instance only with the President [Article 342(1)]. In this task, the President, i.e. the Central Government is aided by the work of the Commissions set up under Articles 338 and 338A. Upon the publication of the list containing the notification under Articles 341(1) and 342(1), for the purposes of the Constitution in relation to the concerned State or the concerned UT, the list of SCs and STs is conclusive. Undoubtedly, these were the original provisions. Yet, one must be mindful of a crucial fact, which is that the task for making special provisions under Article 15 and for making reservations under Article 16(4) extends to the States. The power exercised by the President in relation to every State *vis-à-vis* SCs and STs has been smooth and by all accounts, there has been no resentment or friction. Once the concerned community or caste is reflected in the list of one or the other State or Union Territory, the extent of the benefits to be provided to members of such community is a matter that lies entirely in the States' domain. The amendment or modification of any State list, can be undertaken only by Parliament, not even by the President.

162. Much like in the case of the alignment of Article 338B with the other two previously existing provisions of the Constitution, Article 342A aligns the function (of identification of SEBCs and publishing the list, by the President) with Articles 341 and 342. These three sets of consecutive provisions, share their umbilical cord with the definition clause [Article 366(24) in relation to SCs; Article 366(25) in relation to STs and the new 366(26C) in relation to SEBCs]. This two-way linkage between the definition clause with the substantive provisions is not without significance. As has been held in *Marri Chandra Shekar (supra); Action Committee (supra) and Bir Singh (supra)*, the expression *"for the purposes of the Constitution"* has to be given fullest weight. Therefore, whenever lists are prepared under these three provisions in relation to States or UTs, the classes and castes included in such list and no other are deemed to be castes or classes falling within the one or the other category (SCs, STs, SEBCs) in relation to the particular State or UT for the purposes of the Constitution.

163. If one were to, for the sake of argument, consider the deliberations before the Select Committee reflected in its report, it is evident that amendments at three places were moved to place the matter beyond controversy and clarify that States' jurisdiction and power to identify SEBCs would remain undisturbed. To achieve this, proposed Articles 342A(3) & (4) were introduced. These proposed amendments were not accepted; and were dropped. No doubt, the *rationale* for dropping (the amendments) was the impression given in the form of an assurance that the express terms of the amendment did not divest the States of their power. Further, paras 56 and 57 of the Select Committee report clearly state that the Governor acts on the aid and advice of the Council of Ministers of the State and that Articles 341 and 342 provide for consultation with the Governor in relation to SCs and STs of the concerned States. The assurance held out was that, *"at no time has the State been excluded in the consultation process. It is by way of the State*

Government invariably which recommends to the President the category of inclusion/exclusion in the SCs and STs. Similar provision is provided for in the case of conferring of constitutional status to backward classes for inclusion in Central List of SEBCs in consultation with Governor" thereby implying consultation with the State Government. It was also stated in para 57 (of the report)that "*the expression 'for the purpose of this Constitution' is identical to that phrase in Article 341 and Article 342."*

164. The deliberations of the Select Committee report only show that the existing pattern of identification and inclusion of SCs and STs which entailed the active involvement of the States was sought to be replicated for the purpose of preparing the list, of OBCs, by the President. It was emphasised during the course of arguments, an aspect that finds due reflection in the draft judgment of Ashok Bhushan, J. that the term, "the Central List" is of crucial significance because it in fact controls the entire provision, i.e., Article 342A, that it is in line with the Select Committee Report as well as Parliamentary debates and that this Court has to give it a purposive interpretation. In my respectful opinion, an isolated consideration of the expression, "the Central List" containing classes and communities which are deemed to be backward for the purpose of the Constitution, would undermine the entire constitutional scheme. Parliamentary intent, on the contrary, clearly was to replicate the existing pattern for inclusion in the list of SCs and STs for SEBCs – (a term that had not been defined in the Constitution till then). Yet another way of looking at the matter is that Article 342A(1) is the only provision which enables the publication of one list of SEBCs. This provision clearly talks of publication of a list through a Presidential notification for the purpose of the Constitution after the process of identification. It is this list which contains members of classes or communities which can be called as SEBCs by virtue of Article 366(26C). In other words, the subject of Article 342A(1) determines the subject of Article

366(26C)which in turn controls and guides the definition of the term "SEBCs" for the entire Constitution. This is achieved by using emphatic terms such as *"means"* and *"deemed to be"*. A similar emphasis is to be found in Article 342A(1) which uses *"shall for the purposes of the Constitution"*. In both cases, i.e. Articles 366(26C) and 342A(1), there are no words limiting, or terms indicative of restriction as to the extent to which such inclusion is to operate. Thus, like in the case of Articles 341 and 342, those classes and castes included in the list of SEBCs in relation to every State and every UT are:

(i) For the purposes of the Constitution;

(ii) deemed to be SEBCs in relation to concerned State or Union Territory.

165. The width and amplitude of the expression *"shall be deemed to be"* of the expression cannot be diluted or cut down in any manner whatsoever. If one understands that this list in fact identifies SEBCs for the purposes of the Constitution, all that follows in Article 342A(2) is that such list can only be amended by Parliament. The Court, therefore, has to see the object and content of the entire Article to determine what it means. So viewed, firstly it is linked with Article 366(26C) and the use of the terms "*means*" and *"deemed"* in the definition is decisive, i.e., that there can be no class or caste deemed for the purposes of Constitution other than those listed under Article 342A. Secondly, *Article 342A(1) is the only provision conferring power by which identification is undertaken by the President in the first instance.* This identification and publication of the list containing the cases and communities is in relation to each State and each Union Territory. Third, after publication of this notification, if changes are brought about to it by inclusion or exclusion from that list, (called the "Central List" of SEBCs for the first time), Parliament alone can amend it. It is important that the expression "the Central List" is clarified by the phrase *"socially and educationally backward*

classes specified in a notification under Clause (1)" which is reinforced subsequently by the use of the term *"aforesaid notification"*. Thus, the subject matter of initial identification and publication of the list for the purposes of the Constitution is by the published President alone (under the aid and advice of the Union Council of Ministers) and any subsequent variation by way of inclusion or exclusion can be achieved only through an amendment by law, of that list.

166. If one interprets the entire scheme involving Articles 366(26C), 342A(1) and 342A(2), the irresistible conclusion that follows is that the power of publishing the list of SEBCs, in relation to every State and Union Territory for the purposes of the Constitution is with the President only. Such notification is later called as the Central List by Article 342A(2); it can only be amended by the Parliament. The contrary interpretation virtually reads into the provisions of the Constitution amendments which were proposed and expressly rejected in the proceedings of the Select Committee; it also has the effect of reading in what certain dissenting members had proposed. Furthermore, by the interpretive process of taking into account the deliberations before the Select Committee, and speeches on the floor of the Parliament this Court would be reading into the Constitution provisions which no longer exist i.e., that the State can continue to carry out identification of SEBCs. This exercise would be contrary to the express terms.

167. Therefore, the above expressions, having regard to the precedents of this Court with respect to (i) interpretation of the definition clause under Article 366; (ii) interpretation of new definitions inserted in Article 366 and (iii) interpretation of amendments made to the Constitution which inserted new provisions, where the Court always leant in favour of giving fullest effect to the substantive provisions, this court has to adopt the same approach, to usher change, by plain, literal construction. This court never whittled down the terminology through extrinsic aids such as speeches made on the floor of the Parliament or Select Committee

reports. In this instance, doing so would be giving effect to what Parliamentarians said or Ministers said, ignoring thereby, the plain terms of the Constitution. As stated earlier, the Court cannot assume that Parliament merely indicated a cosmetic change by conferment of constitutional changes which could have been best achieved by introducing Article 338B.

168. Besides the judgment in *Kihoto Hollohan* (supra), this court, in *Raghunathrao Ganpatrao v. Union of India*[133], dwelt on the duty of this court, to discern the meaning, and give effect to amendments to the Constitution. The court quoted from Walter F. Murphy, who in *Constitutions, Constitutionalism and Democracy* explained what an 'amendment' meant:

> *"Thus an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature — that is, an amendment operates within the theoretical parameters of the existing Constitution."*

This court then observed as follows:

> *"86. In our Constitution, there are specific provisions for amending the Constitution. The amendments had to be made only under and by the authority of the Constitution strictly following the modes prescribed, of course subject to the limitations either inherent or implied. The said power cannot be limited by any vague doctrine of repugnancy. There are many outstanding interpretative decisions delineating the limitations so that the constitutional fabric may not be impaired or damaged. The amendment which is a change or alteration is only for the purpose of making the Constitution more perfect, effective and meaningful. But at the same time, one should keep guard over the process of amending any provision of the Constitution so that it does not result in abrogation or destruction of its basic structure or loss of its original identity and character and render the Constitution unworkable. The court is not concerned with the wisdom behind or propriety of the constitutional amendment because these are the matters for those to consider who are vested*

133 1994 Supp (1) SCC 191

> *with the authority to make the Constitutional amendment. All that the court is concerned with are (1) whether the procedure prescribed by Article 368 is strictly complied with? and (2) whether the amendment has destroyed or damaged the basic structure or the essential features of the Constitution."*

169. In his article *Statutory Interpretation and Constitutional Legislation* (sourced from the Cambridge Repository's *Interpreting Constitutional Legislation* David Feldman[134] states that at times, there is no clear indication why a statute or amendment is introduced:

> *"Statutes usually carry on their faces no indication of the mischief at which they are aimed; they do not tell a story. Looking at the statute as a whole will not always help: many statutes are collections of knee-jerk reactions to a number of different stimuli, and the degree of coherence is further reduced where changes in government policy are given effect by amending earlier legislation drafted to give effect to different policies."*

The article then goes on to emphasize that the context, and the pre-existing regime has to be considered, while interpreting the amendment or provision:

> *"Constitutional provisions establishing the state and its main institutions will often not be a response to a particular mischief. A state's institutional design is more likely to reflect a political theory and idea of good government, as in the USA., or to be a result of gradual accretion, as in the UK, than to be a reaction to an identifiable problem. On the other hand, problems arising in the pre-constitutional period may have directly influenced the choice of political theory, and so have indirectly affected the distribution of responsibilities between institutions, the powers allocated to each institution, their relationships with each other, their powers, and forms of accountability."*

170. As to what was the *rationale* for introducing Article 366(26C) and the other substantive amendments by the 102nd Amendment, the statement of objects and

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134 Professor of law, Cambridge University and QC. Also former international judge in the Constitutional Court of Bosnia and Herzegovna https://aspace.repository.cam.ac.uk/bitstream/handle/1810/246176/OA1838_Statutory-interpretation-and-constitutional-legislation-FINAL-19-03-14.pdf?sequence=1&isAllowed=y

reasons is not precise. Even the Select Committee Report only voices that constitutional status is to be conferred upon the new Commission which would undertake its task and that the pattern existing with respect to SCs and STs would be followed. In these circumstances, given that the limited interpretation would virtually continue the *status quo*, this Court has to take into account the state of affairs which existed at the time of introduction of the amendment.

171. The *rationale* for the amendment, highlighting the need for provisions such as Article 338B, 342A read with Article 366(26C) is that Parliament had the experience of about 71 years' working of the Constitution and the system with respect to matters regarding identification of the most backward classes of communities, i.e., SCs and STs. By the 102nd Amendment, one commission for SEBCs was set up to meet the aspirations and expectations of the population of the country who might have become SEBCs for various reasons, to voice their concerns directly for consideration by the National Commission under Article 338B, which could then become the subject matter of inclusion under Article 342A.

172. An offshoot of the 102nd Amendment possibly would be that dominant groups or communities, once included, as SEBCs by states would, due to their relative "forward" status, likely take a disproportionate share of state benefits of reservation in employment and admission benefits to state institutions. Their inclusion can well result in shrinkage of the real share of reservation benefits for the most backward. This consequence can be avoided, if a commission or body, such as the one under Article 338B evolves and applies rational and relevant criteria.

173. The existence of a permanent body, which would objectively, without being pressurised by the dust and din of electoral politics, consider the claims for inclusion, not based on *ad-hoc* criteria, but upon uniformly evolved criteria, with the aid of experts, in a scientific manner, be in consonance with the constitutional

objectives of providing benefits to SEBCs, having regard to relative regional and intra state levels of progress and development. Given all these factors, this Court is of the opinion that the 102nd Amendment, by inserting 366(26C), 342A, 338B and 342A aligned the mechanism for identification of SEBCs with the existing mechanism for identification of SCs/STs.

174. At this stage, a word about Article 338B is necessary. Earlier, it was noticed that this provision mirrors Articles 338 and 338A and sets out various provisions for setting up a National Commission which is like its counterparts, in relation to SCs and STs (Articles 338 and 338A). The consultative provisions under Articles 338B(7) and 338B(9) in the opinion of this Court, only imply that in matters of identification, the States can make their recommendations. However, by reason of Article 342A, it is the President, i.e. the Union Government only, whose decision is final and determinative. The determination made for inclusion or exclusion can be amended through a law made by Parliament alone. Given that Article 338(B)(9) enjoins the State/UT to consult the Commission on all major policy matters affecting SEBCs, this consultation cannot imply that the States' view would be of such weight, as to be determinative or final and submit. The States can by virtue of Article 338(7) consider the report of the Commission and are obliged to table the recommendations relating to them before their legislature. The State can even voice its reservations and state why it cannot accept the report. Further, given the imperative and categorical phraseology of Article 342A, the final decision of whether to include any caste or community in the list of SCBCs is that of the Union Government, i.e. the President.

175. This Court is also of the opinion that the change brought about by the 102nd Amendment, especially Article 342A is only with respect to the process of identification of SEBCs and their list. Necessarily, the power to frame policies and legislation with regard to all other matters, i.e. the welfare schemes for SEBCs,

setting up of institutions, grants, scholarships, extent of reservations and special provisions under Article 15(4), 15(5) and 16(4) are entirely with by the State Government in relation to its institutions and its public services (including services under agencies and corporations and companies controlled by the State Government). In other words, the extent of reservations, the kind of benefits, the quantum of scholarships, the number of schools which are to be specially provided under Article 15(4) or any other beneficial or welfare scheme which is conceivable under Article 15(4) can all be achieved by the State through its legislative and executive powers. This power would include making suggestions and collecting data – if necessary, through statutory commissions, for making recommendations towards inclusion or exclusion of castes and communities to the President on the aid and advice of the Union Council of Ministers under Article 342A. This will accord with the spirit of the Constitution under Article 338B and the principle of cooperative federalism[135] which guides the interpretation of this Constitution.

176. The President has not thus far prepared and published a list under Article 342A (1). In view of the categorical mandate of Article 342A – which has to be necessarily read along with Article 366(26C), on and from the date of coming into force of the 102nd Amendment Act, only the President, i.e. the Central Government has the power of ultimately identifying the classes and castes as SEBCs. This court is conscious that though the amendment came into force more than two years ago, as yet no list has been notified under Article 342A. It is also noteworthy that the NCBC Act has been repealed. In these circumstances, the Court holds that the President should after due consultation with the Commission set up under Article 338B expeditiously, publish a comprehensive list under 342A(1). This exercise should preferably be completed with utmost expedition given the public importance of the matter. Till such time, the SEBC lists prepared by the states

135 *Jindal Stainless Ltd. v. State of Haryana*, 2016 SCC OnLine SC 1260; *State of Rajasthan v. Union of India* 1978 1 SCR 1.

would continue to hold the field. These directions are given under Article 142, having regard to the drastic consequences which would flow if it is held that all State lists would cease to operate. The consequences of Article 342A would then be so severe as to leave a vacuum with respect to SEBCs' entitlement to claim benefits under Articles 15 and 16 of the Constitution.

Re: Point No. 6 Whether, Article 342A of the Constitution abrogates States power to legislate or classify in respect of "any backward class of citizens" and thereby affects the federal policy / structure of the Constitution of India?

177. In W.P.938/2020, learned counsel for the petitioner, Mr. Amol. B. Karande urged that the provisions of the 102nd Amendment, especially Article 366(26C) and Article 342A violate the essential features or the basic structure of the Constitution. It was argued that these provisions impact the federal structure by denuding the State of its power to fully legislate in favour of SEBCs under Entry 25 and Entry 41 of List II, and provide for reservations in favour of SEBCs. It was argued that the power to identify and make suitable provisions in favour of SEBCs has always been that of the States. This constitutional position was recognized in *Indra Sawhney (supra)*, when the Court required the State Government to set up permanent Commissions. Through the impugned provisions, the President has now been conferred exclusive power to undertake the task of identification of SEBCs for the purposes of the Constitution. It was submitted that this strikes at the root of the federal structure because it is the people who elect the members of the State legislatures, who frame policies suitable for their peculiarly situated needs, having regard to the demands of the region and its people.

178. Learned counsel argued that the original Constitution had set apart the power to identify SCs and STs and conferred it upon the President – after which, amendment could be carried out by the Parliament. However, such a power was

advisably retained so far as the States were concerned, with their executives and legislatures. The deprivation of the States' power strikes at the root of its jurisdiction to ensure that its residents get suitable welfare measures in the form of schemes applicable to SEBCs as well as reservations.

179. Learned counsel relied upon certain passages of the judgment of this Court in *Kesavananda Bharti v. State of Kerala*[136] to support the argument that without submitting the amendment for rectification under the proviso to Article 368(2), to the extent it denuded the State legislatures of their powers to make laws in respect of various fields under the State List too, the amendment would be void.

180. The Learned Attorney General who represented the Union argued that there is no question of the 102nd Amendment Act or any of its provisions violating any essential feature of the Constitution. It was submitted that unless the amendment in question directly affects (i.e. takes away the legislative power altogether in the list rather than a part of its content by amending any of the provisions in List II or List III of the Seventh Schedule to the Constitution), there is no need for seeking rectification of a majority of the statutes. The Attorney General relied upon a judgment of this Court in *Sajjan Singh v. State of Rajasthan*[137].

181. Two issues arise with respect to the validity of provisions inserted by the 102nd Amendment Act. The first is a facial challenge inasmuch as the petitioner urges that without following the procedure indicated in the proviso to Article 368(2), i.e. seeking approval or ratification of atleast one half of the legislative assemblies of all the States, the amendment is void. In this regard what is noticeable is that direct amendments to any of the legislative entries in the three lists of the Seventh Schedule to the Constitution requires ratification. Thus, the insertion of substantive provisions that might impact future legislation by the State in an indirect or oblique manner would not necessarily fall afoul of the

136 1973 Supp. SCR 1
137 1965 SCR (1) 933

Constitution for not complying with the procedure spelt out in the proviso to Article 368(2). In *Sajjan Singh (supra)*, this Court held as follows:

> *"The question which calls for our decision is: what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected?"*

The *Sajjan Singh* court repelled the challenge, holding that

> *"… Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained.*

182. The majority judgment, therefore decisively held that an interpretation which hinges on indirect impact of a provision, the amendment of which needs ratification of the states, does not violate the Constitution and that unless the amendment actually deletes or alters any of the Entries in the three lists of the Seventh Schedule, or directly amends an Article for which ratification is necessary, recourse to the proviso to Article 368 (2) was not necessary.

183. More recently, this issue was gone into in *Kihoto Hollohan*, where a challenge on the ground that all provisions of an amendment which introduced the Tenth Schedule were void for not following the procedure under the proviso to Article 368, were questioned. The Court proceeded to analyse every provision of the Tenth Schedule and held that para 7, which excluded the jurisdiction of all

Courts, had the effect of divesting the jurisdiction of Courts under Articles 226 and 32 of the Constitution. In other words, the direct result of the amendment was to bar the jurisdiction of High Courts and thus, it directly impacted Chapter 5 of Part VI; a ratification was required by a majority of the States. Since that procedure was not followed, para 7 was held to be violative of the basic structure of the Constitution. The Court applied the doctrine of severability and held that the other parts of the amendment, contained in the Tenth Schedule did not need any such ratification and that para 7 alone would be severed on the ground of its being contrary to express constitutional provisions. This court ruled as follows:

> ***"59.*** *In Sajjan Singh case [(1965) 1 SCR 933 : AIR 1965 SC 845] a similar contention was raised against the validity of the Constitution (Seventeenth Amendment) Act, 1964 by which Article 31-A was again amended and 44 statutes were added to the Ninth Schedule to the Constitution. The question again was whether the amendment required ratification under the proviso to Article 368. This Court noticed the question thus: (SCR p. 940)*
>
> *xxxxxx xxxxxx xxxxxx*
>
> ***76.*** *The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body politic. The ouster of jurisdiction of courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions in the Tenth Schedule if it had known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of*

Paragraph 7 can, therefore, be held to be severable from the rest of the provisions.

77. *We accordingly hold on contentions (C) and (D):*

That there is nothing in the said proviso to Article 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that 'thereupon the Constitution shall stand amended' the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification.

That accordingly, the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amenable to the legal-sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (Fifty-second Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Article 368(2) was not so ratified.

That Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7.

184. As far as the question of whether the amendment has the effect of violating the basic or essential features so far as it impacts the federal structure of the Constitution is concerned, what is noticeable is that past decisions have emphasized that a mere change brought about through amendments howsoever serious the impact, cannot *per se* be regarded as violative of the basic structure. In

Raghunathrao Ganpatrao (supra)[138] the deletion of Articles 291 and 362 of the Constitution, by amendment, was questioned on the ground that they affected the basic structure, or essential features of the Constitution. This court rejected the argument and held that:

> *"107. On a deep consideration of the entire scheme and content of the Constitution, we do not see any force in the above submissions. In the present case, there is no question of change of identity on account of the Twenty-sixth Amendment. The removal of Articles 291 and 362 has not made any change in the personality of the Constitution either in its scheme or in its basic features, or in its basic form or in its character. The question of identity will arise only when there is a change in the form, character and content of the Constitution. In fact, in the present case, the identity of the Constitution even on the tests proposed by the counsel of the writ petitioners and interveners, remains the same and unchanged."*

185. In *N. Nagaraj (supra)*, this aspect was analysed in the following terms:

> *"For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of the Parliament.……*
>
> *xxxxxx xxxxxx xxxxxx*
>
> *……..The values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. They are to be informed. Overarching and informing of these rights and values is the principle of human dignity under the German basic law. Similarly, secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Therefore, axioms like*

138 Ref. f.n. 104

secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and

These principles are beyond the amending power of the Parliament.

xxxxxx xxxxxx xxxxxx

Under the Indian Constitution, the word 'federalism' does not exist in the preamble. However, its principle (not in the strict sense as in U.S.A.) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the seventh schedule to the Constitution.

To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a pre-occupation with constitutional identity.

xxxxxx xxxxxx xxxxxx

The word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in Kesavananda Bharati. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty."

186. Along similar lines, Krishna Iyer, J. had remarked as to what kind of an amendment would be abhorrent and violate the basic structure in *Maharao Sahib Shri Bhim Singhji v. Union of India*[139] in the following terms:

"Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice."

187. By these parameters, the alteration of the content of state legislative power in an oblique and peripheral manner would not constitute a violation of the concept

139(1981) 1 SCC 166

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

Conclusions

188. In view of the above discussion, my conclusions are as follows:

(1) Re Point No. 1: *Indra Sawhney* (supra) does not require to be referred to a larger bench nor does it require reconsideration in the light of subsequent constitutional amendments, judgments and changed social dynamics of the society, for the reasons set out by Ashok Bhushan, J. and my reasons, in addition.

(2) Re Point No 2: The Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments in the public services and posts under the State) for Socially and Educationally Backward Classes (SEBC) Act, 2018 as amended in 2019 granting 12% and 13% reservation for Maratha community in addition to 50% social reservation is not covered by exceptional circumstances as

contemplated by Constitution Bench in *Indra Sawhney's* case. I agree with the reasoning and conclusions of Ashok Bhushan, J. on this point.

(3) Re Point No. 3: I agree with Ashok Bhushan, J. that the State Government, on the strength of Maharashtra State Backward Commission Report chaired by M.C. Gaikwad has not made out a case of existence of extraordinary situation and exceptional circumstances in the State to fall within the exception carved out in *Indra Sawhney*.

(4) Re Point No 4:Whether the Constitution One Hundred and Second Amendment deprives the State Legislature of its power to enact a legislation determining the socially and economically backward classes and conferring the benefits on the said community under its enabling power?; and

(5) Re. Point No. 5 Whether, States' power to legislate in relation to "any backward class" under Articles 15(4) and 16(4) is anyway abridged by Article 342(A) read with Article 366(26c) of the Constitution of India. On these two interrelated points of reference, my conclusions are as follows:

(i) By introduction of Articles 366 (26C) and 342A through the 102nd Constitution of India, the President alone, to the exclusion of all other authorities, is empowered to identify SEBCs and include them in a list to be published under Article 342A (1), which shall be deemed to include SEBCs in relation to each state and union territory *for the purposes of the Constitution.*

(ii) The states can, through their existing mechanisms, or even statutory commissions, only make suggestions to the President or the Commission under Article 338B, for inclusion, exclusion or modification of castes or communities, in the list to be published under Article 342A (1).

(iii) The reference to the Central List in Article 342A (2) is the one notified by the President under Article 342A (1). It is to be the only list for all

purposes of the Constitution, in relation to each state and in relation to every union territory. The use of the term “the Central List” is only to refer to the list prepared and published under Article 342A (1), and no other; it does not imply that the states have any manner of power to publish their list of SEBCs. Once published, under Article 342A (1), the list can only be amended through a law enacted by Parliament, by virtue of Article 342A (2).

(iv) In the task of identification of SEBCs, the President shall be guided by the Commission set up under Article 338B; its advice shall also be sought by the state in regard to policies that might be framed by it. If the commission prepares a report concerning matters of identification, such a report has to be shared with the state government, which is bound to deal with it, in accordance with provisions of Article 338B. However, the final determination culminates in the exercise undertaken by the President (i.e. the Central Government, under Article 342A (1), by reason of Article 367 read with Section 3 (8) (b) General Clauses Act).

(v) The states’ power to make reservations, in favour of particular communities or castes, the quantum of reservations, the nature of benefits and the kind of reservations, and all other matters falling within the ambit of Articles 15 and 16 – except with respect to identification of SEBCs, remains undisturbed.

(vi) The Commission set up under Article 338B shall conclude its task expeditiously, and make its recommendations after considering which, the President shall expeditiously publish the notification containing the list of SEBCs in relation to states and union territories, for the purpose of the Constitution.

(vii) Till the publication of the notification mentioned in direction (vi), the existing lists operating in all states and union territories, and for the purposes

of the Central Government and central institutions, continue to operate. This direction is issued under Article 142 of the Constitution of India.

(6) Re Point No. 6: Article 342A of the Constitution by denuding States power to legislate or classify in respect of “any backward class of citizens” does not affect or damage the federal polity and does not violate the basic structure of the Constitution of India.

189. The reference is answered in the above terms. The appeals and writ petitions are therefore, disposed of in terms of the operative order of Bhushan, J. in para 444 of his Judgment.

.....J
[S. RAVINDRA BHAT]

New Delhi,
May 5, 2021.